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DOING BUSINESS IN INDIA

A Cyril Amarchand Mangaldas Thought Leadership Publication

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Introduction

India is presently one of the fastest-growing major economies in the world. According to the World Bank's Global Economic Prospects report, India is projected to sustain this status, with an anticipated growth rate of 6.7 per cent in FY26 and FY27. In just over two decades, liberalisation has transformed India into a globalised market-based economy, from an inward-looking, state-based economy, now identified as one of the world's most attractive investment destinations. Over the past few decades, the Indian economy has shown remarkable resilience even in the face of global economic slowdown, thus solidifying its significance in shaping the world's economic trajectory.

Further, a stable central leadership has resulted in the implementation of regulatory changes targeted at improving the country's economic fundamentals and ease of doing business. The combination of a strong and stable government at the central level and a buoyant growth rate has given an impetus to investment and positioned India as a premier investment hub.

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India's potential as a prospective investment destination has been attributed to a variety of reasons, including:

i. A stable democratic environment since independence (78 years);

ii. Progressive and stable governments, at the central and state levels;

iii. Robust and resilient economy, combined with the opening up of various sectors;

iv. Large market size with increasing purchasing power;

v. Access to international markets through membership in regional councils;

vi. Large and diversifed infrastructure spread across the country;

vii. Well-developed R&D, infrastructure, technical and marketing services;

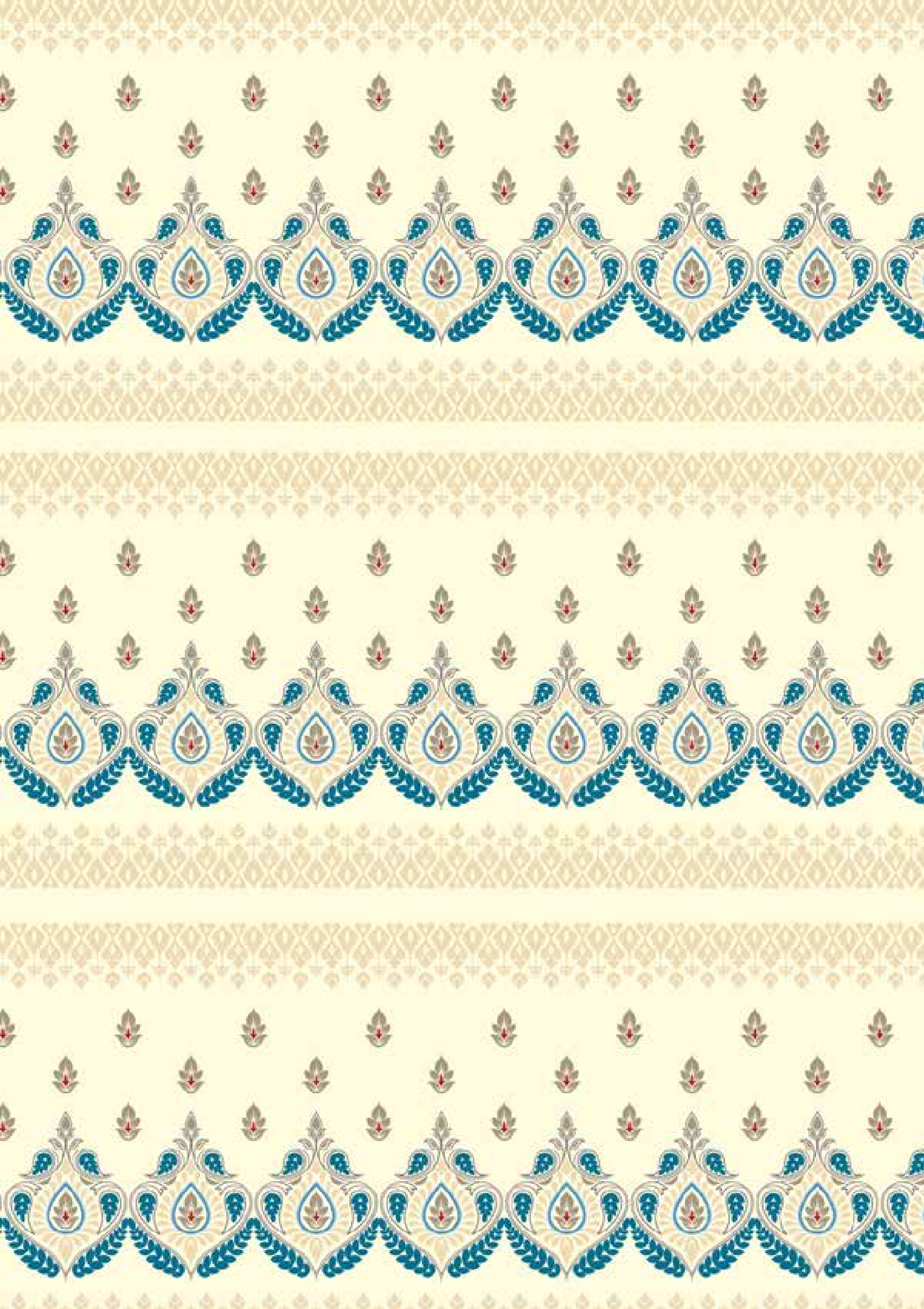
viii. Skilled human resources, with the world's largest youth population, comprising the highest number of individuals in the productive age bracket;

ix. Cost effective production facilities;
x. Well-regulated and developed financial services sector, including the banking system;
xi. Vibrant capital market, comprising approximately seven stock exchanges;
xii. Investor-friendly policies with conducive foreign investment environment that
xiii. Provide freedom of entry in most sectors;
xiv. Current account convertibility;
xv. Established, independent judiciary with a hierarchy of courts and tribunals;
xvi. Statutory and legal protection for intellectual property rights; and
xvii. Common law based legal system.

Since 1991, the industrial sectors have witnessed positive structural changes, improvements in productivity, modernisation, and technological innovations. Companies have focused on their core competencies within India and overseas by forming foreign partnerships and incorporating new technologies, management expertise, and access to foreign markets. In the technology sector, almost all major global players have established operations in India, whereas others procure services from Indian third-party service providers.

The far-reaching and sweeping economic changes that have taken shape since 1991 have unleashed the growth potential of the Indian economy. The Government of India's current policies offer a more transparent economic environment and are geared towards promoting domestic and foreign investment. Over the past two decades, foreign investment has been allowed in all sectors, except for a limited list of prohibited ones. Furthermore, recently, the Government of India has taken several initiatives to liberalise various key sectors in India, including defence, telecom, insurance, space, and railway infrastructure.

Among the many legal reforms, the key changes include the enactment of the Digital Personal Data Protection Act (awaiting implementation), the introduction of a pre-packaged insolvency resolution process and the restructuring of the various labour legislations into four labour codes (awaiting implementation). Initiatives are being undertaken at both the central and state levels to enhance skill development, revamp infrastructure, and attract increased investments. Examples of these efforts include the widely recognised "Make in India" campaign, which seeks to position India as a global manufacturing hub, and the government's endeavor to streamline processes for obtaining approvals and clearances through single-window mechanisms. From a policy perspective, it is clear that the government continues to view foreign investment and private enterprise as the key drivers of economic growth in the country, and policy measures and changes have been tailored in keeping with this objective.



The Indian M&A Sphere

India's integration into the global economy has significantly increased both inbound and outbound M&A, drawing international attention and resulting in substantial domestic valuations. The cumulative value of total FDI equity inflows in India from April 2000 to December 2024 is estimated to be USD 1 trillion. In the first half of FY25, FDI inflows experienced a significant 26 per cent year-on-year increase, reaching USD 42.1 billion, reflecting growing investor confidence and robust economic policies.[1]

Liberalised economic policies and timely regulatory reviews have facilitated an increasing number of inbound and outbound acquisitions.

A series of policy measures undertaken by the Government of India to improve business and boost investor confidence, coupled with stable GDP growth projections have resulted in India emerging as a major player on the global stage, acquiring confidence of entrepreneurs and investors alike, both at home and abroad.

There are many economic and cultural reasons for the rapid growth of M&A activity in India. The economic factors include India's rapidly growing economy, rising corporate earnings and valuations, cost effciency of outsourcing and the availability of highly skilled human resources. The cultural factors driving the M&A boom include the Indian entrepreneurial spirit, language skills, comfort with western culture and concepts, comfort of non-Indians with India's business and legal ethos, democracy and rule of law, and the changing attitude of Indian promoters seeking global partnerships. All these economic and cultural factors have contributed to and supported the surging M&A activity that we are currently witnessing.

Additionally, liberalised economic policies and timely regulatory reviews have facilitated an increasing number of inbound and outbound acquisitions. The regulations, however, continue to be extensive and vary, depending on the sector of the target company, the mode of acquisition, the instrument proposed to be used, the nature of the acquirer, and the nature of the target company.

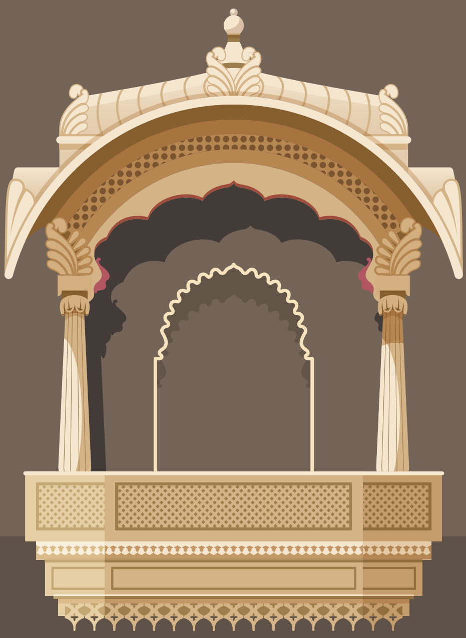
[1] Press Release: Press Information Bureau

The M&A laws in India are still evolving and the regulators are playing "catching up" with the global M&A wave into and out of India. This "catching-up" effort, often results in regulators applying varying "interpretations" of a stated law, creating confusion and an upheaval of settled market practices. Although a few leaps have been made in the recent past, including the passing of the legislations on GST, data privacy law, IBC, and the RBI's cross-border merger regulations, these laws have their own set of issues pertaining to interpretation, impact on deal timelines, and processes, which need to be addressed to smoothen the life cycle of an M&A deal in the country. These are further discussed in the relevant chapters of this handbook.

We now present this handbook to enable readers to have an overview of the legal system and the laws and regulations that are essential for business operations in India.

01

General



What are the business related laws in India?

India has codified commercial laws that include legislations relating to inter alia contracts, companies, partnerships, limited liability partnerships, trusts, insolvency, exchange control, competition, taxation etc. Statutes are supplemented by policy pronouncements, press notes, notifications, and delegated legislation by Governmental departments and regulators.

The key business-related legislations in India are:

i. the erstwhile Companies Act, 1956 and its successor legislation, the Companies Act, 2013 (which govern the incorporation, financing, management, restructuring of companies);

ii. the Indian Contract Act (which lays down general principles relating to the formation, enforceability and breach of contracts; it also deals with the various types of contracts including those of indemnity, guarantee, bailment, pledge, and agency);

iii. Partnership Act (which governs the organization and dissolution of partnerships as well as the rights, liabilities, appointment and retirement of partners);

iv. LLP Act (which governs the organization, management and dissolution of limited liability partnerships as well as the rights and liabilities of the limited liability partnership, its designated partners and other partners);

v. Insolvency Code (which sets out the law governing insolvencies, liquidation and bankruptcies of companies, partnerships and individuals (presently notified only for companies));

vi. Transfer of Property Act,1882 (which sets out the law relating to rights in relation to immovable property in India);

vii. The Foreign Exchange Management Act, 1999 (which provides for India's foreign exchange management regime and regulates the conditions governing the inflow and outflow of foreign exchange and investment into/from India) and the regulations issued thereunder, by the Reserve Bank together with the rules / circulars / press notes / guidelines issued by the Government of India setting out the foreign investment policy (including sector- specific requirements);

viii. The Securities and Exchange Board of India Act, 1992 (which governs the functions and powers of SEBI, India's securities market regulator) and the regulations issued there under, including, in particular, the SEBI ICDR Regulations (which govern the capital raising exercise by listed companies or companies proposed to be listed, including public offer, preferential allotments etc); SEBI LODR Regulations (which govern the disclosure obligations and other corporate governance obligations of listed companies) the SEBI Takeover Regulations (which govern the terms of mandatory and voluntary tender offers for shares of listed companies); the SEBI Insider Trading Regulations (which prohibit dealing in securities of listed companies when in possession of unpublished price sensitive information); and the SEBI Delisting Regulations (which set out the process for the delisting of a listed company);

ix. the SCRA (which governs listing and trading of securities on stock exchanges in India) and the Listing Agreement with stock exchanges;

x. the Competition Act (which regulates combinations (merger control) and anti-competitive behaviour);

xi. Digital Data Protection Act (which safeguards digital personal data); and

xii. the Income Tax Act (which prescribes the tax treatment of dividend, capital gains, mergers, demergers, and slump sales);

xiii. Goods and Services tax (which prescribes the regime taxing supply of goods and services).

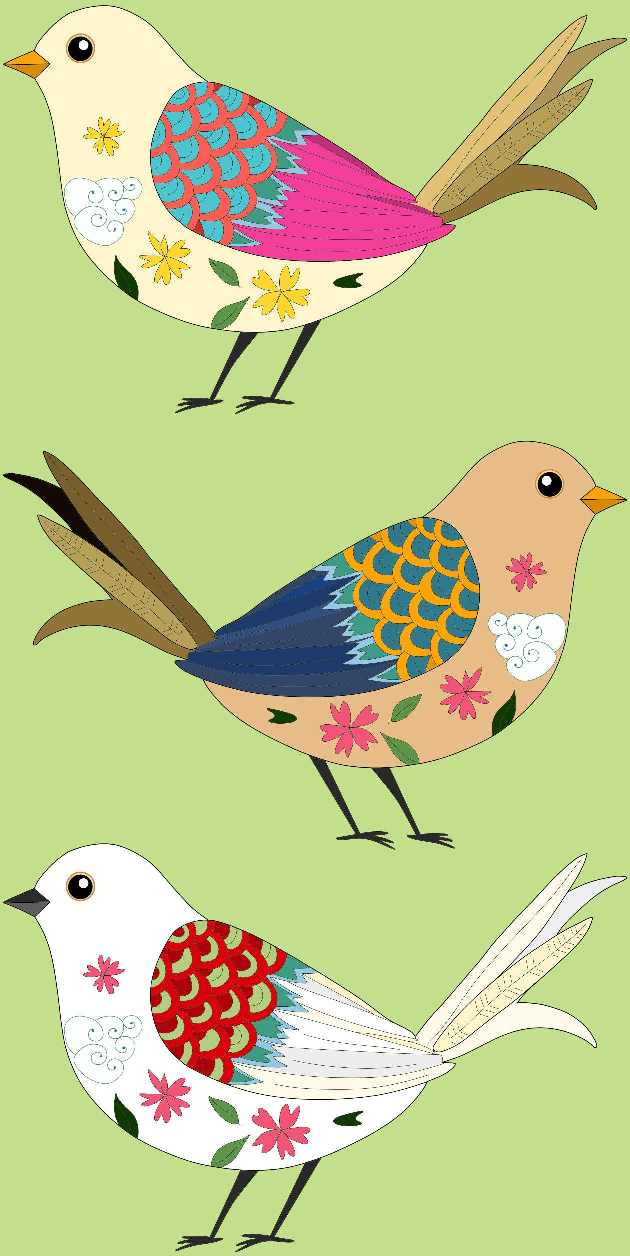
What are the types of business organisations that can be set up in India? What are the the registration/incorporation formalities for these?

Business ventures can be carried on in India through sole proprietorships, partnerships (including LLPs) or through companies incorporated in India. Additionally, non-residents can carry on certain limited business activities through a branch, liaison or project office (non residents are allowed to invest in the capital of companies and LLPs subject to foreign exchange laws of India). Any fetters on the business activities that can be carried on foreign companies that have established business organisations in India have been set out below.

Sole Proprietorship

This is the simplest form of business. The owner of a sole proprietorship is personally entitled to all the profits and is liable for all the losses arising from the business.

NRIs and PIOs resident outside India can make investment in a sole proprietorship (i) on a non-repatriation basis without approval of the Reserve Bank subject to certain conditions and restrictions; and (ii) on a repatriation basis with prior approval of the Reserve Bank. Non-residents (other than NRIs and PIOs) are not allowed to make any investment in a sole proprietorship without prior approval of the Reserve Bank.



No business registration is required under Indian law for constitution of a sole proprietorship. However, tax registrations along with certain local and municipal registrations which may be required in connection with running of the business are required.

Partnership

Partnerships in India, other than LLPs, are regulated under the Partnership Act. Partners of a firm are jointly entitled to all the profits in the manner agreed amongst them and are also, depending upon the terms of the partnership deed, jointly and severally responsible for (i) all the liabilities arising from the business and (ii) for the acts done by the partnership, during their respective tenure as partners. While it is not mandatory, most partners enter into a partnership deed to govern their inter-se relationship as partners. A partnership does not have a corporate character distinct from its members. A partnership may even have corporations as its members.

NRIs and PIOs resident outside India can make an investment in a partnership (i) on a non-repatriation basis without approval of the Reserve Bank subject to certain conditions and restrictions; and (ii) on a repatriation basis with prior approval of the Reserve Bank. Non-residents (other than NRIs and PIOs) are not allowed to make any investment in a partnership without prior approval of the Reserve Bank.

The Partnership Act does not require mandatory registration of the partnership; however, an unregistered partnership and partners of such an unregistered partnership are prohibited from instituting suits to enforce certain rights.

LLPs

LLPs are a new form of a hybrid corporate entity with characteristics of both a limited liability company and a partnership, and are regulated by the LLP Act. The nature of an LLP is that of a body corporate with perpetual succession and it is a legal entity separate from its partners. An LLP can sue and be sued in its own name. Two or more persons (including a body corporate) can incorporate an entity as an LLP under the LLP Act. Every LLP is required to nominate at least two individuals as designated partners, one of whom should be resident in India.

After incorporation, the partners of an LLP may enter into an LLP Agreement which will govern their mutual rights and obligations. Such an LLP Agreement is optional. If such an agreement does not exist, the rights and obligations of the partners of the LLP would be governed by the provisions set out in the first schedule of the LLP Act. For the purposes of its business, every partner of the LLP is an agent of the LLP and not of the other partners.

Any obligation of the LLP arising out of contracts or otherwise is solely that of the LLP and liabilities of the LLP, if any, have to be met out of its property.

The liability of an LLP becomes unlimited in case of a fraud committed against any person with the knowledge and authority of the LLP. In order to incorporate an entity as an LLP the partners would have to file the 'incorporation document' (which is similar to a Memorandum of Association of a company). Pursuant to filing of the document, a Certificate of Incorporation is issued by the RoC which is conclusive evidence of the incorporation of an LLP. FDI is permitted in LLPs under the automatic route in sectors where 100% FDI is allowed through automatic route & there are no FDI-linked performance conditions.

Company

A company may be incorporated in India either as a private company or a public company. However, foreign investment in NBFCs is subject to minimum capitalization requirements. The details regarding setting up and managing a company are set forth later in this handbook.

Branch / Liaison / Project Offices

Setting up branch offices, project offices and liaison offices by foreign companies (i.e. companies incorporated outside India) require prior approval of the Reserve Bank/ authorised dealer bank. However, no approval of the Reserve Bank is required for foreign companies (i) which are banking companies; to establish any offices if such company has obtained approval under Banking Regulation Act; (ii) to establish branch offices / units in SEZs to undertake manufacturing and service activities, subject to satisfaction of certain conditions; (iii) which are insurance companies, to establish a liaison offices if such foreign companies have obtained approval from the IRDA.

Reserve Bank has introduced eligibility criteria for branch and liaison offices. A non-resident can establish a branch offices if it has a profit making track record during immediately preceding 5 FYs in its home country and a net worth of not less than USD 100, 000 or its equivalent. A non-resident can establish a liaison offices if it has a profit making track record during immediately preceding 3 FYs in its home country and a net worth of not less than USD 50, 000 or its equivalent. Foreign companies which establish a place of business in India through a branch offices, must be registered with the RoC and must have complied with certain other conditions.

> “Business ventures can be carried on in India through sole proprietorships, partnerships (including LLPs) or through companies incorporated in India.”

Are there any fetters on the business activities that can be carried on by foreign companies that have established business organizations in India?

Foreign companies would typically set up a company or an LLP in India, should the nature of business they propose to carry in India require the presence of a separate entity. Should a separate legal entity not be required, foreign companies will look to set up branch / liaison / project offices to carry out limited operations such as sales and marketing, co-ordination, etc.

Company

The extent and conditionality of foreign investment in a company incorporated in India is regulated by the various regulations under FEMA and the extant FDI Policy.

Currently, foreign investments are not allowed in companies engaged in certain sectors such as real estate business, gambling and betting, lottery, including government/ private/online lottery, etc.

Branch / Liaison / Project Offices

A branch office may enter into contracts on behalf of the non- resident parent and may generate income. However, the activities that can be undertaken by a branch office are restricted to exporting / importing goods, rendering professional or consultancy services, carrying on research work in which the parent company is engaged, promoting technical or financial collaboration between Indian companies and the parent or overseas group company, representing the parent company in India and acting as buying / selling agent in India, rendering services in information technology and development of software in India, rendering technical support to the products supplied by parent / group companies and foreign airlines / shipping companies. The branch office should normally be engaged in the activity in which the parent company is engaged. The scope of the activities may be further curtailed by conditions in the approval granted by the Reserve Bank.

A liaison office, on the other hand, is not permitted to carry on commercial, trading or industrial activity either directly or indirectly in India. Its activities are restricted to representing the parent company / group companies in India, promoting export / imports from / to India, promoting technical / financial collaborations between parent / group companies and companies in India, and acting as a communication channel between the parent company and Indian companies.

The expenses of liaison office are to be met by way of inward remittance from the non-resident.

A project office represents the interest of a foreign company executing projects in India. Typically, these are representative office of foreign companies undertaking large projects such as major construction, civil engineering and infrastructure.

LLPs

As mentioned above, FDI is permitted in an LLP, in those sectors/activities where 100% FDI is allowed through the Automatic Route and there are no FDI linked performance related conditions.

02

Companies

Overview of the corporate law regime in India

The Companies Act is a central/federal legislation that applies to companies incorporated throughout India. The new Companies Act replaced the earlier Companies Act (1956). The Act and the rules were notified in a phased manner. The Companies Act follows a fixed and variable model whereby several provisions require corresponding rules to be prescribed by the Central Government.

The core objectives behind formulating the Companies Act include:

i. encouraging investments while ensuring sound governance within corporate structures;

ii. enhancing accountability;

iii. protecting the interests of investors and minority shareholders;

iv. de-linking substantial law from procedural aspects;

v. eliminating redundant provisions to streamline and optimise; and

vi. aligning with changing national and international economic situations.

Of the several reforms the Companies Act has introduced, the major changes in the company law regime include introducing concepts like "small company" and "one-person company", greater scrutiny of private companies, enhanced corporate governance standards, introducing provisions safeguarding the interests of investors and minority shareholders, amending provisions relating to audit and auditors, banning insider trading and forward dealing, permissibility of outbound mergers, mandating increased corporate accountability, granting jurisdiction to the NCLT, permitting specific classes of companies to list their securities in foreign jurisdictions, eliminating imprisonment for specific offenses, and upgrading the provisions relating to corporate social responsibility.

What are the different types of companies that can be incorporated in India?

Companies may be incorporated as private companies or public companies. They may be limited by shares or guarantees (which may or may not have share capital) or they could be unlimited i.e. there would be no limit on the liability of the members. The most common, however, is a company limited by shares. The Articles of Association of private companies must restrict the right to transfer shares, limit the number of members to 200 (not including employees), and prohibit the company from inviting the public to subscribe to its securities. A private company must have at least two members and two directors.

Private companies can also be set up as a one-person company or a small company. While a one-person company has only one natural person (an Indian citizen) as a member, a small company is one that has a paid-up share capital not more than INR 5 million or any higher amount up to INR 100 million, and a turnover not exceeding INR 20 million or a higher prescribed amount, but not more than INR 1 billion. The Companies Act exempts one-person companies and small companies from certain requirements relating to meetings, financial records, and such. However, safeguards are in place to prevent the misuse of such companies for structuring purposes, and these are useful only for small businesses.

A public company can freely transfer shares and has no restriction on the number of members it may have. However, any contract or arrangement between two or more persons regarding the transfer of securities will be enforceable as a contract. A public company must have atleast seven (7) members and three (3) directors. Just as every listed company must have at least one-third of the board of directors who are independent directors, certain classes of unlisted public companies must also have at least two independent directors on their board. A listed company and certain classes of unlisted public companies must have at least one woman on its board of directors. Additionally, all companies must have at least one resident director. Furthermore, individuals from countries that share a land border with India need prior security clearance from the Government of India for appointment as a director of an Indian company. A private company that is a subsidiary of a public company is also considered a public company.

The Companies Act also permits the incorporation of a "not-for-profit" company, commonly referred to as a "*Section 8 Company*", for the following objectives: promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, environment protection and such.

Furthermore, based on the control and influence test, a company (in connection with another company) may be categorised as a holding company, a subsidiary company, or an associate company. This classification is significant in the context of related party transactions, consolidation of financial accounts etc.

> **"Companies may be incorporated as private companies or public companies. They may be limited by shares or guarantees."**

What is the process for incorporation?

An Indian company (private or public, limited or unlimited) is incorporated by registering with the appropriate RoC of the state in which it intends to establish its registered office. The documents filed are available for public inspection.

The MCA, in January 2017 introduced the "*Simplified Proforma for Incorporating Company*" (**SPICe**) as an electronic alternative to the existing incorporation process. In January 2018, it amended the rules relating to incorporation of companies, retaining filing of SPICe as the only mechanism for submitting company incorporation applications. Later, in February 2020, the MCA replaced SPICe with the SPICe+ form. SPICe+ is an integrated Web form offering 10 services by three (3) Central Government ministries and departments – Ministry of Corporate Affairs, Ministry of Labour, and the Department of Revenue in the Ministry of Finance – as well as one State Government (Maharashtra), significantly reducing the procedures, time, and cost attached to starting a business in India. SPICe+ is part of various initiatives and the Government's commitment towards the ease of doing business in India. As an integrated application, SPICe+ includes the application for allotment of a DIN for up to three (3) directors, reservation of a name, incorporation of company, and the appointment of directors of the proposed company. SPICe+ also provides services for obtaining PAN, TAN, and GSTIN, and registrations with the ESIC and EPFO. The applicant must file in electronic form constitutional documents of the proposed company, including the Memorandum of Association and Articles of Association, along with the application for incorporation. While the Memorandum of Association outlines a company's objectives, scope of activity and authorised share capital, the Articles of Association lay out the company's rules and regulations regarding its management and the rights of the members/shareholders among themselves and vis-à-vis the company.

Considering that the application process and subsequent filing requirements are digitised, it is important to obtain the digital signature certificates for the directors from certain designated authorities before filing the application.

Within 30 days of the incorporation, a company must conduct its first board meeting, establish a registered office, and file a verification of the registered office with the RoC. The company must also undertake other activities such as opening a bank account, remitting the subscription money, issuing share certificates, and appointing the first statutory auditors of the company.

For incorporating a one-person company, the Memorandum of Association must indicate the name of another consenting person, i.e., a nominee – the individual who will become the member upon the original member's death or incapacity. The name of a one-person company must also add "OPC Limited" to its name.

Furthermore, companies incorporated after November 2, 2018 with share capital, cannot begin any business operations or use its borrowing powers unless:

i. a director of the company submits a declaration to the RoC within 180 days of its incorporation, confirming that all subscribers to the Memorandum of Association have paid for the shares they agreed to take at the time of making the declaration (in the prescribed format); and
ii. that the company has filed a verification of its registered office with the RoC.

Can a non-resident be the first shareholder of a company?

Subject to the sectoral policy on foreign investments and non-resident holding limits applicable to the said sector, non-residents can hold the entire share capital of an Indian company. However, the company must satisfy the minimum membership requirements stipulated under the Companies Act. If a non-resident is a shareholder, the company must file Form FC-GPR with the RBI along with relevant supporting documents, as may be necessary. The Government has introduced a new, simplified SMF to streamline the reporting under the FIRMS portal within 30 days of issuance.

Who is a Significant Beneficial Owner?

Sections 89 and 90 of the Companies Act, along with the Companies (Significant Beneficial Owners) Rules, 2018 ("SBOR"), outline the disclosure requirements of individuals who ultimately control a company. These provisions aim to enhance corporate transparency and deter the misuse of corporate structures for illicit activities, including money laundering, tax evasion, corruption, and other unlawful purposes.

The SBOR defines a “significant beneficial owner” (**SBO**) as an individual who, either independently or with others, directly or indirectly through entities (including residents, non-residents, or trusts) holds specific rights or entitlements in a reporting company. These rights include holding at least 10 per cent of the shares indirectly or together with direct holdings, exercising at least 10 per cent of the voting rights in shares indirectly or in combination with direct holdings, receiving or being entitled to at least 10 per cent of the total distributable dividends or other distributions in a financial year through indirect holdings alone or together with direct holdings, or exercising significant influence or control in a manner not limited to direct holdings.

Section 89(10) of the Companies Act defines “beneficial interest” in a share as the direct or indirect right or entitlement (through contracts, arrangements, or otherwise) to exercise rights attached to such shares or to receive or participate in dividends or distributions in respect of such shares.

The SBOR outlines various criteria to identify individuals as SBOs. It considers an individual as holding a right or entitlement indirectly in a reporting company if, as a member of the company, (i) they hold a majority stake in the member entity or its ultimate holding company (for corporate members); (ii) are the karta of a HUF; (iii) are a partner, hold a majority stake in a corporate partner, or in the ultimate holding company of the corporate partner (for partnership entities); (iv) act as a trustee (in discretionary or charitable trusts), a beneficiary (in specific trusts), or the author/settlor (in revocable trusts); (v) or serve as a general partner, investment manager, or CEO of the investment manager in relation to a pooled investment vehicle governed by specific international and regulatory standards.

SBOs are required to file a declaration with the company where their beneficial ownership exists. Each company is responsible for identifying SBOs, ensuring the filing of declarations, maintaining a register of SBOs, and filing returns with the RoC upon receiving declarations. The SBO register must be accessible to shareholders.

The SBOR exempts certain entities, including authorities under Section 125(5) of the Companies Act, holding reporting companies (provided relevant details are reported in the prescribed form), government bodies, Central or State government-controlled entities, SEBI-registered investment vehicles such as mutual funds, alternative investment funds, REITs, InvITs, and vehicles regulated by the RBI, IRDAI, or PFRDA.

Non-compliance with SBOR requirements or disclosure obligations under the Companies Act could result in penalties from INR 50,000 (approximately USD 600) to INR 5,00,000 (approximately USD 6,098).

Should an Indian Company mandatorily dematerialise its shares?

Yes, it is mandatory for Indian companies to dematerialise their shares; however, there are certain exceptions. Unlisted public companies that are *nidhi* companies, government companies, or wholly owned subsidiaries are not required to issue dematerialised shares, all other unlisted public companies must issue securities exclusively in dematerialised form and enable the dematerialisation of their existing securities.

Any unlisted public company intending to issue shares (including bonus or rights issues) or undertake a buy-back must ensure that the shares held by its directors, promoters, and key managerial personnel are in dematerialised form before proceeding with such actions. Additionally, after October 2, 2018, the transfer of shares of unlisted public companies is prohibited in physical form. While existing shareholders (excluding promoters, directors, or key managerial personnel) may retain their shares in physical form if not transferred, promoters, directors, and key managerial personnel must convert their shares into dematerialised form whenever the company seeks to issue shares, regardless of their intent to transfer such shares.

With effect from October 1, 2024, even private limited companies (except companies categorized as ‘small companies’) are required to issue shares in dematerialised form.

For listed companies, the shares held by promoters and members of the promoter group must be in dematerialised form. The SEBI Listing Regulations also stipulate that any person holding physical shares of a listed company cannot transfer such shares unless first converted into dematerialised form. The only exception is for the transmission or transposition of shares.

How are minority shareholders protected under Indian law?

The Companies Act does not define “minority shareholders” but accords them greater powers and remedies to protect their rights. Permissibility of incorporating entrenchment provisions (supermajority vote) in the Articles of Association is seen as a key minority protection tool under the Companies Act.

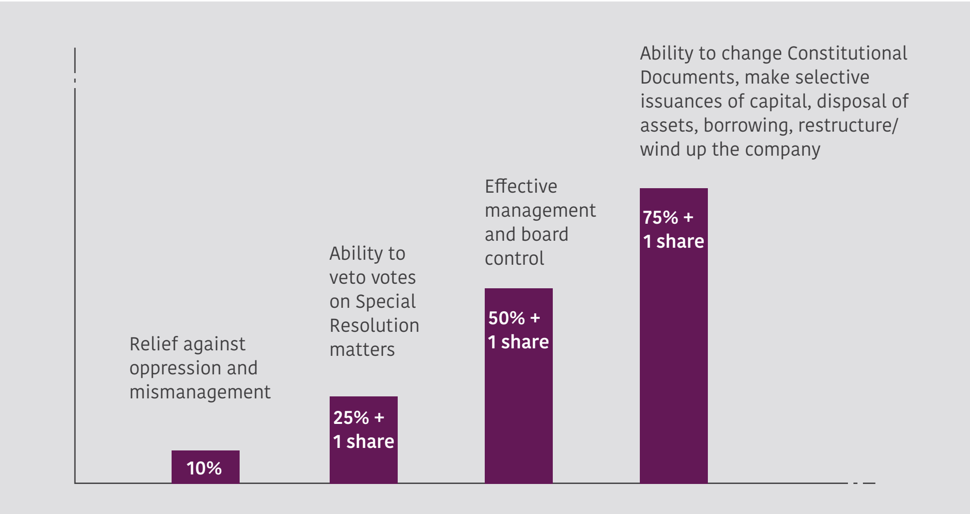
A shareholder owning at least 10 per cent of the voting capital has certain rights, including the right to requisition an extra-ordinary general meeting of the company, the right to challenge variation of rights attached to shares, the right to make an application to NCLT for investigation into the affairs of the company, etc.

> **“Subject to the sectoral policy on foreign investments and non-resident holding limits applicable to the said sector, non-residents can hold the entire share capital of an Indian company.”**

A shareholder holding 10 per cent or more of the issued share capital can also approach the NCLT for remedy against oppression of the minority and for mismanagement by the persons controlling the company or the majority shareholders. However, the burden of proving oppression or mismanagement rests with the shareholder making the allegation, and it is a time-consuming process. Shareholders holding at least 5 per cent in case of an unlisted company and at least 2 per cent in case of a listed company of the issued share capital of the company can file a class action to restrain the company from taking certain actions and for claiming damages against the company, directors, auditors, and other experts and advisors for fraudulent acts.

Shareholders with more than 25 per cent of the voting capital may block resolutions on matters requiring a Special Resolution, such as amendments to the Constitutional Documents, reduction of share capital, disposing of an undertaking or exercising borrowing powers, winding up, etc.

