

# Frequently Asked Questions on Product Liability under the Consumer Protection Act, 2019

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August 2020

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# Contents

<b>1. WHAT IS PRODUCT LIABILITY?</b>	<b>01</b>
<b>2. WHAT KINDS OF PRODUCTS AND SERVICES ARE COVERED UNDER THE PRODUCT LIABILITY REGIME?</b>	<b>02</b>
<b>3. WHO CAN INITIATE A PRODUCT LIABILITY CLAIM?</b>	<b>03</b>
<b>4. WHAT TYPES OF RELIEFS CAN BE PROVIDED UNDER PRODUCT LIABILITY?</b>	<b>04</b>
<b>5. WHO IS COVERED UNDER THE PRODUCT LIABILITY REGIME? ARE FOREIGN MANUFACTURERS COVERED?</b>	<b>05</b>
I. Overview of Persons Covered	05
II. Roles of product manufacturer, seller and service provider	05
III. Liability of Foreign Manufacturers	05
<b>6. IS THE MARKETPLACE LIABLE FOR PRODUCT LIABILITY AND IF YES, IN WHAT CIRCUMSTANCES?</b>	<b>06</b>
<b>7. HOW IS LIABILITY DETERMINED BETWEEN THE PRODUCT MANUFACTURER, SERVICE PROVIDER AND PRODUCT SELLER?</b>	<b>07</b>
I. Who is responsible if several parties are involved in manufacturing of the final product?	08
II. If the product manufacturer is compliant with the safety guidelines and requirements under law, could the manufacturer still be held liable?	08
III. Are there any proactive steps which may be taken to mitigate liability in case it is identified that a defective product is supplied or if there was a deficiency in service?	08
IV. Is there a recall process contemplated? How does it operate?	09
<b>8. WHAT ARE THE TYPICAL DEFENCES AGAINST PRODUCT LIABILITY CLAIM?</b>	<b>10</b>
<b>9. IS MEDIATION AN OPTION FOR RESOLVING A PRODUCT LIABILITY CLAIM? ARE THERE ANY CONSEQUENCES IF THE CONSUMER DOES NOT ACCEPT A SETTLEMENT OFFERED DURING MEDIATION?</b>	<b>11</b>

<b>10. FOR PRODUCTS THAT ARE TO BE USED BY TECHNICAL EXPERTS ONLY, WHAT ADDITIONAL STEPS CAN A COMPANY TAKE TO MITIGATE THE RISK OF A PRODUCT LIABILITY CLAIM?</b>	<b>12</b>
<b>11. IN THE EVENT OF A PRODUCT LIABILITY CLAIM, WHAT EVIDENCE CAN A COMPANY PRODUCE TO PROVE A PRODUCT'S SAFETY AND EFFICACY?</b>	<b>13</b>
<b>12. WHAT IS THE LIMITATION PERIOD FOR BRINGING SUCH CLAIMS?</b>	<b>14</b>
<b>13. CAN INSURANCE BE OBTAINED TO COVER ANY LIABILITY ON ACCOUNT OF PRODUCT LIABILITY?</b>	<b>15</b>
<b>14. AS A DISTRIBUTOR, COULD THE DISTRIBUTOR REQUIRE THE SUPPLIER TO INDEMNIFY THE DISTRIBUTOR FOR ANY CLAIMS? ARE THERE ANY IMPLIED WARRANTIES UNDER LAW?</b>	<b>16</b>
<b>15. CAN CONSUMER BE ASKED TO WAIVE CLAIMS UNDER THE ACT? WILL THAT BE VIEWED AS UNFAIR CONTRACT UNDER THE ACT?</b>	<b>17</b>
<b>ANNEXURE A</b>	<b>18</b>
Definition of Product Manufacturer, Product Service Provider and Product Seller	18

# 1. What is Product Liability?

The term '**Product liability**' has been defined as the responsibility of the product manufacturer or the product seller to compensate for any harm that may be caused to the consumer by the defective product or by deficiency in services relation thereto.<sup>1</sup>

A product liability claim may be brought against either or all the parties in the supply chain including the product manufacturer, product service provider and/or the product seller (these terms are explained later) depending on the facts and circumstances of each case for claiming compensation for the harm caused. The circumstances in which the liability of each of the parties arise is dealt with in detail in query 6 below.

