doing business in india

a primer 4th edition

cyril amarchand mangaldas

advocates & solicitors

character • competence • commitment

cyril amarchand mangaldas

Index

Introduction

India has the distinction of being one of the most consistently growing economies in the world. In just over two decades, liberalization has transformed India from being an inward looking state-based economy, into a globalized market-based economy, now identified as one of the most attractive investment destinations globally. Over the past few years, the Indian economy has shown itself to be robust and remarkably resilient during the global economic slowdown. Further, with the central leadership being given a second term with a strong mandate, it would lead to further economic reform, through implementation of regulatory changes targeted towards improving the ease of doing business in India. A strong, stable government at the centre and a buoyant growth rate have given an impetus to investment and positioned India as a premier investment hub.

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

- Stable democratic environment over the 67 plus years of its independence;
- Progressive and stable governments, at both the Central and State levels;
- Robust and resilient economy combined with the opening up of various sectors;
- Large market size with increasing purchasing power;
- Access to international markets through membership in regional councils;
- Large and diversified infrastructure spread across the country;
- Well-developed R&D, infrastructure, technical and marketing services;
- Skilled human resources, with the world's largest youth population comprising of the highest number of individuals in the productive age bracket and cost effective production facilities;
- Developed banking system, commercial banking network of over 125,000 banking offices operated by both Indian and

foreign banks; supported by a number of national and state-level financial institutions;

- Vibrant capital markets comprising approximately 9 stock exchanges;
- Investor friendly policies with conducive foreign investment environment that provide freedom of entry in most sectors;
- Current account convertibility;
- Established, independent judiciary with a hierarchy of courts;
- Statutory and legal protection for intellectual property rights; and
- Common law based legal system.

Since 1991, the industrial sectors have seen positive structural changes, improvements in productivity, modernization, and infusion of new technology. Companies have consolidated around their areas of core competence within India and overseas by opting for foreign tie-ups and infusing new technology, management expertise and access to foreign markets. In the technology sector, almost all the major global players have established operations in India. 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, except for a small list of prohibited sectors, foreign investment is permitted in all sectors. Furthermore, recently, several initiatives have been taken by the Government towards liberalization of various key sectors in India such as defence, telecom insurance and railway infrastructure. Additionally, steps are being taken at both the Central and State level towards skill development, infrastructure over-haul and increased investment such as, the widely popular 'Make in India' campaign, which aims to establish India as a global manufacturing hub and the Government's effort towards streamlining processes for obtaining approvals and clearances through single-window mechanisms.

From a policy perspective, it is clear that the Government of India continues to view foreign investment and private enterprise as a key driver of economic growth in India and the 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 accelerated inbound and outbound M&A, making international headlines and creating domestic valuations of dizzying multiples. The cumulative value of total FDI equity inflows from April, 2000 to June, 2019 is estimated to be over US$ 436 billion and just between April and June of 2019, total FDI equity inflows into the country is pegged at over US$ 16 billion.[1]

A series of policy measures undertaken by the new political regime in India to improve business and boost investor confidence coupled with GDP growth projections have resulted in India emerging as a major player on the global stage, which has acquired the 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 efficiency 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 largely 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 upon 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 Source: http://dipp.nic.in/sites/default/files/FDI_FactSheet_29June2018.pdf

The M&A laws in India are still evolving and the regulators are still 'catching up' with the global M&A wave into and out of India. This effort to 'catch up' however, often results in regulators applying varying 'interpretations' of a stated law which has created substantial confusion and an upheaval of settled market practice. Although a few leaps have been made in the recent past including passing of the legislation on GST, Insolvency Code and Reserve Bank's cross border merger regulations, these new laws have their own set of issues pertaining to interpretation, impact on deal timelines, and processes, which needs 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 systems and legal rules and regulations that are essential for business operations in India.

This booklet has been updated till November, 2019. Some of the policy changes are not yet effective and could vary.

I. General

1. 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. 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:

- the erstwhile Companies Act, 1956 and its successor legislation, the Companies Act, 2013 (which govern the incorporation, financing, management, restructuring of companies);
- 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);
- Partnership Act (which governs the organization and dissolution of partnerships as well as the rights, liabilities, appointment and retirement of partners);
- 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);
- Insolvency Code (which sets out the law governing insolvencies, liquidation and bankruptcies of companies, partnerships and individuals (presently notified only for companies));
- Transfer of Property Act,1882 (which sets out the law relating to rights in relation to immovable property in India);
- The FEMA (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);

- The SEBI Act (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);
- the SCRA (which governs listing and trading of securities on stock exchanges in India) and the Listing Agreement with stock exchanges;
- the Competition Act (which regulates combinations (merger control) and anti-competitive behaviour);
- the Income Tax Act (which prescribes the tax treatment of dividend, capital gains, mergers, demergers, and slump sales); and
- Goods and Services tax (which prescribes the regime taxing supply of goods and services).

In addition, there are several sector specific legislations (e.g. the Indian Telegraph Act, Drugs and Cosmetics Act, Press Council Act, the Banking Regulation Act, the Insurance Act, and various labour legislations like the Industrial Disputes Act etc.) that must also be considered depending on the nature and type of the transaction.

2. What are the types of business organisations that can be set up in India? Are there 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 in response to question 3 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 premises used for business purposes 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.

In accordance with a recent amendment, it is no longer required for companies to maintain any minimum share capital.

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 office 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 office if such foreign companies have obtained approval from the IRDA; (iv) in cases where Government approval or license/permission by the concerned Ministry/Regulator has already been granted in respect of ventures in Defence, Telecom, Private Security and/or Information and Broadcasting sectors.

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

3. 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 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 collaborations 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 offices 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 offices 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.

II. Companies

1. Overview of the corporate law regime in India and proposed legislative changes

The Companies Act is a central / federal legislation and applies to companies incorporated throughout India. The Companies Act (1956) has been replaced by the new Companies Act (2013)since August, 2013. The provisions of the Companies Act (2013)and the rules there under are being notified in phased manner with a majority of provisions having already been notified. The Ministry of Corporate Affairs has also published corresponding rules and forms under those provisions. The Companies Act (2013) now follows a fixed and variable model whereby several of the provisions require corresponding rules to be prescribed by the Central Government. The old law continues to apply for provisions for which the corresponding provisions of the Companies Act (2013) have not yet come into force.

The main objectives which lie underneath the formulation of the Companies Act (2013) are :

(i) promoting investments along with sound governance within corporate structures;

(ii) enhancing accountability;

(iii) protection of investors and minority shareholders;

(iv) de-linking substantial law from procedural aspects;

(v) introducing compactness by removing redundant provisions; and

(vi) consonance with changes in national and international economic environment.

The Companies Act (2013) has made several legislative changes in the company law regime. While there are several amendments, some major changes include *inter alia*, the introduction of concepts like small company and one-person company, greater scrutiny of private companies, enhanced corporate governance standards, provisions for protections of investors and minority shareholders, amendments to provisions relating to audit and auditors, prohibition on insider trading and forward dealing, permissibility of outbound mergers, enhanced accountability on the part of corporate, vesting of jurisdiction with the National Company Law Tribunal (NCLT), de-linking procedural aspects from substantive law and provisions relating to corporate social responsibility.