The following graph is an indicative representation of the rights associated with different shareholding thresholds:



In case of JVs, it is possible to protect the interests of the minority partners through provisions in the shareholder/JV agreements that increase the threshold for the passage of certain resolutions (therefore providing for "veto" rights) or provide for special quorum requirements. Interests of parties can also be protected through restrictions on the ability of parties to transfer shares held by them in the JV company and providing for "put/call" options on the occurrence of certain specified events/circumstances. The Companies Act recognises the enforceability of such provisions in private arrangements for public companies as well. Separately, relevant regulations issued by the SEBI can be applied for listed entities where such shareholder rights impact governance or disclosure.

The Companies Act enables the Articles of Association to contain provisions, the alteration of which may require a higher threshold than a special resolution. Such entrenchment provisions can be included in the Articles of Association either at the incorporation stage or by a subsequent amendment. In case of private companies, the approval needs to be obtained from all members for subsequent amendments to include entrenchment provisions. Exercising of veto rights that relate to management and policy decisions (by virtue of shareholder agreements or voting agreements), may be considered an exercise of "control" over the Company and such a person exercising control would be treated as a "promoter" under the Companies Act.

The Companies Act includes certain other provisions that contribute to the protection of minority shareholders, such as improvement in the corporate governance standards, mandatory approval for related party transactions, powers to inspect and authorise an investigation, the right to request a company to appoint a small shareholder director, the establishment of stakeholders relationship committee, procedure for squeeze-outs, right to demand poll, and other governance-related measures that safeguard minority interests.

Dissenting minority shareholders must also be provided with exit options in certain cases, such as when an acquirer becomes a holder of 90 per cent equity share capital, there is a variation in the objectives for which money was raised, a listed company merges with an unlisted company, a takeover occurs as a result of compromise or arrangement, etc.

How does one fund a subsidiary in India?

A subsidiary may be funded by:

i. subscribing to equity shares or preference shares or debentures.

ii. extending an ECB, or a foreign currency loan, including through subscription to partially or optionally convertible preference shares, ICDs, OCDs and NCDs (subject

to having the minimum equity contribution and maintaining the debt equity ratio stipulated under the extant foreign exchange regulations and the Companies Act) and which would require compliance with stipulations for eligible borrowers and permitted end-uses.

iii. providing an advance against services to be rendered, but the parties must be mindful of transfer pricing restrictions and ensure that the advance does not extend beyond specified periods so as to constitute an ECB.

What are the rights of a shareholder at 51 per cent and 75 per cent?

Shareholders holding 75 per cent of a company's equity can authorise certain proposals that require approval through a Special Resolution (i.e., a three-fourths majority of the shareholders of the company present and voting at any meeting) such as:

i. alteration of the Constitutional Documents of the company;

ii. change in the name of the company;

iii. reduction of capital, issue of shares to persons excluding existing shareholders;

iv. issue of preference shares by a company with a share capital;

v. issuance of sweat equity shares;

vi. issuance of debentures with an option to convert into shares;

vii. variation in the terms of contract or objects in prospectus;

viii. appointment of more than 15 directors in a company;

ix. disposal of assets borrowing beyond a specified threshold;

x. payment of managerial remuneration in excess of specified limits in case of inadequate profit/loss; and

xi. winding up of the company.

At an annual general meeting of the company, all business to be transacted is deemed to be special, except resolutions for the appointment of directors in place of those retiring, declaration of dividend, approval of audited financial statements, appointment and fixing of remuneration of auditors. These require an Ordinary Resolution, i.e., greater than 50 per cent majority of the shareholders present and voting at the meeting. Further, all companies, except a one-person company and companies with up to 200 members, must only pass certain shareholder resolutions through a postal ballot and not at a shareholders meeting. Such resolutions include items such as:

i. a change in the objectives for which company had raised money from public through a prospectus and still has unutilised funds;

ii. an alteration of Articles of Association regarding insertion of provisions defining a private company;

iii. buy-back of shares;

iv. the issuance of shares with differential voting rights as to voting or dividend;

v. a change in the place of registered office outside the local limits of any city, town, or village;

vi. giving loans or extending guarantee or providing security in excess of the statutory limit;

vii. the election of a director under Section 151 of the Companies Act;

viii. a variation in the rights attached to a class of shares or debentures or other securities; and

ix. the sale of the whole or substantially the whole of the undertaking of a company.

How can a company be listed in India?

Listed or to-be listed companies must comply with the SEBI Act, as well as various regulations and guidelines issued by SEBI thereunder. These include the SEBI ICDR Regulations, SEBI LODR Regulations, and the Listing Agreements entered into between the companies and the stock exchanges where their securities are listed or are yet to be listed.

> **“Shareholders holding 75 per cent of a company’s equity can authorise certain proposals that require approval through a Special Resolution.”**

Shares can be listed through a public issue or an offer for sale in accordance with the requirements specified under the SEBI ICDR Regulations.

Any public company offering securities through a public issue or rights issue must file with SEBI a draft offer document, through their lead merchant banker(s), at least 30 (thirty) days prior to registering the prospectus, red herring prospectus, or shelf prospectus with the RoC or filing the letter of offer with the stock exchange. SEBI may specify changes or issue observations on the draft offer document. The issuer and lead merchant banker must then carry out such changes in the draft offer document in compliance with SEBI’s observations before registering the prospectus, red herring prospectus, or shelf prospectus, as the case may be, with the RoC or filing the letter of offer with the designated stock exchange.

The issuer must also obtain an in-principle approval from stock exchanges in case of:

i. an initial public offer, from all the recognised stock exchanges on which the issuer proposes to get its specified securities listed and

ii. a further public offer and rights issue, from the stock exchanges where its shares are already listed.

The draft offer document filed with SEBI shall be made public, for comments, for at least 21 days from the date of such filing, by hosting it on the websites of the issuer, SEBI, recognised stock exchanges where specified securities are proposed to be listed, and merchant bankers associated with the issue.

After the said deadline expires, the lead merchant banker must file with the SEBI a statement providing information on the comments received by them or the issuer on the draft offer document during that period and the consequential changes, if any, to be made in the draft offer document. Through the lead merchant bankers, the issuer has to file with SEBI an updated offer document highlighting all the changes before registering the red herring prospectus with the RoC or filing the letter of offer with the designated stock exchange.

What is the minimum level of public shareholding in a listed company? What are the consequences of the shareholding of the acquirer being in excess of the minimum level of public shareholding?

At least 25 per cent of shares issued by the company must be offered and allotted to public if the post-issue capital of the company calculated at offer price is less than or equal to INR 16 billion. If the post-issue capital exceeds INR 16 billion but is less than or equal to INR 40 billion, shares equivalent to at least INR 4 billion must be offered and allotted to the public, and the company must increase its public shareholding to at least 25 per cent within three (3) years from the date of listing of the securities.

If the post-issue capital of the company calculated at offer price exceeds INR 40 billion, at least 10 per cent of shares issued by the company must be offered and allotted to the public, and the company must increase its public shareholding to at least 25 per cent within three (3) years from the date of listing the securities.

The Securities Contracts (Regulation) Rules, 1957 (**SCRR**), was amended in 2010 to provide for continuous listing requirements. If the public shareholding of a listed company falls below 25 per cent, the listed company must increase its public shareholding to the minimum prescribed level within 12 months from the date it fell below 25 per cent, as specified by SEBI. Moreover, every listed public sector company whose public shareholding falls below 25 per cent at any time after the commencement of the Securities Contracts (Regulation) (Second Amendment) Rules, 2018, must increase its public shareholding to at least 25 per cent within two (2) years, as specified by SEBI.

If a company does not comply with the minimum public shareholding level, it must undertake suitable action to raise the public shareholding within the prescribed time to keep its shares listed. The Listing Agreement prescribes the following methods to raise public shareholding to minimum specified levels:

i. issuance of shares to the public through a prospectus;

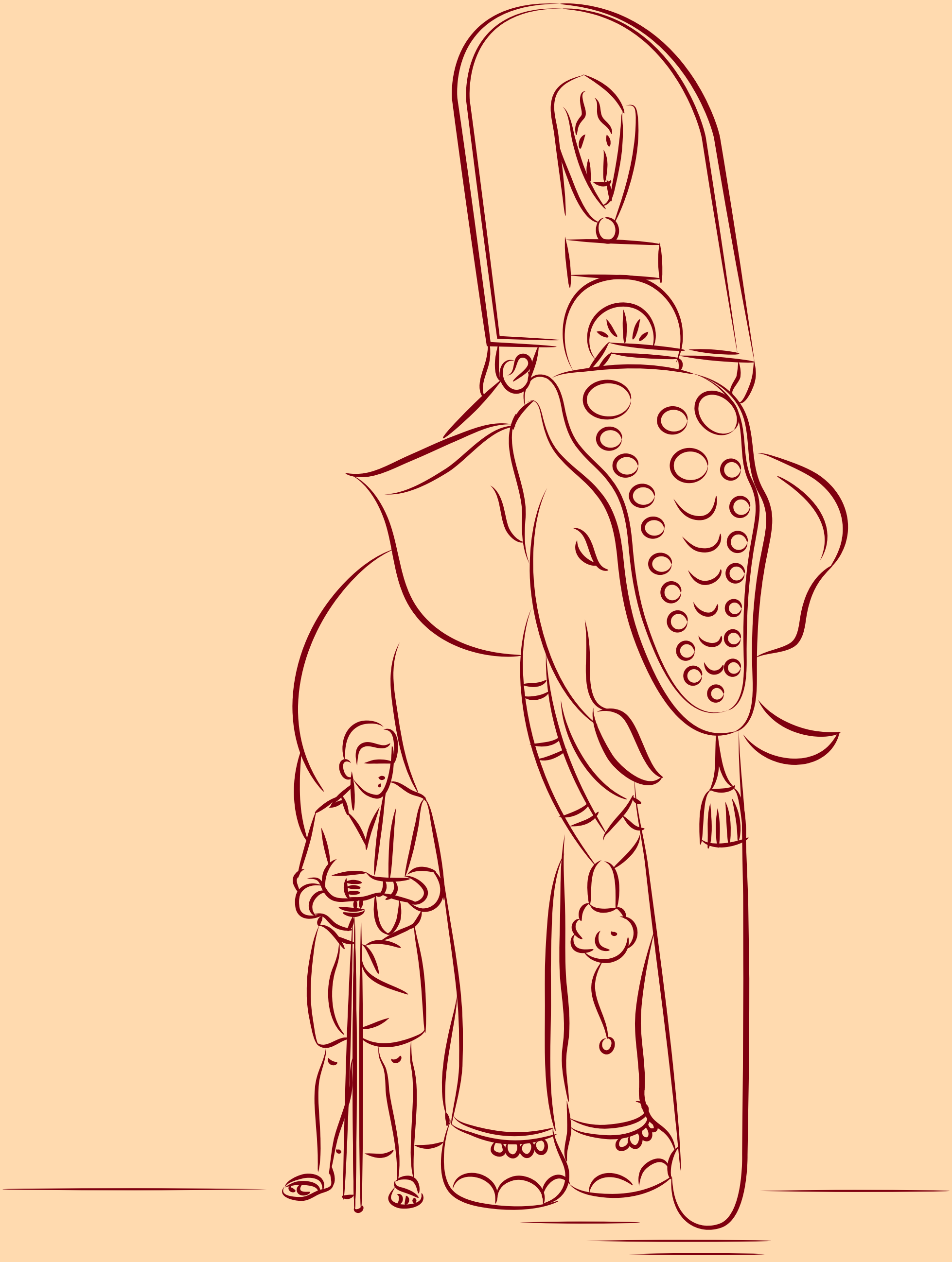
ii. offer for sale of shares held by promoters to public through a prospectus;

iii. offer for sale by the promoter or promoter group on the stock exchange in blocks, in terms of the requirements specified by SEBI;

iv. IPP in terms of Chapter VIIIA of SEBI ICDR Regulations for issue of a maximum of 10 per cent of the paid-up capital of the company;

v. rights issuance to public shareholders;

vi. bonus issuance to public shareholders;



vii. open market sale up to 2 per cent of the total paid-up equity share capital of the listed entity; and

viii. QIP in terms of Chapter VIII of the SEBI ICDR Regulations.

Companies failing to comply with the minimum level of public shareholding within the time period stipulated in the SCRR and the Listing Agreement could face penalties such as compulsory delisting, suspension of trading, monetary penalties, and/or prosecution.

What types of shares can a company issue?

Shares can only be of two kinds:

i. **Equity shares**: These shares have voting rights or differential rights concerning dividend, voting, or other matters and are issued in accordance with the Companies (Share Capital and Debentures) Rules, 2014

ii. **Preference shares:** These shares do not carry voting rights, except in certain circumstances. Preference shareholders have a preferential right over equity shareholders to dividends and to assets in case the company winds up. These shares may be redeemable or convertible into equity shares.

Who can be appointed as a director of a company in India? Can a non-resident be appointed as a director of an Indian company?

A company may appoint an individual as the director of a company, subject to meeting certain conditions. It cannot appoint or reappoint any individual as a director unless the person acquires a DIN. Separately, an individual proposed for appointment as a director of a company must give their consent to hold the position.

An individual cannot be a director of more than 20 companies and can only be a director of not more than 10 public companies.

A company is required to have at least one director who has stayed in India for at least 182 days during the financial year. An Indian company can have foreign directors, as per the Companies Act, provided the Central Government approves the terms of appointment of foreign nationals as full-time/managing directors of an Indian company if their period of stay in India, before their appointment as full-time/managing director, is less than 12 months. For newly incorporated companies, this requirement applies proportionally at the end of the financial year of the company's incorporation.

Furthermore, a prior clearance from the Ministry of Home Affairs, Government of India, is mandatory if the person intended for appointment as a director in an Indian company is a national of a country that shares land border with India – Pakistan, Afghanistan, Nepal, Bhutan, China (including Hong Kong and Macau), Bangladesh, and Myanmar.

Additionally, the SEBI Listing Regulations prohibit a listed company from allowing a person to serve as a director or an independent director in more than seven (7) listed companies. Additionally, a whole-time director or managing director in any listed company can only serve as an independent director in up to three (3) listed companies.

What are the liabilities/obligations of a director under Indian law?

A director who commits a breach may be liable for both civil and criminal consequences, depending on the nature of the breach and the statutory provisions. The liabilities can be summarised as follows:

i. Directors will be liable for civil consequences by way of monetary penalties and/or claim for damages due to breaches of fiduciary duties towards the company and for damages due to fraudulent acts towards stakeholders. Under certain provisions of the Companies Act, the directors may be held personally liable, without any limitation of liability, to third parties, for fraudulent activities.

ii. Directors would be liable for monetary penalties and/or imprisonment. However, in such a case, usually, a director is not liable if they are able to prove that the breach was committed without knowledge and/or that all due diligence was exercised to prevent the commission of the breach.

The Companies Act makes an "officer who is in default" liable to penalty or punishment by way of imprisonment in the event of contravention of the provisions of the Companies Act.

The definition of an "officer who is in default" has a very wide import. A director must act with reasonable diligence and care and has a fiduciary duty to the company and its shareholders as a whole. The Companies Act has now codified the duties of a director, who is now required to act in the best interests of the company, its employees, shareholders, the community, and the protection of the environment.

Directors must also comply with laws requiring disclosures of their directorships, shareholdings, and/or any financial interests in any related parties or contracts, ensuring transparency under the Companies Act.

The duties of a director include attending the board meetings, disclosing any conflicting interest, and acting in accordance with the Articles of Association of the company. A director must exercise these duties with due and reasonable care, skill, diligence, and exercise independent judgment. The director must not become involved in any situation that may have a direct or indirect interest that conflicts, or possibly may conflict, with the company's interest. Independent directors also have additional duties codified under the Code for Independent Directors as specified in Schedule IV of the Companies Act.

The Companies Act also provides for the protection of independent directors and non-executive directors in that they shall be held liable only for acts of omission or commission that occurred with their knowledge, attributable through board processes, and with their consent or connivance, or where they had not acted diligently.

A company may obtain insurance (D&O Insurance) on behalf of its managing director, whole-time director, manager, chief executive officer, chief financial officer, or company secretary for indemnifying any of them against any liability regarding any negligence, default, misfeasance, breach of duty, or breach of trust committed in relation to the company. Moreover, any premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

Directors of listed entities must also:

i. follow the code of conduct set for all Board members and senior management;

ii. continuously disclose their directorships, committee memberships, and significant shareholdings in other companies to the listed company's Board, ensuring they stay within the prescribed limits for directorships and committee memberships;

iii. ensure proper disclosure of information to stock exchanges and shareholders as per SEBI Listing Regulations; and

iv. oversee corporate governance practices within the company.

What are the restrictions on distribution of profits to shareholders in India?

The Companies Act regulates the declaration and distribution of dividends. Its provisions allow dividend (including interim dividend) to be paid out of current profits or profits accumulated over previous years. When computing profits, it is important to exclude any amount representing unrealised gain, notional gains, or revaluation of assets as well as any change in the carrying amount of any asset or liability following a fair-value measurement of the asset or the liability.

In case of losses, interim dividend cannot be declared at a rate higher than the average dividend declared in the preceding three (3) financial years. Dividends can be declared only from the free reserves. A company cannot declare a dividend unless the losses carried forward and depreciation not provided in the previous year(s) is set of against the profit for that year.

However, it is permissible to capitalise profits or reserves of a company to issue fully paid-up bonus shares or settle any amount. Dividend can also be paid using the funds provided by the Central or any State Government to pay dividend, in pursuance of a guarantee given by that Government.

A company that has failed to comply with the provisions of the Companies Act relating to the acceptance of deposits cannot declare a dividend for as long as such non-compliance continues.

Are there any corporate social responsibility norms in India?

Yes. Under the Companies Act and the Companies (corporate social responsibility policy) Rules, 2014. Corporate social responsibility (**CSR**) means the activities a company undertakes to fulfil the statutory obligations laid down in Section 135 of the Companies Act and its rules. However, it must not include activities undertaken in the normal course of the company's business.

In this regard, a company with a net worth of at least INR 5 billion or a turnover of at least INR 10 billion, or net profit of at least INR 50 million during the immediately preceding financial years must have a corporate social responsibility policy and a corporate social responsibility committee. It must also spend at least 2 per cent of the average net profits made in the preceding three (3) years. The company can meet this obligation through third-party charity organisations or charity organisations that it has set up, either on its own or in collaboration with another company or government entity. While there is no penalty for non-compliance, the board of directors must provide reasons for not spending the amount in their board report presented at the company's general meeting. Generally, the company's board sets up a CSR committee to formulate and recommend a CSR policy to its board of directors, suggest the estimated cost for conducting the CSR activities, and monitor CSR activities regularly.

The MCA has released the National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business, 2011, providing companies with a comprehensive framework for responsible business actions encompassing social, environmental, and economical responsibilities of business. The guidelines also provide direction for Indian MNCs planning to invest in or already operating in other parts of the world. These are not mandatory.

Moreover, the Guidelines on CSR and Sustainability for Central Public Sector Enterprises issued by Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises, which became effective from April 1, 2013, and follow the "*comply or explai*n" approach, also mandates that all central public sector enterprises select at least one project each for (i) the development of weaker sections of society and the backward districts and (ii) environment sustainability.

Additionally, the SEBI LODR Regulations mandates the annual reports of the top 1000 listed companies (by market capitalisation) include a Business Responsibility Report.

What are the key corporate governance norms?

In addition to the CSR Rules, Under the Companies Act, at least one-third of the board of directors of a public listed company must comprise independent directors (excluding nominee directors). It is mandatory for listed companies and unlisted public companies to appoint at least one woman director if they have a paid-up share capital equal to or more than INR 1000 million and a turnover of INR 3000 million or more according to their latest audited financials. An independent director can be appointed for a maximum of a two (2) consecutive terms of five (5) years each. After term completion, an independent director cannot be appointed for a period of three (3) years.

The Companies Act also provides duties and corresponding liabilities for key managerial personnel, including the chief executive officer, chief financial officer, managing director, full-time directors, and company secretary. Section 203 of the Companies Act mandates every listed company and every public company with a paid-up capital of INR 100 million or more to appoint whole-time key managerial personnel such as a managing director or chief executive officer, a company secretary, and a chief financial officer.

The Companies Act provides for compulsory rotation of auditors every five (5) years and of audit firms after two (2) terms of five (5) years. It also mandates an auditor to report to the Central Government frauds (exceeding a specified threshold) against the company by its officers/employees. Every listed company and certain prescribed unlisted companies must constitute an audit committee to monitor the auditor's independence and performance. To protect whistleblowers, such companies must also establish a vigil mechanism for directors and employees to report genuine concerns. The company's audit committee oversees this vigil mechanism.

The Companies Act requires an Ordinary Resolution for a certain category of transactions with related parties and exceeding the thresholds provided, except transactions on an arm's-length basis or in the ordinary course of business, and transactions between holding the company and its wholly owned subsidiary. The shareholders interested in such transactions must abstain from voting. This requirement of abstinence is not applicable to the shareholders of private companies.

Can voting rights be exercised by proxy?

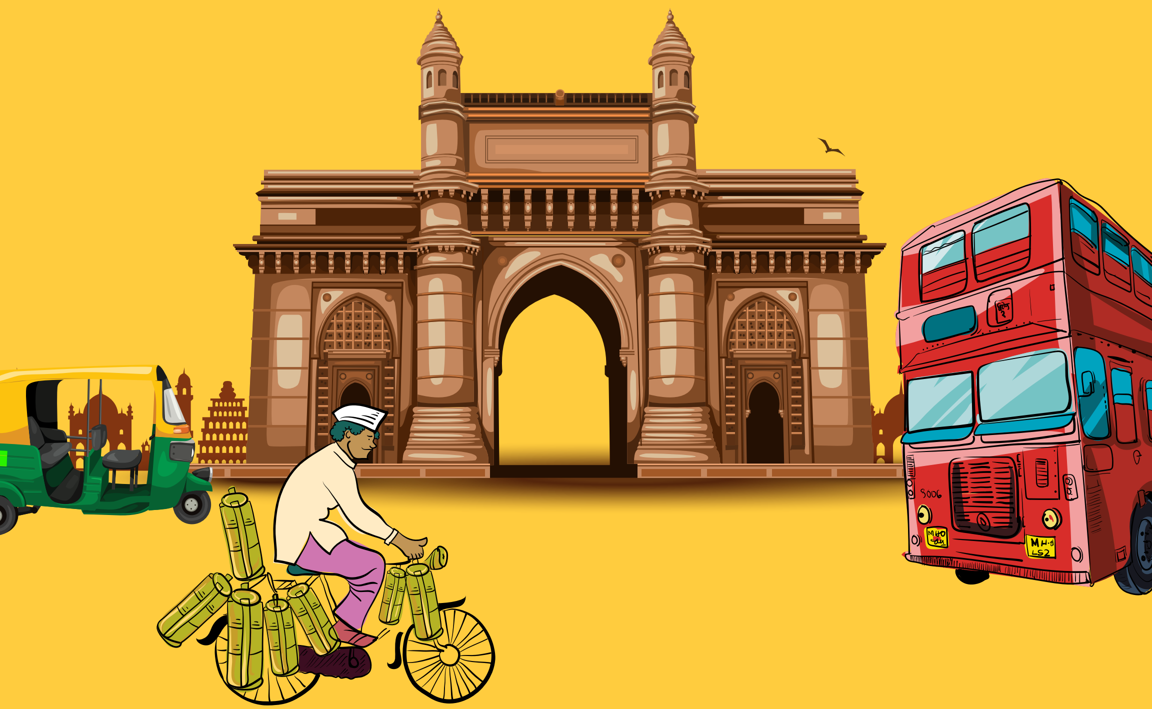
A member of a company entitled to attend and vote at a company meeting can appoint another person (whether or not a member) as a proxy to attend and vote at a meeting instead of them, subject to certain compliances. A person can be a proxy for a maximum of 50 (fifty) members. However, such a proxy is entitled neither to speak at the meeting nor vote, except on a poll. This requirement is applicable to a private company, unless otherwise specified in its Articles of Association.

Can statutory meetings be held through electronic means?

A company is not restricted from holding all its meetings in a physical form. It could conduct these electronically, provided it ensures the presence of a physical quorum during the consideration of any of the restricted items of business to comply with law. This was introduced in response to the pandemic, with an aim to facilitate board and shareholders' meetings and company's business continuity. Post the enforcement of the Companies (Meetings of Board and its Powers) Amendment, Rules 2021, certain specified matters, including the approval of the annual financial statements and the board's report, and matters relating to amalgamation, demerger, merger, acquisition, and takeover can now be dealt with at a meeting held through video-conferencing.

03

Foreign Investment



How is foreign investment regulated in India?

In India, foreign investment in India is primarily regulated by:

i. FEMA and the rules, regulations, and directives it issues through notifications and circulars, including, the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**NDI Rules**);

ii. The FDI Policy issued by the Department for Promotion of Industry and International Trade (**DPIIT**) (formerly Department of Industrial Policy and Promotion – DIPP), Ministry of Commerce and Industry, and the Government of India.

The key regulators monitoring foreign investment in India include:

i. DPIIT (Department for Promotion of Industry and Internal Trade): A part of the Ministry of Commerce and Industry, this department regulates foreign investment in India, formulates policies on foreign investment, and manages applications under the approval route. DPIIT also refers such applications to relevant ministries or departments and conducts joint reviews of pending proposals.

ii. The Reserve Bank: The RBI regulates foreign investment related to exchange control, in accordance with the provisions of the FEMA. The RBI administers the NDI Rules and has the authority to issue directions, circulars, and clarifications for their implementation.

iii. Relevant Ministries/Departments: Various ministries and departments review and approve foreign investment in sectors under their purview, in accordance with the NDI Rules and FDI Policy. For example, the Ministry of Defence oversees foreign investment in the defence sector, while the Ministry of Information and Broadcasting handles approvals for the broadcasting sector.

What are the different routes of investment available for a foreign investor (excluding NRI or PIO) to invest in India?

Currently, subject to prescribed caps or conditions, foreign investors may invest in India through the following three routes:

i. FDI – Automatic Route or Approval Route: The Automatic Route does not require either the foreign investor or the Indian company to obtain approval from relevant ministries, departments, or the RBI; however, the Approval Route mandates obtaining prior approval from the relevant ministries, departments, or the RBI, as applicable, before proceeding with the investment.

ii. ***Investment through the Portfolio Investment Scheme***: This scheme allows a foreign investor to participate as a Registered Foreign Portfolio Investor (**RFPI**); however prior registration with SEBI in accordance with the SEBI (Foreign Portfolio Investors) Regulations, is mandatory.

iii. ***Investment as an FVCI***: This also requires the foreign investor to register with SEBI prior to investment.

What are the restrictions on investments from neighbouring countries in India?

The NDI Rules were updated on April 22, 2020, to counter the risk of opportunistic takeovers or acquisitions of Indian companies from certain specific jurisdictions. While restrictions earlier applied only to investments originating from Bangladesh and Pakistan, since the amendment, prior approval from the Government of India is mandatory for any foreign investment originating from or involving entities based in countries sharing land borders with India or where the beneficial owner of the investment is from such a country. Additionally, any changes in the beneficial ownership (through direct or indirect transfers) of the existing or proposed FDI resulting in the ownership falling under these restrictions will also require Government of India approval. Multilateral banks or funds, of which India is a member, shall not be treated as an entity of a particular country nor shall any country be treated as the beneficial owner of their investments in India.

What are the ways in which a foreign investor can invest in an Indian company?

A company can undertake FDI in India through the following modes:

i. ***Issuance of fresh equity instruments:*** Subject to compliance with the foreign exchange laws and the Companies Act, an Indian company is allowed issue permissible equity instruments under the FDI Policy to a non-resident investor.

ii. ***Secondary acquisitions:***

   a. ***Non-resident to non-resident***: A person resident outside India (excluding NRIs, OCIs, or erstwhile OCBs) can transfer the equity instruments of an Indian company or units of an Investment Vehicle to any other person resident outside India (including NRIs) through sale or as a gift. Government approval is not required for transfer of equity instruments from one non-resident to another in sectors which are under the Automatic Route. However, Government approval will be required for transfer of shares from one non-resident to another in sectors which are under the Approval Route.

b. ***Between non-residents and residents***: Transfers between non-residents and residents of equity instruments of an Indian company or units of an Investment Vehicle as a gift or sale (private sale or sale on a stock exchange) is permitted. Such transfers will be subject to compliance with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalisation (where applicable), etc.

c. ***Swap of equity instruments***: A non-resident may acquire equity instruments of an Indian company by swapping equity instruments subject to meeting certain valuation requirements. The Government's approval is not required for the swap of equity instruments in sectors where the Indian company is engaged in a sector where FDI is permitted without Government approval.

d. ***Non-resident on the stock exchange***: A non-resident may invest/trade in the equity instruments of the Indian companies or units of an Investment Vehicle (if listed) on recognised Indian stock exchanges through a registered broker. A foreign investor already in control of a listed company in accordance with SEBI Takeover Regulations is also permitted to acquire shares of the company on the stock exchange through a registered broker under the FDI route, provided the original and the resultant investments comply with the foreign exchange laws regarding sectoral caps, entry route, mode of payment, reporting requirement, etc.

iii. ***Domestic Investments by NRIs or OCIs***: NDI Rules deem investments made by NRIs or OCIs for the purchase and sale of equity instruments of an Indian company, capital of an LLP, convertible notes issued by start-ups or units of Investment Vehicles on non-repatriation basis.as domestic investment at par with the investment made by residents. Further, a company, trust, and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India under the special dispensation available to NRIs or OCIs under the FDI Policy and NDI Rules. However, NRIs or OCIs – including a company, trust, and partnership firm incorporated outside India and owned and controlled by them –cannot invest in equity instruments or units of a Nidhi company or companies involved in agricultural or plantation activities, real estate business or construction of farm houses or dealing in transfer of development rights.

iv. ***DRs/FCCBs***: The issuance of DRs and FCCBs can be carried out in the manner discussed.

> **"Foreign investors can invest through the following routes - Foreign Direct Investment, Foreign Portfolio Investment or Foreign Venture Capital Investment."**

What are the ways in which a foreign investor can invest in an Indian company?

A foreign investor should assess the applicable FDI regime before choosing investment instruments, considering each instrument is accorded a different treatment under the current FDI Policy. The NDI Rules, subject to the pricing guidelines/valuation norms under FEMA regulations, allows foreign investors to invest through:

i. ***Equity instruments***: "Equity instruments" are equity shares, fully convertible debentures, fully preference shares, and share warrants issued by an Indian company.

ii. ***Partly paid shares***: Issued to a non-resident, these shares must be fully called up within 12 months of their issuance.

iii. ***LLPs***: Investment can be made in LLPs engaged in activities that permit FDI up to 100 per cent under the automatic route, provided these have no performance conditions linked to FDI, as stipulated in the FDI Policy and NDI Rules.

Can an Indian company issue instrument(s) besides those set forth to attract foreign investment?

An Indian company can also raise money through the issue of DRs and FCCBs in the following manner:

i. ***DRs***: These are negotiable securities that a depository bank issues outside India, on behalf of an Indian company. These represent instruments of a company denominated in a foreign currency, held as a deposit by a custodian bank in India. DRs are typically traded on international stock exchanges, including those in the United States, Singapore, Luxembourg, London. While DRs listed and traded in the US markets are referred to as ADRs, those listed and traded elsewhere are typically called GDRs. DRs are issued in accordance with the provisions of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, as amended, read with

Foreign Exchange Management (Overseas Investment) Rules, 2022; the Depository Receipts Scheme, 2014; the Companies (Issue of Global Depository Receipts) Rules, 2014; the SEBI-issued circular of October 10, 2019, on the Framework for Issuance of Depository Receipts (as applicable) and relevant guidelines the Government of India issues from time to time.

ii. ***FCCBs***: These are bonds issued by an Indian company, denominated in foreign currency, where both the principal and interest are payable in the foreign currency. These bonds are issued in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the Foreign Exchange Management (Non-debt Instruments) Rules, 2019. Non-resident entities subscribe to FCCBs in a foreign currency and can convert these, either partially or wholly, into ordinary shares of the issuing company.

As securities and bonds that can be converted to equity, DRs and FCCBs are also subject to FDI norms outlined earlier in this chapter. However, FCCBs and DRs with underlying debt instruments are excluded from sectoral cap restrictions and will not be reckoned for total foreign investment.

Is FDI prohibited in any sector/business?

Following are the sectors in which FDI is prohibited in India:

i. Lottery businesses, including Government/private lottery, online lotteries, etc.

ii. Gambling and betting activities and establishments, including casinos, etc.

iii. Chit funds.

iv. *Nidhi* company.

v. Trading in transferable development rights.

vi. Real estate business or construction of farm houses. ‘Real estate business’ means dealing in land and immovable property with a view to earning profit and does not include development of townships, construction of residential or commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships, real estate broking services and registered Real Estate Investment Trusts (**REITs**) and earning of rent or income on lease of the property.

vii. Manufacturing of cigars, cheroots, cigarillos, and cigarettes, of tobacco or of tobacco substitutes.

viii. Activities/sectors not open to private sector investment, such as atomic energy and railway operations. Exceptions include construction, operation, and maintenance of (a) suburban corridor projects through public private partnership; (b) high-speed train projects; (c) dedicated freight lines; (d) rolling stock including train sets and locomotives/coaches manufacturing and maintenance facilities; (e) railway electrification; (f) signaling systems; (g) freight terminals; (h) passenger terminals; (i) infrastructure in industrial parks pertaining to railway line/sidings including electrified railway lines and connectivity to main railway lines; and (j) mass rapid transport systems

ix. Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contracts for lottery business, gambling, and betting activities.

Are there any limits / caps on FDI depending upon the business of the Indian company?

The maximum permissible limit for foreign investment/sectoral cap in an Indian company is determined by the sector in which it operates. FDI is permitted by non-residents in the capital of an Indian company, either under the Automatic Route or the Approval Route, up to a specified percentage of the entity's total capital as mentioned in the FDI Policy. Certain sectors, including pension funds, broadcasting, and print media, have capped investments. However, in most sectors, FDI is permitted up to 100 per cent (in some cases under the Approval Route).

Are there any pricing guidelines that a foreign investor has to comply with while investing in any of the equity instruments of an Indian entity?

The RBI has specified the pricing guidelines for the acquisition of equity instruments of Indian companies by non-residents.