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1. S.2(34), CPA 2019 defines product liability as the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.

## 2. What kinds of products and services are covered under the product liability regime?

The CPA 2019 applies to goods as well as services provided in relation to the goods supplied, unless specifically excluded by the Central Government by way of a notification.

Human tissues, blood, blood products and organs are excluded from the definition of products.

Services rendered free of charge or under a contract of personal service are excluded from the service covered under the CPA 2019. However, if services are provided free of charge but attached to the product, it may be argued considering that there was a charge for the product that such services should get included in the product liability claim.

### 3. Who can initiate a product liability claim?

Any of the following persons may initiate a product liability claim before a consumer forum:

- i. the consumer to whom the goods are sold;
- ii. any recognised consumer association;
- iii. one or more consumers, where there are numerous consumers having the same interest, with the permission of the consumer forum deciding the case; (class action) or
- iv. the Central Government, the CCPA or the State Government *suo moto*.<sup>2</sup>

It is pertinent to note, that persons who have purchased a good or availed a service for commercial purposes are not considered to be consumers under the CPA 2019, unless such persons are purchasing a good or availing a service exclusively for the purposes of earning their livelihood through self-employment.

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2. The CCPA can initiate an investigation on its own motion or on the basis of a complaint regarding the violation of a consumer right. The investigation is conducted by the Director General appointed under the CPA, or the District Collector. If the CCPA is satisfied that there has been a violation of consumer rights or unfair trade practice after the investigation is concluded and after an opportunity for hearing is provided, the CCPA can pass an order issuing directions.

## 4. What types of reliefs can be provided under Product Liability?

The consumer commissions<sup>3</sup> established under the CPA 2019 are empowered to grant compensation to the consumer in case of product liability claims for the harm caused.

Additionally, the consumer commissions are empowered to issue directions to the product manufacturer, product service provider and product sellers under the CPA 2019, including:

- a. To remove the defect in the goods or services;
- b. To replace the defective goods with new goods of similar description which are free of any defect;
- c. To refund the price of the goods to the consumer along with interest as may be decided;
- d. To not offer hazardous goods for sale or withdraw the hazardous goods offered from sale;
- e. To direct manufacturers/sellers to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
- f. To pay a sum determined by the consumer forum in the event the loss or injury affects a large number of consumers who are not easily identifiable; and
- g. To require one party to pay for the legal costs of the other party.

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3. The CPA 2019 re-establishes the existing consumer redressal fora, which are now referred to as Consumer Commissions. There are three levels of Consumer Commissions – the District, State and National Consumer Commissions. The jurisdiction of the Commissions are determined basis the value and cause of action of the consumer complaint.

## 5. Who is covered under the Product Liability regime? Are foreign manufacturers covered?

### I. Overview of Persons Covered

Under the CPA 2019, a product liability action can be brought against any (or all, based on the nature of complaint) of the following persons:

- i. Product manufacturer;
- ii. Product service provider; and
- iii. Product seller.

### II. Roles of product manufacturer, seller and service provider

The CPA 2019 distinguishes between the roles of a product manufacturer, product seller and service provider. The terms product manufacturer, product service provider and product seller as defined in CPA 2019 are provided in **Annexure A**.

The CPA 2019 distinguishes between a 'product service provider' and a service provider in general where a product service provider provides a service e.g. repair or maintenance in respect of a product as opposed to providing a service simpliciter e.g. providing consulting services.

### III. Liability of Foreign Manufacturers

The definition of product manufacturer under the CPA 2019 does not distinguish between domestic and foreign manufacturers. Under the CPA 2019, consumers may institute complaints before the consumer forum where:

- i. The cause of action arises wholly or partly arises;
- ii. Where any of the opposite parties resides or carries on business; or
- iii. The consumer resides or works.