2. 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 commonly used form is a company limited by shares. The Articles of Association of private companies must restrict the right to transfer shares, and the number of members to 200 (not including employees) and prohibit the company from making any invitation to the public to subscribe for securities of the Company. A private company is required to have a minimum of two members and two directors. In accordance with a recent amendment, it's no longer a requirement for private or public companies to maintain any minimum share capital.

Private companies can also be set up as a one person company or a small company. A one person company has only one natural person (an Indian citizen) as a member. A small company is a private company which has a paid up share capital not exceeding INR 5million and turnover not exceeding INR 20million or such other amount as may be prescribed, but not more than INR 100million & INR 1billion, respectively. One person companies and small companies have been exempted from certain requirements under the Companies Act (2013). However, there are safeguards against using these type of companies for structuring purposes and these companies would be useful only for small businesses.

The shares of a public company are freely transferable and there is no limit on the number of members such companies may have. However, any contract or arrangement between two or more persons in respect of transfer of securities should be enforceable as a contract. A public company is required to have a minimum of 7 members and 3 directors, every listed company is required to have at least one-third of the board of directors comprise of independent directors. Certain classes of unlisted public companies are also required to 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. A private company, which is a subsidiary of a public company, is also considered to be a public company.

The Companies Act (2013) also allows for the incorporation of a 'not for profit' company, commonly referred to as a *'Section 8 Company'*. A Section 8 Company may be incorporated for the following objectives::promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any other such objects.

Further, based on the control and influence test, a company (in connection with another company) may be categorized as a holding company, a subsidiary company or an associate company. Such classification is significant from the perspective of *inter alia*, related party transactions, consolidation of financial accounts, etc.

3. What is the incorporation process?

Indian companies (whether private or public, limited or unlimited) are incorporated by registration with the appropriate RoC of the State in which the registered office of the company is to be located. 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. Later in January, 2018, the rules relating to incorporation of companies were amended, and filing of SPICe was retained as the only mechanism for making an application for incorporation of a company. SPICe, as an integrated application, includes application for allotment of DIN for upto 3 directors, reservation of a name, incorporation of company and appointment of directors of the proposed company. The constitutional documents of the proposed company, comprising of the memorandum of association and the articles of association, are required to be filed in electronic form along with the application for incorporation. The Memorandum of Association sets out the objects and scope of activity of the company and the authorized share capital of the company. The Articles of Association set out the rules and regulations of the company in respect of its management and the rights of the members / shareholders *inter se* and vis-à-vis the company.

It may be noted that, with the application process and subsequent filing requirements being digitalised, digital signature certificates for the directors will also have to be obtained from certain designated authorities prior to the application being filed.

Within 30 days of the incorporation, a company is required to have a registered office, and within 30 days, it has to file a verification of the registered office with the RoC.

In addition to the above, for incorporating a one person company, the Memorandum of Association shall indicate the name of another consenting person, i.e. a nominee, who will become the member upon death or incapacity of the original member. The name of such a one person company should have "OPC Limited" added to its name.

4. 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, the entire share capital of an Indian company may be held by non-residents. The company would however have to satisfy the condition as to the minimum number of members required under the Companies Act (2013).

5. How are minority shareholders protected under Indian law?

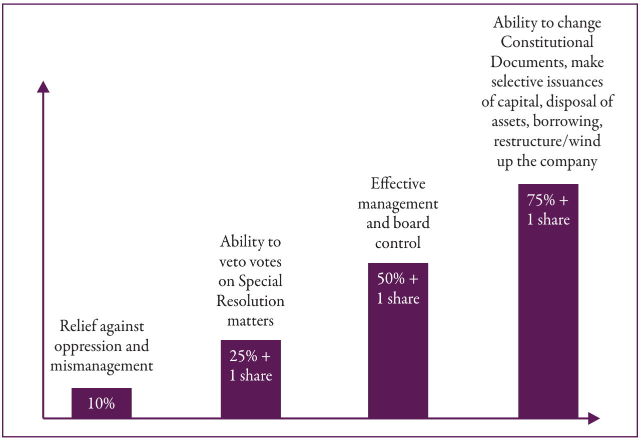
Minority shareholders have been given greater powers and remedies under the Companies Act (2013); with an aim to protect their rights. Permissibility of incorporating entrenchment provisions in the Articles of Association is seen as one of the major minority protection tool under the Companies Act (2013).

Certain rights are available to a shareholder owning at least 10% of the voting capital, such as the right to requisition an extra-ordinary general meeting of the company, right to challenge variation of rights attached to shares, right to make an application to NCLT for investigation into affairs of the company etc.

Remedy is also available to a shareholder holding 10% or more of the issued share capital to approach the NCLT for remedy against oppression of the minority and for mismanagement of the company by the persons in control of the company or the majority shareholders. However, the burden of proving oppression or mismanagement would be on the shareholder alleging the same and the process may take several years. Shareholders holding at least 5% in case of an unlisted company & at least 2% 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 as well as for claiming damages against the company, directors, auditors and other experts and advisors for fraudulent acts.

Shareholders holding more than 25% of the voting capital may block resolutions on matters requiring a special resolution. Matters required to be passed by special resolution include amendments to the Constitutional Documents, reduction of the 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, interests of the minority partners may be protected through provisions in the shareholder/JV agreements, which increase the threshold required for the passage of certain resolutions (therefore providing for "veto" rights) or provide for special quorum requirements. Interests of parties are also protected through restrictions on the ability of parties to transfer shares held by them in the JV company, as well as providing for "put / call" options upon the occurrence of certain specified events / circumstances. The enforceability of such provisions in private arrangements has been recognized by the Companies Act (2013) for public companies as well. The Companies Act (2013) 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. It may also be noted that exercising of veto rights that relate to management and policy decisions (by virtue of shareholder agreements or voting agreements), may be considered to be an exercise of 'control' over the Company and such a person exercising control, would be treated as a 'promoter' under the Companies Act (2013).

The other provisions included in the Companies Act (2013) which contribute to protection of minority shareholders include - increase in the corporate governance standards, approval requirements for related party transactions, powers to inspect and get an investigation conducted, right to request a company to appoint a small shareholder director, establishment of stakeholders relationship committee, procedure for squeeze outs, right to demand poll and other governance related measures for safeguarding minority interests.

Dissenting minority shareholders are also required to be provided with exits in certain cases, such as where an acquirer becomes a holder of 90% equity share capital, variation of the objects for which money has been raised, merger of a listed company with an unlisted company, takeover as a result of compromise or arrangement, etc.

6. How does one fund a subsidiary in India?

A subsidiary may be funded by:

- subscribing to equity shares or compulsorily convertible preference share capital or compulsorily convertible debentures;
- extending an ECB, or a foreign currency loan, including through subscription to partially or optionally convertible preference shares, OCDs and NCDs (subject to having the minimum equity contribution and maintaining the debt equity ratio stipulated under the extant foreign exchange regulations) and which would require compliance with stipulations laid down for eligible borrowers and permitted end-uses;
- providing an advance against services to be rendered (in case of a captive IT / ITES unit). However, the parties must be mindful of transfer pricing restrictions and take care that the advance does not extend beyond specified periods so as to constitute an ECB.