*i. **Issue of equity instruments:***

a. For equity instruments of an Indian company listed on a stock exchange in India, the issuance price to a non-resident must not be lower than the price determined in accordance with relevant SEBI guidelines.

b. For equity instruments of an Indian company not listed on a stock exchange in India, the price of equity instruments – both primary and secondary – must not be less than the fair valuation of equity instruments done by a SEBI-registered merchant banker or a chartered accountant as per any internationally accepted pricing methodology on an arm's length basis.

c. Non-residents (including NRIs), investing under the FDI route, can invest in an Indian company at face value by subscribing to its Memorandum of Association.

d. For equity instruments (excluding share warrants) issued pursuant to a rights issue, (i) for a listed company, the price is as determined by the company; (ii) for an unlisted company, at a price which is not less than the price at which the offer is made to the resident shareholders in the rights issue; or (iii) for the renunciation of rights from a person resident outside India, the pricing guidelines for issuance of equity instruments (excluding a share warrant are to be followed).

e. The pricing of partly paid equity shares must be determined upfront, with 25 per cent of the total consideration amount (including share premium) being paid upfront. The balance consideration is to be paid within 12 months. The payment of the balance consideration is not applicable where the issuer complies with the relevant requirements of SEBI ICDR Regulations, in relation to a monitoring agency. In case of an unlisted company, relaxation from the requirement of paying the balance consideration within 12 months is available when the investee company appoints a monitoring agency on the same lines as required for a listed company.

ii. Transfer of existing equity instruments:

a. Transfer from resident to non-resident:

The price of equity instruments of an Indian company transferred by a resident in India to a non resident should not be less than:

- the price determined according to applicable SEBI guidelines for a listed Indian company or a company going through delisting process; or
- the price of equity instruments calculated using an internationally accepted pricing methodology for valuing equity instruments on an arm's length, certified by a chartered accountant, a SEBI-registered merchant banker, or a practicing cost chartered accountant for an unlisted Indian company.

b. Transfer from non-resident to resident:

Transfer of equity instruments by a non-resident to a resident must not exceed the minimum price determined for the transfer of equity instruments from a resident to a non-resident (as enumerated previously).

Are there transfers that require prior approval from the RBI??

Prior permission from the RBI is required in the following indicative instances of transfer of equity instruments from residents to non-residents:

i. when the transfer price is not determined in compliance with the pricing guidelines stipulated by the foreign exchange laws;

ii. when the non-resident investor requests a deferment of payment of consideration, beyond 25 per cent of the total consideration or the 18-month period which is permitted under law; or

iii. when an NRI or an OCI proposes to transfer equity instruments to a non-resident, but the company operates in a sector under the Approval Route.

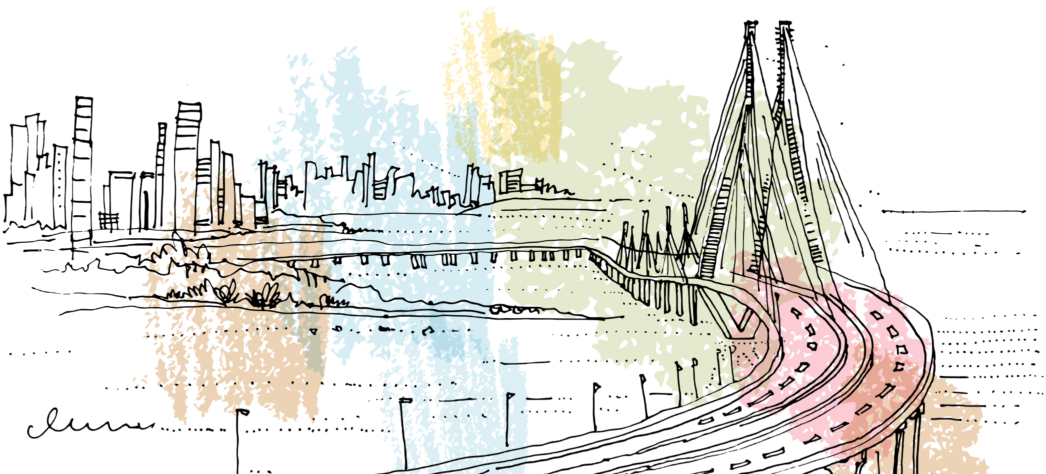
The following indicative instances of transfer of equity instruments from residents to non-residents also require the approval of the DPIIT or the concerned administrative ministries/departments:

i. when the transfer of securities of companies operating in sectors fall under the Approval Route; or

ii. where the transfer results in breach of the applicable sectoral caps.

What are the reporting requirements to the RBI in case of issuance or transfer of shares?

The RBI issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, which stipulates the mode of payment and attendant conditions for investment in India by a person residing outside India.



i. ***Reporting of FDI inflow:***

The RBI, with an aim to simplify the reporting process under FEMA, has introduced SMF, a master form for filing five (5) forms – Forms FC-GPR, FC-TRS, LLP-I, LLP-II, and CN. Besides these, four (4) other forms – ESOP, DI, DRR, and InVi – are also made available to report FDI inflow.

ii. ***Reporting of issue of equity instruments:***

The Indian company issuing equity instruments under the FDI scheme must submit Form FC-GPR, within 30 days from the date of issue to the relevant RBI regional office through its AD Bank.

Indian companies receiving FDI must also file an annual return on foreign liabilities and assets with the RBI by July 15 of each year. This annual return should provide information pertaining to all investments by way of direct investment/portfolio investments/reinvested earnings/other capital in the Indian company made during the previous years including the current year on or before July 15 of each year (i.e., the information submitted by July 15 will pertain to all investments made in the previous year up to March 31).

iii. ***Reporting of transfer of equity instruments:***

Form FC-TRS must be filed for transfer of equity instruments within 60 days of the transfer of equity instruments or receipt/remittance of funds, whichever is earlier, both for transfers between non-residents and residents and those between two non-residents.

The onus for submission of Form FC-TRS lies with the resident transferor/transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be.

The AD banks must report the purchase/transfer of equity instruments by NRIs or OCIs on stock exchanges in India in Form LEC (**NRI**).

Who is an FVCI?

An FVCI is an investor incorporated and established outside India, registered under the SEBI FVCI Regulations, and proposes to make investments in accordance with SEBI FVCI Regulations. A Designated Depository Participant (**DDP**) grants an FVCI registration on behalf of SEBI. On examining the application for registration, the DDP generally verifies whether the applicant is a “fit and proper” person to be registered as an FVCI. The FVCI applicant must also submit, as a part of the FVCI application, information on the ultimate

> **Prior permission from the RBI is required in the following indicative instances of transfer of equity instruments from residents to non-residents.**

beneficial owner (end natural person), details of its regulatory status, and disciplinary history, etc.

Various factors are considered, including whether the securities market regulator of the applicant's country of residence is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding; whether the applicant or its beneficial owners are named in the Sanctions List of the UN Security Council or identified in the public statement of Financial Action Task Force, and other relevant details.

What are the advantages of structuring the investment under the FVCI route?

The FVCI route is generally preferred for investments in unlisted Indian companies, although in certain cases investments are also made in listed Indian companies.

Investment through the FVCI route offers four primary benefits:

i. An FVCI can make and dispose of investments at negotiated prices that are not subject to the RBI's pricing regulations and is, therefore, not subject to any limit on returns unlike foreign investors governed by the Foreign Exchange Management (**Non-Debt Instruments**) Rules, 2019 (**NDI Rules**).

ii. Pre-IPO share capital an FVCI holds would not be subject to a lock-in period of six (6) months after the date of allotment in an IPO, provided the FVCI has held the shares for at least six (6) months, unlike for most other pre-IPO share capital of such Indian companies.

iii. The open offer obligations in the SEBI Takeover Regulations do not apply to a transfer of shares from an FVCI to the promoters of the target company pursuant to an agreement between the FVCI and the promoters.

iv. FVCIs are accorded QIB status, making them eligible to subscribe to securities at the IPO of an issuer through the book-building route.

What are the restrictions/investment norms for FVCIs?

The following limitations apply to FVCI investments:

i. Investment conditions and restrictions applicable to FVCIs must be adhered to with respect to their investible funds. These restrictions must be met by the end of its life cycle.

ii. Under the SEBI FVCI Regulations, an FVCI must maintain a prescribed asset composition of its investible funds, investing at least 66.67 per cent of its investible funds in unlisted equity shares or equity-linked instruments (i.e., instruments convertible into equity shares or share warrants, preference shares, debentures compulsorily, or optionally convertible into equity) of VCUs or investee companies. These are defined under the SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**), which replaced the SEBI (**VCF**) Regulations, 1996, effective May 21, 2012. It may invest the remaining 33.33 per cent of investible funds by subscribing to an IPO of a VCU or investee company scheduled for listing, or through preferential allotment of equity shares of a listed company, subject to a lock-in of one (1) year. Under the FVCI Regulations, an FVCI can invest its total funds committed in one VCF or an alternate investment fund (as defined in the AIF Regulations). The definition of a VCU in the SEBI FVCI Regulations excludes most categories of NBFCs, companies engaged in gold financing or any other activity specified by SEBI in consultation with the Government of India from time to time or other activity that may not be permitted under the industrial policy of the Government of India.

iii. FVCIs are entitled to invest in equity and debt instruments issued by Indian companies engaged in 10 specified sectors and whose shares are not listed on a recognised stock exchange. The specified sectors include IT hardware and software development, biotechnology, nano technology, seed research and development, research and development of new chemical entities in the pharmaceutical sector, dairy industry, poultry industry, production of biofuels, the infrastructure sector, and hotel-cum-convention centres with seating capacity of exceeding 3000. The sectoral conditionality does not apply to investments in start-ups. However, if the investment is in equity instruments, the sectoral caps, entry routes, and attendant conditions of the FDI route will apply. FVCIs are also permitted to invest in units of Category-I alternate investment funds (as defined in the AIF Regulations) and VCFs or units of a scheme or fund set up by a Category-I alternate investment funds and VCFs. FVCIs may invest in eligible securities (equity, equity-linked instruments, debt, debt instruments, debentures of a start-up, IVCU, VCF, units of schemes, and/or funds set up by a VCF by Category-I AIF). This can be done through the purchase of such capital instruments from either the issuer of the security/instrument or any other person holding the security/instrument or on a recognised stock exchange.

What are the categories of FPIs?

The FPI Regulations have specific categories for different classes of eligible applicants: (i) Category-I for governmental and government-related entities such as central banks, international multilateral agencies, pension funds, appropriately regulated entities such as insurance or reinsurance entities, banks, asset management companies, etc.; (ii) Category-II for investors not eligible under Category I, such as, endowments and foundations, charitable organisations, family offices, etc. Registration applications for these entities must be processed through DDPs.

What are the advantages of structuring an investment through the FPI route?

A registered FPI may, subject to the pricing and ownership restrictions discussed subsequently, freely buy and sell securities issued by any listed (or to be listed) Indian company, trade in derivatives on a recognised stock exchange, invest in units of real estate investment trusts, infrastructure investment trusts and units of Category-III Alternative Investment Funds, etc. FPIs can appoint a domestic custodian for custody of investments made and repatriate any capital, capital gains, and dividends that they may make or receive.

What are the restrictions/investment norms for FPIs?

The following restrictions apply to investments undertaken by FPIs:

i. All FPI transactions are subject to SEBI- stipulated process restrictions and specifications and must be conducted through stock brokers registered with SEBI, except in certain cases.

ii. Unless expressly permitted, the holding of unlisted shares may be subject to the NDI Rules, such as a cap on investment percentage and other sector-specific restrictions.

iii. In instances where an FPI holds equity shares in an unlisted company and retains them even after the company lists its shares, the FPI holdings are subject to lock-in period equivalent to the shares held by a foreign direct investor in a similar position, according to the applicable foreign exchange laws and FPI Regulations.

iv. The total holding by each FPI or an investor group as referred in FPI Regulations must neither exceed 10 per cent of the total paid-up equity capital on a fully diluted basis nor exceed 10 per cent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company.

v. The cumulative holdings of all FPIs, including any other direct and indirect foreign investments in the Indian company, must not exceed the sectoral caps applicable to the Indian company as outlined in the NDI Rules. For Indian companies in FDI-prohibited sectors, the aggregate limit with respect to an Indian company is 24 per cent.

vi. If the FPIs investments breach these limits, they have five (5) trading days from the date of settlement of the trades causing the breach, to divest their holdings.

vii. If the FPI chooses not to divest, the entire investment in the company by the FPI and its investor group shall be considered as investment under the FDI route. The FPI and its investor group can then no longer make further portfolio investment in the investee company. The conversion to FDI is subject to a prescribed operational framework.

04

Business and Asset Transfers

What is the difference between a business transfer and an asset sale?

The primary difference between a business transfer and an asset sale is that in the former, the buyer acquires the entire business operations of the seller, including assets, liabilities, contracts, intellectual property, employees and goodwill on a "going concern basis", while in the latter, the purchaser acquires specific identified assets and/or liabilities (often referred to as "cherry picking"). In a business transfer, a lump-sum consideration is made without assigning values to individual assets and liabilities (save and except for determining the value of assets or liabilities for stamp duty purposes). In contrast, an asset sale involves separately identifiable prices for each asset.

What are the transaction costs that would typically accrue to a business transfer and an asset sale?

A business transfer (which constitutes a "slump sale" for the purposes of the Income Tax Act) is generally considered to be more cost-efficient than an asset sale.

i. ***Capital Gains:*** The gains arising from a business transfer fall within the definition of a "slump sale" under the Income Tax Act, and are taxed as long-term or short-term capital gains, depending on the period for which the seller held the undertaking as a whole, prior to disposition, irrespective of the period for which each constituent asset was held. In case of a slump sale, capital gains is computed by reducing the net worth of the undertaking from the higher of actual sale consideration or fair market value of the undertaking, determined in accordance with the prescribed methodology. Gains from disposal of an undertaking held for more than 36 months are taxed as long-term capital gains.

   On the other hand, in an asset sale, capital gains tax is to be paid by the seller on income arising from the transfer of each asset. The method of computation of capital gains varies based on the nature of the asset, i.e., depreciable asset, non-depreciable asset, or business asset.

ii. ***Tax Holiday:*** Generally, for business transfers, the tax holiday period attached to the business undertaking is allowed to be carried forward. However, such tax holidays are not available for transfer of separate assets of such an eligible business undertaking.

iii. ***Goods and Services Tax (GST):*** There is no GST payable on a business transfer, but the transfer of assets in an asset sale will attract GST.

iv. ***Stamp Duty:*** Stamp duty is applicable on the document affecting the property transfer, with the rate of duty depending on the state in which the document is executed and where the property sought to be transferred is situated. The stamp duty rate is typically an ad *valorem* rate.

For both slump and asset sales, assets are usually transferred in the following manner: (a) immovables, under a registered deed of conveyance; (b) movables, by delivery of possession; (c) intellectual property, comprising trademark and copyright, by deed of assignment; (d) contracts, by way of deed of novation; and (e) employees, by way of execution of fresh employment agreements/appointment letters by the transferee entity (along with continuation of benefits from the transferor entity).

v. ***Registration Fees:*** For transfer of immoveable properties, transfer documents are compulsorily required to be registered with the relevant authority upon payment of fees, which vary from state to state.

What approvals are required for effecting a slump sale or an asset sale?

For a slump sale, approval from the board of directors of the company transferring the undertaking is needed. However, if the proposed sale meets a certain threshold, then approval from the majority of the shareholders of the seller, by a Special Resolution, would also be required. Such shareholder nod would have to be by way of a postal ballot/e-voting.

In case of an asset transfer, generally approval from the board of directors of the company transferring the asset is sufficient (unless the asset is a material part of the business of the transferring company, in which case, shareholder approval shall also be required).

Further, approvals from lenders, employees, third parties, and regulatory authorities may be required for both slump sale and/or asset sale.

Additionally, Indian labour law also provides protection for “workmen” in case of transfer of a business undertaking in which they are employed. Such transfers usually attract retrenchment compensation and notice, as prescribed, unless: (i) the workmen are absorbed in the transferred undertaking with their consent; (ii) the terms of employment in the transferred undertaking are no less favourable than those applicable to them originally; and (iii) the transferred undertaking is liable to pay the workmen, in the event of their retrenchment, compensation considering their services being continuous. A similar approach is adopted for non-workmen as well.

> "A business transfer (which constitutes a "slump sale" for the purposes of the Income Tax Act) is generally considered to be more cost-efficient than an asset sale."

How long does it take to complete a business or asset transfer by private arrangement?

The process of business or asset transfer could take 8–10 weeks or more, depending on approvals and consents (including in relation to licences) that may be required, and the extent of negotiation between the parties involved. There are typically additional formalities, particularly for transfer of immoveable properties, which could take longer.

Are there any disadvantages of a private arrangement over a court process?

Individual approvals of creditors, regulatory authorities, and third parties would be required for transfer of an undertaking, licences, and other business-related agreements through a private arrangement. This could be time-consuming. However, in case of a court process, it is not necessary to seek individual approvals from creditors or third parties, prior to the transfer, except as required under loan agreements and specific third-party contracts, such as shareholders' agreements. All other agreements, permits, and licences are transferred by a court order, though additional formalities to record such transfers would still be required.

Additionally, in case of a court process-based arrangement, losses can be carried forward by the transferring company, if they are directly relatable to the transferred undertaking. This would not be available in case of a transfer under a private arrangement.

05

Tribunal-Based Restructuring

What are the various forms of tribunal-based restructuring recognised under Indian law?

The provisions relating to schemes of arrangement in the Companies Act, which became effective in December 2016, introduced several changes in the process for schemes of arrangement, including replacing the jurisdictional High Courts with the NCLT as the approving authority for schemes of arrangement.

Several types of restructuring – whether of the business (including mergers, demergers, spin-offs, or slump sales), capital (including consolidation or reduction of capital), or debt – can be achieved through a process involving the sanction of the NCLT under the provisions of Sections 230–234 of the Companies Act. The basic process involves filing the terms of the arrangement in the form of a draft scheme of arrangement with the relevant NCLT, seeking its directions in relation to the process prescribed. After obtaining the approval of the shareholders and creditors in accordance with the NCLT's directions, the NCLT reviews whether the proposed restructuring is procedurally as well as substantively fair. Schemes for mergers, demergers and slump sales, or combinations thereof, are the most common kinds of restructuring proposed and conducted under the provisions of Sections 230–234 of the Companies Act.

What special rules apply to schemes of arrangement for listed companies?

Listed companies considering schemes of arrangement are subject to applicable SEBI regulations. Under the SEBI (Listing obligations and Disclosure Requirements) Regulations, 2015, listed companies are obligated to ensure that such schemes of arrangement do not violate the relevant securities laws by requiring them to submit for review and observations such schemes to the stock exchanges concerned and to SEBI before filing with the NCLT. SEBI has also made these requirements applicable to companies that only have listed debt (i.e., Non-Convertible Debentures and/or Non-Convertible Redeemable Preference Shares).

SEBI also requires listed companies to submit various documents along with the draft scheme, including a fairness opinion from a merchant banker, valuation report (in certain instances) of an independent chartered accountant, the audit committee's report, the independent directors' committee report, compliance report, auditor's certificate on compliance with accounting standards, report on complaints, etc. This is to facilitate reviews by the stock exchanges and SEBI and to monitor compliance.

Besides enhancing SEBI's ability to monitor compliance with securities regulations, the regulations aim to accomplish the following:

i. ***Ensure compliance with securities regulations:*** The regulations stipulate certain conditions that unlisted companies must meet before seeking listing pursuant to a scheme of merger/demerger. The regulations also prescribe certain pricing requirements to prevent using such schemes to circumvent preferential allotment guidelines.

ii. ***Increase transparency:*** The regulations aim to improve disclosures, providing for detailed prescriptions on disclosure requirements. They also require listed companies to disclose multiple documents, including the observation letter, and make them available on their website and that of the stock exchanges.

iii. ***Protect minority shareholder's interests:*** In certain specified cases, the regulations mandate that the listed entity ensure that the scheme of arrangement includes provisions for voting by public shareholders through e-voting. The scheme of arrangement shall be acted upon only if the public shareholders' votes favouring the scheme exceed the votes against it, thereby protecting minority (or non-promoter) shareholders' interests.

Pursuant to a scheme of amalgamation, what conditions must a transferee company satisfy for listing of shares?

In instances of a listed transferor entity and unlisted transferee entity, the transferee's shares may be listed under a scheme of amalgamation/demerger without making an IPO, provides it meets the following conditions:

i. The equity shares sought to be listed are proposed to be allotted by the unlisted transferee to the holders of securities of the listed transferor pursuant to a scheme sanctioned by NCLT under Section 230-234 of the Companies Act, 2013;

ii. At least 25 per cent of the post scheme paid-up share capital of the transferee company (i.e., the company seeking listing) comprises shares allotted to the public shareholders of the transferor entity.

   Note that the above condition does not apply if:

   a. the entity's valuation exceeds INR 1600 crore;

   b. the post-scheme shareholding value of the listed entity's public shareholders in the transferee entity is not less than INR 400 crore;

c. at least 10 per cent of the transferee entity's post-scheme paid-up share capital comprises shares allotted to the transferor entity's public shareholders and the public shareholding increases to at least 25 per cent within one year from the date of listing, and an undertaking to this effect is incorporated in the scheme.

iii. The transferee entity will not issue/reissue any shares not covered under the scheme of arrangement.

iv. At the time of the application for listing, no existing outstanding warrants/ instruments/ agreements should give any person the right to take the equity shares in the transferee entity at any future date. If there are, the public shareholding threshold requirement will be computed assuming full conversion of such instruments.

v. The transferee entity's shares issued in lieu of the transferor entity's locked-in shares will be subject to lock-in for the remaining period.

Note that since some additional conditions are prescribed in relation to the unlisted company, such a company may apply to SEBI to relax the requirement of an IPO if it satisfies these conditions.

What are the advantages and disadvantages of following a tribunal-based restructuring scheme?

The main advantages of adopting a tribunal-sanctioned scheme of arrangement include the following:

i. ***Beneficial tax treatment:*** The Income Tax Act specifically defines "amalgamations" and "demergers". If implemented as per the conditions specified, the scheme would provide, among others, the following benefits:

a. There will be no capital gains tax incidence on the amalgamating/de-merged company or those shareholders (who are issued shares in consideration for the merger or demerger). Moreover, the holding period required to determine if the shares sold are a long-term or a short-term capital asset will include the period during which that shareholder held shares of the amalgamating/demerged company, prior to the scheme.

b. On fulfilling certain conditions, the amalgamated company may carry forward the accumulated business loss of the amalgamating company(ies) for eight years and it's unabsorbed depreciation for an indefinite period, each from the year

> **"The main advantage of a tribunal-based restructuring is the beneficial tax treatment."**

in which the amalgamation was effected. However, the Finance Bill, 2025 has proposed to amend the Income Tax Act to provide that where an amalgamation has been effected on or after April 1, 2025, the accumulated business loss of the amalgamating company(ies) can be carried forward only for a period of 8 years from the year in which such loss was first computed in the hands of the amalgamating company i.e., the period for which the amalgamating company(ies) would have been otherwise eligible to carry forward such losses.

c. The companies can amortise the amalgamation expenses over five years from the date of amalgamation/demerger.

d. Certain tax holidays or other tax benefits available to the amalgamating/ demerged company(ies) as on the date of amalgamation/demerger will be available to the amalgamated/resulting company.

e. The resulting company can now record the assets and liabilities at a value different from book value immediately before the demerger, if such valuation is in accordance with Companies (Indian Accounting Standards) Rules, 2015.

ii. Single-window clearance: Relevant judicial precedents have established that the provisions under the Companies Act (1956) for schemes of arrangements is "a complete code in itself" and is intended to be a "single-window clearance". Essentially, companies are not required to separately follow procedural requirements prescribed in other sections of the Companies Act for various corporate actions that are already included in the scheme.

iii. Exemption from mandatory tender offer requirements: As long as certain conditions are met, the acquisition of shares under such a scheme of arrangement is exempt from the mandatory tender offer requirements under the SEBI Takeover Regulations.

iv. Transaction costs: Certain Indian states have a cap on the stamp duty charges payable for a transfer implemented under a NCLT-sanctioned scheme of arrangement.

The main disadvantages in a NCLT process are:

a. Time period: The process before the NCLT takes about four to eight months, or sometimes even longer if objections are raised before the NCLT, thereby delaying the entire transaction.

b. **Disclosures**: The nature of disclosures is more extensive than in a private process.

c. **Public scrutiny**: Considering the terms of the arrangement are in the public domain, these are open to scrutiny and challenge. The Court, too, is empowered to modify the scheme prior to its sanctioning. The changes may not be commercially desirable, requiring parties to withdraw the scheme with the leave of the tribunal.

What is the role of the tribunal when approving a scheme of restructuring?

Judicial precedents under the Companies Act (1956) have established that the court's role is not merely procedural and that it will not sanction a scheme merely because shareholders and creditors have given their consent. The Supreme Court of India has laid out that the court ensure the following key principles before sanctioning a scheme:

i. that the scheme is fair;

ii. that the statutory provisions have been complied with;

iii. that the concerned meetings had the relevant material for the shareholders/creditors to make an informed decision;

iv. that the class of persons who attended the meeting were fairly represented;

v. that the statutory majority was acting bona fide;

vi. that the scheme is not patently unfair or grossly prejudicial to the shareholders; and

vii. that the scheme is not violative of any provision of law or contrary to public policy.

The court/tribunal will typically not sit in judgement on the commercial wisdom of the parties involved in the scheme and will, typically, refrain from questioning the strategic and commercial aspects of the scheme.

How are classes of shareholders and creditors determined?

Under the Companies Act, companies are required to convene separate class meetings of shareholders and creditors to approve the scheme. Each class would have to approve the scheme by the requisite three-fourths majority in value. However, what constitutes a class has been a matter of debate. In relation to the corresponding provisions of the Companies Act (1956), courts have held that persons with common interests and those offered the same compromise by the company would be considered as being in the same class. Individuals accorded different rights and subject to different terms would not be considered as being in the same class.

Are there any special provisions for schemes of arrangement in relation to banks?

The Banking Regulation Act and related RBI guidelines/directions govern the merger of two banks, and not the provisions of Companies Act. The process would be as follows:

i. The board of directors of the two banking companies must individually approve the draft scheme of amalgamation by a two-thirds majority of the board's total strength (not merely those present at the meeting).

ii. At a meeting called for the purpose, the shareholders of each banking company must then approve the scheme of amalgamation, passing a resolution by a majority in number representing two-thirds in value of the shareholders, present in person or by proxy.

iii. After the requisite majority of shareholders approve the scheme of amalgamation, it must be submitted to the RBI for sanction. The submission must also include a valuation report (with a detailed computation), details of the price of the shares, where the amalgamated company is listed, and any other information the RBI may request.

iv. If the RBI is sanctioning a scheme, a dissenting shareholder is entitled to claim from the banking company concerned, in respect of the shares held by them, their value as determined by the Reserve Bank when sanctioning the scheme.

v. The Banking Regulation Act and the RBI guidelines/directions for such mergers prescribe additional process and compliance requirements, including notice and advertisement, board approval parameters, information that must be submitted to the RBI, etc.

What are the procedural requirements that need to be complied with in a tribunal-based restructuring?

The following requirements need to be complied with in a tribunal-based restructuring:

i. The company's board of directors must approve the restructuring, including the terms of the draft scheme and the form of consideration payable (cash or shares).

ii. The company must submit an application to the stock exchanges and SEBI (if a listed company) for their comments.

iii. It must then file the scheme (including related documents) with the relevant NCLT.

iv. The relevant NCLT will then direct the company to convene the meetings of the various classes of shareholders and creditors to approve the scheme and issues notices in this regard.

v. The company must give a notice, including all information provided to shareholders/creditors for approval, to various authorities, such as the Registrar of Companies, the Regional Director (Ministry of Corporate Affairs), Official Liquidator, Income Tax authorities, RBI, SEBI, stock exchanges, if required, and any other relevant sectoral regulator. These authorities are entitled to make representations before the tribunal (in case of any concerns on the scheme) within 30 days of receiving the notice.

vi. After the requisite majority – representing three-fourths in value of each class of shareholders and/or creditors – approves the scheme, the company files the petition for final sanction of the scheme with the NCLT. For a listed company, for certain specified cases, the public shareholders voting in favour of the scheme should be more than those voting against it.

vii. Pursuant to filing of this petition, the NCLT will conduct a hearing before granting sanction.

viii. Once the NCLT sanctions the scheme, it can be made effective, subject to the receipt of other necessary regulatory and contractual approvals.

The company must file a copy of the NCLT order sanctioning the scheme with the RoC within 30 days of the date on which the drawn-up order is prepared. It must pay stamp duty on the NCLT's order sanctioning the scheme. The stamp duty varies from state to state.

The Government introduced the Fast Track Merger (**FTM**) route under Section 233 of the Companies Act, aiming to promote ease of doing business and streamline the

restructuring process. The FTM route is available for mergers or arrangements among: (i) a holding company and its subsidiaries; (ii) small companies; and (iii) start-up companies. Under FTM, the Regional Director (Ministry of Company Affairs) approves the schemes instead of the NCLT. The procedural requirements are similar but comparatively truncated and offer a time-effective solution.

What is the effect of a scheme of amalgamation on the (i) employees and (ii) legal proceedings of the transferor company?

It is not a statutory requirement to seek employees' approval for a scheme. Courts have been satisfied that employees' interests are protected, where the scheme provides that the transferee company will absorb the transferor company's employees without any interruption of services, and that it will extend status and benefits to these employees on terms not less favourable than those given to them by the transferor company. However, employees cannot be transferred without their consent, whether express or implied.

The legal proceedings instituted in the transferor company's name will continue in the transferee company's name, and the transferee company's name replacing the transferor company's name.

Who may raise objections to a scheme of arrangement?

Stakeholders, regulators such as SEBI, and the relevant stock exchanges (in case of listed companies), the Regional Director or others interested in the transferor and the transferee companies, may raise bonafide objections to a scheme. The Companies Act provides that an objection may only be made by a member with at least 10 per cent of the shareholding or a creditor with outstanding debt amounting to at least 5 per cent of the total outstanding debt.

Are cross-border mergers allowed under Indian company law?

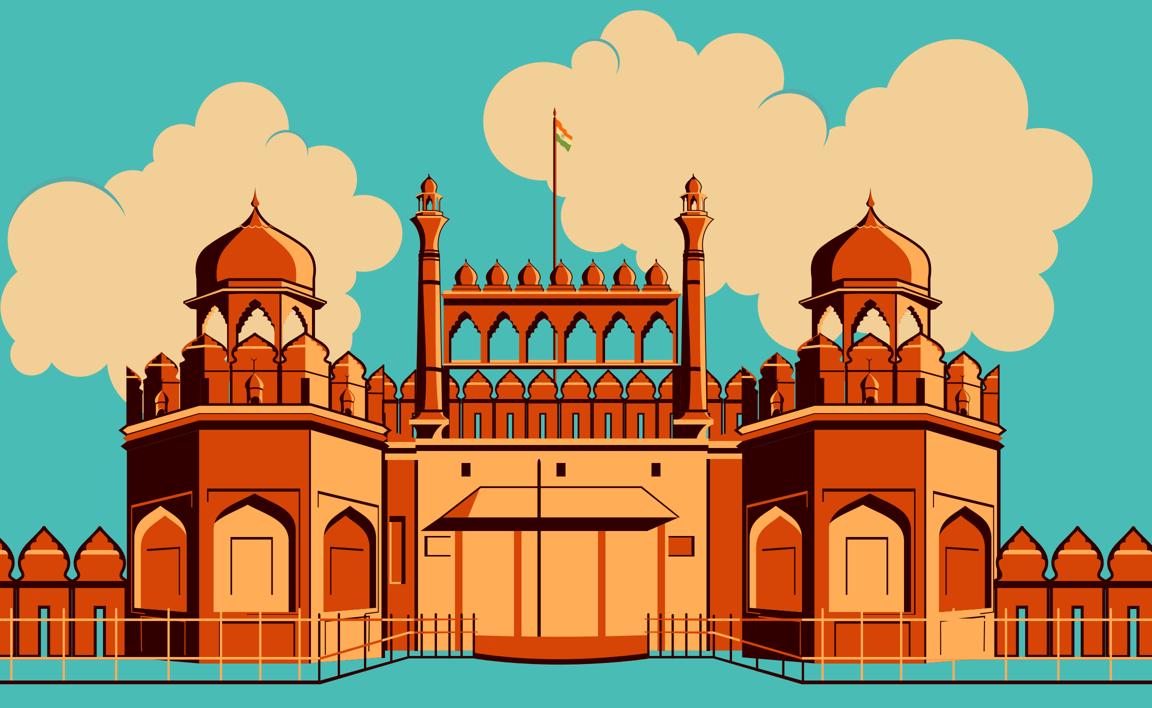
Section 234 of the Companies Act, permits in-bound and out-bound mergers between a foreign company and an Indian company, only if the foreign company is in any of the countries as notified by the Central Government and is subject to the RBI's approval. The RBI has further laid down regulations with additional conditions for such mergers. The procedure for the Indian company for cross-border mergers would be the same. Further, the Ministry of Corporate Affairs has now allowed the merger of a foreign transferor holding company with its Indian subsidiary via the FTM route. It has also streamlined FDI regulations regarding cross-border share swaps between Indian and foreign companies.

What are the critical dates involved in a scheme of arrangement?

The Companies Act provides that a scheme clearly indicate an "appointed date" from which it is to be effective. It would be deemed to be effective from that date. The appointed date can be either a calendar or an event-based date. Moreover, the security holders of the transferor company, who will be entitled to receive the securities in the transferee company in lieu of their holding in the transferor company, are determined as of an identified date.

06

Raising Capital



What are the various ways in which shares of an existing company can be acquired?

Shares or instruments convertible into shares of an existing company may be acquired through preferential allotment of newly issued shares by the company or a secondary sale of existing shares by a shareholder of the company. If the company is listed on a stock exchange, existing (listed) shares can be acquired through open market purchases on the stock exchange. In this regard, FDI on the stock exchange is permitted, subject to certain restrictions.

When do Indian companies seek access to capital?

A company may seek to access capital at various stages of its growth cycle, including at the time of:

i. Incorporation and initial set up;

ii. Placements during its operational phase where the company may seek:

   a. VC placements;

   b. Strategic placements;

   c. PE placements;

   d. IPO and pre-IPO placements;

   e. Overseas listing of its securities;

   f. Follow on offerings (post listing), such as:

      - *Domestic*: FPO, Rights Issues, Qualified Institutional Placements, Preferential Allotments.

      - *International*: GDR, ADR, FCCB.

What rules govern fresh issue of shares by way of preferential allotment?

Preferential allotment of shares or other securities (including fully or partially convertible instruments convertible into shares) is subject to prior shareholder approval by way of a special resolution, as per the Companies Act. The share price must be supported by a valuation report of a registered valuer.

A company issuing shares or other securities on a preferential basis must comply with the conditions applicable for a private placement under the Companies Act, which includes, inter alia, (i) the issuance of a private placement offer letter; (ii) restrictions on the number of persons to whom a preferential allotment can be made; (iii) the manner in which monies shall be payable towards the subscription of securities; and (iv) the time period within which the securities have to be allotted. A company making a preferential allotment is required to maintain a return of allotment.

A preferential allotment by a public listed company is additionally subject to SEBI ICDR Regulations and the Listing Regulations, which, inter alia, prescribe: (i) the eligibility requirement for the acquirer to participate in a preferential allotment; (ii) the process and the approvals required for such preferential allotment; (iii) the time period within which the allotment process is required to be completed; (iv) the manner of determining the price at which the acquirer can subscribe to the shares; and (v) the lock-in on the pre-preferential allotment shareholding of the acquirer and the lock-in on the shares and instruments convertible into shares that are preferentially allotted to non-promoters or promoters of the company, as the case may be.

The listed company is required to maintain the offer letter and record of private placement.