However, enforcement remains a challenge in the case of foreign manufacturers. The process to compel a foreign party to be part of proceedings before an Indian court is long drawn out, as is the process of executing a decree against the foreign manufacturer in case the foreign manufacturer does not comply with the decree voluntarily.

To remedy this, the CPA 2019 contains a provision under which the product seller would be liable in a product liability claim in the event it is not possible to effect a service of notice or process or warrant against the product manufacturer or the product manufacturer is not subject to the law in force in India or an order cannot be enforced against the product manufacturer. Therefore, product sellers (importers) may insist on indemnification from the product manufacturer (exporter) in the event of a product liability claim. The product manufacturer may negotiate to contractually demarcate the obligations of the product manufacturer (exporter) and the product seller (importer), so that in the event of a product liability claim arising due to a lapse of the product seller, the product manufacturer is not obligated to indemnify the product seller. The contractual demarcations could broadly follow the division of liability provided for under the CPA 2019.

## 6. Is the marketplace liable for product liability and if yes, in what circumstances?

A marketplace<sup>4</sup> that provides simpliciter a platform for buying and selling of products should not be held liable for product liability issues. However, if a marketplace provides additional services and also acts as a product manufacturer/service provider as defined under the CPA 2019, then the marketplace may be liable in the event of a product liability claim. Some instances include where the marketplace: a) provides an express warranty for a product which is independent of what has been provided by the manufacturer; or b) provides services (such as installation) with respect to a product.

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4. Section 3 (g) of Consumer Protection (E-Commerce) Rules, 2020 “marketplace e-commerce entity” means an e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.

## 7. How is liability determined between the product manufacturer, service provider and product seller?

The CPA 2019 provides for specific instances in which the product manufacturer, product seller or the product service provider would be responsible in the event of a defect in the product or deficiency in services relating thereto.

The *Product Manufacturer* would be liable in a product liability action if:

- i. the product contains a manufacturing defect;
- ii. the product is defective in design;
- iii. there is a deviation from manufacturing specifications;
- iv. the product does not conform to an express warranty regardless of whether the manufacturer was negligent in making such express warranty; or
- v. the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.

The *Product Service Provider* would be liable in a product liability action, if:

- i. the service provided was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required under any law or pursuant to any contract.
- ii. there was an act of omission or commission or negligence or conscious withholding any information which caused harm;
- iii. adequate instructions or warnings to prevent harm were not issued; or
- iv. the service did not conform to express warranty or the terms and conditions of the contract.

A *Product Seller* (who is not a product manufacturer) would be liable in a product liability action if:

- i. the seller has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm;
- ii. the seller has altered or modified the product and such alteration or modification was a substantial factor in causing the harm;
- iii. the seller has made an express warranty of a product independent of any express warranty made by a manufacturer and the product failed to conform to such express warranty which caused the harm;
- iv. the product has been sold by the product seller and the identity of product manufacturer of such product is not known, or the service of notice or process or warrant cannot be effected on the product manufacturer or the product manufacturer is not subject to the law in force in India or an order cannot be enforced against the product manufacturer;
- v. the product seller failed to exercise reasonable care in assembling, inspecting or maintaining such product; or
- vi. the product seller did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

## I. Who is responsible if several parties are involved in manufacturing of the final product?

The apportionment of liability in case of multiple manufacturers would be determined on a case to case basis, where the commission would examine which component caused the defect, and whether adequate instructions/warnings were provided for proper use.

This would be relevant in cases involving white goods and automobiles where different components are manufactured by different manufacturers.

In previous product liability cases where multiple parties were involved (though not multiple manufacturers), the courts have tried to determine which party was responsible for the defect in the goods.<sup>5</sup> However, in the event it is not possible to impute liability to one particular party, all opposite parties may be held jointly and severally liable.<sup>6</sup>

## II. If the product manufacturer is compliant with the safety guidelines and requirements under law, could the manufacturer still be held liable?