7. What are the rights of a shareholder at 51% and 75%?

Shareholders holding 75% of a company's equity will be able to authorise certain proposals which are required to be approved by a Special Resolution (i.e. a 3/4th majority of the shareholders of the company present and voting at any meeting) such as:

- alteration of the Constitutional Documents of the company;
- change the name of the company;
- reduction of capital, issue of shares to persons other than existing shareholders;
- issue of preference shares by a company having a share capital;
- issue of sweat equity shares;
- issue of debentures with an option to convert into shares;

- variation of the terms of contract or objects in prospectus;
- appointment of more than 15 directors in a company;
- disposal of assets borrowing beyond a specified threshold;
- payment of managerial remuneration in excess of specified limits in case of inadequate profit / loss;
- winding up of the company.

At an annual general meeting of the company, all business to be transacted is deemed to be special, other than resolutions for appointment of directors in place of those retiring, declaration of dividend, approval of audited financial statements, appointment and fixing of remuneration of auditors all of which require an Ordinary Resolution, i.e. greater than 50% majority of the shareholders present and voting at the meeting. Further, all companies, other than One Person Company and companies having up to 200 members, are required to pass certain shareholder resolutions only through postal ballot and not at a shareholders meeting. Such resolutions include items such as:

- change in objects for which company has raised money from public through prospectus and still has any unutilized amount;
- buy-back of shares; and
- sale of the whole or substantially the whole of undertaking of a company.

8. How can a company be listed in India?

Companies that are listed or to be listed should comply with the SEBI Act, various regulations and guidelines issued by SEBI there under, primarily the SEBI ICDR Regulations, SEBI LODR Regulations and Listing Agreements entered into between the companies and the stock exchanges on which their securities are listed or are yet to be listed.

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

Any public company offering securities through a public issue or rights issue has to file a draft offer document along with prescribed fees with SEBI 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 designated stock exchange. SEBI may specify changes or issue observations on the draft offer document. If SEBI specifies changes or issues observations on the draft offer document, the issuer and lead merchant banker has to carry out such changes in the draft offer document and comply with the observations issued by SEBI 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 has to obtain in-principle approval from recognised stock exchanges:

(a) in case of an initial public offer, from all the recognised stock exchanges on which the issuer proposes to get its specified securities listed; and

(b) in case of 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, if any, for a period of at least 21 days from the date of such filing, by hosting it on the websites of SEBI, recognised stock exchanges where specified securities are proposed to be listed, and merchant bankers associated with the issue.

After expiry of the aforementioned period the lead merchant banker is required to file with the SEBI a statement giving information of 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. The issuer has to, file with SEBI through the lead merchant bankers, an updated offer document highlighting all changes made in the offer document before registering the red herring prospectus with the RoC or filing the letter of offer with the designated stock exchange.

Please refer to our separate primer on listing in India for a detailed description of the listing process and its requirements.

9. 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% of shares issued by the company have to 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 such post issue capital is more than INR 16 billion but less than or equal to INR 40 billion, shares equivalent to at least INR 4 billion have to be offered and allotted to public, and it has to be ensured that such company increases its public shareholding to at least 25%within a period of 3 years from the date of listing of the securities.

If the post issue capital of the company calculated at offer price is more than INR 40 billion, at least 10% of shares issued by the company have to be offered and allotted to public, and it has to be ensured that such company increases its public shareholding to at least 25% within a period of 3 years from the date of listing of the securities.

The SCRR was also amended to provide for continuous listing requirements. In the event public shareholding of a listed company falls below 25% (or 10% as the case may be), the listed company has a period of 12 months from the date when public shareholding fell below 25% (or 10% as the case may be) to increase the public shareholding to minimum prescribed levels in the manner specified by SEBI.

Where the minimum public shareholding level is not complied with, the company will have to undertake suitable action to raise the public shareholding within the prescribed time, in order to keep the company's shares listed. The following methods have been prescribed under the Listing Agreement to raise public shareholding to minimum specified levels:

(a) Issuance of shares to the public through a prospectus;

(b) Offer for sale of shares held by promoters to public through a prospectus;

(c) Offer for sale by the promoter or promoter group on the stock exchange in blocks, in terms of the requirements specified by SEBI;

(d) Institutional placement programme (IPP) in terms of Chapter VIIIA of SEBI ICDR Regulations for issue of a maximum of 10% of the paid-up capital of the company;

(e) Rights issuance to public shareholders;

(f) Bonus issuance to public shareholders;

(g) Open market sale up to 2% of the total paid up equity share capital of the listed entity; and

(h) Qualified institutions placement (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 set forth in the SCRR and the listing agreement could face penalties such as compulsory delisting, suspension of trading, monetary penalties and / or prosecution.

10. What types of shares can a company issue?

Shares can only be of two kinds:

- *equity shares* - These shares have voting rights or differential rights as to dividend, voting or otherwise (and) are issued in accordance with the Companies (Share Capital and Debentures) Rules, 2014, and
- *preference shares* - Such shares do not carry voting rights, except in certain circumstances. Preference share holders have a preferential right over the equity shareholders to dividends and to assets of the company in case of a winding up. These shares may be redeemable or convertible into equity shares.

11. 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?

The Companies Act provides that an individual can be appointed as a director of a company, subject to the other conditions being met. The Companies Act clarifies that no company can appoint or re-appoint any individual as director of the company unless he has been allotted a DIN.

The Companies Act also provides that no individual can be a director of more than 20 companies, and an individual can be a director of a maximum of 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 that the terms of appointment of a foreign national as a full-time / managing director of an Indian company, have been approved by the Central Government if his period of stay in India, prior to being appointed full-time / managing director, is less than 12 months. If the directors appointed to a company are not full-time / managing directors, then no such approval is required.

12. 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 upon the nature of the breach and the statutory provisions. The liabilities can be summarised as follows:

(a) 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 (2013), the directors could be held personally liable, without any limitation of liability, to third parties for fraudulent activities.

(b) In respect to breach of certain statutory provisions, directors would be liable for monetary penalties and / or imprisonment. However, in such a case, usually, a director is not liable if he can prove that the breach was committed without his knowledge and / or that he had exercised all due diligence to prevent the commission of the breach.

The Companies Act (2013) 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 (2013). The definition of an 'officer who is in default' has a very wide import. A director is required to act with reasonable diligence and care and has a fiduciary duty to the company and the shareholders of the company as a whole. The Companies Act (2013) has now codified the duties of a director. He is now required to act in the best interests of the company, its employees, shareholders, the community and the protection of the environment.

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.

The Companies Act (2013) also provides for the protection of independent directors and non-executive directors. Such directors shall only be held liable in respect of such acts of omission or commission, which had occurred with their knowledge, attributable through board processes, and with their consent or connivance, or where they had not acted diligently.

Further, the Companies Act (2013) provides that a company may obtain an 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 in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company and any premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

13. What are the restrictions on distribution of profit in India?

The Companies Act (2013) regulates the declaration and distribution of dividend. Under the Companies Act (2013), a dividend (including interim dividend) can be paid out of current profits or the profits accumulated of earlier years. In computing profits, any amounts representing unrealised gain, notional gains or revaluation of assets and any change in carrying amount of any asset or of liability on measurement of the asset or the liability at fair value shall be excluded.

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

Dividend is also payable out of the moneys provided by the Central or any State Government for the payment of dividend in pursuance of a guarantee given by that Government.

A company which has not complied with provisions of the Companies Act (2013) relating to acceptance of deposits cannot declare dividend, so long as such non-compliance continues.