The necessity for getting regulatory approvals in the case of foreign investors seeking to subscribe to shares under the FDI route or the FPI route would be dependent on the activities of the target company and whether investment in companies carrying out such activities is permitted to be made under the Automatic Route (as against the Approval Route) under the foreign exchange regulations. Please see Chapter 3 for details regarding foreign investment.

What are the options available to a seller to sell the existing shares of an Indian company?

A seller may exit its investment in an Indian company in a number of ways. As a rule, repatriation of sale proceeds of a divestment from India is freely permitted, subject to compliance with applicable pricing guidelines at the time of transfer, though in certain circumstances, RBI approval may be required. Some of the common exit options that sellers may utilise are:

i. **Negotiated sale/sale of shares of an unlisted company:**

   A seller may sell equity instruments, including equity shares, convertible debentures and convertible preference shares to residents or non-residents through a negotiated deal. In this regard, please note the following from the perspective of Indian foreign exchange laws:

> **“Put and call options for sale and purchase of shares of a public company are subject to SCRA and SEBI notifications.”**

a. Non-resident to Non-resident: A person resident outside India (other than an NRI or OCI) can transfer, by way of sale or gift, the equity instruments of an Indian company to any person resident outside India.

b. Non-resident to Resident: A person resident outside India can transfer any equity instrument to a person resident in India, by way of sale, subject to compliance with the pricing guidelines, reporting requirements, etc. A person resident outside India can also transfer any equity instruments to a person resident in India, by way of gift.

c. Resident to Non-resident: A person resident in India can transfer, by way of sale, equity instruments to a person resident outside India, subject to compliance with various stipulations under the extant exchange control regulations, including sectoral caps or investment limits, pricing guidelines, reporting requirements, etc. A gift of equity instruments by a person resident in India to a person resident outside India will be subject to prior approval from the RBI and subject to certain conditions.

b. Transfer involving certain restricted countries: In case of issuance to or transfer of equity instruments of an entity in India, directly or indirectly, resulting in the beneficial ownership transferring to an entity of a country, which shares land borders with India (including China, Pakistan, etc.) or the beneficial owner is situated in or is a citizen of any such country, the same will require government approval.

ii. IPO or sponsored ADR/ GDR:

An unlisted company can offer exit to its investors as part of an IPO. In such cases, the seller would have the option to offer its shares in the target company for sale as part of the listing process or exit thereafter (subject to certain conditions including, in certain cases, statutory lock-in for the prescribed period). Such transfer by a person resident outside India will also need to be compliant with foreign exchange laws.

In case the target company is a listed company, the seller may require the company to support a sponsored ADR/ GDR programme, where the underlying shares are offered by the shareholder as opposed to a fresh issue of shares by the target company to form the shares underlying the depository receipts issued. Such an exit route also requires other conditions and criteria such as regulatory approval, a minimum prior holding period, etc., to be satisfied by the seller. Under the Depository Receipts Scheme 2014, unlisted companies are also permitted to issue ADRs/ GDRs, subject to certain specified conditions.

Although the operational framework has only been prescribed for listed companies, an unlisted company proposing to list its securities may simultaneously issue permissible securities for issuance of ADRs/ GDRs, subject to certain conditions.

iii. Buyback by the company:

The target company may buyback the securities held by the seller. A company can buyback securities only up to 25% of its paid-up equity share capital and free reserves in a single financial year. The buyback can only be funded out of the proceeds of a fresh issue of securities (other than securities of the variety being bought back), the securities premium account, and free reserves. The debt equity ratio cannot be more than 2:1 (equity being the paid up capital and free reserves) calculated post the buyback. Buy backs beyond 10 per cent of the total paid-up equity share capital and free reserves requires shareholder approval.

The buyback offer can be made: (a) from existing shareholders on a pro-rata basis; (b) from the open market; or (c) by purchasing securities issued to employees of the company pursuant to a stock option or sweat equity scheme. However, a company is not permitted to undertake a buyback within a period of one year, reckoned from the date of closure of the preceding offer of buyback, if any.

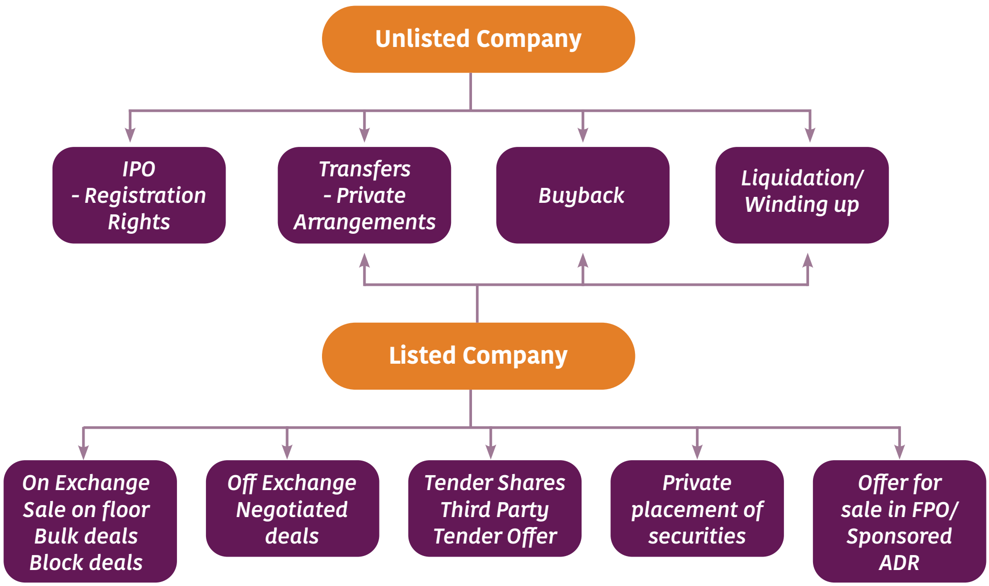
Listed companies would have to comply with the provisions of the SEBI Buyback Regulations, which provide for additional conditions that need to be complied with, including in relation to limits on offer for buyback that can be made from the open market, the process for buyback of physical shares or other specified securities, requirement to create an escrow account, etc. The price at which a company buys back its shares or other specified securities is determined based on the method of buyback chosen (such as, through tender offer, open market etc.). Before undertaking buyback of securities, listed companies are also required to file with the RoC and SEBI, a declaration of solvency signed by at least two directors of the company, including the managing director, and verified by an affidavit to the effect that the company is capable of meeting its liabilities and the company will not be rendered insolvent within one year from the date of declaration. Further, companies with non-resident shareholders would have to ensure compliance with applicable foreign exchange rules/ regulations.

iv. Sale on an Indian stock exchange:

For target companies that are listed, a seller (including a non-resident seller) is permitted to sell its investment on the stock exchange. Subject to the sale being at the prevailing market price, the seller may freely repatriate the sale proceeds outside India upon payment of applicable taxes.

Sale of shares over a stock exchange cannot typically be made to an identified buyer. A special provision has, however, been made for consummation of large transactions on the exchange, which are pursuant to private arrangements concluded of the exchange. Such transactions are required to be completed on the 'block trade' window of the stock exchange, which is operational for a specified period of the day, and is required to be done between an identified buyer and an identified seller. The transaction must be concluded at +/- 1 per cent of the ruling market price or the previous day's closing price, and the order has to be for a minimum value of Rs 100 million.

The following table provides a snapshot of the exit options available to a seller:



Are pricing restrictions applicable to subscription/ acquisition of shares? Are foreign investors subjected to special restrictions?

Please refer to our response to Questions 9 and 11 under the chapter "Foreign Investments in India". Additionally, in case of both listed and unlisted companies, the price of shares transferred by way of sale, by a non-resident to a resident, shall not be more than the minimum price at which the transfer of shares can be made from a resident to a non-resident.

Can parties enter into put and call options for sale and purchase of shares?

Put and call options for sale and purchase of shares of a public company are subject to SCRA and SEBI notifications. SEBI has issued a notification under SCRA to permit certain kinds of contracts for sale and purchase of securities, including contracts for pre-emption, right of first refusal, or tag-along or drag along rights contained in shareholders agreements or articles of association of companies. This notification also allows the sale and purchase of securities (including shares) by exercising put or call options, subject to conditions set out below:

i. the title and ownership of underlying securities should be held continuously for a minimum period of one year from the date of entering into the contract containing the option;

ii. the settlement of the contract is to be made with actual delivery of the underlying securities;

iii. the consideration payable for sale and purchase of securities should be compliant with valuation requirements, and

iv. the contract must be in compliance with foreign exchange laws.

Also, optionality clauses in equity instruments being issued to non-residents have been permitted under the foreign exchange laws, subject to the following conditions:

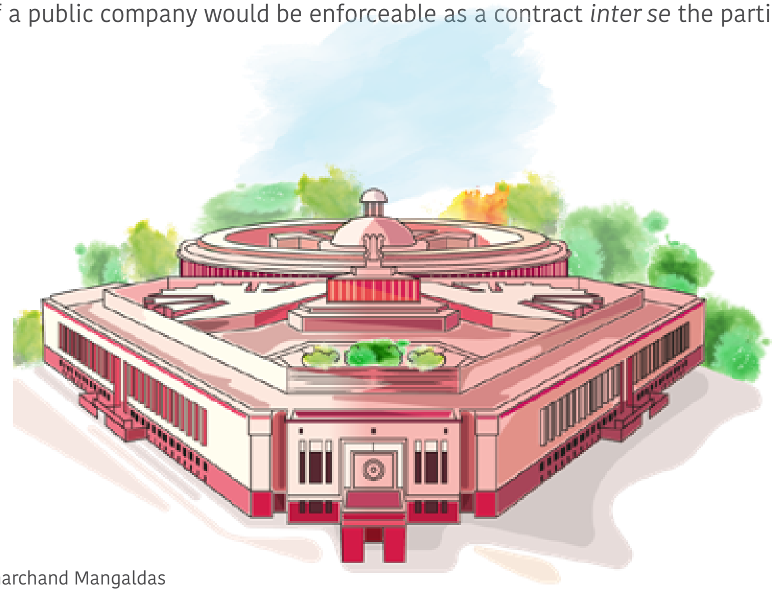
i. a minimum lock-in period of one year (or such other higher lock-in period prescribed for a specific sector);

ii. the non-resident exercising the option shall be eligible to exit without any assured return, subject to the prescribed pricing guidelines.

Can an acquirer enter into an agreement with the shareholders of a company on governance and transfer-related aspects?

An acquirer usually enters into an agreement with the company's shareholders to outline the mutual rights and obligations between the parties, and the manner in which the company is to be governed, including matters concerning the right to appoint directors, affirmative voting rights and transfer restrictions on the shares held by the parties to the agreement. Such contractual rights would have to be incorporated into the Constitutional Documents of the company from an enforceability perspective. In case of acquisition of shares in sectors requiring prior Government approval under FEMA, details of any agreements between shareholders that may affect board appointments in the investee company, or on exercise of voting rights, or create voting rights disproportionate to shareholding or any matter incidental thereof, the agreements would have to be disclosed to the relevant approving authority. The approving authority will consider such inter se agreements for determining ownership and control, when considering the case for approval of foreign investment.

The issue of enforceability of transfer restrictions in case of shares of a public company has been the subject matter of judicial scrutiny. There have been conflicting judgments delivered by different High Courts on this issue. While the Companies Act (1956) provides that there can be no restrictions on the right to transfer shares in a public company, this issue has, to some extent, been clarified in the Companies Act (2013), which provides that any contract or arrangement between two or more persons in respect of transfer of securities of a public company would be enforceable as a contract *inter se* the parties.



> **"The issue of enforceability of transfer restrictions in case of shares of a public company has been the subject matter of judicial scrutiny."**

Can an acquirer undertake a leveraged acquisition in India?

An acquirer's ability to acquire shares by leveraging locally within India is restricted by the following factors:

i. rules against financial assistance restrict Indian public companies from making available their assets as security for the acquisition of their own shares or shares of their holding company;

ii. resources and liquidity of domestic banks, and limits on capital market exposure imposed upon domestic banks by the Reserve Bank;

iii. investing companies with foreign investment or foreign owned operating cum investing companies are generally not permitted to leverage funds from the domestic market for making downstream investments in India;

iv. prohibition on the use of foreign debt for investment in the capital markets under the end-use restrictions imposed by the ECB Guidelines; and

v. pledge of shares of an Indian investee company by non-residents is permitted (a) in favour of Indian banks for securing credit facilities being extended to the investee company for bonafide business purposes and (b) in favour of overseas banks for securing credit facilities being extended to the non-resident investor or its overseas group company or the promoter of the Indian Company for bonafide business purposes overseas and not for direct or indirect investments in India, among other conditions. Both forms of pledge by a non-resident shareholder are subject to conditions under the foreign exchange regulations.

Subject to the rules against financial assistance and limitations on the ability to pledge shares of an Indian company, a non-resident acquirer may leverage overseas to fund the acquisition of shares in India.

What insider-trading restrictions are applicable to acquisition of shares of listed companies?

The SEBI Insider Trading Regulations prohibits an "insider" (either on his own or on behalf of any other person) from trading in securities of a listed company or a company proposed to be listed on a stock exchange when in possession of 'unpublished price sensitive information' or from communicating, counselling, or procuring to convey such information to another. An insider is any person who is or was connected with the company or is deemed to have been connected with the company, and who is reasonably expected to have access to UPSI, or who has in fact received or had access to UPSI in respect of that company.

Any act of subscription, buying, selling, dealing or agreeing to subscribe, buy, sell, or deal in any listed securities by any person, whether as principal or agent, would be construed as trading in securities for the purposes of the SEBI Insider Trading Regulations. Communication of UPSI in furtherance of legitimate purposes, performance of duties or discharge of a person's legal obligations is not prohibited.

Price sensitive information is information that directly or indirectly relates to a company or its securities and which, if published, is likely to materially affect the price of that company's securities. This includes the company's periodic financial results, information on declaration of dividend, change in capital structure, issue or buyback of securities, major expansion plans, new projects, amalgamations, mergers, takeovers, disposal of whole or part of the undertaking, changes in key managerial personnel and significant changes in plans, policies or operations of the company. The price sensitive information must be unpublished, i.e., it must not be generally available. Information would, generally, cease to be unpublished when reported to stock exchanges or officially communicated to the press/ public by the target company.

Can an acquirer undertake due diligence prior to investment? Are there restrictions on conducting such exercises with respect to a listed company?

It is common practice to conduct a legal, financial and tax due diligence prior to investing in private companies or public unlisted companies. Due diligence exercises may also be undertaken on a listed company, subject to provisions of the SEBI Insider Trading Regulations. The SEBI Insider Trading Regulations create specific exemptions on communication of UPSI in connection with transactions where:

i. the transaction entails an obligation to make an open offer under the SEBI Takeover

Regulations, where the board of directors of the listed company is of the informed opinion that sharing of such information is in the best interests of the company; or

ii. the transaction does not entail an open offer, but the board of directors of the listed company is of opinion that such information sharing is in the best interests of the company. Such information is required to be made public at least two trading days prior to the proposed transaction being effected.

In such cases, the party receiving UPSI pertaining to the company will be required to execute a confidentiality and non-disclosure agreement to keep the information confidential and not trade in securities of the company, except in connection with the proposed transaction. Further, the board of the listed company must ensure that a structured original database is maintained, containing names of such persons/ entities with whom information is shared and their Permanent Account Number (**PAN**), or any other identification authorised by law if PAN is not available. Certain matters, in relation to any company, would form part of public record and may be accessed by applying to the appropriate authority (such as the RoC or the stock exchanges) free of cost or on payment of necessary fees. Specific documents and records of information are also required to be maintained by companies at their registered offices and can be reviewed by shareholders. Needless to say, the quantum and quality of publicly available information is more extensive in relation to publicly listed companies than unlisted public and private companies.

What disclosures are mandated for acquisition or disposal of shares of a target company? Are special disclosures applicable to foreign investors?

In relation to listed companies, the SEBI Takeover Regulations stipulate initial disclosure of aggregate shareholding and voting rights if the acquirer and persons acting in concert with him acquire 5 per cent or more of the total shareholding and voting rights of the target company. In addition, the SEBI Takeover Regulations prescribe continual disclosures of changes exceeding 2 per cent of the shareholding or voting rights by an acquirer holding 5 per cent and above, to be made to the investee company and the stock exchange(s). This would include acquisition/ disposal of shares, voting rights, convertible securities, and encumbrances.

The SEBI Insider Trading Regulations stipulate initial disclosure of holdings by every promoter, member of the promoter group, key managerial personnel and directors; and continual disclosure of trading in securities (which include derivatives) by every promoter, member of promoter group, designated person and director of the company if the value of securities traded in one transaction or a series of transaction, over any calendar quarter, exceeds INR 1 million or such other value as may be prescribed. The relevant stock exchange must be intimated within two trading days of receiving the disclosure or from becoming aware of such information. The disclosures made by a person under the SEBI Insider Trading Regulations must include trading by such person's immediate relatives and by any other person for whom such person takes trading decisions. Additionally, a listed company may, at its discretion, impose an obligation on any connected person or class of connected persons to disclose its holdings and trading in the securities of the company.

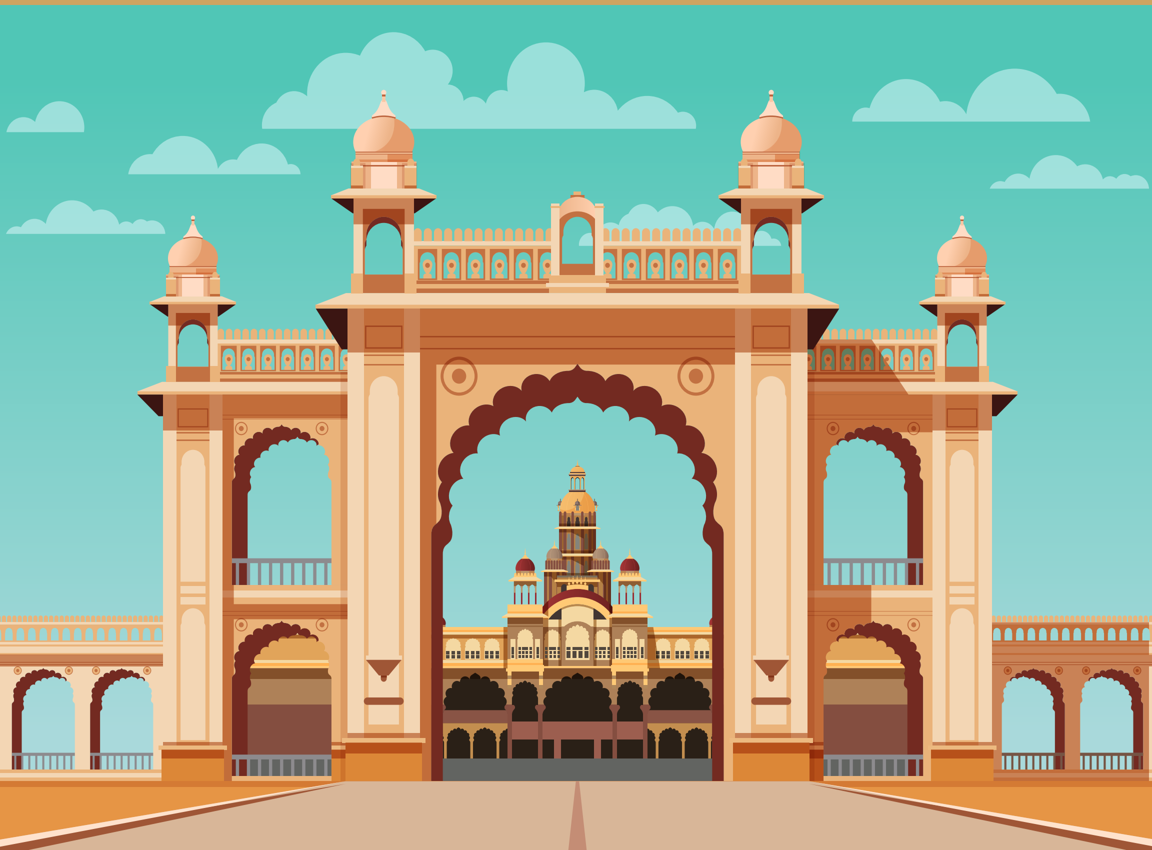
All companies, listed or otherwise, are required to maintain a return of allotment of shares in a prescribed format under the Companies Act, whenever shares are issued (including to foreign investors). In addition, there are certain intimation/ reporting requirements under the foreign exchange regulations, depending on the structure of the transaction at hand, including reporting regarding the foreign investor.

Can a foreign investor acquire shares and defer part of the consideration towards an indemnity or settle the consideration through an escrow?

Yes, the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, permit payment of deferred consideration in transfers between a non-resident and a resident, subject to two conditions – (i) that not more than 25% of the total consideration can be deferred by the buyer (ii) the consideration cannot be deferred beyond 18 months from the date of the transfer agreement. Such deferred consideration can be settled by an escrow mechanism as well. Further, a seller can indemnify the buyer for up to 18 months from the date of payment of full consideration, provided the buyer has paid the total consideration to the seller.

07

Takeover Code



Tender offer obligations only arise with respect to public companies listed on a recognised stock exchange in India (**Target**) and are governed by the SEBI Takeover Regulations.

When does a tender offer under the SEBI Takeover Regulations get triggered?

In terms of the SEBI Takeover Regulations, the acquisition of a substantial number of shares or voting rights of a Target triggers the obligation to make a tender offer to the public shareholders of such a company in the following circumstances:

i. acquisition of 25 per cent or more of the voting rights of the Target by an acquirer (together with persons acting in concert).

ii. when the acquirer (together with persons acting in concert) already holds between 25 per cent and 75 per cent of the shares or voting rights of the Target, acquisition of more than 5 per cent of the voting rights in the Target in any financial year ending March 31.

iii. acquisition of "control" over the Target, irrespective of acquisition of shares or voting rights, also triggers the obligation to make a tender offer under the SEBI Takeover Regulations. "Control" is broadly defined and includes the right to appoint directly or indirectly or by virtue of agreements or in any other manner, majority of the directors on the board of the Target or to control its management or policy decisions.

Will acquisitions of overseas companies/unlisted Indian companies/listed Indian companies which result in a substantial acquisition of shares/voting rights, or of control of a Target, trigger tender offer obligations under the SEBI Takeover Regulations??

Yes. The SEBI Takeover Regulations apply to both direct and indirect acquisition of shares/voting rights and/or control over a Target. The thresholds set out above would apply to indirect acquisitions as well, where an indirect acquisition involves the ability of the acquirer (together with persons acting in concert) to exercise or direct the exercise of voting rights in excess of the prescribed thresholds or control over the Target.

> “The SEBI Takeover Regulations apply to both direct and indirect acquisition of shares/voting rights and/or control over a Target.”

What is the difference between a mandatory tender offer and a voluntary tender offer?

Mandatory offers are tender offers triggered by transactions described in Question 1 above. Unlike mandatory offers, voluntary offers are not triggered by underlying events. Further, the offer size of a voluntary offer can be as low as 10 per cent as (opposed to 26 per cent for mandatory offers).

Can an unsolicited or hostile acquisition be made under the SEBI Takeover Regulations?

Yes. Any person holding less than 25 per cent of shares/voting rights in a Target can make a voluntary offer or a competing offer to an ongoing tender offer.

Can a competing offer be made under the SEBI Takeover Regulations?

Yes, however a competing offer can only be made within 15 working days from the date of the detailed public statement of the original offer by the acquirer. Such a competing offer may be made by an existing shareholder or otherwise. There is a restriction on making an offer or entering into an agreement that could trigger an offer after the expiry of the said 15 working days and until the completion of the original offer.

Once a competing offer has been made, both original offer and competing offer are treated at par and the Target would have to extend equal level of information and support to each of the acquirer. The Target cannot favour one acquirer over the other(s) or appoint such acquirer’s nominees on the board of the Target, pending completion of the two offers.

The minimum offer size of a competing offer must be in excess of the size of the original offer, net of the competing acquirer's existing shareholding. A competing offer can be conditional upon a minimum level of acceptance only if the original tender offer made by the first acquirer is also conditional.

What is a "creeping acquisition"?

Shareholders holding between 25 per cent and 75 per cent of a Target would be able to consolidate their shareholding by way of acquisitions of up to 5 per cent of the voting rights of the Target in each financial year. This 5 per cent acquisition may be made through negotiated purchases, preferential allotments or on-market acquisitions. The calculation of the 5 per cent limit will be by way of an aggregation of the gross acquisitions of the acquirer (together with persons acting in concert) in that financial year. Acquisition pursuant to a resolution plan approved under IBC is exempted from the creeping acquisition limit of 5 per cent.

Who is an "acquirer" and who are "persons acting in concert"?

An acquirer is any person who, by itself, through, or with others acting in concert, directly or indirectly, acquires or agrees to acquire shares or voting rights, or exercise control over, a Target.

Persons acting in concert are those who, with the common objective/purpose of acquisition of shares, voting rights, or exercising control over a Target, pursuant to an agreement or understanding (formal or informal), directly or indirectly cooperate for acquisition of such shares, voting rights, or control. The SEBI Takeover Regulations prescribe certain categories of persons who are deemed to be acting in concert with each other, unless the contrary is established. Accordingly, a company, its holding company, subsidiary company and companies under the same management or control are deemed to be persons acting in concert with each other. Similarly, the promoters and members of the promoter group of a company, including a venture capital fund and its sponsor, trustee, trustee company, and asset management company are deemed to be persons acting in concert.

An acquirer and persons acting in concert are jointly and severally responsible for fulfilling the obligations under the SEBI Takeover Regulations.

Are there any exemptions from complying with the obligations under the SEBI Takeover Regulations?

The SEBI Takeover Regulations provide a rational tiered approach to transactions that are exempt from tender offer obligations if the transactions satisfy certain prescribed conditions. The exemptions typically cover cases involving:

i. acquisition pursuant to inter-se transfer of shares between certain categories of shareholders such as immediate relatives and persons disclosed as promoter and promoter group in the prescribed filings for a minimum period of three years;

ii. ordinary corporate actions (such as rights issue and buy back);

iii. acquisitions made in the ordinary course of business (such as allotment of shares to an underwriter pursuant to an underwriting agreement);

iv. acquisition of shares by the lenders pursuant to conversion of their debt as part of debt restructuring as per the RBI guidelines and acquisition pursuant to a resolution plan under IBC; and

v. acquisitions pursuant to a scheme sanctioned by an order of a court or tribunal. Further, SEBI may, in its discretion, grant fact-specific exemptions.

How is "offer price" calculated under the SEBI Takeover Regulations?

The minimum offer price for a mandatory or voluntary tender offer in a direct acquisition would have to be the highest of the following:

i. the negotiated price under any triggering transaction;

ii. the 52-week volume weighted average price paid by the acquirer or person(s) acting in concert for the shares of Target;

iii. the highest price paid by the acquirer/person(s) acting in concert for any acquisition of the Target's shares in the preceding 26 weeks; an

iv. 60 trading day volume weighted average market price (if the Target shares are frequently traded) or the fair price determined on certain parameters (if the Target shares are not frequently traded).

Indirect acquisitions, where the underlying Target does not form a predominant part of the business being acquired, have been given price protection under the SEBI Takeover Regulations, subject to the payment of 10 per cent interest for the period between the date on which the primary acquisition is announced/contracted and the date on which the detailed public announcement for the underlying Target is made (if this period is more than five working days).

In cases of indirect acquisitions where the proportionate net asset value/sales turnover/ market capitalization of the Target represents more than 15 per cent of the total business being acquired, the SEBI Takeover Regulations mandate a "price attribution".

Can non-compete payments be made by an acquirer to the counter party in a triggering transaction?

Any non-compete payment made or payable to a counter party in a triggering transaction necessarily must be reflected in the tender offer price payable to the public shareholders of the Target. In addition, all incidental, contemporaneous or collateral payments are also to be considered in determining the offer price.

What is the mandatory offer size under the SEBI Takeover Regulations?

A mandatory tender offer must be made for a minimum of 26 per cent of the Target's share capital. The size of a voluntary tender offer under Regulation 5 of the SEBI Takeover Regulations must be at least 10 per cent of the Target's share capital. Further, the offer size is calculated basis the fully diluted share capital of the Target, taking into account any potential increase in the number of outstanding shares (during the offer period) contemplated as of the 10th working day from the closure of the tender period.

In case the aggregate number of shares validly tendered is less than the offer size, all such validly tendered shares must be accepted. However, if the number of validly tendered shares in the offer is more than the offer size, then valid tenders will be accepted on a proportionate basis.

What are the modes of payment under the open offer?

The consideration offered in a tender offer may be all or part cash, or stock or secured debt instruments listed on a stock exchange in India, subject to compliance with the specified conditions. The chosen mode of payment is required to be disclosed in the open offer document meant for the Target's shareholders.

What are the main obligations imposed on the Target and its board of directors under the SEBI Takeover Regulations?

The SEBI Takeover Regulations mandate an active, but neutral role for the Target during the offer period. Upon the public announcement of a tender offer for acquiring shares of a Target, the board of directors of such Target shall ensure that during the offer period, the business of the Target is conducted in the ordinary course, consistent with past practice. Also, a committee of independent directors (which may seek independent professional advice at the expense of the Target) is required to provide reasoned recommendations on the offer (or on all offers, if competing offers are made) to the shareholders of the Target. The Target is required to publish the said recommendations prior to opening of the open offer. In case of competing offers, the Target is obligated to extend equal support to all acquirers.

The Target must also obtain the approval of its shareholders by way of a Special Resolution conducted through postal ballot for actions outside the ordinary course of business during the pendency of a tender offer. Such actions include *inter alia*: (i) alienating any material assets; (ii) effecting material borrowings outside the ordinary course of business; and (iii) issuing or allotting any authorised, but unissued securities entitling the holders thereof to voting rights in the Target.

What is the typical process and timeline for a tender offer?

A tender offer is initiated by making a public announcement to the Target's shareholders, specifying the tender offer price determined in accordance with the SEBI Takeover Regulations. This is followed by the publication of a detailed public statement containing details of the offer, which is followed by the issue of a letter of offer to the public shareholders of the Target, after which the "tendering period" commences. At the end of the tendering period, the offer price is paid to all shareholders of the Target whose tendered shares are accepted in the offer, pursuant to which, the tendered shares are transferred to the acquirer. Under the SEBI Takeover Regulations, the timeline for a tender offer would be approximately 57 working days, which may stand extended on account of intervening events. A typical tender offer timeline under the SEBI Takeover Regulations is set out below:

Event	Day
Appointment of merchant banker	Prior to X
Public announcement (PA)	X
PA to Target	X + 1
Detailed public statement	X + (<) 5 working days (or within 5 working days of completion of the primary acquisition in case of a "pure" indirect acquisition) = Y
Provision of escrow	Y – (<) 2 working days
Filing of draft letter of offer with SEBI	Y + (<) 5 working days
Making of competing offer	Y + (<) 15 working days
Appointment of acquirer nominees to the board of the Target (Optional)	After Y + 15 working days (subject to: (a) 100 per cent tender offer consideration being deposited in escrow in cash; (b) tender offer being unconditional or all conditions being fulfilled; and (c) no competing offer having been announced)
Completion of underlying transaction giving rise to the tender offer, subject to meeting 100 per cent tender offer escrow cash deposit requirement (Optional)	After Y + 21 working days
Receipt of comments from SEBI	Y + (<) 20 working days
Specified date	10 working days prior to Z

Event	Day
Dispatch of final letter of offer	Y + (<) 27 working days
Ban on acquirer/persons acting in concert to acquire or sell shares of the Target until expiry of the tendering period commences.	
Target prohibited from fixing any record date for a corporate action lying between this date and the date of expiry of the tendering period.	Z – 3 working days to Z + 10 working days
Comments on the offer by committee of independent directors	2 working days prior to Z
Last date for upward revisions (Optional)	(>) 1 working days prior to Z
Issue of advertisement announcing the schedule of activities	Z - 1 working day
Commencement of tendering period	Y + (<) 32 working days = Z
Closure of tendering period	Z + 10 working days
Issue of post offer advertisement	Z + (<) 25 working days
Filing of report with SEBI by merchant banker	Z + (<) 25 working days
Release of escrow	Not earlier than Z + 50 days
Completion of underlying transaction, giving rise to the tender offer without meeting 100 per cent tender offer escrow cash deposit requirement	Not before payment to public shareholders and not later than (Z + 20) + 26 weeks

In case shareholding of the Target breaches the maximum permissible non-public shareholding threshold (75 per cent) pursuant to a tender offer, the acquirer is required to ensure that the Target becomes compliant with this requirement within 12 months, using the prescribed methods. If an acquirer intends for the Target to stay listed and shareholding of the Target exceeds maximum permissible non-public shareholding pursuant to completion of the tender offer (which hasn't triggered pursuant to creeping acquisition limit breach), such acquirer has the option (subject to compliance with certain conditions) to proportionately reduce the shares or voting rights to be acquired such that the acquirer's resulting shareholding in the Target does not exceed the maximum permissible non-public shareholding.

Can a conditional tender offer be made under the SEBI Takeover Regulations?

Under the SEBI Takeover Regulations, the only condition that an acquirer may attach to a tender offer (other than receipt of regulatory approvals in relation to the offer or the triggering transaction) is to make the offer conditional upon a minimum level of acceptance. Where the tender offer has been made pursuant to an agreement, such an agreement must contain a condition stating that if the tender offer does not receive the desired level of acceptance, the acquirer shall not acquire any shares under the tender offer and that the agreement attracting the obligation to make the tender offer shall stand rescinded.

Additionally, when a tender offer is made conditional upon a minimum level of acceptance, the acquirer cannot, during the offer period, acquire any shares in the Target except under the tender offer or any triggering transaction.

Under what circumstances can an acquirer withdraw a mandatory or voluntary tender offer?

A tender offer may be withdrawn only in the event of (i) rejection of a statutory approval (provided such a requirement was disclosed in the tender offer documents); (ii) death of an acquirer who is a natural person; or (iii) failure of the underlying triggering agreement on account of non-satisfaction of a condition to such agreement for reasons outside the reasonable control of the acquirer (subject to adequate disclosures having been made in the tender offer documents). If the triggering transaction is a preferential allotment of the Target's shares, then the failure of the preferential allotment would not be a permitted ground for withdrawal of the tender offer. In addition, SEBI has powers to permit withdrawal of a tender offer in such circumstances which, in its opinion, merit withdrawal. If a mandatory tender offer is withdrawn, the acquirer cannot complete the underlying triggering transaction.

Can an acquirer delist the Target as part of the tender offer process?