A product should not be considered defective if it is (i) in compliance with standards required to be maintained under law, (ii) as agreed between parties under a contract, or (iii) as claimed by the manufacturer. However, failure to comply with safety guidelines or absence of adequate instructions on the product to prevent incorrect usage could attract liability.

## III. Are there any proactive steps which may be taken to mitigate liability in case it is identified that a defective product is supplied or if there was a deficiency in service?

The product manufacturer/service provider may voluntarily recall the goods or withdraw the product related services from the market. Currently, the CPA 2019 does not prescribe a process or require for voluntary recall. However, depending upon the product being recalled, there may be specific industry/product guidelines applicable to the recall process.

The product manufacturer/service provider may also consider notifying the Central Consumer Protection Authority (“**CCPA**”) – the regulator responsible for administering and enforcing the CPA 2019 – regarding the defect identified and the recall process. The CCPA is currently being constituted and is expected to commence functioning shortly.

It should be noted that the recall of products or services would not preclude the product manufacturer/service provider from product liability actions initiated due to harm caused by the products/services already in the market.

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5. Mrs. Rashmi Handa and Ors. v. OTIS Elevator Company (India) Ltd & Ors I (2014) CPJ 344 (NC).

6. Bhopal Steels v Govind Lal Sahu & Others III (2008) CPJ 89 NC.

#### **IV. Is there a recall process contemplated? How does it operate?**

The CCPA may pass orders directing recall of products post investigation, if there is sufficient evidence to establish violation of consumer rights or unfair trade practice by a person. However, no specific rules have been prescribed so far on recall procedures.

## 8. What are the typical defences against product liability claim?

A product manufacturer/service provider/seller can take the following defences under the CPA 2019.

- i. The complainant is not a 'consumer' under the CPA 2019 as the complainant has either obtained the goods for resale, commercial purposes or has availed a product free of charge.
- ii. Even if the product was defective, no 'harm'<sup>7</sup> caused to a consumer by the use of the defective product.
- iii. In case of a claim against a product seller, the product was misused, altered or modified at the time of the harm.<sup>8</sup>
- iv. In case of a claim against a product manufacturer for not having provided adequate warning or instructions, the product manufacturer shall not be liable if:
  - The product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer.<sup>9</sup>
  - The product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used.<sup>10</sup>
  - The product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts.<sup>11</sup>
  - While using the product, the complainant was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.
- v. The product manufacturer would not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product.<sup>12</sup>

7. The CPA 2019 considers damage to property, personal injury, illness, death, mental agony or emotional distress attendant to personal injury/illness or damage to property, or loss of consortium or services caused due to the harm.

8. Section 87(1), CPA, 2019

9. Section 87(2)(a), CPA, 2019

10. Section 87(2)(b), CPA, 2019

11. Section 87(2)(c), CPA, 2019

12. Section 87(3), CPA, 2019

## 9. Is mediation an option for resolving a product liability claim? Are there any consequences if the consumer does not accept a settlement offered during mediation?

Yes, the CPA 2019 specifically provides for mediation as a means of dispute resolution. The relevant consumer forum may refer a dispute to mediation in the event both parties are amenable to the same.

In the event the dispute is not resolved by way of mediation, the relevant consumer forum from where the dispute was referred to mediation will continue to hear the dispute. You may note, that the mediator is also required to submit a report on the mediation to be submitted to the relevant consumer forum which may make a reference to the settlement offer made by the opposite party.

## 10. For products that are to be used by technical experts only, what additional steps can a company take to mitigate the risk of a product liability claim?

Manufacturers of goods to be used by technical experts should specifically mention that the product is intended to be used or dispensed by or under the supervision of an expert or a class of experts only, as the case may be. The product should also be accompanied by adequate warnings and instructions for the usage of the product. This would serve as a defence in the event any consumer (who is not the technical expert intended to use the product) brings a product liability claim against the product manufacturer alleging that adequate warnings/instructions for use were not provided. As part of the defence the product manufacturer may state that (i) the consumer was not meant to use the product as the product was intended to be used by or under the supervision of experts, and (ii) that adequate warnings/instructions on usage were provided to the expert.