14. Are there any corporate social responsibility norms in India?

Yes. Under the Companies Act (2013), a company having 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 is required to have a corporate social responsibility policy and a corporate social responsibility committee, and spend at least 2% of the average net profits made in the preceding 3 years. This obligation can be met through third party charity organizations or charity organizations set up by the company, either by itself or along with or any other company or government entity. While there is no penalty for non-compliance of this requirement, the board of directors is required to provide reasons for not spending the amount in the board report laid before the company at a general meeting.

The MCA has released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011 which provides companies with a comprehensive framework for responsible business action that encompasses social, environmental and economical responsibilities of business. Further, the guidelines provide direction for Indian MNCs planning to invest or already operating in other parts of the world. The guidelines are a refinement over the Corporate Social Responsibility Voluntary Guidelines 2009. They are not mandatory. In addition, under the Guidelines on CSR and Sustainability for Central Public Sector Enterprises issued by Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises and effective from April 1, 2013, it is mandatory for all central public sector enterprises to select at least one project each for (i) development of weaker sections of society and the backward districts and (ii) environment sustainability. These guidelines also follow the *"comply or explain"* approach.

In addition, under the SEBI LODR Regulations, it is mandatory for the top 500 listed companies, to include Business Responsibility Report in their annual reports.

15. Are there any corporate governance norms?

Yes. Under the Companies Act (2013), at least 1/3rd of the board of directors of a public listed company is required to comprise of independent directors (excluding nominee directors). An independent director can be appointed for a maximum of a two consecutive terms of 5 years each after which such an independent director cannot be appointed for a period of 3 years. Further, the Companies Act (2013) provides onerous duties and corresponding liabilities for key managerial personnel, which include the Chief Executive Officer, Chief Financial Officer, Managing Director, full time directors and Company Secretary.

The Companies Act (2013) also provides for compulsory rotation of auditors every 5 years and of audit firms every after two terms of 5 years. An auditor is further mandated to report frauds (exceeding a specified threshold) against the company by its officers / employees to the Central Government. Every listed company and certain prescribed companies are required to constitute an audit committee to monitor the auditor's independence and performance. To protect whistleblowers, such companies are also required to establish a vigil mechanism for directors and employees to report genuine concerns.

A certain specific category of transactions with related parties and exceeding the thresholds provided, save for transactions on an arm's length basis or in the ordinary course of business; and transactions between holding company and its wholly owned subsidiary, require an ordinary resolution under the Companies Act (2013) and the shareholders interested in such transaction are required to abstain from voting. This requirement of abstinence is not applicable to the shareholders of private companies.

The SEBI LODR Regulations also require public listed companies to appoint a specified number of independent non-executive directors and constitute separate sub-committees of the board of directors for functions like audit and remuneration.

The MCA has released the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011 which provide a set of corporate governance practices. The guidelines are not mandatory.

16. Are there any insolvency laws applicable to companies established in India?

Under the recently enacted Insolvency Code, companies which have committed a default to the extent of at least INR 100,000 will undergo a Corporate Insolvency Resolution Process ("CIRP") prior to its liquidation. The CIRP commences once the NCLT accepts the application in this regard by *inter alia* the company or its creditors. Upon commencement of the CIRP, there shall be a moratorium over institution of new suits or continuation of pending suits or any action to foreclose or enforce any security interest created by the company in respect of its property.

As a part of the CIRP, resolution professionals will be appointed and a committee of creditors comprising only financial creditors is constituted. A resolution plan is formulated which is to be approved by the committee of creditors by a majority vote of 66%. Upon approval of the resolution plan by the committee of creditors, the sanction of the NCLT will be obtained and thereafter the plan will be implemented by the company. In the event that the committee of creditors does not approve the resolution plan or decides to liquidate the company or, if the NCLT rejects the resolution plan, the company undergoes liquidation. Any person whose interests are affected by the contravention of the resolution plan by the company may make an application to the NCLT for liquidation of the company.

Any company may also undergo voluntary liquidation under the provisions of the Insolvency Code upon the passing of a special resolution of its members in general meeting and approval of such resolution by two-thirds of the creditors (by value).

Additionally, any company may be wound up by the NCLT under the provisions of the Companies Act (2013) on such grounds including acting against the interests of India or fraudulent conduct of its affairs or if, in the opinion of the NCLT, it is just and equitable to do so.

17. Can voting rights be exercised by proxy?

A member of a company who is entitled to attend and vote at a meeting of the company can appoint another person (whether or not a member) as his/her proxy to attend and vote at a meeting instead of him / her, subject to certain compliances. A person can be a proxy for a maximum of 50 (fifty) members. However, such a proxy is not entitled to speak at the meeting and is not entitled to vote except on a poll. This requirement is applicable to a private company, unless otherwise specified in its Articles of Association.

18. Can statutory meetings be held through electronic means?

The Companies Act (2013) requires the members of the company to be personally present for constituting the quorum at shareholders meetings. Electronic means are allowed only for voting at a shareholders meeting for certain prescribed companies. A board meeting, however, can even be held through audio visual means which are capable of recording and recognizing the participation of directors, such as video conferencing. Certain specified matters, including approval of the annual financial statements and the board's report and matters relating to amalgamation, demerger, merger, acquisition and takeover cannot be dealt with at a meeting held through video conferencing.

III. Foreign Investment

1. How is foreign investment regulated in India?

Foreign investment in India is primarily regulated by: (i) FEMA and Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("NDI Rules") promulgated thereunder; (ii) the Master Direction on Foreign Investment consolidating the various notifications and circulars issued by the Reserve Bank along with other regulations; and (iii) To consider deletion of (ii) and (iii) as same applicable only in case of the press note being reflected in the Rules read with various press notes issued by the Department of Promotion of Industry and International Trade (DPIIT), Ministry of Commerce and Industry and Government of India.

2. Who are the key regulators that monitor foreign investment in India?

DIPP (a department of the Ministry of Commerce and Industry, Government of India) along with the concerned ministries/departments will be primarily responsible for regulating foreign investment in India. In addition, the Reserve Bank also regulates foreign investment for the purposes of exchange control in accordance with the provisions of the FEMA.

3. What are the different routes through which a foreign investor (other than NRI or PIO) may invest in India?

At present(subject to prescribed caps or conditions),a foreign investor may invest in India through three routes, namely:

(i) FDI, either under the Automatic Route or the Approval Route: Under both routes foreign investors do not require any prior registration with a regulatory authority in India;

(ii) investment under the Portfolio Investment Scheme as a Registered Foreign Portfolio Investor (RFPI), subject to prior registration with SEBI in terms of the SEBI (Foreign Portfolio Investors) Regulations, 2019; and

(iii) investment as an FVCI, subject to prior registration with SEBI.

4. What are the different instruments available for investment in India under the FDI Policy?

(i) A foreign investor should consider the applicable FDI regime before selecting instruments for investment, as the treatment accorded to each instrument is different under the current FDI Policy.

(ii) As per the NDI Rules, subject to the pricing guidelines / valuation norms under FEMA regulations, a foreign investor can invest in Equity instruments as per the NDI Rules: (k) "equity instruments" means equity shares, convertible debentures, preference shares and share warrants issued by an

Indian company of a Indian company: (a) equity shares; (b) fully, compulsorily and mandatorily convertible preference shares; (c) fully, compulsorily and mandatorily convertible debentures; or (d) share warrants. Refer to explanation under the NDI Rules:

(I) Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid. "Convertible debentures" means fully, compulsorily and mandatorily convertible debentures. "Preference shares" means fully, compulsorily and mandatorily convertible preference shares. Share Warrants are those issued by an Indian company in accordance with the regulations by the Securities and Exchange Board of India. Equity instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.