Delisting is the process of making a listed company private. It is done by taking off the shares of the Target from the stock exchanges on which they are listed. Delisting is governed by the SEBI Delisting Regulations and requires an acquirer to provide an exit opportunity to the public shareholders of the Target. Under the SEBI Takeover Regulations, read in conjunction with the SEBI Delisting Regulations, if the acquirer is desirous of delisting the Target as part of the tender offer, the acquirer is required to declare its intention to delist the Target at the time of making the public announcement (except when the tender offer is a "pure" indirect acquisition). An acquirer intending to delist the Target is required to disclose: (i) the minimum offer price as mentioned above; and (ii) the indicative price for delisting, which shall include a suitable premium reflecting the price that such acquirer is willing to pay for the delisting offer, with detailed disclosures of the rationale and justification for the indicative price so determined. In case the response to the said offer leads to the delisting threshold, as set out in the SEBI Delisting Regulations, being met, the Target goes private and all shareholders who tendered their shares shall be paid the indicative price for delisting. In case the aforesaid delisting threshold is not met or requisite approvals for delisting are not received, the acquirer is required to continue with the tender offer and all shareholders who tendered their shares can either withdraw their tendered shares or shall be paid the open offer price.

The SEBI Takeover Regulations provides for consequences in the event the Target does not get delisted as a result of a delisting offer but because of that, the acquirer's shareholding exceeds the maximum permissible non-public shareholding threshold of 75 per cent in the Target. Most notably, the acquirer has a 12 month period to attempt another delisting of the Target (subject to fulfilling certain conditions). If the second attempt fails, the acquirer has to ensure compliance with the minimum public shareholding within 12 months from such subsequent failed delisting offer.

What are the key disclosure requirements under the SEBI Takeover Regulations?

An acquirer would have to disclose an acquisition of 5 per cent or more of the shares or voting rights in the Target by the acquirer (together with persons acting in concert) within two working days of such acquisition. An acquirer (together with persons acting in concert) holding in excess of 5 per cent would have to disclose every acquisition or disposal of shares representing 2 per cent or more of the shares or voting rights in the Target, even if such disposal leads to the acquirer holding less than 5 per cent.

The acquisition of convertible instruments and encumbrances on shares would also attract disclosure requirements. Promoters are required to disclose details of encumbered shares in the Target and encumbered shares of the holding company of the Target, where encumbrance has been defined to include any restriction on the free and marketable title to shares, pledge, lien, negative lien, non-disposal undertaking and any covenant, transaction, condition or arrangements in the nature of encumbrance. Promoters are also required to file annual declarations, confirming that they (or a person acting in concert) have not created any encumbrances other than those already disclosed.

08

Delisting

What are the kinds of delistings that may be effected?

As per the SEBI Delisting Regulations, delisting is permitted primarily under two routes:

i. voluntary delisting from some or all recognised stock exchanges;

ii. compulsory delisting.

Additionally, the SEBI Delisting Regulations also envisage and provide for delisting in the following scenarios:

i. voluntary delisting of small companies (i.e. companies with up to INR 10 crore paid-up capital and net worth of up to INR 25 crore);

ii. delisting of companies listed on Innovators Growth Platform (**IGP**) pursuant to an IPO;

iii. delisting of a subsidiary company pursuant to a scheme of arrangement with its listed holding company;

iv. delisting by operation of law (involving delisting in case of winding up proceedings of a listed company, derecognition/ refusal of renewal of registration of stock exchanges where shares of companies are listed, etc.); and

v. delisting of a listed investment holding company (**IHC**) pursuant to a scheme of arrangement.

What is the process to be followed for voluntary delisting?

A listed company may voluntarily decide to delist its equity shares from some or all stock exchanges. In case of delisting from one or more (but not all) stock exchanges, the delisting may be undertaken with the approval of the board of directors of the listed company and the relevant stock exchanges, without providing an exit opportunity to public shareholders.

The shares of a listed company may be voluntarily delisted by an acquirer (including promoter and promoter group) from all stock exchanges on which they are listed, upon completion of a successful delisting offer in accordance with the provisions of the SEBI Delisting Regulations. For this, public shareholders must be given an exit opportunity pursuant to a price determined by a reverse book building (**RBB**) process, as outlined under the SEBI Delisting Regulations. The voluntary delisting offer is subject to prior approval of the company's board and of its shareholders with 75 per cent majority, through a postal ballot and/or e-voting with at least two-third of the public shareholders voting in favour of such a resolution. In-principle approvals of the stock exchanges on which the shares are listed must also be obtained.

How is the RBB process effected?

The RBB process envisages offer price discovery by inviting bids after providing a floor price (computed as per the SEBI Delisting Regulations). The price is discovered through the RBB process, i.e. the price at which equity shares accepted through eligible bids brings the shareholding of the acquirer (along with the persons acting in concert) to 90 per cent of the total issued shares. The tendering of equity shares by the shareholders and its settlement by the acquirer is facilitated through the stock exchange mechanism, as specified by SEBI.

What is a fixed price process and when can an acquirer adopt it?

When shares of a listed company are frequently traded, it can opt for the fixed price process, which serves as an alternative to RBB. Under the fixed price approach, the acquirer can specify the price at which it proposes to delist the company upfront, i.e., the fixed delisting price, which must be at a premium of at least 15 per cent to the floor price. Here, the acquirer is bound to accept the equity shares tendered in the delisting offer, if the post-offer shareholding of the acquirer, along with the equity shares tendered by the public shareholders, reaches 90 per cent at the fixed delisting price.

How is pricing determined in a voluntary delisting process?

The offer documents for voluntary delisting are required to provide a floor price (computed as per the SEBI Delisting Regulations). The acquirer can also provide an indicative price, which must be higher than the floor price. The acquirer is obligated to adhere to the indicative price even if the discovered price determined pursuant to the RBB process exceeds the floor price, but is below the indicative price. The acquirer is bound by the discovered price determined pursuant to the RBB process if it matches the floor or indicative price. If the discovered price determined pursuant to the RBB process is unacceptable to the acquirer, it may make a counteroffer (provided the post-offer acquirer shareholding is not less than 75 per cent, and not less than 50 per cent of the public shareholding has been tendered in the RBB process) at the counter offer price which is in accordance with the SEBI Delisting Regulations.

"Delisting can either be voluntary or compulsory."

When is a delisting offer considered successful in case of voluntary delisting?

The success of a delisting offer depends on: (a) the acquirer's acceptance of the discovered price determined pursuant to the RBB process, unless a counter offer is made or fixed price delisting approach is adopted; and (b) the acquirer's shareholding after the offer (along with shares tendered by public shareholders at the discovered price/ counter offer price/ fixed price, as the case may be) reaching 90 per cent of the total issued shares of the listed company. Companies that launch delisting offers and fail to reach the delisting threshold must still ensure compliance with the applicable public shareholding levels within the specified time period.

What is compulsory delisting and what are its consequences?

A recognised stock exchange may delist equity shares of a company on the grounds prescribed by SEBI, by passing a reasoned order, after providing it an opportunity of being heard. In such instances, an independent valuer is appointed by the recognised stock exchange to determine the fair value of the delisted equity shares. The company's promoters will be obliged to purchase the delisted equity shares from interested public shareholders by paying fair value, as determined by the said independent valuer. After such compulsory delisting, the company, its whole time directors and promoters and companies promoted by any of them are inter alia restricted from accessing the securities market.

How are small companies delisted?

Delisting of small companies whose shares are infrequently traded (i.e. where shares traded in the preceding 12 months are less than 10 per cent of the total shares of the company) may be undertaken without providing public shareholders' an exit opportunity, after obtaining prior approval of the company's board and of its shareholders with 75 per cent majority, through a postal ballot or e-voting with at least two-third of public shareholders voting in favour of such a resolution. Stock exchanges too need to be approached for their approval. Further, the following conditions need to be met: (i) exit price by the acquirer cannot be less than the floor price (i.e. price determined after taking into account valuation parameters, including book value, comparable trading multiples and such other parameters as are customary for valuation of shares of such companies), (ii) acquirer writing individually to public shareholders, informing them of its intention to delist the shares, exit price, and seeking consent for the proposed delisting, (iii) public shareholders holding at least 90 per cent of the public shareholding giving their consent to the proposed delisting.

How is delisting undertaken for equity shares of a company listed on IGP pursuant to an IPO?

Equity shares of a company listed on the IGP may be delisted, subject to (i) prior approval of its board of directors and of its shareholders by a Special Resolution, through postal ballot or e-voting, with majority of the public shareholders voting in favour of such a resolution; (ii) delisting price is determined based on the floor price computed as per the SEBI Takeover Regulations and an additional delisting premium; (iii) the post offer shareholding of the acquirer, along with persons acting in concert, taken together with the equity shares tendered, reaches 75 per cent of the total issued shares of that class, and at least 50 per cent equity shares held by the public shareholders as on date of the board meeting are tendered and accepted; (iv) approval of the stock exchanges on which its shares are listed.

What are the prerequisites for delisting a subsidiary company's equity shares?

The delisting of a listed subsidiary company's shares may be undertaken pursuant to a scheme of arrangement with its listed holding company, wherein the subsidiary will become a wholly-owned subsidiary of the listed holding company, without following the process laid down in the SEBI Delisting Regulations, subject to compliance with inter alia the following conditions: (i) both the listed holding company and the subsidiary company should be in the same line of business, (ii) equity shares of the subsidiary company should be frequently traded, (iii) listed holding company should issue equity shares in lieu of cancellation of any equity shares in the delisting subsidiary company, (iv) approvals from shareholders of both the companies, through e-voting, should be obtained, wherein votes cast by public shareholders of the listed subsidiary in favour of the proposal are at least two times the number of votes cast against it and the votes cast by the public shareholders of the listed holding company should be more than the number of votes cast by the public shareholders against it, (v) both companies' equity shares should have been listed for a minimum of three years without suspension, (vi) the subsidiary should have been a listed subsidiary of the listed holding company for a minimum of three preceding years.

How are equity shares of a listed IHC delisted?

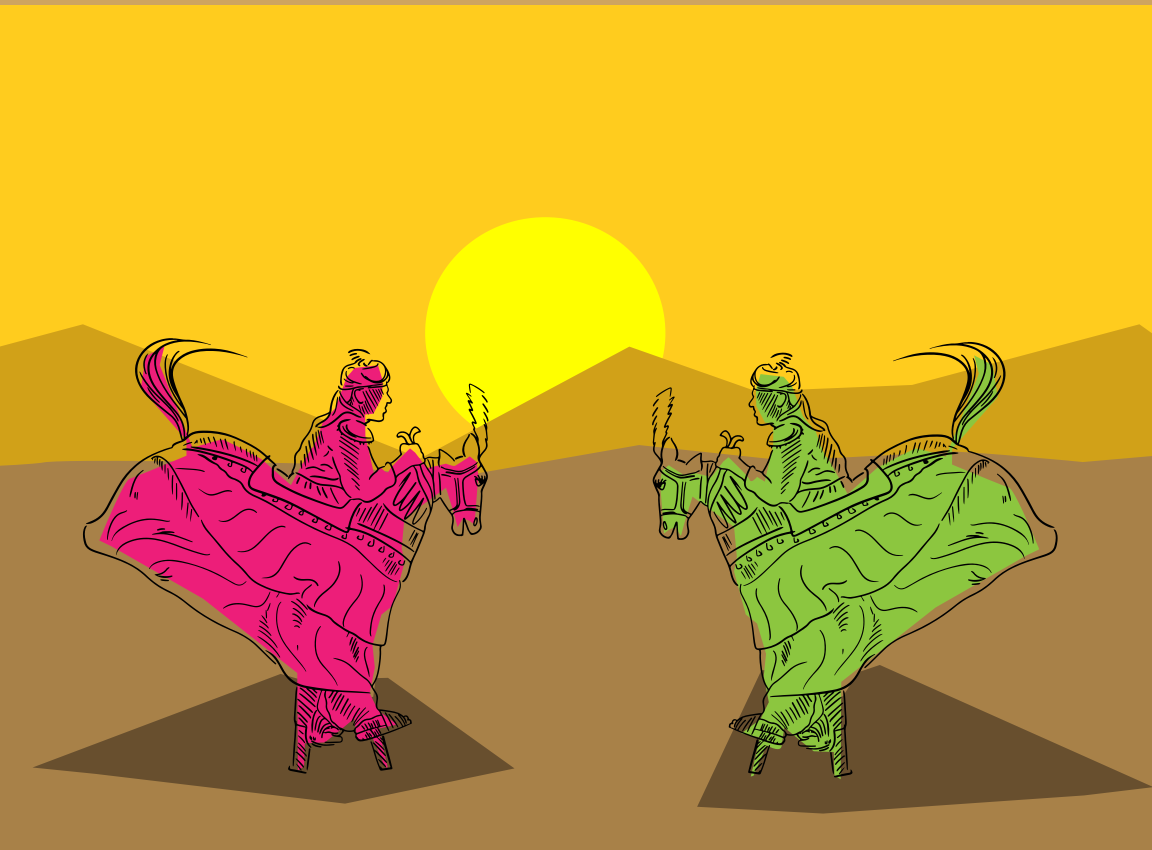
A listed IHC may undertake delisting if at least 75 per cent of its fair value (net of liabilities), comprising direct investments, is invested in equity shares of other listed companies. Here, the delisting is required to be undertaken pursuant to a scheme of arrangement, without following the processes laid down in SEBI Delisting Regulations, subject to approval of the stock exchanges and of its shareholders (by e-voting, wherein votes cast by public shareholders in favour are not less than two times the votes cast against it), and satisfaction of certain prescribed conditions, such as: (i) transfer of underlying equity shares held by the listed IHC in other listed companies to public shareholders, in proportion to their shareholding in the IHC; (ii) cash payments to the public shareholders of the IHC in exchange for the underlying shares or investments made by IHC in unlisted companies and other assets; and (iii) subsequent extinguishment of public shareholding of the IHC pursuant to a scheme for selective reduction of capital.

Can a delisted company relist its equity shares?

A voluntarily delisted company (except small companies), delisted IHC, and delisted subsidiary company pursuant to a scheme of arrangement as explained above, cannot seek listing of any of their equity shares for a period of three years from the date of delisting of their equity shares. Where a company has been compulsorily delisted, the company (and its whole time directors, person(s) responsible for ensuring compliance with the securities laws, its promoters and companies promoted by any of them) cannot seek to list their equity shares, access the securities market or act as an intermediary in the securities market for a period of 10 years from the date of such delisting.

09

Competition Law



What are the laws governing competition/anti-trust in India?

Competition law in India is governed by the Competition Act and the rules and regulations thereunder. The Competition Act provides for *inter alia* the establishment of the CCI, the nodal authority for monitoring, enforcement, and implementation of competition law in India. Appeals against CCI decisions can be filed within 60 days, before the NCLAT. Further appeals against the NCLAT orders can be filed within 60 days before the Hon'ble Supreme Court of India.

What is the scope of the Competition Act?

The Competition Act primarily seeks to regulate the following:

i. anti-competitive agreements (Section 3);

ii. abuse of dominance (Section 4); and

iii. combinations (Sections 5 and 6).

What is meant by "relevant market" under the Competition Act?

Section 2(r) of the Competition Act defines "relevant market" as the market determined by the CCI with reference to either "relevant geographic market" or "relevant product market" or both. "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand for goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. "Relevant product market" is defined as a market comprising all those products or services that are regarded as interchangeable or substitutable by: (i) the consumer, due to characteristics of the products or services, their prices and intended use; or (ii) the supplier, because of ease in shift of production strategy and quick marketing without bearing significant additional costs or risks in response to small and permanent changes in relative prices.

What are "anti-competitive agreements"?

Section 3 of the Competition Act invalidates agreements between enterprises, persons, association of enterprises or persons with respect to production, supply, distribution, storage, acquisition, or control of goods or provision of services, which cause or are likely to cause an AAEC in India. Under the Competition Act, horizontal agreements (any agreement between enterprises or persons, or associations thereof, engaged in identical or similar trade or provision of goods or services), including cartels, which (i) directly or indirectly determine the purchase or sale price; (ii) limit or control production, supply, markets, technical development, investment or provision of services; (iii) share the market or source of production or provision of services; and/or (iv) directly or indirectly result in bid rigging or collusive bidding, are presumed to have an AAEC. The Competition (Amendment) Act, 2023, expanded the scope of anti-competitive horizontal agreements to recognise "hub and spoke cartels". Any enterprise, person, or association thereof that participates or intends to participate in an anti-competitive horizontal agreement shall be presumed to be part of the agreement, irrespective of whether it is engaged in an identical or similar trade.

Further, vertical agreements (agreements, including but not restricted to those between enterprises or persons, or associations thereof, which are engaged at different levels of the same production or supply chain) including tie-ins, exclusive contracts, distribution agreements (exclusive), refusals to deal, and resale price maintenance policies, that cause or are likely to cause AAEC in India, are prohibited.

According to Section 27 of the Competition Act, the CCI may order enterprises or persons or associations thereof to discontinue and/or modify the agreement and/or impose a penalty that may be up to 10 per cent of the average turnover or income of the past three financial years. However, in case of any agreement entered into by a cartel, the CCI may impose upon each enterprise or person that is in the cartel, a penalty of up to three times its profit for each year of continuance of such an agreement or 10 per cent of its turnover or income for each year of the continuance of such an agreement, whichever is higher. Explanation 2 inserted by the Competition (Amendment) Act, 2023, clarifies that the term "turnover" which now refers to the global turnover of an enterprise, derived from all products and services. The CCI (Determination of Monetary Penalty) Guidelines, 2024 (**Penalty Guidelines**), provide a methodology for determining penalties. It clarifies that penalties will be calculated on relevant turnover of the enterprise, unless such determination of "relevant turnover" is not feasible.

What is "abuse of dominance"?

Section 4 of the Competition Act prohibits an enterprise or a group from abusing its dominant position. "Dominant position" refers to a position of power held by an enterprise within the relevant market in India, which allows it to function independently of the prevailing competitive forces in the relevant market or influence its competitors, consumers or the relevant market to its advantage. An enterprise or a group is seen as abusing its dominant position if (i) it sets unfair prices (including predatory pricing) or unfair conditions on the sale or purchase of goods or services; or (ii) restricts production or technical development in ways that harm consumers or block consumers from accessing the market; resulting in contracts being subject to additional obligations that are not related to the main subject of the contract, or involving use of dominant position in one relevant market to enter or protect another relevant market.

The CCI may order the enterprise to discontinue such abuse and/or impose a penalty, which may be up to 10 per cent of the turnover or income of the last three financial years and/or may order division of an enterprise enjoying a dominant position to ensure that such an enterprise does not abuse its dominant position. As with anti-competitive agreements, the term "turnover" refers to the global turnover of an enterprise derived from all products and services. The Penalty Guidelines are applicable to anti-competitive agreements and abuse of dominant position.

What is a "combination" and how is it regulated?

Sections 5 and 6 of the Competition Act are operative provisions governing combinations in India. Section 5 of the Competition Act provides that an acquisition of enterprise(s) by one or more persons, a merger or an amalgamation exceeding the prescribed thresholds under the Competition Act (provided below), read with the notifications issued by the MCA and the Competition (Minimum Value of Assets or Turnover) Rules, 2024, would require prior filing and approval from the CCI.

Section 6 of the Competition Act inter alia provides that "combinations" are required to be mandatorily notified by the parties to the CCI. CCI prohibits combinations which cause or are likely to cause an AAEC within the relevant market in India. The procedure for notifying such combinations is set out under Combination Regulations.

The revised jurisdictional thresholds for merger control filing before the CCI are:

i. The Competition (Minimum Value of Assets and Turnover) Rules, 2024, provide that combinations would not be required to notify, and seek an approval from the CCI, if the target enterprise, including its divisions, units and subsidiaries, whose assets, control, voting rights, or shares are being acquired, has either (a) assets not exceeding INR 4,500 million in India or (b) turnover not exceeding INR 12,500 million in India in the financial year immediately preceding the financial year in which binding transaction documents are executed (**Small Target Exemption**). The exemption is not available if the deal value threshold (explained below) is breached.

ii. If a transaction cannot avail of the Small Target Exemption or exemptions provided under The Competition (Criteria for Exemption of Combinations) Rules, 2024, it would require the CCI's approval, in case the jurisdictional thresholds, including the deal value threshold under Section 5 of the Competition Act, are breached:

a. *Parties test*: The acquirer and the target enterprise, or the merging entities, including its divisions, units and subsidiaries jointly have either: (a) assets in excess of INR 25 billion in India or turnover in excess of INR 75 billion in India; or (b) worldwide assets in excess of USD 1.25 billion, including at least INR 12.5 billion in India or worldwide turnover in excess of USD 3.75 billion, including at least INR 37.5 billion in India.

b. *Group test*: The group to which the target entity will belong post-acquisition or merger, has either:

   - The assets in excess of INR 100 billion in India or turnover in excess of INR 300 billion in India; or
   - worldwide assets in excess of USD 5 billion, including at least INR 12.5 billion in India or worldwide turnover in excess of USD 15 billion, including at least INR 37.5 billion in India. The revised thresholds are provided in the form of a table below.

iii. The Deal Value Threshold (**DVT**) is an additional jurisdictional threshold introduced by Competition (Amendment) Act, 2023. A notification requirement, and prior CCI approval is triggered if the following two tests of DVT are breached:

a. the transaction value exceeds INR 200 billion; and

b. the target has "substantial business operations in India" (**SBOI**) – in terms of its Indian user base, gross merchandise value (**GMV**) or turnover. The guidance on how to calculate the value of transactions and assess SBOI has been provided in the Combination Regulations.

iv. DVT applies to transactions signed on or after September 10, 2024; and transactions that were signed before September 10, 2024, but are pending closing (either partially or completely).

What are the transactions that require notification to the CCI?

The three types of transactions that require prior CCI approval are:

i. transactions relating to acquisition of shares, voting rights or assets (including joint ventures);

ii. transactions relating to acquisition of "control" over another enterprise; and

iii. merger or amalgamation of enterprises.

Therefore, all acquisitions (of shares, voting rights, assets or control), mergers or amalgamations, which meet the prescribed thresholds have to be mandatorily notified to the CCI prior to giving effect/consummating such transactions.

What are the factors that the CCI may take into consideration while determining AAEC of a combination in India?

Section 20(4) of the Competition Act outlines factors for the CCI to consider when assessing if a combination causes or may cause an AAEC in India's relevant market. These include competition levels from imports, entry barriers (regulatory and others), countervailing buyer power, substitutes availability, market shares of parties involved (individual and combined), likelihood of competitor foreclosure, and vertical integration extent. The CCI must also consider three positive effects of a combination: saving a failing business, fostering innovation, and contributing to economic development in India when evaluating AAEC.

What is the process of merger filing?

The Competition Act provides for a self-assessment regime to determine the form of merger notification, basis market share of the transacting parties. Further, the Combination Regulations provide two types of forms for notification of a combination:

i. *Form I*: is the shorter form requiring basic information pertaining to the combination, with a filing fee of INR 3 million.

ii. *Form II*: is a longer and more detailed, technical form, which parties are required to file under certain circumstances, with a filing fee of INR 9 million.

> **Competition Act invalidates agreements which cause or likely to cause appreciable adverse effect on competition in India.**

The onus in on the acquiring company to notify the CCI in an acquisition whereas such obligation is jointly fastened upon the parties in case of a merger or amalgamation.

How long will the CCI review process take?

The CCI has 30 calendar days from the date of application to form a prima facie opinion on whether a combination is likely to cause an AAEC within the relevant market in India. The 30 calendar day timeline, which constitutes Phase I, is not absolute as the CCI may issue a defects letter highlighting any deficiencies in the information submitted within 10 calendar days. Time taken by the parties to respond to/provide such information is not included in the 30 calendar day timeline. The CCI can also "stop the clock" for further information required for its assessment and the time taken by the parties to submit further information will be excluded from the 30-calendar day computation. The CCI has approved more than 879 Form I merger notifications to date, in Phase I. If the parties to a combination propose a modification before the CCI reaches a prima facie opinion, the CCI will get an additional 12 calendar days to evaluate the proposed modification. Further, the CCI has another 10 calendar days to form its prima facie opinion where it calls for information from third parties in respect of the proposed combination.

At the end of Phase I, the CCI may either approve the transaction or order a Phase II investigation (i.e., an additional 150 calendar day review period). The CCI has invoked this only eight times, where the combining parties had high market share. It should be noted that the parties cannot complete the transaction until the earlier of: (i) expiry of 30 calendar days (subject to "stop the clock") (ii) final CCI decision; or (iii) lapse of 150 days from the date of CCI notification.

What is the "Green Channel" approval route?

In line with the government's policy to improve ease of doing business in India, the CCI, by way of a notification dated August 13, 2019, introduced the concept of a "Green Channel" approval route, which was later codified in the Competition (Criteria of Combination) Rules, 2024 (**Green Channel Rules**), on September 9, 2024. Green Channel Rules allow parties to file a simplified version of Form I and receive deemed approval of the transaction immediately upon notifying the CCI. However, the Green Channel Rule only applies to transactions where the acquirer (including the acquirer group's affiliates) has no existing interests in the companies:

i. that may be seen as competitors of the target's business;

ii. that operate in markets with vertical linkages to the target's business; or

iii. with complementary linkages to the target's business.

An enterprise is considered to be an affiliate of another, if such enterprise has any of the following:

i. 10 per cent or more shareholding or voting rights;

ii. right or ability to have director or observer representation on the board of directors; or

iii. access commercially sensitive information.

Are there any exemptions from mandatory pre-notification?

In addition to transactions that can avail of the Small Target Exemption, the Competition (Criteria for exemption of Combinations) Rules, 2024 (**Exemption Rules**), provide a list of categories of transactions which are exempt from filing a notification under the Competition Act. These are:

i. Transactions that are "ordinarily" exempt under the Exemption Rules – transactions set out in Schedule I of the Exemption Rules are exempt from notification to the CCI. Such transactions include transactions such as acquisition of not more than 25 per cent of shares or voting rights of a target company, made solely as an investment and not leading to control; acquisition of current assets in the ordinary course of business; and intra-group mergers and amalgamations.

ii. Specific exemptions have also been granted to banking companies and regional rural banks in this respect.

iii. The Competition (Amendment) Act, 2023, introduced a mechanism, which enables purchase of securities on the stock exchange, prior to CCI notification. However, to utilise this mechanism, the acquirer must:

   a. file the requisite notification with the CCI within 30 days of the initial share acquisition; and

   b. not exercise any ownership or beneficial rights and interests in relation to the acquired securities, including exercise of voting rights (except in relation to matters relating to liquidation and/or insolvency), until the CCI approves the transaction.

Is it possible to have pre-notification discussions with the CCI?

The CCI provides non-binding pre-notification consultations, which may also be conducted on a no-names basis.

What orders can the CCI pass in case of merger control?

The CCI can pass an order approving the combination, if it does not cause an AAEC in India's relevant market. If the CCI is of the view that the combination results in an AAEC, it may disapprove of it and/or propose suitable modifications that are required to be carried out within a prescribed time period. The parties to the combination also have the option of submitting amendments to the modifications proposed, which the CCI may approve or reject. The CCI may also issue an interim order (by way of a temporary injunction), restraining any party from carrying on any act, which is or is likely to be in contravention of Section 3, 4 or 6 of the Competition Act.

What are the penalties imposed in the event of non-compliance with the provisions of the Competition Act/ violation of Standstill provisions?

In case of failure to intimate the CCI about the proposed combination that exceeds the prescribed thresholds or consummation of a whole or part of the combination, (prior to receiving the CCI's approval) the CCI can impose a penalty up to 1 per cent of the total turnover or assets or the value of the transaction, whichever is higher. Further, a failure to furnish information or providing false information will attract a monetary penalty of a minimum of INR 5 million, up to a maximum of INR 50 million under Section 44 of the Competition Act. Further, the Competition Act imposes personal liability on the responsible officers of a company, in case of a contravention by a company.

How are the procedures of CCI and NCLAT regulated?

The CCI and the NCLAT, while discharging their respective functions, are guided by the principles of natural justice, subject to the provisions of the Competition Act/supporting regulations and the relevant rules made by the Central Government.

What are the key elements of Settlement and Commitment?

The Competition (Amendment) Act, 2023, introduced provisions relating to "Settlement" and "Commitment" (**S&C**). These provisions allow parties being investigated (for abuse of dominant position or anti-competitive vertical restraints, but not cartels) by the CCI to close the inquiry by offering behavioural and/or structural commitments. "Settlement" typically includes the payment of a settlement amount, along with behavioural and/or structural commitments, whereas a "Commitment" does not involve any financial liability.

Settling with the CCI is not tantamount to a contravention, but third parties can still claim damages. Commitments given to the CCI also do not amount to a contravention, with the added benefit that third parties do not have a right to compensation.

S&C applicants are required to make true and full disclosures in respect of the alleged contraventions (including in their responses to the CCI's requests for information). The CCI may use these disclosures against the applicant itself or any other parties to the inquiry, who have not filed S&C applications. So,

i. The CCI/director general (**DG**) could use the information submitted by the applicant to build a case of contravention if the S&C application is rejected or withdrawn.

ii. The CCI could also start fresh investigation or expand the scope of the inquiry based on the information submitted in the S&C application.

iii. The CCI will take into account past S&C applications while considering an application, suggesting that past S&C orders could be aggravating factors to its consideration of each application.

iv. Applicants or third parties cannot appeal against the CCI's S&C orders.

v. The CCI may appoint independent monitoring agencies, including accounting firms, management consultancies, law firms, etc., to oversee implementation of the agreed S&C terms.

vi. An S&C application can be withdrawn any time before the CCI passes an order accepting or rejecting the applicant's proposal.

vii. In case of non-compliance with an S&C order or if the CCI finds that the applicant has not made true and full disclosure, or if there are material changes in the facts, the CCI can revoke the S&C order and may reinstate inquiry against the applicant. The applicant may incur some financial liability if the CCI orders it to pay legal costs (up to INR 10 million) for this.

There is an outer timeline of 130 working days (for commitments) and 180 working days (for settlements) for the CCI to conclude proceedings, unless it extends the timeline after recording reasons in writing.

10

Overseas Investments

What are the investment routes available for overseas investment by a person resident in India?

FEMA prescribes three broad categories of overseas investments (**OI**):

i. overseas direct investment (**ODI**);

ii. debt investment excluding OPI (**Non-OPI Debt**);[2]

iii. overseas portfolio investment (**OPI**).

These may be made through (i) the Automatic Route or (ii) the Approval Route.

As per the OI regulations, the following are categorised as debt instruments:

i. government bonds;

ii. corporate bonds;

iii. all tranches of securitisation structures, excluding equity tranches;

iv. borrowing by firms through loans; and

v. depository receipts with underlying debt securities.

The following are categorised as non-debt instruments:

i. all investments in incorporated entities;

ii. capital participation in LLPs;

iii. all instruments of investments are recognized by the FDI Policy;

iv. investment in units of AIFs and REITs and Infrastructure Investment Trusts;

v. investment in units of mutual funds and exchange-traded funds which invest more than 50 per cent in equity;

vi. the junior-most layer (equity tranche) of securitisation structure;

vii. acquisition, sale, or dealing directly in immovable property;

viii. contribution to trusts; and

ix. depository receipts issued against equity instruments.

[2] An Indian Entity can lend or invest in a Non-OPI Debt subject to the following conditions: (i) the Indian Entity is eligible to make ODI; (ii) the Indian Entity had made ODI in a foreign entity; (iii) the Indian Entity has acquired Control in such foreign entity before or on the date of making the financial commitment.

> **ODI is permitted for bona fide business activities in all sectors, provided these comply with regulations governing the same.**

What is overseas direct investment (ODI)?

ODI refers to investments by residents through (i) the acquisition of unlisted equity capital;[3] (ii) subscription to the memorandum of association of a foreign entity;[4] (iii) investment in 10 per cent or more of the paid-up equity capital of a listed foreign entity; or (iv) investment with control, where the investment is less than 10 per cent of the paid-up equity capital of a listed foreign entity.

Under the OI regulations, "control" means the right to appoint majority of the directors or to control management or policy decisions, directly or indirectly, (which includes exercise of management rights) that entitle them to 10 per cent or more of voting rights or in any other manner in the entity.

What is overseas portfolio investment (OPI)?

OPI refers to investments by residents other than by way of ODI. OPI is prohibited in (i) unlisted debt instruments; (ii) any security issued by a person resident in India, who is not in an IFSC; (iii) any derivatives, unless otherwise permitted by the Reserve Bank; and (iv) any commodities including bullion depository receipts.

Who is eligible to make Overseas Investment from India under the Automatic Route?

Overseas Investment can be made by any of the following under the Automatic Route, subject to compliance with the OI regulations:

i. any company, as defined under the Companies Act, 2013;

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[3] Includes fully and compulsorily convertible instruments.
[4] A foreign entity means an entity incorporated outside India including IFSC that has limited liability. However, the restriction of limited liability is not applicable to an entity with core activity in the strategic sector. Strategic sector includes energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups, and any other sector or sub-sector as deemed necessary by the Central Government.

ii. any body corporate incorporated by any law in force;

iii. any limited liability partnership incorporated under the LLP Act;

iv. any partnership firm registered under the Indian Partnership Act, 1932;

Entities listed in (i) to (iv) are collectively called "**Indian Entity**".

v. any individual resident in India who is a natural person;

vi. mutual funds, venture capital funds, or AIFs;[5]

vii. SEBI approved clearing corporations of a stock exchange and its clearing members;

viii. a domestic depository to issue Indian Depository Receipts; or

ix. AD banks, including their overseas branches during the normal course of banking business.

In which sectors is ODI permitted?

ODI is permitted for *bona fide* business activities[6] in all sectors, provided these comply with regulations governing the same. However, some prohibitions include: ODI by persons resident in India in entities engaged in 'Real Estate Activity', and gambling in any form is not permitted. 'Real estate activity' for the purposes of ODI means buying and selling of real estate or trading in transferable development rights, but does not include development of townships, construction of residential/commercial premises, roads, or bridges.

Any ODI in a foreign entity engaged in dealing with financial products linked to the Indian rupee will require prior approval of the RBI.

Beyond the general terms and conditions pertaining to ODI, some special conditions are applicable to ODI by Indian entities engaged in financial services activity[7] for investment in a foreign entity directly or indirectly engaged in financial services activity. The India Entity should:

i. have earned a net profit in the preceding three financial years;

ii. be registered with the relevant regulatory authority in India to conduct financial services activities; and

[5] Any investment by these entities shall be governed by instructions issued by SEBI and shall be treated as OPI.

[6] A bona fide business activity is one that is permissible under Indian laws and the host country or host jurisdiction where the foreign entity is situated.

[7] An Indian Entity not engaged in financial services activity may make ODI in an entity engaged in a "financial services activity" (either directly or indirectly), excluding banking or insurance, provided the Indian Entity has posted net profits during the preceding three (3) financial years. An entity is considered to be engaged in a "financial services activity", if it undertakes an activity (carried out by an entity in India), which would require registration with or is regulated by a financial sector regulatory in India.

iii. have obtained approval from the regulatory authorities concerned both in India and abroad to engage in such financial services activities.

What are the terms and conditions applicable to OI by a person resident in India under the Automatic Route?

The following conditions apply to OI made by a person resident in India:

i. The "total financial commitment" of the Indian Entity in all foreign entities (taken together as of the time of making the commitment) must not exceed 400 per cent of the net worth of the Indian Entity as on the date of the last audited balance sheet.