For example, medical equipment intended to be used by qualified medical personnel should contain adequate warnings/instructions with respect to who can operate the equipment. For specialised equipment, the warnings/instructions could even specify the class/qualification of medical personnel that the product is intended to be used by.

## 11. In the event of a product liability claim, what evidence can a company produce to prove a product's safety and efficacy?

A product manufacturer may provide the following evidence to demonstrate the product is safe and efficacious, as applicable:

- i. Documents demonstrating that the product is as per standards prescribed by law e.g. standards prescribed under the Medical Device Rules, 2017 in the case of medical devices;
- ii. Documents demonstrating the product is in compliance with the standards prescribed under law or by organisations such as the Bureau of Indian Standards, International Standards Organisation or the International Electrotechnical Commission;
- iii. Independent test reports demonstrating the quality of the product;
- iv. Expert evidence on the cause and effect of the defect in the product or cause of the harm caused (e.g. consumer negligence);
- v. A copy of the agreement between the manufacturer and complainant capturing the terms of sale and any warranties made in respect of the product;
- vi. A copy of the manufacturing specifications to demonstrate there is no deviation between the product sold to the complainant and the manufacturing specifications;
- vii. A copy of the warranty to demonstrate the product conforms to the express warranty provided in respect of the product; and
- viii. User manuals/instructions/label design to demonstrate adequate warnings and usage instructions were provided in respect of the product.

## 12. What is the limitation period for bringing such claims?

A complaint must be filed with a Consumer Dispute Redressal Commissions within two years from the date on which the cause of action has arisen.<sup>13</sup>

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<sup>13</sup>. Section 69(1), CPA 2019

## 13. Can insurance be obtained to cover any liability on account of product liability?

Product liability insurance is available in India and can be explored as an option to cover product liability claims under the CPA 2019.

14. As a distributor, could the distributor require the supplier to indemnify the distributor for any claims? Are there any implied warranties under law?

Yes, it should be permissible for the distributor to obtain an indemnity from the supplier in case of any product liability claims initiated against the distributor. There are no implied warranties under the CPA 2019.

## 15. Can consumer be asked to waive claims under the Act? Will that be viewed as unfair contract under the Act?

The definition of unfair contract under the CPA 2019 is broad and covers the imposition of unreasonable conditions that puts a consumer at a disadvantage. Given this, a waiver of claims under the CPA 2019 may be construed as an unfair contract.

Additionally, you may note that agreements in restraint of legal proceedings i.e. an agreement in which any party *“is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his right”* is void under the Indian Contract Act, 1872 and therefore unenforceable.<sup>14</sup>

The question of waiver of claims is yet to be tested before a court of law. Therefore, any contractual language regarding waiver of product liability claims should be examined closely to prevent unenforceability either from a CPA 2019 or an Indian contract law perspective.

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14. Section 28, Indian Contract Act, 1872.

# Annexure A

## Definition of Product Manufacturer, Product Service Provider and Product Seller

### Product Manufacturer

Product Manufacturer means a person who,

- i. makes any product or parts thereof
- ii. assembles parts thereof made by others
- iii. puts or causes to be put his own mark on any products made by any other person
- iv. makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose
- v. designs, produces, fabricates, constructs or re-manufactures any product before its sale
- vi. being a product seller of a product, is also a manufacturer of such product.

### Product Service Provider

Product service provider means a person who provides any service in respect of such product.

### Product Seller

Product seller, in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes—

- i. a manufacturer who is also a product seller;
  - ii. a service provider,
- but does not include –
- a. a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats;
  - b. a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction;
  - c. a person who—
    - i. acts only in a financial capacity with respect to the sale of the product;
    - ii. is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider;
    - iii. leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

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Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at [research@nishithdesai.com](mailto:research@nishithdesai.com)

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