(ii) Partly paid shares that have been issued to a person resident outside India shall be fully called-up within twelve months of such issue or as may be specified by the

Reserve Bank from time to time. Twenty- five per cent of the total consideration amount (including share premium, if any) shall be received upfront.

(iii) In case of share warrants, at least twenty-five per cent of the consideration shall be received upfront and the balance amount within eighteen months of the issuance of share warrants.

Additionally, foreign investors can invest in LLPs engaged in activities permitted under the Automatic Route without any governmental approvals.

Optionality clauses are permitted in capital instruments issued on or after December 30, 2013.The issuance of instruments with optionality clauses are subject to a minimum lock-in-period of 1yearor as prescribed for the specific sector, whichever is higher. After the expiry of the lock-in period, a non-resident investor is eligible to exit without any assured return as per the pricing/valuation guidelines issued by Reserve Bank from time to time. (Pricing guidelines are discussed in detail in Question 9).

(iii) Permissibility under NDI Rules unclear. To also refer to the term 'hybrid securities'.

5. Can an Indian company issue any other instrument(s) apart from the instruments set forth in Question 4 (above) to attract defined specifically under the rules?

An Indian company can also obtain defined specifically under the rules through DRs and FCCBs in the following manner:

(i) DRs are negotiable securities issued outside India by a depository bank, on behalf of an Indian company, which represent the foreign currency denominated instrument of the company held as a deposit by a custodian bank in India. DRs are typically traded on stock exchanges in the US, Singapore, Luxembourg, London, etc. DRs listed and traded in the US markets are known as ADRs, and those listed and traded elsewhere are typically known as GDRs. DRs are issued in accordance with the provisions of FEMA 20 read with Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2017, the Depository Receipts Scheme, 2014 and guidelines issued by the Government of India thereunder, from time to time.

(ii) FCCBs are bonds issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 and subscribed by a non-resident entity in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part.

Considering DRs and FCCBs are convertible into equity, they are also subject to the FDI norms as set out above. However, FCCBs and DRs having underlying instruments in the nature of debt will not be included in the sectoral cap and will not be reckoned for total foreign investment.

6. Is FDI prohibited in any sector/business?

FDI is prohibited in the following sectors:

(i) lottery business including Government/private lottery, online lotteries, etc.;

(ii) gambling and betting including casinos, etc.;

(iii) chit funds;

(iv) nidhi company no specific exception under the Rules. If non-repat and deemed domestic wouldn't it also be applicable to the other prohibited sectors;

(v) trading in transferable development rights;

(vi) real estate business or construction of farm houses not including development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014;

(vii) manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes;

(viii) activities/sectors not open to private sector investment, e.g. atomic energy and railway transport (other than construction, operation and maintenance of the following: (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 park pertaining to railway line/sidings including electrified railway lines and connectivity to main railway line; and (j) mass rapid transport systems); and

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

7. 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 is operating. FDI is permitted by non-residents in the capital of an Indian company, either under the Automatic Route or through the Approval Route, only to the extent of a specified percentage of the total capital of an entity as mentioned in the FDI Policy. Sectors in which investments have been capped include pension funds, insurance, etc. FDI in a majority ofthe sectors is permitted up to 100% (in some cases under Approval Route).

8. What are the ways for a foreign investor to invest in an Indian company?

FDI in India can be done through the following modes:

(i) Issuance of fresh capital instruments by a company: Subject to compliance with the FDI Policy, FEMA and Companies Act (2013) and the rules thereunder, an Indian company may issue permissible capital instruments under the FDI Policy to a non-resident investor.

(ii) Acquisition by way of transfer of existing capital instruments: Non-resident investors can also invest in Indian companies by purchasing/acquiring existing permissible capital instruments from Indian shareholders or from other non-resident shareholders in the following manner:

- Non-resident to non-resident: A person resident outside India (other than an NRI or OCB) can transfer the capital instruments of an Indian company to any other person resident outside India (including NRIs) by way of sale or gift. Government approval is not required for transfer of capital instruments in the investee company from one non-resident to another in sectors which are under the Automatic Route. However, Government approval will be required for transfer of stake from one non-resident to another in sectors which are under the Approval Route.
- Non-resident to resident: A non-resident can transfer the capital instruments to any person resident in India as a gift or sale under private arrangement or sale on a recognised stock exchange (in the manner prescribed by SEBI), subject to compliance with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalization (where applicable), etc.
- Resident to non-resident: A person resident in India can transfer capital instruments of an Indian company, by way of sale under private arrangement to a person resident outside India. Such transactions will be subject to compliance with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalization (where applicable), etc.
- Swap of capital instruments: A non-resident may acquire capital instruments of an Indian company by way of a swap of capital instruments subject to certain valuation requirements being met. No

approval, of the Government will be required for swap of capital instruments where the Indian company is engaged in a sector where FDI is permitted without Government approval.

- Complicated in case of one holding in non-repat to another.
- Non-resident on the stock exchange: Registered FIIs/FPIs and NRIs can invest/trade through a registered broker in the capital of the Indian companies on recognised Indian stock exchanges. 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 that the original and the resultant investments are in line with the FDI Policy and FEMA regulations in respect of sectoral caps, entry route, mode of payment, reporting requirement, etc.

(iii) DRs/FCCBs: Issuance of DRs and FCCBs can be carried out in the manner discussed in Question 5 above.

9. Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the capital instruments of an Indian entity?

The Reserve Bank has prescribed pricing guidelines for the acquisition of capital instruments of Indian companies by non-residents.

Issue of capital instruments:

- Where capital instruments of the Indian company are listed on a recognized stock exchange in India, the price of capital instruments issued to a non-resident must not be less than the price determined in accordance with relevant SEBI guidelines.
- Where capital instruments of the Indian company are not listed on a recognized stock exchange in India, the

price of capital instruments issued to a non-resident must not be less than the fair valuation of capital 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.

- Where the issue of capital instruments is on preferential allotment basis, the price of capital instruments issued to a non-resident shall not be less than the price applicable to transfer of capital instruments from a resident to a non-resident (discussed herein after) as per the pricing guidelines laid down by the Reserve Bank from time to time.
- However, non-residents (including NRIs) eligible to invest under the FDI Policy, can make investments in an Indian company at face value by way of subscription to its Memorandum of Association, so long as they are subject to entry route and sectoral cap compliance under FEMA along with the applicable provisions of the Companies Act (2013).
- Rights issue: Where the issue of capital instruments (other than share warrants)is undertaken pursuant to a rights issue, the offer must be, subject to sectoral caps as applicable to the company: (a) at a price as determined by the company, in case of usage of term across to be revised to equity instruments (other than share warrants)of a listed company; or (b) in case of capital instruments (other than share warrants)of an unlisted company, at a price which is not less than the price at which the offer on rights basis is made to the resident shareholders.
- Partly paid equity shares: Pricing of partly-paid equity shares is to be determined upfront and 25% of the total consideration amount (including share premium, if any) must be received upfront. The balance consideration is required to be paid within a period of 12 months. The payment of the balance consideration within 12 months is not applicable where the issue size exceeds INR 5 billion and 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 issue size exceeds INR 5 billion; however, the investee company would have to appoint a monitoring agency on the same lines as required for a listed company.