   However, if the Indian Entity's total financial commitment exceeds USD 1 billion in a financial year, prior approval of the RBI would be required – even if the total financial commitment of the Indian Entity remains within the eligible limit of 400 per cent of the net worth as per the last audited balance sheet.[8]

ii. For a resident individual, the overseas investment ceiling must comply with the Liberalised Remittance Scheme as prescribed by the RBI.

iii. The ODI may be made by an Indian Entity through (a) subscription as part of memorandum of association or purchase of equity capital; (b) acquisition via bidding or tender procedure; (c) acquisition by way of rights issue or allotment of bonus shares; (d) capitalisation with specified time periods for realisation any amounts due by the foreign entity under FEMA; (e) swap of securities; and (f) merger, demerger, amalgamation, or any scheme of arrangement.

iv. The ODI should ensure that the foreign entity is engaged in a *bona fide* business activity and not in a prohibited sector (e.g., real estate activity or gambling) as specified earlier.

v. The Indian Entity must route all its investment-related transactions only through one branch of an AD to be designated by it[9] and procure a UIN from the RBI before making the ODI.

vi. The issuance or transfer of equity capital of a foreign entity shall be subject to a price arrived on an arm's length basis, as clarified in the response later.

vii. A person making an ODI or financial commitment must comply with the relevant reporting as specified in the OI regulations.

viii. The OPI by an Indian Entity must not exceed 50 per cent of its net worth, as on the date of its last audited balance sheet.

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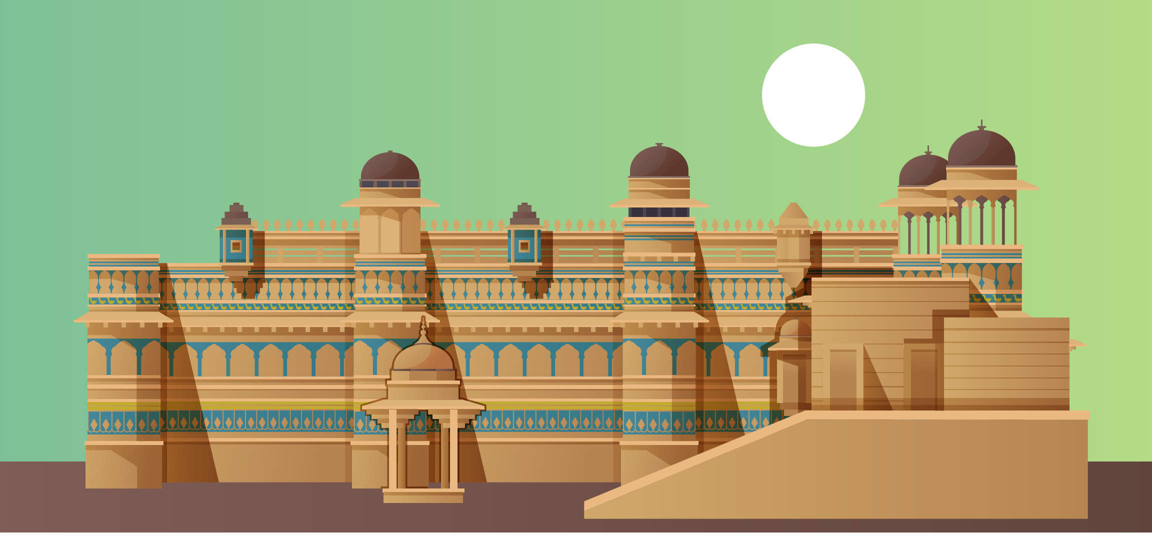
[8] The last audited balance sheet shall not be older than 18 months from the date of the transaction.
[9] A new AD bank may be appointed after procuring a no-objection certificate from the existing AD bank.



How is "total financial commitment" reckoned for the purposes of ODI? How is net worth calculated for the purposes of ODI?

Under the OI regulations, 'financial commitment' has been defined to mean as the aggregate amount of investment made by a person resident in India by way of ODI or debt other than OPI, in a foreign entity or entities in which the ODI is made, and shall include the non-fund-based facilities extended by such person to or on behalf of such foreign entity or entities.

For determining "total financial commitment", the following are to be reckoned:

i. 100 per cent of the amount of equity capital;

ii. 100 per cent of the amount of loan or any debt instruments issued by the foreign entity, including uncapitalised pre-incorporation expenses;

iii. 100 per cent of the value of guarantees, excluding performance guarantees issued by the Indian Entity to or on behalf of the foreign entity or its step-down subsidiary;[10]

iv. 100 per cent of the value of personal guarantees issued by resident individual promoter of the Indian Entity;

v. 50 per cent of the value of performance guarantees issued by the Indian Entity to or on behalf of the foreign entity or its step-down subsidiary, subject to the conditions specified;

[10] (a) Where the guarantee is extended by a group company of an Indian Entity, it shall be counted towards the utilisation of the group company's financial commitment limit independently. Provided that any fund-based exposure to or from the Indian entity shall be deducted from the net worth of such group company for computing its financial commitment limit; (b) Where a guarantee has been extended jointly and severally by two or more Indian Entities, 100 per cent of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities.

vi. 100 per cent of the value of the bank guarantee issued by a resident bank on behalf of the foreign entity or its step-down subsidiary, which is backed by a counter guarantee/collateral by the Indian Entity;

vii. the value of the pledge or charge over assets or amount of facility, whichever is lesser, if the facility has not been reckoned for the limit or if the Indian Entity has availed the facility for itself;[11]

viii. 100 per cent of payments deferred by the person resident in India;

ix. utilisation of the amount raised by the issue of ADRs/ GDRs and stock-swap of such receipts; and

x. utilisation of the proceeds from ECB, to the extent the corresponding pledge or charge on the assets to raise such borrowings has not been included in the financial commitment limit.

Net worth (taken from the definition of Companies Act) means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.

Should the entire investment abroad be made in a single tranche?

ODI in a foreign entity may be made in multiple tranches; however, the person resident in India should ensure that the sum of all tranches – the total financial commitment – does not exceed the RBI's prescribed limit.

What are the permitted funding sources for ODI?

Funding for investment in a foreign entity may sourced from one or more of the following:

i. remittances through banking channels;

ii. funds held in an account maintained in accordance with the provisions of FEMA;

[11] The "negative pledge" or "negative charge" created by an Indian entity or a bid bond guarantee obtained in accordance with these regulations for participation in a bidding or tender procedure for the acquisition of a foreign entity shall not be reckoned towards the financial commitment limit.

iii. swap of securities;

iv. proceeds obtained from ADRs/GDRs or stock swap of such receipts; or

v. external commercial borrowing, raised in accordance with FEMA provisions, for making ODI or financial commitment through debt by an Indian Entity.

Are there any valuation requirements for the shares through which ODI is made?

The OI regulations mandate that the valuation of the shares of a foreign entity be undertaken in accordance with the internationally accepted pricing methodology for valuation confirmed by the AD bank in case of (i) issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India or (ii) a transfer from a person resident in India to a person resident outside India. The price must be arrived at on an arm's length basis.

Are Indian Entities permitted to remit funds for participating in the bidding process for the acquisition of a foreign company?

Parties not eligible under the Automatic Route must apply to the RBI for approval. A person resident in India eligible under the Automatic Route to make the proposed investment may remit an earnest money deposit (**EMD**) for the acquisition of a foreign company through the bidding and tender procedure after filing Form A2 or the AD bank may issue a bid bond guarantee on their behalf in accordance with the OI regulations.

In the event the bid is successful, the AD bank will facilitate further remittance subject to the filing of Form FC and compliance with the OI regulations. If the Indian resident is not successful, they shall repatriate the amount remitted.

An open-ended bid guarantee shall be converted into a close-ended guarantee within three months from the contract award date.

If the person resident in India decides not to proceed with the investment after a successful bid/tender process, the AD banks shall ensure the bona fides of transaction while permitting the invocation of bid-bond guarantee or forfeiture of EMD.

Can an Indian Entity issue guarantees in favour of its offshore subsidiary?

An Indian Entity that has Control in the foreign entity or any of its step-down subsidiaries in which the foreign entity has Control can issue guarantees. Such guarantees will be treated as a part of the non-fund-based commitment. Guarantees furnished may be corporate, personal, performance based, or a bank guarantee backed by a counter-guarantee or collateral by the Indian Entity or its group company and issued by a bank in India.

However, all financial commitments including all forms of guarantees should be within the overall ceiling prescribed by the RBI (and in case of performance guarantees, 50 per cent of the amount of the guarantee shall be reckoned towards the financial commitment limit).

No guarantee is "open ended" in that the amount and the time period of the guarantee must be specified upfront. In case of performance guarantee, the time specified for the completion of the contract shall be the validity period of the related performance guarantee.

A group company[12] of an Indian Entity can issue a corporate or a performance guarantee to or on behalf of the foreign entity or its step-down subsidiary under the Automatic Route. For the invocation of a performance guarantee, no prior approval from the RBI is required. However, if a group company has extended the guarantee, it shall be counted towards the utilisation of its financial commitment limit independently.

Is an Indian Entity permitted to pledge its shares in the foreign entity?

An Indian Entity is permitted to pledge the shares it holds directly in the foreign entity in which it has made an ODI or the shares it holds indirectly in any of its step-down subsidiaries outside India, for availing fund or non-fund based facilities for itself or the foreign entity, from an AD bank or a public financial institution in India or an overseas lender or a debenture trustee registered with SEBI.

[12] Which is a holding company of the Indian Entity i.e., holding atleast 51 per cent, or a subsidiary of the Indian Entity (where the Indian Entity holds at least 51 per cent) or promoter group company.

Can the investment in the foreign entity be made through an SPV?

The RBI has permitted overseas investment through SPVs in a foreign entity engaged in a *bona fide* business activity.

Is OPI by a listed Indian Entity permitted?

Listed Indian companies are permitted to make portfolio investments up to 50 per cent of their net worth as on the date of the last audited balance sheet, including by way of reinvestment.[13]

What are the stipulations regarding overseas investment by individuals resident in India?

Resident individuals satisfying the criteria prescribed under the OI Rules are permitted to undertake overseas investment by way of an ODI in equity capital or by way of an OPI in a foreign entity engaged in a *bona fide* business activity. The overseas investment the resident individuals make cannot exceed the overall limit prescribed under the Liberalised Remittance Scheme by the RBI.

Permitted modes are:

i. ODI in any operating foreign entity not engaged in financial services activity and which does not have a subsidiary or step-down subsidiary in which the resident individual has Control;

ii. OPI;

iii. ODI or OPI through (a) rights issue or allotment of bonus shares; (b) capitalisation with specified time periods for realisation of any amounts due by the foreign entity under FEMA; (c) swap of securities on account of a merger/demerger/amalgamation/liquidation; (d) gift/inheritance; (e) sweat equity shares or minimum qualification shares issued for holding a management post in the foreign entity; or (f) ESOP or employee benefit scheme.[14]

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[13] "Reinvestment" means that the OPI proceeds are exempted from repatriation provisions as long as such proceeds are reinvested within the time specified for realisation and repatriation as per the Foreign Exchange Management (Realisation, Repatriation, and Surrender of Foreign Exchange) Regulations, 2015.

[14] A resident individual, who is an employee or a director of an Indian office or branch of an overseas entity or a subsidiary in India of an overseas entity or of an Indian entity in which the overseas entity has direct or indirect equity holding, can acquire shares or interest under Employee Stock Ownership Plan (ESOP) or Employee Benefits Scheme (EBS) or sweat equity shares offered by such overseas entity, provided that the issue of ESOP or EBS are offered by the overseas entity globally on a uniform basis.

> **An Indian Entity that has Control in the foreign entity or any of its step-down subsidiaries can issue guarantees, which will be treated as a part of the non-fund-based commitment.**

Acquisition under (e) and (f) will be treated as an OPI if it is less than 10 per cent and without Control.

However, a resident individual may, without any limit, acquire foreign securities by way of (i) inheritance from a person resident in India holding such securities in accordance with FEMA; (ii) any gift from a person resident in India who is a relative and holds such securities in accordance with FEMA; or (iii) any gift from a person resident outside India, subject to compliance with the Foreign Contribution (Regulation) Act, 2010 (which excludes receipt from a relative).

Can an Indian Entity set up a step-down subsidiary in India through its foreign entity directly or indirectly through step-down subsidiary of the foreign entity?

A person resident in India cannot make any financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries.

This restriction does not apply to: (a) banking companies; (b) non-banking financial companies; (c) Insurance companies; and (d) government companies.

11

Intellectual Property

What laws governs the protection of intellectual property rights in India?

India has a robust intellectual property protection framework, with laws in place to safeguard various forms of intellectual properties, such as copyright, designs, patents, trade marks, and geographical indications. As a signatory to agreements such as the Paris convention for protection of industrial property and the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**), India has amended and harmonised all intellectual property laws to ensure international compliance. Being a common law jurisdiction, India also safeguards business goodwill and reputation represented by a mark, name, or get-up under the law of passing off. The law also protects trade secrets and offers remedies for breach of confidentiality.

How are computer software and programs protected in India?

India's Copyright Act recognises and protects as literary works all computer programs, tables, and compilations, including computer databases. Authors can seek protection of both the object and source codes as literary works, with the term of protection extending for life of the author and 60 years after that. The copyright owner of a computer program can also sell or rent any copy of such a program. All copyright owners are entitled to seek protection against unauthorised use and/or misappropriation of their entire work or a substantial part of it through remedies such as injunction, damages, and accounts of profits. The law also provides for criminal remedies against misuse, including imprisonment and/or imposition of fine. Although the law does not mandate registering a work to seek protection or claim damages against infringement, it is recommended that authors ensure that each work is accompanied by a copyright notice.

Patent law also protects computer-implemented or computer-related inventions, however, the following are not patentable: (i) a mathematical or business method; (ii) a computer programme per se; or (iii) algorithms.[15] While mere algorithms or a set of instructions, would not be patentable, a computer related invention making a technical contribution or generating a technical effect cannot be considered as an algorithm and would be patentable under the Indian Patents Act, 1970. Similarly, a claimed invention that is essentially a business method cannot be patented. However, a claimed subject matter that aims to solve a technical problem or makes a technical contribution, such as

[15] Section 3(k), Patents Act 1970 (As amended).

improving data privacy, cannot be held as merely a business method and hence would be patentable under the Indian Patents Act, 1970.

The patent law bestows on the patentee the exclusive right to prevent third parties from using, offering for sale, selling, or importing the patented article in India. Similarly, for a patent process, the law grants the patentee the exclusive right to prevent the third parties from using the process, and from using, offering for sale, selling, or importing the product directly obtained by that process in India.

What patent protection is available to a biotechnology company?

The same patentability criteria apply to biotechnological inventions as to any product- and process-related invention under the Indian Patents Act, 1970: *novelty* (it must be new and novel),[16] *originality* (it must involve an inventive step),[17] and *industrial applicability* (it must be capable of being made or used in an industry). However, certain exceptions to patentability include include any invention whose primary or intended use or commercial exploitation is against public order or morality or causes serious prejudice to human, animal or plant life, health, or the environment;[18] is part of traditional knowledge;[19] is merely an admixture of components resulting only in the aggregation of properties;[20] is a method related to agriculture or horticulture;[21] or are plants or animals in whole or in part and merely are biological processes for their production or propagation, except for microorganisms.[22]

How are trade marks and service marks protected in India?

The Indian Trade Marks Act, 1999 (enforced on September 15, 2003) includes extensive provisions for the registration, protection, licensing, and assignment of trade marks. The definition of a mark is non-exhaustive and *"includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof"*. Registration under the statute grants the registered proprietor exclusive rights to the use of the trade mark, subject to any conditions and third party rights, and is valid for 10 years and may be renewed perpetually in 10-year increments. The law entitles the proprietor of a registered trade

[16] An invention is considered as new and novel if it is not anticipated by prior publication, prior use or prior public knowledge.
[17] "Inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.
[18] Section 3(b), Patents Act 1970 (As amended)
[19] Section 3(p), Patents Act 1970 (As amended)
[20] Section 3(e), Patents Act 1970 (As amended)
[21] Section 3(h), Patents Act 1970 (As amended)
[22] Section 3(j), Patents Act 1970 (As amended)

> **"Numerous judicial precedents protect foreign proprietors and their trade marks based on their worldwide business goodwill."**

mark to take action for infringement against unauthorised use and claim remedies such as injunctions, damages, account of profits, delivery-up of the infringing products, etc. The law also addresses issues of comparative advertising, misuse of trade marks through advertising, and unfair and dishonest commercial practices.

Protection to goodwill and reputation are also offered under the law of passing off. Indian courts have recognised the transborder reputation of an overseas trader, and numerous judicial precedents protecting foreign proprietors and their trade marks based on their worldwide business goodwill that has spilled into India, even without any direct business presence in India. The protection also extends to unauthorised use regarding trade names or domain names.

How does one protect confidential information and trade secrets in India?

Section 16 of the Indian Copyright Act, 1957, specifically provides the right to restrain breaches of trust or confidence. Although India has no special statute that governs the protection of trade confidential information, it has well-established principles to protect confidential information and trade secrets. To obtain relief from a court of law, the plaintiff must:

i. identify the specific information relied upon;

ii. show that it was shared in circumstances of confidence;

iii. show that such type of information could be treated as confidential; and

iv. show that such information has commercial value.

While it is possible to protect confidential information contractually and under common law, it is advisable to include specific covenants to define a relationship (such as an employer/employee) to treat business information received during the term of employment as confidential.

Trade secrets may be considered a sub-set of confidential information. However, the information must satisfy the following three conditions for it to claim protection as a trade secret:

i. It is not generally known or accessible, i.e., the information is secret;

ii. It is commercially valuable due to such secrecy; and

iii. To ensure its protection, the holder of the information should have taken reasonable steps, such as confidentiality agreements with its employees.

The Law Commission of India has proposed the Trade Secrets Bill, 2024, as a dedicated law to protect trade secrets. Although currently pending legislative action, if enacted, it would usher India into a statutorily recognised regime for trade secret protection. Besides adopting the aforementioned three conditions for defining trade secrets, the Trade Secrets Bill, 2024, also proposes certain exceptions for information holders, such as disclosure of trade secrets through compulsory licenses ordered by the Central Government to third parties or the Government itself in cases of national emergency, extreme urgency of substantial public interest, including situations of health emergency, national security, etc.

As a remedy, the Trade Secrets Bill, 2024, provides for the right to institute a civil suit in case of misappropriation of trade secrets, with an obligation on the court concerned to preserve the secrecy of the subject matter of the dispute.

Can the employees of an Indian company be required to sign confidentiality agreements?

Confidentiality provisions can be made part of employment agreements and impose varying degrees of confidentiality obligations on the employees, including requiring personnel to return all confidential information and material to the company at the time of termination of their employment. A company may also enter into separate non-disclosure agreements with its employees. Such provisions are enforceable under Indian law. Additionally, a company may impose requirements preventing such personnel from using such confidential information after employment termination.

What is the protection available in case of infringement of intellectual property rights?

The law entitles an intellectual property owner to pursue a civil or criminal action against the infringement of a registered intellectual property. The civil remedies to enforce rights in intellectual property include injunctions, damages, or accounts of profits.

The law allows a rightful owner to seek injunctive reliefs to restrain infringing activities, (including *ex parte* orders) and appoint a court receiver to inspect the defendant's premises, books of accounts, etc.

Besides civil remedies, the law also entitles the owner to criminal remedies for infringement of copyright and trade marks. Additionally, contractual remedies, such as indemnity against intellectual property infringement, replacement of infringing portion of software or other material with non-infringing material, etc., are common practice in India.

Does Indian law recognise transactions carried out electronically?

The Information Technology Act, 2000, grants legal recognition to electronic records if (i) they are made available in an electronic form; and (ii) are accessible for use in a subsequent reference. It also grants legal recognition to electronic signatures (including digital signatures). In addition, a contract proposal communicated, accepted, revoked, etc., in electronic form or through an electronic record shall not be deemed unenforceable solely because its uses any electronic form or means. This implies that under the Indian law a contract is not invalidated for its electronic form and is considered as valid as and afforded equal protection as a non-electronic contract.

How can a company outsourcing its activities to India safeguard intellectual property, which is created in the course of performance of an outsourcing contract?

Under the Indian copyright law, the author of a work is considered the first owner of the copyright, with certain exceptions. For works an author creates in the course employment under a service or apprenticeship contract, the employer is deemed to be the first owner of copyright, unless an agreement suggests otherwise. However, if the author creates a photograph, painting, drawing, engraving or cinematographic film for valuable consideration at the request of a person, then that person is considered the first owner of copyright, unless an agreement suggests the contrary. Therefore, in an outsourcing scenario, it is advisable that a company ensure that the third-party contractor has entered into valid contracts stating that the intellectual property rights created during the course of the service vests with the contractor, and that the contractor subsequently assigns the rights in such works to the company.

What are the relevant data protection laws in India?

The Information Technology Act, 2000, contains provisions related to data protection, imposing civil liability for negligent handling of "sensitive personal information" and criminal liability in cases of disclosure of information in breach of a lawful contract.

The law imposes liability on a body corporate (possessing, dealing, or handling any sensitive personal data or information in a computer resource that it owns, controls, or operates) negligent in implementing and maintaining reasonable security practices and procedures, thereby causing wrongful loss or wrongful gain to any person, and requires that it pay damages as compensation to the affected person. The Central Government has also notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, which outlines directions for a body corporate on the collection, privacy, and disclosure of personal information, including sensitive personal information/data.

The law also imposes liability on any person, including an intermediary, who has gained access to any material containing personal information about another person through a lawful contract. If such a person discloses the information without the consent of the person, intending or knowing that it is likely to cause wrongful gain or wrongful loss, then such unauthorised disclosure may be punishable, with the person facing up to three years imprisonment and up to INR 0.5 million fine.

In 2023, the Indian Parliament passed the Digital Personal Data Protection Act, 2023 (**DPDP Act**), seeking to replace Section 43A of the Information Technology Act, 2000, and the Information Technology (Reasonable Security Practices and Procedures and Sensitive

Personal Data of Information) Rules, 2011. However, the Government of India has not yet notified the DPDP Act, and as such, is not in force currently.

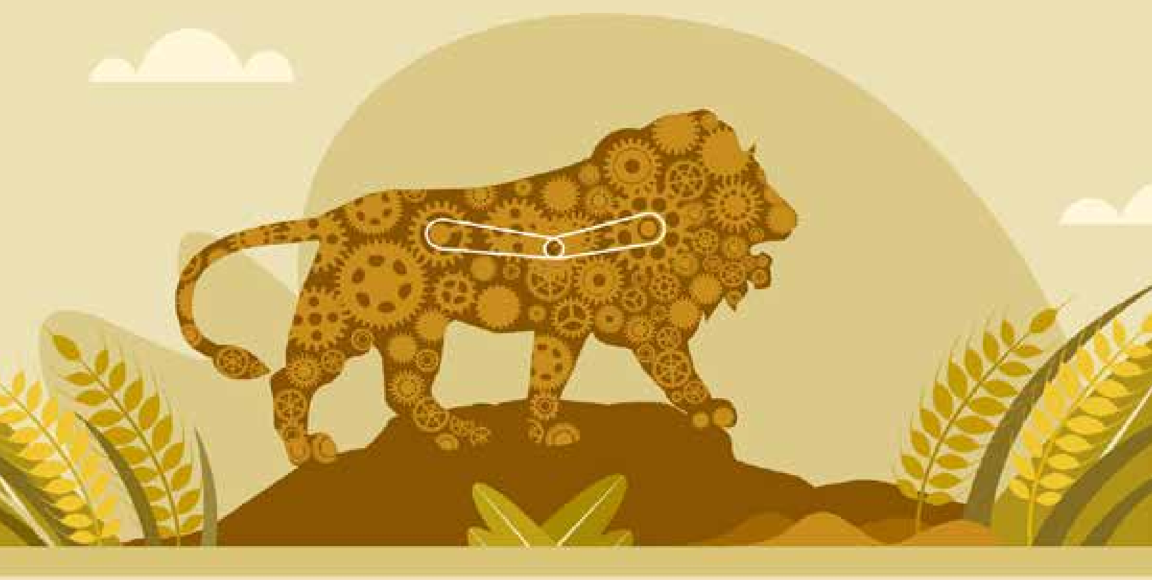
The DPDP Act protects digital personal data, which means any data about an individual who is identifiable by or related to such data in a digital form. It regulates the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes. A data fiduciary can only process the personal data of a "data principal" upon receiving their consent and for a lawful purpose or for certain legitimate uses.

What are the relevant legal principles relating to use of artificial intelligence and intellectual property rights in India?

In India, laws governing intellectual property rights, especially in relation to its overlap with artificial intelligence, are still not clearly defined. It is yet to establish legal principles to attribute authorship or affix liability for intellectual property infringement involving artificial intelligence. Remedies under common law, such as passing off, principle of unjust enrichment, and breach of privacy (as guaranteed by the Constitution of India), are still available for protection against unauthorised use of personality rights by artificial intelligence tools. This has enabled celebrities and eminent persons to seek protection for their personality rights.

12

Employees



What are the key labour legislations in India?

The Indian Parliament and the state legislatures have the power to legislate concurrently on labour-related issues. Key labour legislations in India can be grouped as follows:

Group I

Laws to provide basic protection to industrial workers:

a. Factories Act
b. Payment of Wages Act
c. Minimum Wages Act
d. Contract Labour Act
e. Employees' Compensation Act
f. Fatal Accidents Act

Group II

Laws for promoting industrial peace, harmony, conciliation, and adjudication of industrial disputes:

a. Industrial Disputes Act
b. Industrial Employment (Standing Orders) Act
c. Trade Unions Act

Group III

Laws providing social security and welfare of employees:

a. Employees' Provident Funds and Miscellaneous Provisions Act
b. Employees' State Insurance Act
c. Payment of Gratuity Act
d. Payment of Bonus Act
e. Maternity Benefit Act
f. Sexual Harassment of Women at Workplace Act
g. Equal Remuneration Act
h. Rights of Persons with Disabilities Act
i. Transgender Persons (Protection of Rights) Act

j. Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act

Group IV

General law:

a. Constitutional provisions relating to fundamental rights enshrined in the Constitution of India
b. Indian Contracts Act

Group V

State laws:

a. Shops and establishments acts in force in various states
b. State labour welfare fund act read with rules frames thereunder
c. State amendments to central laws and certain state-specific statues (and present only in some states), such as the Maharashtra Private Security Guards Act, 1981.

With an aim to improve the ease of doing business, the Government of India proposed consolidating numerous complex labour laws currently in existence into four broader labour codes. These four codes are (i) Code on Wages; (ii) Code on Industrial Relations; (iii) Code on Social Security; and (iv) Code on Occupational Safety, Health, and Working Conditions (collectively known as **Labour Codes**). Although these Labour Codes have been passed by the Indian Parliament and have received President's assent, these are currently not in force. Once implemented, these Labour Codes will streamline existing compliance requirements and also recognise gig and platform workers as a separate class outside of the traditional employment structure and extend social security benefits to them.

What are the restrictions on the employment of foreign nationals in India?

India allows foreign nationals having a valid employment visa to work in India. While employment visas can be issued to skilled/qualified professionals or to persons engaged or appointed on contractual or employment basis, these cannot be granted for routine, ordinary, secretarial, or clerical jobs.

The MHA had previously issued FAQs stipulating conditions for employment visas to work in India, including the requirement that foreign nationals sponsored for an employment visa in any sector must draw a salary in excess of USD 25,000 per annum. However, in a

> **“Current legislation permits Indian employees to subscribe to equity shares of a foreign company under a cashless employee stock option scheme, without remittance from India.”**

notification dated August 13, 2020 (**2020 MHA Notification**), the MHA issued a revision, specifying that a foreign national being sponsored for an employment visa in any sector should draw a minimum gross salary of INR 1.625 million per annum (approx. USD 19,000), with limited exceptions for certain categories of employees such as ethnic cooks, language teachers, etc.

Given the ambiguity regarding the minimum salary threshold for the issuance of employment visas, it is advisable to seek specific advice from external immigration consultants, considering the authorities may still consider the higher threshold of USD 25,000 per annum specified in the FAQ instead of the INR 1.625 million (approx. USD 19,000) per annum mentioned in the 2020 MHA Notification.

The 2020 MHA Notification has set INR 9,10,000 per annum as the minimum salary for an employment visa for foreign nationals engaged as teaching faculty at the level of Assistant Professors and above by the Central Higher Educational Institutions, which are the Indian Institutes of Technology (**IITs**), Central Universities (**CUs**), National Institutes of Technology (**NITs**), Indian Institutes of Management (**IIMs**), and Indian Institutes of Science Education and Research (**IISERs**).

Additionally, foreign nationals intending to stay in India for more than 180 days must register with the relevant FRRO/FRO within 14 days of arrival.

What are the statutory working hours and/or overtime wages prescribed under Indian labour laws?

Indian employment laws typically prescribe a maximum of 9 hours of work per day and 48 hours per week. However, these limits are not uniform across all states and are based on the provisions of the local shops and establishments act applicable to the state in which the employee(s) works.

It is important to note that employment of women during the night is restricted. However, certain states allow night shifts for women if the employers obtain consent from these women and ensure certain safety measures. Moreover, some states have granted exemptions from work-hour limits for women employed in the IT/ITES sector through government notifications, subject to compliance with conditions set by the local labour department/police, etc. These conditions include providing transport services with security personnel, maintaining the data of all women employees who leave after the prescribed working hours, and implementing other security features. Some Indian Courts have also held such restrictions or employment of women during night shifts as unconstitutional under the Factories Act.

Employees working beyond the normal working hours are entitled to overtime wages, typically at twice the ordinary rate of wages (defined as per a prescribed formula for calculating "ordinary rate of wages").

What are the statutory requirements for grant of leave or public holidays?

The Factories Act and the relevant shops and establishments acts grant employees annual leave with wages and casual and/or sick leave.

In addition to the weekly and compensatory holidays prescribed under Indian statutes, the employees are also entitled to national holidays (as per the provisions of the local holidays acts and/or government notifications). These compulsory holidays include Republic Day (January 26), Independence Day (August 15), and Gandhi Jayanti (October 2) along with five to seven holidays from a list specified by the relevant state legislations, including the local national festivals and holiday acts, and/or additional holidays as issued through state government notifications from time to time.

What are the maternity /paternity leave benefits provided to employees?

The Maternity Benefit Act, grants 26 weeks of paid maternity leave to women employees covered under the Maternity Benefit Act for their first two children and 12 weeks of paid maternity leave for those with more than two surviving children (**Maternity Benefit**).

The Maternity Benefit Act also extends the Maternity Benefit to adoptive and commissioning mothers, providing 12 weeks of leave from the date the child is handed over to the adopting mother or commissioning mother. It also mandates that establishments with 50 or more employees must provide creche facilities. Every establishment covered by the Maternity Benefit Act is also obligated to inform every woman employee of the benefits available under the Maternity Benefit Act at the time of their appointment. The Maternity Benefit Act also recognises the work-from-home concept for women employees (post the period of Maternity Benefit) if the nature

of their work can be performed at home. However, this provision is only intended to facilitate working from home and does not impose any obligation on the employer to permit the same.

Further, the Maternity Benefit Act restricts the dismissal/termination of services of women employees during their maternity leave and ensures that the conditions of service of a female employee are not changed to her disadvantage during this period. The Maternity Benefit Act also provides for leave of varied durations in cases of miscarriage, premature birth, medical termination of pregnancy, tubectomy, etc.

While many companies provide paternity leaves to their employees, it is important to note that there are currently no laws regulating paternity leaves in India.

Can employees of an Indian company be granted employee stock options in a foreign company?

A foreign company can issue stock options to employees of (i) its office or branch in India; (ii) its subsidiary in India; and (iii) an Indian company in which the foreign company has equity holding (directly or indirectly), where the employee stock option schemes offer shares globally on a uniform basis and requires remittance by the Indian employee. Current legislation permits Indian employees to subscribe to equity shares of a foreign company (even without any equity holding in the Indian company) under a cashless employee stock option scheme, provided it does not involve remittance from India. Further, the Liberalised Remittance Scheme of the RBI allows resident individuals to make remittances through ADs up to USD 250,000 per financial year (**LRS Limit**) for any permitted capital or current account transaction or a combination of both (which would include education, family expenses abroad, subscription of shares of the foreign company and employee stock options etc.). There is no limit on the remittance if the acquisition of shares or interest in the foreign entity is through an employee stock ownership plan/equity incentive plan adopted by the foreign entity. However, such remittance will be first reckoned against the LRS Limit, i.e., the incentive holder is free to remit funds beyond the LRS Limit.

Can employment contracts contain restrictive covenants like non-compete?

Any agreement that restrains trade is considered void under the provisions of the Indian Contracts Act. However, the Supreme Court of India has held that while agreements restraining employees from engaging in activities similar to their employers during the course of employment are enforceable, non-compete restrictions operating after the termination of employment would be considered void and unenforceable.

Non-solicitation restrictions are valid and enforceable during and after the term of employment, but these could be void and unenforceable if found to be unreasonable (in terms of scope, geography, timeline, etc.).

Nonetheless, these restrictive clauses on non-compete and non-solicitation are routinely included in employment contracts (especially for senior-level employees) as a deterrent.

How can the services of an employee be terminated?

An employee's services can be terminated as per the terms of his/her employment contract. If the employee is covered under the relevant state's shops and establishment act or is a "workman" as defined under the Industrial Disputes Act, the termination must be in accordance with relevant statute. However, the company's internal policies would prevail if more beneficial than those prescribed under the applicable law. These statutes set out the minimum notice requirements/payment in lieu of the notice and requirements for distribution of severance payments in case of retrenchment of workman-category employees.

Further, in case the dismissal of an employee is on the grounds of misconduct (i.e., termination for cause), it is not necessary to comply with the aforementioned notice requirements. However, before terminating the services of an employee for misconduct, the law requires the employer to conduct a disciplinary enquiry in accordance with principles of natural justice (such as issuing a show cause notice, having an impartial enquiry office, allowing the respondent to adduce evidence, cross-examine witnesses, etc.), to establish the guilt of the employee.