- Share warrants: The pricing for share warrants and the price/conversion formula must be determined upfront and 25% of the consideration amount is also required to be paid upfront. The balance consideration must be paid within a period of 18 months. The price at the time of conversion should not be lower than the fair value worked out at the time of issuance of share warrants and pricing guidelines stipulated by the Reserve Bank from time to time. Thus, an investee company is free to receive consideration more than the pre- agreed price.
- Instruments with optionality clauses: Equity shares or fully, compulsorily and mandatorily convertible preference shares/debentures can be issued with optionality clauses, subject to the condition that the non-resident investor exits without any assured returns. In case of an investment in a listed company, the non-resident investor is eligible to exit at the market price prevailing on the recognized stock exchange. In case of investment in unlisted companies, the non-resident investor will be eligible to exit at a price determined as per any internationally accepted pricing methodology on arm's length basis.
- Convertible capital instruments: The price/conversion of convertible capital instruments can be determined upfront or be based on a conversion formula, which must also be fixed upfront; however, the price at the time of conversion cannot be less than the fair value worked out at the time of issuance of these instruments, as per any internationally accepted pricing methodology on arm's length basis for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies.
- Capital instruments Swap: For investments by way of capital instruments waps, subject to the condition that irrespective of the amount, valuation has to be done by a

merchant banker registered with SEBI or an investment banker outside India registered with the appropriate regulatory authority in the host country.

Transfer of existing capital instruments:

(i) *Transfer from resident to non-resident:*

The price of the capital instruments of an Indian company transferred by a resident in India to a non-resident shall not be less than:

- the price worked out in accordance with applicable SEBI guidelines in case of a listed Indian company; or
- the price at which the preferential allotment can be made under applicable SEBI guidelines, in case of a listed Indian company or a company going through delisting under applicable Delisting Regulations ; or
- the price of capital instruments calculated as per any internationally accepted pricing methodology for valuation of capital instruments on an arm's length basis duly certified by a chartered accountant or a SEBI registered merchant banker or a practicing cost chartered accountant, in case of a unlisted Indian company.

(ii) *Transfer from non-resident to resident:*

- Transfer of capital instruments by a non-resident to a resident must not be undertaken at a price which is more than the minimum price at which the transfer of capital instruments can be made from a resident to a non-resident (as enumerated above).

10. Are there any instances of transfer by way of sale, which require prior approval from the Reserve Bank?

(i) Prior permission from the Reserve Bank is required in the following instances of transfer, (i.e. sale of shares / compulsorily convertible preference shares / compulsorily convertible debentures) from residents to non-residents:

- the transfer is to take place at a price that is not determined in accordance with the pricing guidelines prescribed by the FDI Policy and regulations/guidelines prescribed by SEBI;
- the non-resident investor proposes deferment of payment of the amount of consideration except in case of deferment of upto 25% of the total consideration for a maximum period of 18 months;
- refer Rule 9(4) also subject to conditions. ; or
- proposed transfer of capital instruments from an NRI or an OCI to a non-resident in case the company is engaged in a sector which is under the Approval Route.

(ii) The approval of the DIPP or the concerned administrative ministries/departmentswill be required for the following transfers from residents to non-residents:

- transfer of securities of companies engaged in sectors falling under the Approval Route; or
- where the transfer results are in breach of the applicable sectoral caps.

11. SMF Update to be captured.

(i) *Reporting of FDI in flow:*

Recently, the Reserve Bank, with an aim to simplify the reporting process under FEMA 20, has introduced a revised reporting process for foreign investments in India, namely, SMF. The SMF would be made available online with effect from August 1, 2018. With the implementation of SMF, 9 of the existing 12 forms will be subsumed into one single master form. However, till the time the SMF is made applicable, entities will still need to continue to file certain forms for reporting requirements in case of issuance of capital instruments or transfer of capital instruments as discussed below.

(ii) *Advance reporting:*

An Indian company having received FDI either under the Automatic Route or the Approval Route is required to report details of the consideration to the Reserve Bank. The advance reporting form, through an AD Bank, must be submitted together with copies of FIRC evidencing the receipt of inward remittances along with the KYC report on the non-resident investors from the overseas bank remitting the amount. The submissions must be made to the concerned regional office of the Reserve Bank within 30 days from the date of receipt of the inward remittance.

(iii) *Reporting of issue of capital instruments:*

The Indian company issuing capital instruments under the FDI scheme must file Form FC-GPR, signed by the managing director/director/secretary of the company, within 30 days from the date of issue, to the concerned regional office of the Reserve Bank through its AD Bank. Indian companies are also required to file an annual return on foreign liabilities and assets in the form prescribed under the FEMA 20 directly with the Reserve Bank 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).

(iv) *Reporting of transfer of capital instruments:*

Form FC-TRS is required to be filed for transfer of capital instruments within 60 days of transfer of capital instruments or receipt/remittance of funds whichever is earlier, for the transfer between:

- non-resident holding capital instruments in an Indian company on a repatriable basis and non-resident holding capital instruments on a non-repatriable basis; and
- non-resident holding capital instruments in an Indian company on a repatriable basis and resident.

The onus for submission of Form FC-TRS is on the resident transferor/transfereeor the person resident outside India holding capital instruments on a non-repatriable basis, as the case may be.

Further, the purchase/ transfer of capital instruments by NRIs or OCI on stock exchanges in India shall be reported by the AD banks in Form LEC (NRI).

12. Who is an FVCI?

FVCI is an investor incorporated and established outside India, is registered with SEBI under the SEBI FVCI Regulations and proposes to make investments in accordance with SEBI FVCI Regulations. SEBI acts as the nodal agency for providing registration to FVCI. However, one copy of the FVCI application, which is required to be submitted to SEBI in duplicate, is forwarded by SEBI to the Reserve Bank for its approval from a foreign exchange perspective. On examining the application for registration, SEBI would generally verify whether the applicant is a 'fit and proper' person to be registered as a FVCI. FVCI applicant is also required to submit, as a part of the FVCI application, a firm commitment letter from its investor(s) in the minimum amount of USD 1 million; its previous years financial statements and the financial statement for the investor(s) making the commitment. Various factors are considered including the applicant's track record and competence, whether its Constitutional Documents permit it to carry on venture capital investment activities, and whether the applicant is regulated by an appropriate foreign regulatory authority or is a registered income tax payer or has submitted a certificate from its banker of the applicant's or its promoters' track record where it is neither a regulated entity nor an income tax payer.

13. 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 Reserve Bank's pricing regulations and is therefore not subject to any limit on returns unlike foreign investors under the FDI Policy;

(ii) pre-IPO share capital held by an FVCI would not be subject to a lock-in period of one year post the date of allotment in an IPO subject to the FVCI having held the shares for a minimum period of one year (from the date of filing of the prospectus), unlike most of the other pre-IPO share capital of such Indian companies;

(iii) the open offer obligations contained in the SEBI Takeover Regulations are not applicable 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; and

(iv) FVCIs registered with SEBI have been accorded QIB status and would accordingly be eligible for subscribing to securities at the IPO of an issuer through the book-building route.

14. Are there any restrictions/investment norms for FVCIs.

The following limitations apply to FVCI investments:

(i) an FVCI is required to designate its investible funds for investment into India at the time of seeking registration. Accordingly, investment conditions and restrictions would be applicable with respect to such investible funds. The investment restrictions on the FVCI are required to be satisfied by the end of its life cycle;

(ii) under the SEBI FVCI Regulations, FVCI must maintain a prescribed asset composition of its investible funds - at least 66.67% of its investible funds must be invested 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 (as defined under the SEBI (Alternative Investment Funds) Regulations, 2012

("AIF Regulations") which replaced the SEBI (VCF) Regulations, 1996 with effect from May 21, 2012), whilst not more than 33.33% of its investible funds may be invested, amongst others, by way of subscription to an IPO of a VCU or investee company, whose shares are proposed to be listed or through preferential allotment of equity shares of a listed company. Under the SEBI FVCI Regulations, an FVCI can invest its total funds committed in one VCF or an alternative investment fund (as defined in the AIF Regulations);

(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 related to hardware and software development, biotechnology, nano technology, seed research and development, research and development of new chemical entities in pharmaceutical sector, dairy industry, poultry industry, production of bio-fuels,infrastructure sector and hotel-cum-convention centres with seating capacity of more than three thousand. However, the sectoral conditionality does not apply to investments in start-ups (as defined in FEMA 20). 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 of a fund set up by a Category - I alternate investment funds and VCFs. The definition of a VCF in the SEBI FVCI Regulations excludes most categories of NBFCs, companies engaged in gold financing or any other activity which maybe specified by SEBI in consultation with Government of India from time to time or other activity which may not be permitted under the industrial policy of the Government of India. FVCI 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) either through purchase of such capital instruments either from the issuer of the security/ instrument or from any other person holding the security/ instrument or on a recognised stock exchange. It may also set up a domestic asset management company to manage its investments. SEBI registered FVCIs are also allowed to invest under the FDI scheme, as non-resident entities, in other companies, subject to FDI Policy and FEMA regulations.

15. 2019 Regulations related updates to be captured for 15-17 (both inclusive).

SEBI, at its meeting on October 5, 2013, approved the draft for SEBI (Foreign Portfolio Investors) Regulations, 2014 ("FPI Regulations"). Consequently, the FPI Regulations were notified on January 7, 2014 and came into effect on June 1, 2014. The FPI Regulations merge the existing categories of FIIs and QFIs into a new investor class, viz. 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 multi-lateral agencies, etc.); (ii)Category II (for appropriately regulated broad based funds like mutual funds, appropriately regulated persons like banks, investment managers, etc., university and pension funds, unregulated broad based funds with regulated investment managers, etc.); and (iii) Category III which is a residual category, not falling under Category I or Category II. Registration applications for these entities are now required to be processed through designated depository participants which will replace SEBI as the primary authority that vets these applications. The FPI Regulations contained grand fathering provisions for existing FIIs, sub-accounts and QFIs, which assisted in taking steps to ensure a seamless transition to the new regime.

The nature of investments that can be made by FIIs broadly continues to remain unchanged in the FPI regime as well, with the exception of unlisted equities, which are not referred to in the FPI Regulations.

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

A registered FPI may, subject to the pricing and ownership restrictions discussed below, freely buy and sell securities issued by any Indian company, realise capital gains on investments made through the initial amount invested in India, appoint a domestic custodian for custody of investments made and repatriate any capital, capital gains, and dividends that they may make or receive.

17. Are there any restrictions/investment norms for FPIs?

The following limitations apply to investments by FPIs:

(i) all transactions of the FPI are subject to process restrictions and specifications prescribed by SEBI and must necessarily be through stock brokers registered with SEBI, except in certain cases;

(ii) unless specifically permitted, acquisitions of shares that are unlisted may be subject to the FDI Policy;

(iii) where an FPI holds equity shares in an unlisted company and continues to hold such shares after such a company lists its shares, the FPIs holdings are subject to lock-in for the same period as is applicable to shares held by a foreign direct investor placed in similar position according to the extant foreign exchange laws and FPI Regulations;

(iv) the total holding by each FPI or an investor group as referred in FPI Regulations shall be less than 10 percent of the total paid-up equity capital on a fully diluted basis or less than 10 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company and the total holdings of all FPIs put together shall not exceed 24 percent of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants. The said limit of 10 percent and 24 percent will be called the individual and aggregate limit, respectively.

Provided the aggregate limit of 24 percent may be increased by the Indian company concerned up to the sectoral cap/ statutory ceiling, as applicable, with the approval of its board of directors and its general body through a resolution and a special resolution, respectively.

(v) in case the total holding of an FPI increases to 10 percent or more of the total paid-up equity capital on a fully diluted basis or 10 percent or more of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company, the total investment made by the FPI shall be re-classified as FDI subject to the conditions as specified by SEBI and the Reserve Bank in this regard and the investee company and the investor complying with the reporting requirements prescribed in regulation 13 of FEMA 20.

18. New External Commercial Borrowings (ECB) framework issued on January 16, 2019 and Master Directions to be specified.

Foreign investment in partially, optionally or non-convertible preference shares/ bonds/ debentures, is construed as an ECB and would be subject to the ECB norms. At present ECB is governed by the ECB Master Directions.

The ECB regime underwent major changes in November 2015 whereby the revised ECB framework was divided into three tracks :(I) Track I comprises medium term foreign currency denominated ECB with MAM of 3/5 years; (ii)Track II consists of long term foreign currency denominated ECB with MAM of 10 years; and(iii)Track III comprises Rupee- denominated ECB with MAM of 3/5 years. All in cost ceilings also vary across the three Tracks.

ECB can be raised by way of bank loans, securitized instruments, buyers' credit, suppliers' credit, FCCBs, and financial leases through the automatic route. ECB through foreign currency exchangeable bonds can be only raised under the government route.

Eligible borrowers include the following:

(I) *Track 1*: Companies in the manufacturing and software development sectors, shipping and airlines companies, small industries development bank of India, units in SEZs, export import bank (only under approval route), companies in infrastructure sector, non-banking financial companies, infrastructure finance companies, core investment companies and housing finance companies;

(ii) *Track 2*: Entities under Track 1, REITs and INVITs; and

(iii) *Track 3*: Entities under Track 2, non-banking financial companies(including micro-finance institutions), not for profit companies, societies, trusts, and cooperatives engaged in micro financing activities, companies engaged in miscellaneous services and developers of SEZs/ National Manufacturing and Investment Zones.

Eligible lenders include the following:

(i) *Track 1*: International banks, international capital markets, multilateral financial institutions, export credit agencies, equipment suppliers, foreign equity holders, overseas long term investors such as pension funds, insurance companies, etc. and overseas branches/subsidiaries of Indian banks;

(ii) *Track 2*: Entities under Track 1 except for overseas branches/subsidiaries of Indian banks;

(iii) *Track 3*: All entities listed under Track I except overseas branches / subsidiaries of Indian banks. In case of non-banking financial companies–micro-finance institutions, other eligible micro-finance institutions, not for profit companies and non-governmental organizations. ECB can also be availed from overseas organisations and individuals, subject to compliance with Financial Action Task Force (FATF) guidelines on anti-money laundering (AML) / combating the financing of terrorism (CFT), as may be applicable.

Additional end-use relaxations vide July 30 circular to be included.