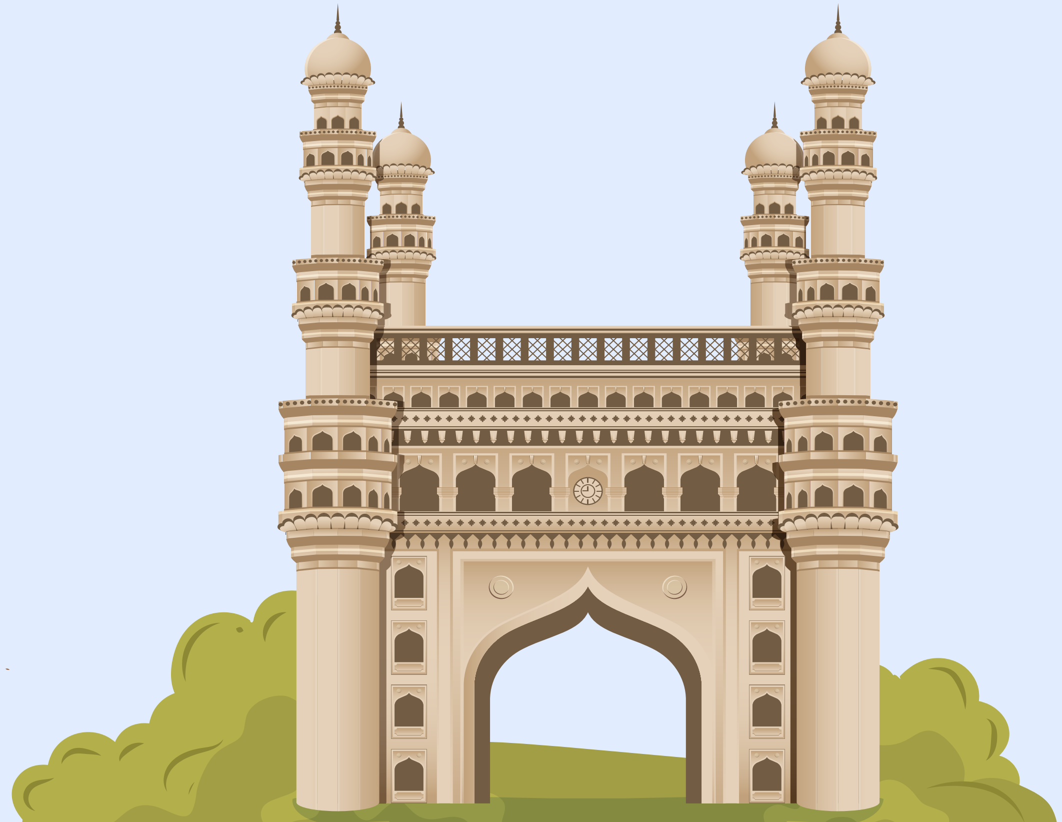
Are severance payments statutorily required to be paid in India?

The provisions of Industrial Disputes Act entitles a workman who has been employed for at least one year of continuous service to retrenchment compensation, calculated at the rate of 15 days' average pay for every completed year of service or part thereof in excess of 6 months.

Retrenchment compensation is also payable to workmen in case of lay off/closure of an undertaking. Certain local shops and establishments legislations may also require payment of severance compensation based on the years of continuous service.

13

Insolvency/ Winding up



What are the laws that govern insolvency and bankruptcy/ winding up proceedings in India?

In India, the law governing insolvency and restructuring processes is the:

The Insolvency and Bankruptcy Code, 2016 (IBC)

IBC is the primary legislation codifying a comprehensive statutory framework for insolvency resolution and liquidation of Indian companies (excluding financial service providers, unless otherwise notified by the Central Government[23]) and limited liability partnerships (collectively referred to as the **Corporate Debtor**), and bankruptcy of individuals and partnership firms.[24] IBC provides for a time-bound and creditor-in-control regime.

Insolvency and liquidation process for corporate persons

A financial creditor, operational creditor, or corporate applicant (such as a company's shareholder or any other authorised person) can initiate the corporate insolvency resolution process (**CIRP**) under IBC upon a default in payment of debt exceeding INR 10 million.

A financial creditor is the one who has advanced a debt in exchange for time value of money. A financial creditor can file an application before the NCLT either independently or jointly with other financial creditors. Financial creditors who form part of a "class of creditors" – such as debenture holders or holders of other debt securities, deposit holders, or home-buyers in the case of real estate companies, (**Class of Creditors**) – must file the application for initiating CIRP jointly by not less than (i) 100 creditors of the same Class of Creditors or (ii) 10 per cent of the total number of creditors in the same Class of Creditors, whichever is less.

An operational creditor is the one to whom debt is owed for the provision of goods and services, including employment, or claim against debt related to taxes and other government dues. Before filing an application with the NCLT, an operational creditor is required to issue a demand notice of unpaid operational debt or provide a copy of the invoice(s) to the Corporate Debtor.

If a Corporate Debtor defaults, a corporate applicant may file an application with the NCLT for initiating CIRP. The corporate applicant must furnish, among others, a special

[23] The Ministry of Corporate Affairs vide Gazette Notification bearing S.O. 4139(E) dated November 18, 2019, notified the NBFCs (including housing finance companies) with asset size of INR 5 billion or more as per the last audited balance sheet as the category of financial service provider against whose insolvency resolution and liquidation proceedings shall be undertaken in accordance with the provisions of the IBC.

[24] As on date of publication of this Chapter, provisions relating to insolvency and bankruptcy process of individuals and partnership firms are in force only in respect to the personal guarantors of Corporate Debtor. This Chapter does not cover the insolvency and bankruptcy process of individuals and partnership firms.

> **IBC provides for a time-bound and creditor-in-control regime.**

resolution passed by shareholders of the Corporate Debtor, or a resolution passed by at least three-fourth of all the Corporate Debtor's partners, as the case may be, approving filing of the CIRP application.[25]

On admitting an application against the Corporate Debtor, the NCLT declares a moratorium prohibiting (i) the institution or continuation of pending suits or proceedings against the Corporate Debtor, including executing any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority; (ii) transferring, encumbering, alienating, or disposing off by the Corporate Debtor of any of its assets, any legal right, or beneficial interest therein; (iii) any action to foreclose, recover, or enforce any security interest created by the Corporate Debtor regarding its property, including any action under the SARFAESI Act; and (iv) the recovery of any property by an owner or lessor where such property is in the possession of the Corporate Debtor.[26] The NCLT appoints an insolvency professional as an interim resolution professional (**IRP**), who is eventually replaced by or confirmed as the resolution professional (**RP**) by the committee of creditors (**CoC**) constituted in relation to the Corporate Debtor. The IRP/RP is responsible for conducting the CIRP and keeping the Corporate Debtor's operations running on a going concern basis until the NCLT approves a resolution plan or orders liquidation.

From the date of the IRP's appointment, (i) management of the affairs of the Corporate Debtor vests in the IRP and (ii) the board of directors of the Corporate Debtor stands suspended and the IRP/RP exercises the board's powers. The IRP becomes responsible for the invitation and verification of claims from the stakeholders of the Corporate Debtor. Based on such verification, the IRP constitutes the CoC comprising financial creditors who are not the Corporate Debtor's "related party". In instances where the Corporate Debtor has no financial creditor or where all financial creditors are related parties, the CoC will include the 18 largest operational creditors.

The CIRP involves a mechanism for inviting, evaluating, and approving the CoC's resolution plan, which required further approval by the NCLT. Once the NCLT approves a resolution plan, it is binding on all stakeholders of the Corporate Debtor. The IBC restricts participation in the resolution or liquidation process of individuals whose misconduct contributed to defaults or those who are otherwise undesirable.

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[25] Section 10(3)(b) of the IBC.
[26] Section 14 of the IBC.

The IBC prescribes a timeline of 180 days for the completion of the CIRP, extendable up to 270 days with the NCLT's approval,[27] and an outer limit of 330 days.

If the CoC does not approve a resolution plan or liquidates the Corporate Debtor, or the NCLT rejects the resolution plan, the NCLT will order the liquidation of the Corporate Debtor.

During liquidation, the liquidator will form a liquidation estate and the proceeds will be distributed by way of a distribution waterfall.[28] A secured creditor will have to either (i) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator as per the distribution waterfall or (ii) realise its security interest outside the formal liquidation process and share the proportionate liquidation and other priority dues. The distribution waterfall is as follows:

i. the insolvency resolution process costs and the liquidation costs paid in full;

ii. debts owed to a secured creditor in the event the secured creditor has relinquished security interest to the liquidation estate; ranked equally with workmen's dues for the 24-month period preceding the liquidation commencement date;

iii. wages and unpaid dues owed to employees other than workmen for the 12-month period preceding the liquidation commencement date;

iv. financial debts owed to unsecured creditors;

v. the following debts ranked equally:

   a. any amount due to the Central Government and the State Government related to the whole or any part of the 2-year period preceding the liquidation commencement date; and

   b. debts owed to a secured creditor for any unpaid amount following the enforcement of their security interests outside the formal liquidation process;

vi. any remaining debts and dues;

vii. preference shareholders, if any; and

viii. equity shareholders.

The liquidation process is to be completed within one year from the liquidation commencement date.[29] If sale of the Corporate Debtor or business of the Corporate Debtor is attempted, an additional period of 90 days can be added to the liquidation process.[30] Similarly, any compromise or arrangement proposed under the Companies Act

[27] Section 12(1) read with Sections 12(2) and 12(3) of the IBC.
[28] Section 53 of the IBC
[29] Regulation 44(1) of the Liquidation Process Regulations.
[30] Proviso Regulation 44(1) of the Liquidation Process Regulations.

must be completed within 90 days from the order of liquidation, and this time period will not be included in the liquidation period.[31]

A company may also initiate voluntary liquidation under the provisions of the IBC by passing of a special resolution of its members in a general meeting and securing its approval by two-thirds of the creditors (by value). Voluntary liquidation can be initiated only when the majority of the directors declare that the company either does not have any debt or will be able to pay off its debts in full, from the proceeds of assets to be sold in the voluntary liquidation.

Fast track corporate insolvency resolution process

IBC also prescribes a fast-track corporate insolvency resolution process, which is applicable to small companies (as defined under the Companies Act), specified start-ups (other than a partnership firm), and unlisted companies with a total asset size of less than INR 10 million.[32] Designed for quicker completion than the regular CIRP, the resolution process is allowed a maximum of 90 days (extendable by a further 45 days).

After an application for the initiation of CIRP is admitted, it can be withdrawn with the NCLT's approval provided 90 per cent of the CoC members consent to such withdrawal.

Pre-packaged insolvency resolution framework

The IBC was amended in 2021 to provide for a pre-packaged insolvency resolution framework (**Pre-pack**) for MSMEs.[33] Pre-pack under IBC is a debtor-in-possession regime as opposed to the creditor-in-control model for other corporate debtors.

Insolvency resolution process for financial service providers

IBC provides for resolution of corporate persons, other than a "financial service provider" (**FSP**). An FSP is defined under Section 5(17) of the IBC to mean "*…a person engaged in the business of providing financial services*[34] *in terms of authorisation issued or registration granted by a financial sector regulator*". Accordingly, banks, insurance companies and other similarly regulated entities are excluded from the purview of the IBC, unless otherwise notified by the Central Government.

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[31] Regulation 2B of the Liquidation Process Regulations.

[32] Section 55 of the IBC read with the MCA Notifications dated June 14, 2017 and August 30, 2022.

[33] MSMEs in India are classified based on investment and annual turnover, i.e. the maximum threshold for (a) micro enterprise INR 10 million for investment and INR 50 million for annual turnover; (b) small enterprise is INR 100 million for investment and INR 500 million for annual turnover; and (c) medium enterprise is INR 500 million for investment and INR 2.5 billion for annual turnover.

[34] Section 5(16) of the IBC defined "financial services" to include any of following services: "*(a) accepting of deposits; (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so; (c) effecting contracts of insurance; (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person; (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of— (i) buying, selling, or subscribing to, a financial product; (ii) availing a financial service; or (iii) exercising any right associated with financial product or financial service; (f) establishing or operating an investment scheme; (g) maintaining or transferring records of ownership of a financial product; (h) underwriting the issuance or subscription of a financial product; or (i) selling, providing, or issuing stored value or payment instruments or providing payment services*"

The Central Government issued the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (the **FSP Rules**) which are applicable to the insolvency and liquidation proceedings of FSPs. NBFCs (including housing finance companies) with an asset size of INR 5 billion or more as per the last audited balance sheet, have been notified as FSPs to which the IBC (and the FSP Rules) are applicable.[35]

Insolvency for group companies

The IBC does not have specific provisions for insolvency at group or enterprise levels. However, Indian courts have considered various instances of consolidation for group insolvency. The resolution of the *Videocon Group* entities was the first instance of substantive consolidation by Indian courts, which was the result of judicial intervention in the absence of a statutory mandate.[36] In *Edelweiss Asset Reconstruction Company Limited vs. Sachet Infrastructure Pvt. Ltd.*,[37] the NCLAT ordered for the procedural consolidation of the CIRPs of certain land-holder companies (which were co-guarantors and co-borrowers) with that of the principal debtor company, which was the developer of the township. These rulings have been followed in subsequent cases as well.

The Companies Act:

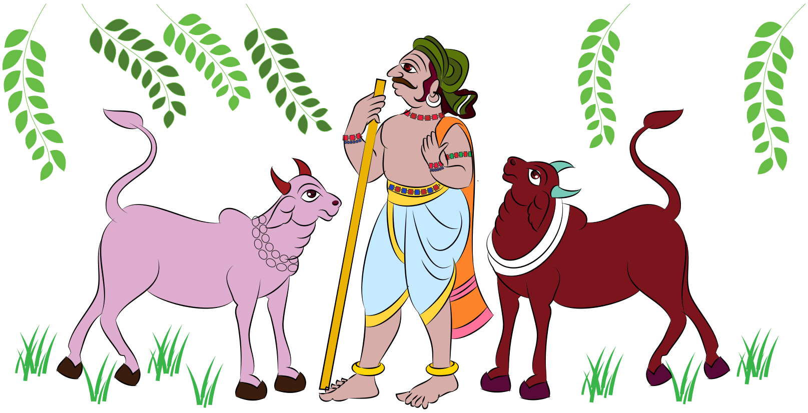
Winding-up

Winding-up proceedings against companies can be initiated under the Companies Act on grounds other than default in payment, such as: (i) the passing of special resolution by the shareholders of the company to wind up; (ii) the company acting against the sovereignty and integrity of India, security of the Indian state, friendly relations with foreign states, public order, decency, or morality; (iii) the company conducting affairs in a fraudulent manner; (iv) the company defaulting in the filing of financial statements or annual returns with the Registrar for the immediately preceding five consecutive financial years; and (v) on just and equitable grounds, in the opinion of the NCLT. The liquidator takes control of the company to collect, realise, and distribute its assets to creditors according to the statutory order of priority.

Scheme of Arrangement

A scheme under Section 230(1) of the Companies Act may also consider debt restructuring by the company's creditors (or a class of creditors)/members (or a class of members), or by the company itself before NCLT. Any scheme of corporate debt restructuring requires the consent of at least 75 per cent of the creditors by value of the secured creditors as

[35] MCA Notification dated November 18, 2019.
[36] 2019 SCC Online NCLT 745.
[37] 2019 SCC Online NCLAT 592.



a precondition for making the application before the NCLT.[38] The scheme is then put to vote in the meeting of each class of members and creditors, convened as per the NCLT's directions. Once approved by the majority of persons representing at least three-fourths in value at each meeting, an application for sanctioning the scheme must be submitted to the NCLT.[39] A sanctioned scheme will be binding on the company, all creditors or class of creditors/members or class of members, and the contributories of the company.[40]

Restructuring regime issued by the Reserve Bank of India for stressed assets:

The RBI issued the Prudential Framework for Resolution of Stressed Assets dated June 7, 2019 (**Stressed Asset Directions**), aiming for early recognition, reporting, and time-bound resolution of stressed assets. The framework requires specified lenders, such as scheduled commercial banks, to establish board-approved policies for the resolution of stressed assets. It stipulates that if a borrower's account has a default[41] with any specified lender, all lenders of the borrower must, within 30 days of the default, conduct a *prima facie* review of the account (**Review Period**) and decide on a resolution strategy either by implementing a resolution plan or by initiating legal proceedings for insolvency or recovery.[42]

During the Review Period, all lenders must enter into an inter-creditor agreement, providing ground rules for the finalisation and implementation of the resolution plan. The resolution plan may involve any action/plan/reorganisation, including regularisation of the account through the payment of all overdues by the borrower entity, the sale of the exposures to other entities/investors, change in ownership, and restructuring. The Stressed Asset Directions particularly require the resolution plan to provide for the payment of not less than the liquidation value due to the dissenting lenders.

[38] Section 230(2) (c) of the Companies Act.
[39] This will be as per Form No.CAA.5 of the Scheme Rules.
[40] Section 230(6) of the Companies Act.
[41] The term 'default' has been defined to mean non-payment of debt (as defined under the IBC) when whole or any part or instalment of the debt has become due and payable and is not paid by the debtor.
[42] Paragraph 9 of the Stressed Asset Directions.

Recovery proceedings under the SARFEASI Act:

The SARFAESI Act permits specified classes of "secured creditors" to enforce security interest available to them without any court intervention, providing for two important alternative methods for the recovery of non-performing assets (**NPAs**): (i) taking possession of the secured assets of the borrower (to lease, assign, or sell such assets) and (ii) temporarily taking over the management or business of the borrowers until the NPA is recovered.

What judicial/regulatory bodies deal with insolvency and bankruptcy/winding-up proceedings in India?

Judicial bodies for insolvency and bankruptcy/winding-up proceedings

a. ***National Company Law Tribunal(s)***: The NCLT is the primary adjudicating authority for CIRP and liquidation processes under the IBC and winding-up proceedings under the Companies Act. The NCLAT hears appeals against the orders of the NCLT. Appeals from the NCLAT's orders lie before the Supreme Court of India.

b. ***The Debts Recovery Tribunals (DRT)***: DRTs are primarily focused on the recovery of debts due to banks and financial institutions, but they also play a role in insolvency proceedings for individuals and partnerships under the IBC. The Debt Recovery Appellate Tribunal hears appeals against the DRT's orders.

Regulatory bodies for insolvency and bankruptcy/ winding up proceedings

a. ***Insolvency and Bankruptcy Board of India (IBBI)***: The IBBI is a regulatory body for overseeing the functioning of insolvency professionals, agencies, and information utilities under the IBC. It also formulates regulations and guidelines to ensure effective implementation of the IBC.

b. ***Reserve Bank of India***: The RBI is primarily a banking regulator, but it also plays a significant role in the financial health of financial institutions and has the power to direct the banks to initiate a CIRP against any stressed company.

c. ***Ministry of Corporate Affairs***: The MCA is involved in the winding-up proceedings as it oversees the compliance of companies with the legal provisions laid out in the Companies Act. It also formulates rules in relation to the IBC, as specified.

14

Taxes

Section A: Direct Taxes

What are the laws relating to direct taxes in India?

Following are the direct taxes payable in India:

a. ***Income Tax***: Income tax is payable on income, including capital gains, which is a separate head of income. The Indian law relating to income tax is contained in the Income Tax Act, 1961. The Income Tax Act is a central act of Parliament and is reviewed annually, at the time when the Finance Bill (part of the Union Budget) is presented.

b. ***Securities Transaction Tax (STT)***: STT is payable on taxable securities transactions, based on the value of such transactions, at specfied calculated rates. For example, STT at 0.1 per cent is payable on sale and purchase of equity shares on the stock exchange and at 0.2 per cent on sale of unlisted shares in an IPO.

What determines the extent of an entity's liability to pay Income tax in India?

Taxable income is a function of an entity's 'residential status' and source of income.

A company is said to be resident in India if:

i. it is an Indian company; or

ii. its place of effective management, in that year, is in India (place of effective management means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are in substance made).

Thus, all Indian companies (including a WOS of a foreign company) are treated as residents. A foreign company can also be said to be a resident in India if its place of effective management in a particular year is in India.

Resident companies are subject to tax on their worldwide income, unless otherwise exempted. Non-resident companies are essentially taxed on the income received, accrued or arising or deemed to be received, accrued or arising in India.

The applicable tax rates for a domestic company and a foreign company having a permanent establishment in India (i.e. by way of a branch, project office, etc.) are mentioned below. If the foreign company does not have a permanent establishment in India, then the rate of tax depends on the nature of income received by the foreign company and the provisions of the relevant DTAA.

What are the applicable income tax rates for various types of business entities that can be set up in India?

A non-resident can operate in India by establishing a branch office, project office or a liaison office. Alternatively, it may also incorporate an Indian company, either as a WOS or as a joint venture company, in partnership with another resident or non-resident entity. The choice of the nature of entity in India would depend upon commercial exigencies.

The rate of tax (excluding specified incomes chargeable at special rates) depends upon the taxable income of the entity, which is as follows:

1. **Indian Company**

Normal corporate tax rates

Taxable Income	Rates
Up to INR 10 million	31.20% [43]
Above INR 10 million – Up to INR 100 million	33.38%
Above INR 100 million	34.94%

Minimum Alternate Tax

If a company's tax liability is less than 15 per cent of its 'book profits', then instead of paying corporate tax at the above rates, the company is required to pay MAT on adjusted book profits (as prescribed) at the following tax rates:

Book Profits	Rates
Up to INR 10 million	15.60%
Above INR 10 million – Up to INR 100 million	16.692%
Above INR 100 million	17.472%

Tax credit is available for tax paid under MAT, for a period of 15 years.

[43] All tax rates mentioned here are inclusive of the applicable surcharge and education unless otherwise specified.

2. Branch Office/ Project Office

A branch or a project office of a foreign company is considered as a permanent establishment in India. Therefore, generally, income attributable to activities undertaken in India is taxable and the tax rates are as under:

Normal corporate tax rates

Taxable Income	Rates
Up to INR 10 million	36.40%
Above INR 10 million – Up to INR 100 million	37.13%
Above INR 100 million	38.22%

Minimum Alternate Tax

Book Profits	Rates
Up to INR 10 million	15.60%
Above INR 10 million – Up to INR 100 million	15.9121%
Above INR 100 million	16.380%

However, for a company located in an IFSC and deriving income solely in convertible foreign exchange, MAT is payable at the rate of 9 per cent (plus applicable surcharge and cess) of the book profits.

Tax credit is available in respect of tax paid under MAT, for a period of 15 years. MAT is not applicable to non-residents who do not have any business connection or permanent establishment in India.

3. Liaison Office

Under the extant RBI regulations, a liaison office is not permitted to carry on business activities in India. Thus, generally, the liaison office does not form a permanent establishment in India and accordingly, no taxable income can be attributed to the activities carried out in India. However, in case the liaison office carries on business activities and forms a permanent establishment in India, then the tax rates applicable to branch/ project office would apply.

How are capital gains taxed in India?

Gains earned on the sale of a capital asset are subject to capital gains tax. Capital gains are computed by reducing the cost of acquisition, cost of improvement and sale-related expenses from sale consideration. Capital gains can be classified as (a) short-term or (b) long-term, depending on the period of holding. The periods of holding have been simplified in the Finance Act, 2024, as follows:

Nature of gains	Period of Holding (listed securities, units of Unit Trust of India, units of an equity oriented fund or zero coupon bond)	Period of Holding (all other assets including unlisted securities, debt-oriented funds, etc.)
Long-term	> 12 months	> 24 months
Short-term	≤ 12 months	≤ 24 months

In certain situations, the period of holding of a previous owner of the asset is counted for the purpose of ascertaining whether the capital asset is short-term/ long-term.

Tax incidence is generally higher in the case of short-term capital gains as compared to long-term capital gains. Long-term capital gains on all assets are taxable at 12.5 per cent. Short-term capital gains, arising on the transfer of listed securities that are subject to STT, are chargeable to tax at 20 per cent. However, short-term capital gains arising from the transfer of all other assets is chargeable to tax at applicable rates. Hence, a resident company is liable to pay tax at 30 per cent and a foreign company is liable to pay tax at 35 per cent. The rates are also subject to applicable surcharge and health and education cess.

In case the sale consideration is payable to a non-resident, then the buyer is required to withhold tax at the time of credit or payment, whichever is earlier. Further, the non-resident would be entitled to DTAA benefits, only if it obtains a tax residency certificate from its Government Authorities and necessary documents prescribed under the Income Tax Act.

Are all transfers of capital assets subject to income tax in India?

All transfers of capital assets are not subject to tax in India. Under the Income Tax Act, certain situations are specified, which though regarded as 'transfer' are not subject to tax in India (on meeting of certain prescribed conditions). For instance:

i. Transfer of capital asset by an Indian holding company to its Indian subsidiary or *vice-versa*;

ii. Transfer of capital asset pursuant to an amalgamation, demerger, etc., subject to fulfilment of prescribed conditions;

iii. Transfer of GDRs made outside India between non-residents; and/ or

iv. Transfer by way of conversion of bonds or debentures, including foreign currency bonds into shares.

What are the tax implications of share transfer in a foreign company by a foreign seller to a foreign buyer, where the foreign company directly or indirectly owns shares in an Indian company?

The Income Tax Act provides that any income arising, directly or indirectly, through the transfer of a capital asset situated in India shall be deemed to accrue or arise in India. Further, it also provides that an asset or capital asset, being any share or interest in a company or entity incorporated outside India, shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

Therefore, the transfer of shares in a foreign company by a foreign seller, where the of shares of the foreign company derive their value, directly or indirectly, substantially from the shares of an Indian company, would be subject to tax under the Indian tax laws. These provisions do not override the provisions of any DTAA which India has entered into with various countries. Hence, if the foreign seller is from a jurisdiction with whom India has a beneficial arrangement, then capital gains earned by such non-residents may not be chargeable to tax in India, in view of the respective DTAA between India and the country of the foreign seller.

The share or interest of the foreign entity shall be deemed to derive its value substantially from assets (whether tangible or intangible) located in India, if the value of such Indian assets exceeds INR 100 million, and represents at least 50 per cent of the value of all assets owned by the foreign entity. The term "value" means the fair market value of the asset as on the specified date, which would be determined in the manner prescribed. In a case where all the assets owned, directly or indirectly, by the foreign entity are not located in India, capital gains will apply only on such part of the income as is reasonably attributable to the Indian assets.

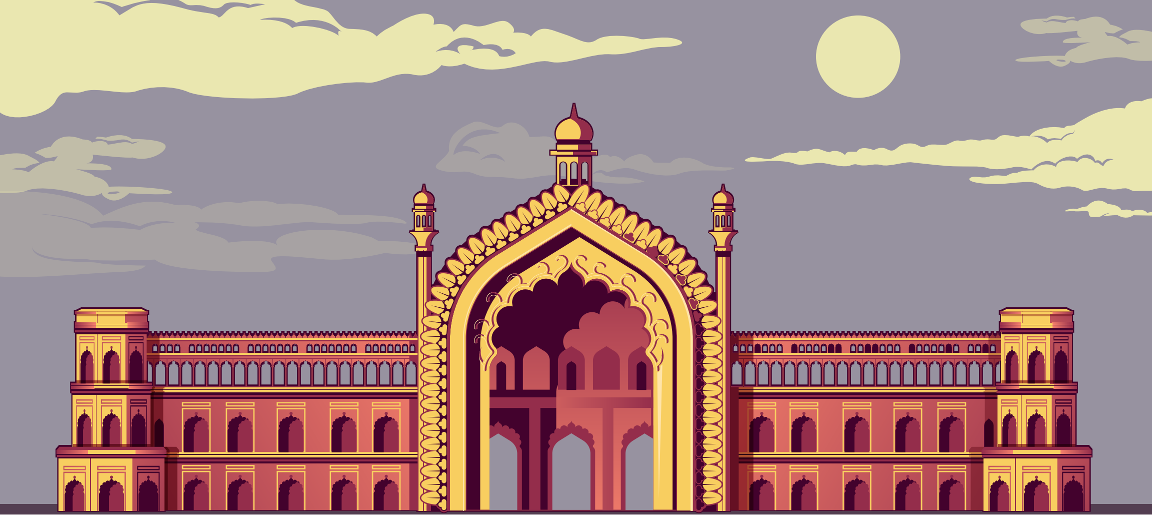
It is important to note that the provisions of indirect transfers are not applicable to small non-resident shareholders transferring their shares/ interest in a foreign entity, if such shareholders, along with their associated enterprises, do not hold the right of management or control of more than 5 per cent voting power or share capital in the entity holding Indian assets, either directly or through the intermediary entity(ies), to fall within the ambit of exemption.

Further, overseas amalgamations and demergers are excluded from the ambit of indirect transfers so long as such transactions are exempt from taxes on such amalgamation and demerger, in their respective home jurisdictions. In case of an overseas amalgamation, at least 25 per cent of the shareholders of the amalgamating foreign company should continue to remain shareholders of the amalgamated foreign company to be tax-exempt. In case of an overseas demerger, shareholders holding at least three-fourth of the value of the shares of the demerged foreign company should continue to remain shareholders of the resulting company to be tax-exempt.

What are the tax implications of share transfer in a foreign company by a foreign seller to a foreign buyer, where the foreign company directly or indirectly owns shares in an Indian company?

As per the DTAAs signed by India, only the DTAA with the Netherlands provides for a beneficial framework for capital gains taxation that has not been revised. As per the DTAA with the Netherlands, any income earned by a tax resident of the Netherlands shall not be chargeable to tax in India if, subject to the fulfilment of certain conditions, (i) the Dutch tax resident holds less than 10 per cent shares in the Indian company whose shares are being transferred; or (ii) the shares of the Indian company are being transferred to another non-resident in India.

It may be noted that in the last couple of years, the other DTAAs that provided tax benefits to tax residents of such jurisdictions like Singapore, Mauritius and Cyprus, have been renegotiated and the respective tax residents are no longer entitled to claim such tax benefits.



Whether royalties and/ or fees for technical services received by a foreign company are liable to tax in India?

Yes, royalties and/ or fees for technical services received by a foreign company (not having a permanent establishment in India) are liable to tax in India at 10 per cent. However, on account of surcharge and education cess, the ETR would be 10.92 per cent for income exceeding INR 100 million. This tax is required to be withheld by the payer at the time of credit or payment, whichever is earlier. This rate shall be subject to any concessional rate available under any DTAA between India and the country of residence of the non-resident.

Whether interest payable by Indian companies on foreign currency borrowings from a non-resident is liable to tax in India?

Yes, interest payable by Indian companies on foreign currency borrowings from a non-resident is liable to tax in India as follows:

i. Interest on foreign currency loans, made before July 1, 2023, is taxable at a concessional rate of 5 per cent (plus applicable surcharge and health and education cess),[44] subject to the fulfilment of certain conditions. If made after July 1, 2023, the interest shall be taxable at 20 per cent, subject to the fulfilment of certain conditions or the rate of 35 per cent in other cases.

[44] The tax rates mentioned in this section shall be subject to applicable surcharge and health and education cess.

ii. Interest on foreign currency long-term bonds or Indian Rupee denominated bonds listed in a recognised stock exchange in an IFSC, made before July 1, 2023, is taxable at a concessional rate of 5 per cent, subject to the fulfillment of certain conditions. If made after July 1, 2023, 9 per cent interest shall be taxable, subject to the fulfilment of certain conditions.

iii. Interest on rupee-denominated bonds, government securities or municipal debt securities issued before July 1, 2023, is taxable at a concessional rate of 5 per cent, subject to the fulfilment of certain conditions. If made after July 1, 2023, interest shall be taxable at 10 per cent for Category III AIFs located in the IFSC, subject to the fulfilment of certain conditions and at 20 per cent for foreign institutional investors.

The above rates are subject to any concessional rate available under any DTAA between India and the country of residence of the non-resident.

Are there any tax incentives for setting up new businesses in India?

There are various tax incentive schemes available for setting up new businesses in India. Some business activities are entitled to tax holidays from income tax (on the fulfilment of certain conditions), including:

i. Setting up of offshore banking units in an SEZ.

ii. Setting up and operating a cold chain facility, warehousing facility for agricultural produce, laying and operating a cross-country natural gas or crude or petroleum oil pipeline network.

iii. Deduction of 100 per cent of profits for five consecutive assessment years, beginning with the relevant assessment year in which business for collecting and processing or treating bio-degradable waste for generating power or producing bio- fertilisers commenced.

iv. Deduction of 100 per cent of specified income for 10 years (at the option of the unit) out of 15, beginning with the year in which permission under the Banking Regulation Act, permission/ registration under the SEBI Act, or permission/ registration under the International Financial Services Centres Authority Act, 2019, was obtained for setting up a unit in an IFSC.

v. Setting up eligible start-ups engaged in innovation, development or improvement of products or processes or services or a scalable business model, with high potential for employment generation or wealth creation, between April 1, 2016, to April 1, 2025.

What are the regulations related to transfer pricing in India in relation to International Taxation?

Cross-border transactions with 'associated enterprises' (**AE**) fall within the ambit of Indian transfer pricing regulations and shall be undertaken having regard to the arm's length price (**ALP**).

ALP denotes a price that is applied or proposed to be applied in a transaction between persons other than AE, in uncontrolled conditions. Similarly, whether or not the transacting parties are treated as AE, shall have to be determined based on prescribed criteria, including equity participation, control, economic dependence, etc. In case any international transaction is undertaken by the taxpayer with its AE without any regard to ALP, then revenue authorities are empowered to make appropriate adjustments to the income/ expenses declared by the taxpayer.

Transfer pricing regulations require maintenance of prescribed documentation on a contemporaneous basis by the person who has entered into international transaction(s) with its AE. A transfer pricing report from an independent chartered accountant, providing the details of the transactions with the AE and the ALP, also has to be filed with the revenue authorities within the prescribed time limit. Failure to maintain the documentation or provide prescribed information to the revenue authorities or obtain the transfer pricing report can attract penalties.

Safe Harbour Rules

To reduce the increasing number of transfer pricing audits and prolonged disputes, safe harbour rules were introduced for determination of ALP in respect of specific international transactions. The ALP determined basis the safe harbour rules would be accepted by the revenue authorities. The specific international transactions include the following:

i. provision of software development services and information technology enabled services;

ii. provision of knowledge process outsourcing services;

iii. intra-group loan to WOS;

iv. provision of corporate guarantee to WOS;

v. provision of contract R&D services, wholly or partly relating to software development or generic pharmaceutical drugs;

> "In case any international transaction is undertaken by the taxpayer with its AE without any regard to ALP, then revenue authorities are empowered to make appropriate adjustments."

vi. manufacture and export of core auto components;

vii. manufacture and export of non-core auto components; and

viii. low value adding intra group services.

Are transfer pricing provisions applicable to domestic transactions?

Yes, transfer pricing provisions are applicable to specified domestic transactions between resident taxpayers/ units of taxpayers, where the aggregate value of such transactions exceed INR 200 million. The specified domestic transactions, include:

i. inter-unit transfer of goods or services between two undertakings, wherein one of the undertaking is enjoying a tax holiday; and

ii. more than ordinary profits are being generated in the course of business transacted between two parties that are closely connected, where one is enjoying a tax holiday.

Any income or allowance for any expenditure in relation to specified domestic transactions is to be computed having regard to ALP.

Taxpayers transacting such specified domestic transactions need to maintain contemporaneous documentation. A transfer pricing report from a chartered accountant, providing the dealings with the AE and the ALP, has to be filed with the revenue authorities within the prescribed time limit.

Is there a tax on dividend?

Dividend is taxed in the hands of the investor. Domestic companies declaring dividends are required to withhold taxes before distributing it to domestic shareholders at 10 per cent, if the aggregate amount of dividend distributed or paid during the financial year to a shareholder exceeds INR 5,000.

In case of non-resident shareholders, the withholding tax shall be deducted at the rate prescribed under the Income Tax Act or as per the rate prescribed under the relevant DTAA, whichever is more beneficial.

Is GAAR currently provided under the Income Tax laws?

Currently, the Income Tax Act provides specific anti-avoidance rules, like transfer pricing, dividend stripping, etc. In addition to this, GAAR has also been introduced under the Income Tax Act.

GAAR applies to "impermissible avoidance arrangements", which is defined as an arrangement whose main purpose is to obtain a tax benefit and which satisfies at least one of the four additional tests:

i. creates rights or obligations that are not ordinarily created between (previous) dealings at arm's length;

ii. results, directly or indirectly, in misuse or abuse of provisions of the Income Tax Act;

iii. lacks commercial substance or is deemed to lack commercial substance, in whole or in part; or

iv. is entered into or carried out other than for bonafide purposes.

In case GAAR is invoked, the consequences could be severe and could include:[45]

i. denial of DTAA benefits;

ii. disregarding, combining or re-characterising steps in the transactions;

iii. disregarding accommodating parties;

iv. deeming persons who are connected persons in relation to each other to be one and the same person;

v. reallocating income or expenditure;

vi. revising the place of residence of any party or situs of an asset;

vii. looking through corporate structure;

viii. treating arrangement as if they had not been entered into;

ix. re-characterising equity or debt or accrual of receipts or expenditure, etc.

Both residents and non-residents are allowed to approach the AAR to determine the applicability of GAAR.

[45] The list mentioned here is illustrative in nature

Further, it has been provided that GAAR shall not apply to:

i. an arrangement where the tax benefit arising to all parties to the arrangement does not exceed INR 30 million in aggregate;

ii. FIIs who have not taken the benefit of a DTAA;

iii. a non-resident person who has made investment by way of offshore derivative instruments or otherwise, directly or indirectly, in an FII; and

iv. any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from 'transfer' of investments made before April 1, 2017. Without prejudice to this, GAAR provisions shall apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from an arrangement on or after April 1, 2017.

Whether India has a mechanism to determine taxability or otherwise of a transaction in advance?

Yes, India does have a mechanism to determine taxability or otherwise of a transaction in advance, especially for non-resident taxpayers, to facilitate proper planning and avoid any future disputes. The various mechanisms are listed below:

Board for Advance Rulings (BAR)

A non-resident undertaking a transaction in India, or a resident undertaking a transaction with a non-resident or a resident undertaking one or more transaction(s) of value INR 1 billion or more can seek an advance ruling to determine the taxability or to obtain certainty on the tax liability of such transactions undertaken or proposed to be undertaken. Such an advance ruling is issued by an independent body called the Boards for Advance Rulings or BAR constituted by the CBDT. The BAR shall consist of two members being senior officers not below the rank of Chief Commissioner of Income Tax. The advance rulings of the BAR shall not be binding on the applicant or the revenue authorities and if aggrieved, the applicant or the revenue authorities may appeal against the ruling of the BAR before the High Court.

APA

The APA programme allows the taxpayer to enter into an agreement with the revenue authorities on an appropriate transfer pricing methodology for a set of international transactions over a fixed future time period.

The salient features of the provisions are as follows:

i. APAs will specify the determination of the ALP or the manner in which the price is to be determined. The ALP shall be determined basis the prescribed methods or any other non-prescribed method;

ii. APA is valid for a maximum of five consecutive years, unless there is a change in the provisions of law or the facts having a bearing on the transaction;

iii. APA would be binding on the taxpayer and the revenue authorities in respect of the concerned international transaction; and

iv. APA roll back is also available for the roll back years, and a 'roll back year' has been defined to mean any previous year falling within the period of four previous years, preceding the first previous year covered in the APA (i.e. the regular APA).

What are the ways of resolving disputes with revenue authorities in India?

Normal Dispute Resolution

i. Appeal before the CIT(A)

The company may lodge an appeal with the CIT(A) within 30 days from the date of receipt of the order from the tax officer.

ii. Appeal before the ITAT

The company may appeal against the order of the CIT(A) to the ITAT within 60 days from the date of receipt of the CIT(A)'s order. The ITAT is the last fact-finding appellate authority.

iii. Appeal before the HC

The taxpayer may further appeal to the High Court of the concerned state within 120 days of the ITAT order on a question of law.

iv. Appeal before the SC

This is India's apex authority. If the taxpayer is aggrieved by the High Court order, he may lodge an appeal to the Supreme Court of India within 90 days of the High Court order.

Alternate Dispute Resolution Panel (DRP)

To expedite the resolution of disputes, an alternate dispute resolution mechanism, known as the DRP, is also prescribed under Indian tax laws. Such an alternate scheme of dispute resolution is applicable to foreign companies or entities who have been required to pay tax on adjustments done on account of transfer pricing adjustments. Directions issued by the DRP are binding on the Assessing Officer. However, DRP mechanism is not available to any assessment or reassessment order passed by an Assessing Officer with prior approval of the Principal Commissioner or Commissioner.

Mutual Agreement Procedure (MAP)

Under a MAP, India and competent authorities of the concerned treaty country negotiate until they reach an agreement acceptable to both the authorities. To facilitate MAP, the Government of India has specified rules that state that any resident taxpayer, aggrieved by the actions of a foreign tax authority, can apply to the prescribed competent authority in India to seek relief under MAP.

To facilitate it further, India has entered into MOUs with competent authorities of the US, UK and some other countries. The main advantage of these MOUs is that revenue authorities may suspend tax collection in India (provided appropriate bank guarantees are provided) during the pendency of a MAP negotiation involving transactions with associated enterprises in the US, UK, Denmark, etc.

Another aspect to be considered is the time frame involved in MAP. To address this, the MOUs with the US and UK provide a maximum period of two years to bring MAP to a close. However, at a practical level, it has been observed that such issues have been pending for a long time due to lack of coordination between the MAP authorities of both the countries as well as the taxpayer.

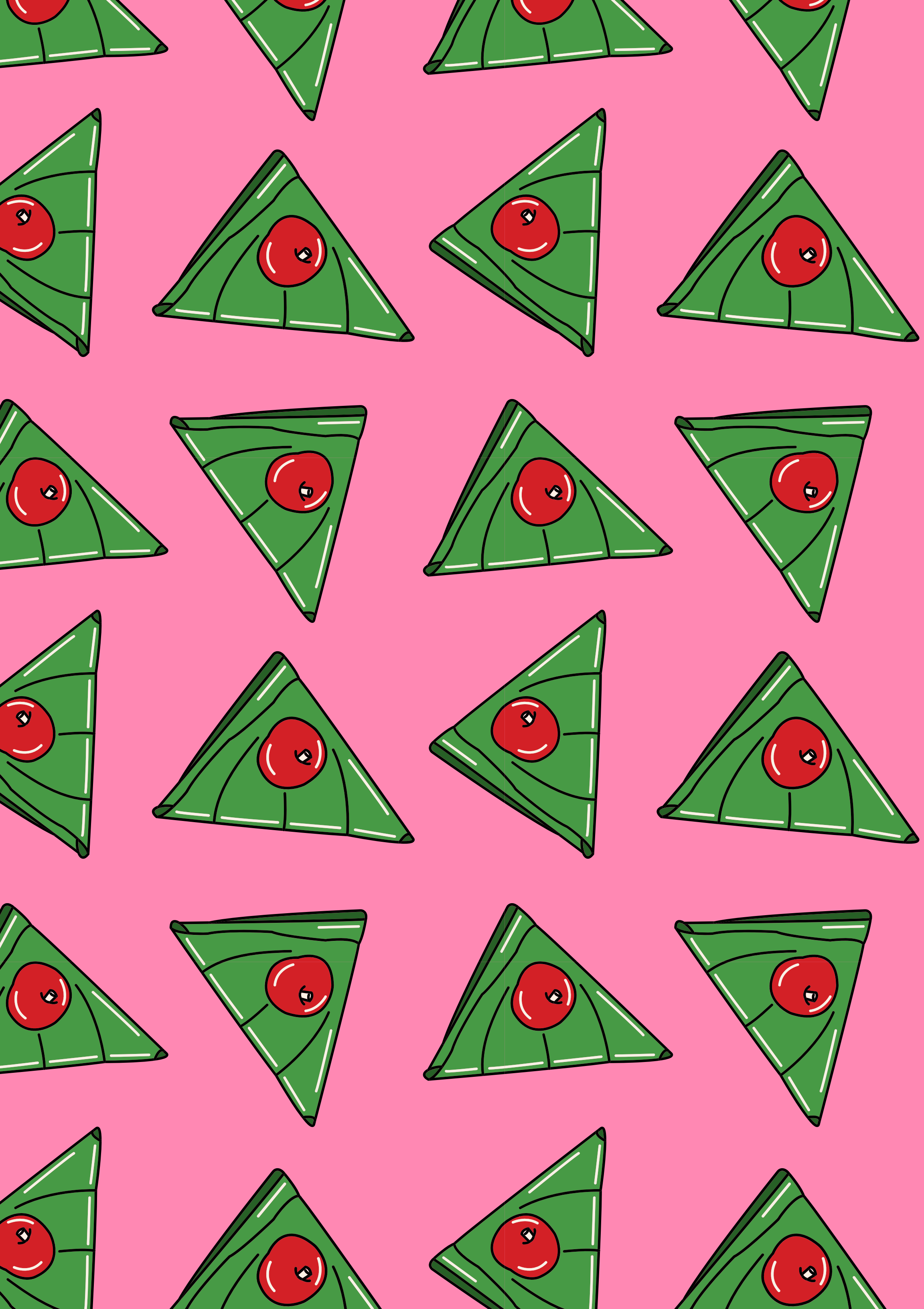
Settlement Commission

Settlement commission is a quasi-judicial body before which taxpayers can apply and disclose additional income that has not been disclosed to the revenue authorities, provided the tax on undisclosed amount exceeds a specified amount. The Settlement Commission, *inter alia*, has the power to grant immunity from penalty and prosecution. The taxpayer must pay the full amount of tax and interest on additional income disclosed before filing the application.

The Settlement Commission decides upon the admissibility of the application. In case of admitted applications, it carries out the process of settlement in a time bound manner by giving an opportunity to both parties. At present, the benefit of the settlement mechanism can be availed by a taxpayer only once in a lifetime.

APA

APA can be entered into by the taxpayer with the Revenue authorities to avoid disputes in the future (discussed in above).



Section B: Indirect Taxes

What are the laws relating to indirect taxes in India?

At present, the Goods and Services Tax (**GST**) and customs duty are the only two pre-eminent indirect taxes levied under the Indian law. Following are the legislations governing indirect taxes in India:

a. ***Customs Duty***: Customs duty is imposed on the import of goods into and export of goods from India and is levied in terms of the Customs Act, 1962, and the Customs Tariff Act, 1975, on the transaction value of goods unless otherwise specified.The effective rate of customs duty on import of most non-agricultural products is 30.98%.

b. ***Goods and Services Tax***: India has adopted a dual GST model, with effect from July 01, 2017. It is a unified system of taxation, which has streamlined the country's indirect tax regime, by subsuming most of the erstwhile indirect taxes like central excise duty, service tax, value added tax/ sales tax, entry tax, etc., into a single regime.

In terms of GST legislations, intra-state supplies of goods and/ or services are subject to simultaneous levy of Central GST and State GST. Inter-state supply of goods and/ or services, including imports are eligible to Integrated GST.

The GST rates notified for supply of goods or services are categorised under broad rate slabs of 5 per cent, 12 per cent, 18 per cent and 28 per cent.

The GST legislation covers all goods and services under its ambit, except petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption.

c. ***Excise Duty***: Although GST has subsumed the excise duty regime for most products in India, it is still imposed on manufacture of goods specified under Schedule IV to the Central Excise Act, 1944. Such goods are in the nature of petroleum and tobacco products. The power to levy excise duty primarily remains with the Central Government, though the power to levy excise duty on alcoholic products has been conferred upon state governments.

d. ***Sales Tax***: Sales tax is levied on sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption. In India, sales tax is levied both at the Central and State level, as discussed below:

> **“It is a unified system of taxation, which has streamlined the country’s indirect tax regime.”**

e. **Value Added Tax**

VAT is levied by states on intra-state sale of goods. Every state has enacted its own VAT legislation to levy tax on such sales. VAT rates vary from one state to another.

f. **Central Sales Tax**

CST is levied on inter-state sales. The power to levy CST is conferred on the Central Government. The levy of CST is governed by the CST Act. The rate of CST is 2 per cent, against issue of Form C thereunder.

g. **Professional Tax**

Professional tax or employment tax is levied in certain states on persons engaged in any profession, trade, calling or employment. The rate slabs of professional tax vary from state to state. Professional tax is charged on the income of individuals, profits on business or gains from vocation.

Whether royalties and/ or fees for technical services received by a foreign company are liable to any indirect tax levies in India?

When a technical service is rendered by a foreign company to a company in India, then the fee payable by the company in India would be subject to GST, being import of service. GST on such import would be payable under reverse charge mechanism by the recipient in India.

Are there any indirect tax incentives for setting up new businesses in India?

There are various indirect tax incentives for setting up new businesses in India, which include the following:

Foreign Trade Policy, 2023

FTP provides for a suite of export promotion schemes such as the Advance Authorization Scheme, the Export Promotion Capital Goods Scheme, Duty Remission Scheme, the Duty-Free Import Authorization Scheme, Duty Drawback Scheme, Deemed Export Benefits, etc.

In addition, there are various incentive schemes notified or to be notified for making certain districts as export hubs, targeting specific manufacturing sectors such as GI products, agricultural clusters, and toy clusters, etc.

Customs and GST

The benefits of the abovementioned schemes are provided through notifications/ circulars issued under the applicable customs and GST laws. In addition, the Central Government has the power to notify exemptions/ concessions in relation to specific industry, specific purpose or a specific area.

Further, India has also signed Free Trade Agreements (**FTA**) with various countries for exemptions from import duty of various specified goods.

SEZ

Subject to conditions prescribed in this regard, developers of an SEZ and units established in SEZs are entitled to various indirect tax benefits, *inter alia* including:

i. Exemption from payment of import duties on imported goods;

ii. Drawback or such other benefits as may be admissible from time to time on goods procured or services provided from the DTA into a SEZ or unit; and

iii. Upfront exemption/ refund of GST paid on procurement of goods and services, if such goods or services are meant to carry on authorised operations.

Export Oriented Unit (EOU) Scheme

The following indirect tax benefits are available to a unit registered under the EOU Scheme:

i. Basic customs duty exemption on imports of goods, including capital goods and second hand goods, subject to fulfilment of prescribed procedural conditions;

ii. GST and compensation cess exemption on import of goods, including capital goods and second hand goods; and

iii. Upfront exemption/ refund of GST paid on domestic procurement of goods by EOU units, subject to fulfilment of procedural compliances prescribed in this regard.

Does India have a mechanism to determine indirect tax implications of a transaction in advance?

Yes, the legislations governing levy of customs duty and GST provide for a scheme of advance ruling where non-residents/ foreign investors proposing to undertake business in India may approach the authorities under the respective laws for ascertaining their tax liability in the country. The said facility also allows non-resident applicants to be represented by an authorised representative before the authorities.

The scheme of advance rulings under the customs laws allows the following categories of applicants to seek advance ruling:

i. any person holding a valid Importer-Exporter Code;

ii. exporting any goods to India; or

iii. having a justifiable cause to the satisfaction of the authority.

15

Dispute Resolution

What is the judicial set up in India?

An elaborate and extensive judicial and quasi-judicial system exists in India, with courts being the judicial authorities, and regulators such as the SEBI (for the securities market) and tribunals such as the NCLT (for company and bankruptcy matters) being quasi-judicial authorities. A separate civil and criminal system exists in each state, with the High Court being the highest court for each state. Appeals, whether statutory or discretionary, from the High Courts lie with the Supreme Court of India, which is the apex judicial authority in the country.

Do Indian courts recognise choice of law and jurisdiction clauses?

Yes, Indian courts generally recognise choice of law and jurisdiction clauses. However, it must be noted that Indian courts can invalidate choice of law clauses if they perceive the same to be against the "public policy" of India. If a foreign law is chosen only to evade mandatory provisions of Indian law, it may be invalidated on grounds of being opposed to public policy.

Before 2021, Indian nationals entering into contracts amongst themselves were prohibited from excluding the application of Indian law to their contract. This rule also applied to wholly owned subsidiaries of foreign companies incorporated in India. However, the Supreme Court in 2021,[46] settled the law on whether two Indian companies, including foreign companies with Indian subsidiaries, can choose foreign arbitral seats. The Supreme Court held that there was nothing in the public policy of India that limited party autonomy in the selection of a foreign arbitral seat by Indian parties. The Supreme Court observed that:

"77. A reading of the aforesaid judgments leads to the conclusion that freedom of contract needs to be balanced with clear and undeniable harm to the public, even if the facts of a particular case do not fall within the crystallised principles enumerated in well-established "heads" of public policy. The question that then arises is whether there is anything in the public policy of India, as so understood, which interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India.

91. Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals, as has been held hereinabove."

[46] PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion Pvt. Ltd., (2021) 7 SCC 1 (Paras 77 and 89-91).

Thus, Indian entities now have the liberty to choose a foreign arbitral seat in contracts with other Indian parties.

Further, parties contracting with Indian companies under foreign law, must note that if an action is brought under such contract to an Indian court, foreign law will have to be pleaded like an ordinary fact and proved by experts.

With respect to choice of jurisdiction clauses, it must be noted that parties, by agreement, cannot confer jurisdiction on a court that otherwise does not have jurisdiction over the subject matter. Indian law differs from English law on this aspect, as an Indian court cannot assume jurisdiction merely based on a contractual stipulation between the parties.

However, if multiple courts have jurisdiction over the subject matter, an agreement between the parties to submit their disputes to one such court shall be valid, as long as it does not lead to absolute ouster of the jurisdiction of the civil courts. It has been held by Indian courts on several occasions that if jurisdiction has been conferred on a foreign court alone, Indian statutes and the jurisdiction of Indian courts shall, to that extent, be inapplicable. However, an Indian court may refuse to enforce a stipulation on the choice of forum, if it believes that such choice is oppressive, unfair, or inequitable and does not bear any real or substantial connection to the subject matter of the dispute.

As far as court proceedings arising out of domestic arbitral proceedings are concerned, the law laid down by the Supreme Court of India suggests that the courts that exercise jurisdiction over seat/venue, shall have exclusive supervisory jurisdiction over arbitral proceedings, irrespective of any arrangement between the parties.

How are foreign judgments enforced in India?

A judgment rendered by a court outside India is conclusive on any matter directly adjudicated upon, except:

i. where the judgment has not been pronounced by a court of competent jurisdiction;

ii. where the judgment has not been given on the merits of the case;

iii. where the judgment appears, on the face of the proceedings, to be founded on an incorrect view of international law or where there has been refusal to recognise the law of India in such cases where Indian law is applicable;

iv. where the proceedings in which the judgment was obtained are opposed to natural justice;

v. where the judgment has been obtained by fraud; or

vi. where the judgment sustains a claim founded on a breach of any law in force in India.

> **Parties, by agreement, cannot confer jurisdiction on a court that otherwise does not have jurisdiction over the subject matter.**

It may be noted that Indian law recognises the enforcement of only those foreign judgments that conclusively determine the rights of the parties, i.e., those which amount to a decree within the meaning of the Code of Civil Procedure. There is presently no provision under Indian law for enforcing a foreign court's decision granting interim relief.

Where a foreign judgment has been rendered by a superior court in any country or territory outside India, which the Government of India has by notification declared to be a reciprocating territory, it may be enforced in India by proceedings for execution as if the judgment had been rendered by the relevant court in India. Various countries, including the United Kingdom, Hong Kong, United Arab Emirates, Canada, and the Republic of Singapore, have been declared by the Government of India to be reciprocating territories, except (amongst others) the United States of America. According to Section 44A(1) and (2) of the Code of Civil Procedure, judgments issued by reciprocating territories can be enforced by presenting a certified copy of the judgment from the superior court of the reciprocating territory. Additionally, a certificate from the superior court stating the extent, if any, to which the judgment has been satisfied or adjusted must be provided.

A court judgment from a jurisdiction that is not a reciprocating territory may be enforced only by instituting a new suit in India to enforce the foreign judgment and not through execution proceedings. The suit must be brought in India within three years from the date of the judgment in the same manner as any other suit filed to enforce a civil right in India.

What are the alternative methods of dispute resolution available in India?

Alternative methods of dispute resolution may be adopted by parties to a contract. These may include resolution of disputes through mediation, conciliation, or arbitration.

The Arbitration and Conciliation Act, which is based on the UNCITRAL model law, provides a framework for the arbitration and conciliation process in India. This legislation aligns Indian law with international principles on arbitration and acknowledges the recognition of foreign arbitral awards.

How are arbitral awards enforced in India?

Where the seat of arbitration is in India, the arbitral award is a domestic award and is directly enforceable in the same manner as a decree of a court, once the time for making an application under the Arbitration and Conciliation Act to aside the award (three months and an additional 30 days at the discretion of the court) has expired, unless the award is stayed by the court. Thus, only an execution proceeding needs to be initiated for the enforcement of such awards. The mere filing of an application to set aside an award does not render it unenforceable, unless the court stays its operation. This may be subject to such conditions as the court may deem fit, including depositing the awarded amount (or part thereof) in court.

Foreign awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**NY Convention**) and under the Geneva Protocol on Arbitration Clauses (**Geneva Convention**) can also be enforced in India by Indian courts once they have attained finality and meet the conditions for enforceability under Indian law.

However, it may be noted that only foreign awards made in territories that have been specifically notified by the Central Government as convention countries under the NY Convention/Geneva Convention are enforceable. So far, the Central Government has notified around 51 countries as convention countries for the purposes of enforcement of awards under the NY Convention or Geneva Convention (out of over 150 countries that are signatories to the NY Convention).

All other foreign awards, not made in a convention country as provided above, will be enforceable only through the institution of a separate civil suit before an Indian court. While the suit may be filed basis the foreign award, such award will have only persuasive value and will not be binding on the Indian court.

What are the grounds on which an arbitration award can be challenged in courts in India?

Prior to its amendment in 2015, the Arbitration and Conciliation Act provided the following grounds on which a domestic arbitration award could be challenged in the courts:

i. a party was under some incapacity;

ii. the arbitration agreement was invalid under the law chosen by the parties or, if no law was specified, according to the current applicable law;

iii. the applicant established that it did not receive proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

iv. the award dealt with a dispute that was neither anticipated nor included within the scope of the original submission to arbitration;

v. the award contained decisions on matters beyond the scope of the submission to arbitration;

vi. composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of the arbitration agreement or in the absence of such agreement, was not in accordance with Part I of the Arbitration and Conciliation Act;

vii. if the court found that the subject matter of the dispute was not capable of settlement by arbitration; or

viii. the arbitral award was in conflict with the public policy of India.

The Arbitration and Conciliation Act, before its amendment in 2015, provided that an award was in conflict with the public policy inter alia if the making of the award was induced or affected by fraud or corruption. The scope of public policy as a ground for challenge to an arbitral award was expanded pursuant to judicial dicta, and has been held by Indian courts to include the following:

i. incapacity of the party;

ii. fundamental policy of Indian law, i.e., (a) compliance with statutes and judicial precedents, (b) adoption of a judicial approach – which demands a decision to be fair, reasonable and objective, (c) compliance with the principles of natural justice, and (d) a decision which is not perverse or irrational, such that a reasonable person would have arrived at it;

iii. interest of India;

iv. justice or morality; and

v. patent illegality i.e., (a) contravention of the substantive law of India, (b) contravention of the Arbitration and Conciliation Act, and (c) contravention of the terms of the contract.

The scope of public policy was circumscribed by way of an amendment to the Arbitration and Conciliation Act in 2015, and broadly limited to the following:

i. where the making of the award was induced or affected by fraud or corruption;

ii. where the award is in contravention with the fundamental policy of Indian law; and

iii. where the award is in conflict with the most basic notions of morality or justice.

An additional ground of challenge, namely patent illegality that appears on the face of the award, was introduced. However, it was limited to awards arising out of domestic arbitrations (where both parties are Indian). It has also been clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. The Supreme Court of India has also interpreted patent illegality under the circumscribed scope to include only (i) contravention of the Arbitration and Conciliation Act, (ii) interpretation of the contract which no reasonable person would have arrived at, or where the arbitrator commits a jurisdictional error, and (iii) perversity, i.e., a finding based on no evidence or on documents taken behind the back of parties, or an award, which ignores vital evidence.

The Supreme Court of India has interpreted "fundamental policy of Indian law" under this circumscribed scope to include only (i) violation of statues that are enacted in national economic interest, (ii) disregarding orders or binding judgements of superior courts in India, and (iii) violation of principles of natural justice, as being contrary to the fundamental policy of Indian law. The 2015 amendment clarifies that assessment of contravention with the fundamental policy of Indian law shall not entail a review of the merits of the dispute.

The Supreme Court of India, in 2018, held the 2015 amendments to the Arbitration and Conciliation Act to be applicable to all applications for setting aside an award, which were pending on the date of commencement of the 2015 amendment, i.e., October 23, 2015, irrespective of when the arbitral proceedings commenced. The Arbitration and Conciliation Act was further amended in 2019. It stated that the 2015 amendments will not apply to arbitral proceedings that commenced prior to October 23, 2015, and court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such court proceedings were filed prior to or after October 23, 2015. The Supreme Court of India, in 2019,[47] struck down the provisions of the 2019 amendment as being unconstitutional, and held that non-bifurcation of court proceedings and arbitration proceedings with reference to October 23, 2015, was manifestly arbitrary.

Following the decision of the Supreme Court of India on the 2019 amendment, the circumscribed scope of public policy applies to all applications pending on the date of commencement of the 2015 amendment, i.e., October 23, 2015, irrespective of when the arbitral proceedings commenced.

[47] Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors., (2020) 17 SCC 324.

Glossary

Abbreviations	Meaning
1993 Scheme	Issue of Foreign Currency Convertible Bonds and Ordinary Shares Scheme, 1993
2020 MHA Notification	Notification dated August 13, 2020 issued by the Ministry of Home Affairs
AAEC	Appreciable Adverse Effect on Competition
AAR	Authority for Advance Ruling
AD	Authorised Dealer
ADRs	American Depository Receipts
AE	Associated Enterprises
ALP	Arm's Length Price
APA	Advance Pricing Agreement
Approval Route	Foreign investment which requires approval of the concerned administrative ministries/ departments, DPIIT, the Reserve Bank or such other regulator as may be required.
Arbitration and Conciliation Act	Arbitration and Conciliation Act, 1996
Automatic Route	Foreign investment which does not require approval of the concerned administrative ministries/ departments and/or DPIIT and/or the Reserve Bank
Banking Regulation Act	Banking Regulation Act, 1949
BAR	Board for Advance Rulings

Glossary

Abbreviations	Meaning
CCI	Competition Commission of India
CIRP	Corporate Insolvency Resolution Process under the Insolvency Code
CIT (A)	Commissioner of Income Tax (Appeals)
Class of Creditors	Financial creditors who form part of a "class of creditors" – such as debenture holders or holders of other debt securities, deposit holders, or home-buyers in the case of real estate companies,
Combination Regulations	CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended from time to time.
Companies Act	Companies Act, 2013
Competition Act	Competition Act, 2002 as amended by Competition (Amendment) Act, 2007
Competition Amendment Act	Competition (Amendment) Act, 2023
Contract Labour Act	The Contract Labour (Regulation and Abolition Act), 1970
Corporate Debtor	Indian companies (excluding financial service providers, unless otherwise notified by the Central Government[1]) and limited liability partnerships to whom Insolvency Code applies
CSR	Corporate Social Responsibility
CST	Central Sales Tax

[1] The Ministry of Corporate Affairs vide Gazette Notification bearing S.O. 4139(E) dated November 18, 2019, notified the NBFCs (including housing finance companies) with asset size of INR 5 billion or more as per the last audited balance sheet as the category of financial service provider against whose insolvency resolution and liquidation proceedings shall be undertaken in accordance with the provisions of the IBC.

Glossary

Abbreviations	Meaning
DDP	Designated Depository Participant
DDPA	Digital Data Protection Act, 2023
Designated Depository	Designated depository participant as defined under SEBI (Foreign Portfolio Investors) Regulations 2014
DIN	Director Identification Number
DIPP	Department of Industrial Policy and Promotion, Government of India
DPIIT	Department of Promotion of Industry and International Trade
DR	Depository Receipts
DRP	Dispute Resolution Panel
Drugs and Cosmetic Act	Drugs and Cosmetics Act, 1940
DTA	Domestic Tariff Area
DTAA	Double Taxation Avoidance Agreement
DVT	Deal Value Threshold
ECB	External Commercial Borrowings
ECB Guidelines/ECB Policy	Master Circular on External Commercial Borrowings and Trade Credits dated July 1, 2011, as updated and amended from time to time.
Employees' Compensation Act	Employees' Compensation Act, 1923

Glossary

Abbreviations	Meaning
Employees' Provident Funds	Employees' Provident Funds and and Miscellaneous Provisions Miscellaneous Provisions Act, 1952 Act
Employees' State Insurance Act	Employees' State Insurance Act, 1948
EPFO	Employees Provident Fund Organization
EOU	Export Oriented Unit
ESIC	Employees State Insurance Corporation
Equal Remuneration Act	Equal Remuneration Act, 1976
Exemption Rules	Small Target Exemption, the Competition (Criteria for exemption of Combinations) Rules, 2024
Factories Act	Factories Act, 1976
Fatal Accidents Act	Fatal Accidents Act, 1855
FCCB	Foreign Currency Convertible Bond
FDI	Foreign Direct Investment
FDI Policy	Foreign Direct Investment Policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry and the Government of India
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIRMS	Foreign Investment Reporting and Management System

Glossary

Abbreviations	Meaning
Foreign Trade Policy	Foreign Trade Policy 2023
FPI	Foreign Portfolio Investor
FTA	Free Trade Agreements
FTM	Fast Track Merger
FVCI	Foreign Venture Capital Investor
GAAR	General Anti Avoidance Rules
GDRs	Global Depository Receipts
GST	Goods and Service Tax
GSTIN	Goods and Service Tax Identification Number
Human Immunodeficiency Virus Act	Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017
ICD	Inter Corporate Deposit
IGP	Innovators Growth Platform
IHC	Investment Holding Company
Income Tax Act	Income Tax Act, 1961
Indian Contract Act	Indian Contract Act, 1872

Glossary

Abbreviations	Meaning
Indian Entity	Under the OI Regulations, shall mean: i. any company, as defined under the Companies Act, 2013; ii. any body corporate incorporated by any law in force; iii. any limited liability partnership incorporated under the LLP Act; iv. any partnership firm registered under the Indian Partnership Act, 1932;
Indian Telegraph Act	Indian Telegraph Act, 1885
Industrial Disputes Act	Industrial Disputes Act, 1947
Industrial Employment (Standing Orders) Act	Industrial Employment (Standing Orders) Act, 1946
INR	Indian Rupee
Insolvency Code	The Insolvency and Bankruptcy Code, 2016
Insurance Act	Insurance Act, 1938
Insurance Regulatory And Development Authority Act	Insurance Regulatory And Development Authority Act, 1999
IPO	Initial Public Offering
IRDAI	Insurance Regulatory and Development Authority
IRDA	Insurance Regulatory and Development Authority

Glossary

Abbreviations	Meaning
IRP	Interim Resolution Professional
ITAT	Income Tax Appellate Tribural
IVCU	Indian Venture Capital Undertaking
JV	Joint Venture
Liberalised Remittance Scheme /LRS	Liberalised Remittance Scheme for resident individuals issued by Reserve Bank vide Master Directions updated as of September 06, 2024
Listing Agreement	An agreement entered into by a listed company with the relevant stock exchanges for the listing of its shares
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
LLP Agreement	Limited Liability Partnership Agreement
M&A	Mergers & Acquisitions
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
Maternity Benefit/s	Benefits under the Maternity Benefit Act
Maternity Benefit Act	Maternity Benefit Act, 1961
MCA	Ministry of Corporate Affairs

Glossary

Abbreviations	Meaning
MHA	Ministry of Home Affairs
Minimum Value Rules	Competition (Minimum Value of Assets or Turnover) Rules, 2024
Minimum Wages Act	Minimum Wages Act, 1948
NBFC	Non-Banking Financial Company
NCDs	Non – Convertible Debentures
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NDI Rules	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
Non-OPI Debt	Debt investment excluding OPI (under Overseas Investment)
NRI	Non Resident Indian
OCB	Overseas Corporate Body
OCD	Optionally Convertible Debentures
OCI	Overseas Citizen of India
ODI	Overseas Direct Investment
OI	Overseas Investment

Glossary

Abbreviations	Meaning
OPI	Overseas Portfolio Investment
Ordinary Resolution	A resolution passed by the shareholders in a meeting of the shareholders, where the votes cast by members entitled to vote at the meeting in favour of the resolution, exceed the votes cast against the resolution
PAN	Permanent Account Number
Partnership Act	Indian Partnership Act, 1932
Payment of Bonus Act	Payment of Bonus Act, 1965
Payment of Gratuity Act	Payment of Gratuity Act, 1972
Payment of Wages Act	Payment of Wages Act, 1936
PE	Private Equity
PIO	Person of Indian Origin
R&D	Research and Development
RBB	Reverse Book Building
REIT	Real Estate Investment Trust
Reserve Bank / RBI	Reserve Bank of India
R&D	Research and Development

Glossary

Abbreviations	Meaning
Revenue	Income tax or commercial taxes authorities as the case may be
Right of Persons with Disabilities Act	Right of Persons with Disabilities Act, 2016
RoC	Registrar of Companies
S&C	Settlement and Commitment (under the Competition (Amendment) Act, 2023)
SARFAESI Act	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SBO	Significant Beneficial Owner
SBOR	Companies (Significant Beneficial Owners) Rules, 2018
SCRA	Securities Contracts (Regulation) Act, 1956
SCRR	Securities Contracts (Regulation) Rules, 1957
SEBI	Securities and Exchange Board of India
SEBI Act	Securities and Exchange Board of India Act, 1992
SEBI Delisting Regulations	Securities Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI FVCI Regulations	Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000
SEBI ICDR Regulations	Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009
SEBI Insider Trading Regulations	Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015

Glossary

Abbreviations	Meaning
SEBI LODR Regulations	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015
SEBI Takeover Regulations	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
Sexual Harassment of Women Workplace Act	The Sexual Harassment of at Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
SEZ	Special Economic Zone
Small Target Exemption	Target exemptions under The Competition (Minimum Value of Assets and Turnover) Rules, 2024
SMF	Single Master Form
Special Resolution	A resolution passed by the shareholders in a meeting of the shareholders, where the votes cast by members entitled to vote at the meeting in favour of the resolution, are not less than three times the number of votes cast against the resolution. A resolution cannot be considered a special resolution unless the intention to propose the resolution as a special resolution has been duly specified in the notice calling the meeting of the shareholders, which notice is in terms of the requirements prescribed by the Companies Act
SPICe	Simplified Proforma for Incorporating Company
Stressed Asset Directions	The Prudential Framework for Resolution of Stressed Assets dated June 7, 2019) issued by the RBI
STT	Securities Transaction Tax
TAN	Tax Deduction Account Number

Glossary

Abbreviations	Meaning
Trade Marks Act	Trademarks Act, 1999
Trade Unions Act	Trade Unions Act, 1926
Transgender Persons (Protection of Rights) Act	Transgender Persons (Protection of Rights) Act, 2019
UNCITRAL	United Nations Commission on International Trade Law
UPSI	Unpublished Price Sensitive Information
USD	United States Dollar
VAT	Value Added Tax
VC	Venture Capital
VCF	Venture Capital Fund
VCU	Venture Capital Undertaking
WOS	Wholly Owned Subsidiary

Notes

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