ECBs raised under the current regime are subject to the following end use prescriptions:

(i) Investment in real estate or purchase of land except when used for affordable housing as defined in harmonized master list of infrastructure sub-sectors notified by Government, construction and development of SEZs and industrial parks/integrated townships.

(ii) Investment in capital markets.

(iii) Equity investment.

Additionally for Track I and Track III, the following negative end uses are applicable except when raised from direct and indirect equity holders or from a group company, and provided the MAM of loan is of 5 years:

(i) Working capital purposes.

(ii) General corporate purposes.

(iii) Repayment of rupee loans.

Lending to entities for the above end uses also constitutes a negative end use for all three Tracks.

Currency of borrowing

ECBs can be raised in any freely convertible foreign currency as well as in Indian Rupees in the manner as prescribed in the ECB Master Directions depending on the nature of the transaction or the kind of lenders involved.

ECB by start-ups

Start-ups are afforded certain relaxations for raising ECB under a separate framework. These entities are restricted from raising ECB beyond USD 3 million or equivalent per financial year either in Indian Rupees or any convertible foreign currency or a combination of both.

19. To check no change in Master Directors - Other Remittance Facilities.

The remittances relating to royalty payments fall under the automatic route.

Remittances of consultancy fees exceeding: (a) US$ 10 million per project for any consultancy services procured by an Indian entity in respect of infrastructure projects; and (b) US$ 1 million per project for other consultancy services from outside India, requires the prior approval of the Reserve Bank. However, this rule does not apply if payments are made out of funds held in an RF C account of the remitter.

IV. Business and Asset Transfers

1. 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 purchaser acquires the entire business undertaking of the seller consisting of assets, liabilities, employees and goodwill on a 'going concern basis', whilst in the latter, the purchaser can acquire specific identified assets and/or liabilities (often described as 'cherry picking'). A business transfer typically involves a lump-sum consideration without values being assigned to individual assets and liabilities (save and except for determination of value of assets or liabilities for stamp duty), whilst in an asset sale, the price of each asset would be identifiable.

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

Generally, a business transfer (which constitutes a 'slump sale' for the purpose of the Income Tax Act) is more cost efficient than an asset sale.

Capital Gains: The gains arising from a business transfer, which fall within the definition of a 'slump sale' under the Income Tax Act, 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. Gains from the disposal of an undertaking held for more than 36 months are taxed as long term capital gains. On the other hand, in case of an asset sale, capital gains tax is to be paid by the seller on the income arising from the transfer of each asset.

Generally in case of a business transfer, the tax holiday period attached to the business undertaking is allowed to be carried forward. However, such tax holidays are not available upon transfer of separate assets of such an eligible business undertaking.

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

Stamp duty: Stamp duty is attracted on the document affecting the transfer of property and the rate of duty would depend upon the state in which the document is executed and where the property sought to be transferred is situated. The rate at which stamp duty is payable is typically an ad *valorem* rate based upon the state in which the property is situated.

Typically the assets would be transferred in the following manner, which would be similar for both slump sales as well as asset sales: (a) immovables under a registered deed of conveyance; (b) movables by delivery; and (c) intellectual property comprising of trademark and copyright by deed of assignment.

The deed of conveyance for the transfer of immoveable properties in respect of both slump sales and asset transfers will attract stamp duty. Where moveable property is transferred by delivery (without a specific deed of conveyance) no stamp duty would be payable.

Registration Fees: Transfer documents in respect to transfer of immoveable property are required to be registered with the relevant authority upon payment of fees, which vary from state to state.

3. What approvals are required for affecting a slump sale or an asset sale?

For a slump sale, in addition to obtaining the approval of the board of directors of the company transferring the undertaking, an approval of the majority of the shareholders of the seller, by special resolution, would be required in certain cases. Such shareholder approval would have to be by way of a postal ballot / e-voting.

In case of an asset transfer, generally an approval of 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).

Both for a slump sale and an asset transfer, approvals from lenders, employees, third parties, and regulatory authorities may be required.

In addition to the above, Indian labour law also provides protection for 'workmen' in the case of transfer of the undertaking in which they are employed. Such transfers normally attract a retrenchment compensation and notice, as prescribed, unless: (a) the workman is absorbed in the transferred undertaking with his / her consent; (b) the terms of employment in the transferred undertaking are no less favourable than those applicable to the workman originally; and (c) the new employer is liable to pay the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous. A similar approach is adopted for non-workman as well.

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

The process of business or asset transfers could take between 6 - 8 weeks or more (depending on the approvals and consents (including in relation to licenses) 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.

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

Individual approvals of the creditors, regulatory authorities, and third parties would be required for the transfer of the undertaking, licenses and other business related agreements through a private arrangement. This could be a time consuming process.

In case of a court process however, it is not necessary to seek individual approvals of creditors or third parties prior to transfer, except as required under loan agreements and specific third party contracts, such as shareholders' agreements. All other agreements, permits and licenses are transferred by the order of the court, though additional formalities to record such transfer will still for required.

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

V. Tribunal Based Restructuring

1. What are the various forms of tribunal based restructuring that are recognized under Indian law?

The provisions in relation to schemes of arrangement in the Companies Act (2013), which came into effect in December, 2016, introduced several changes in the process for schemes of arrangement including *inter alia* to change the approving authority for schemes of arrangement from the jurisdictional High Courts to the NCLT.

Several types of restructuring, whether of the business (including mergers, demergers, spin-offs or slump sales) or 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 (2013). The basic process involves the filing of 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, obtaining the approval of the shareholders and creditors, as may be directed by the NCLT, pursuant to which the NCLT will review 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 that are undertaken under Sections 230 to 234 of the Companies Act (2013).

2. Are any special rules applicable to schemes of arrangement involving listed companies?

Listed companies proposing to undertake such schemes of arrangement are further subject to the regulations of SEBI in this regard. Under the SEBI (Listing obligations and Disclosure Requirements) Regulations, 2015, listed companies are obligated to ensure that such scheme of arrangement do not violate in any way the applicable securities laws. Accordingly, the SEBI regulations require that listed companies submit such schemes to the concerned stock exchanges and SEBI for their review and observations prior to filing the scheme with the NCLT. Along with the draft scheme the listed companies are required to submit various documents such asa fairness opinion from a merchant banker, valuation report (in certain instances) of an independent chartered accountant, the audit committee's report, etc. to facilitate the review by the stock exchanges and SEBI and monitor compliance.

In addition to enhancing SEBI's ability to monitor compliance with securities regulations, the regulations seek to address the following:

(a) Ensuring compliance with securities regulations. The regulations lay down certain conditions for unlisted companies to meet before seeking listing pursuant to a scheme of merger/demerger. Further, they have introduced certain pricing requirements to check instances of such schemes being used to circumvent preferential allotment guidelines;

(b) Improving disclosures and provide for detailed prescriptions on disclosure requirements and require multiple documents (including the observation letter) to be disclosed and made available on the listed company's & the stock exchange's website.

(c) In certain specified cases, for schemes involving listed companies, the scheme is considered approved only if the votes cast by public shareholders in favour of the scheme exceed the votes cast by public shareholders against it. Thus the regulations also seek to protect minority shareholders' interests.

3. What are the conditions that need to be satisfied for listing of shares by a transferee company pursuant to a scheme of amalgamation?

Where the transferor entity is listed and the transferee entity is unlisted, then the latter's shares may be listed under a scheme of amalgamation/demerger without making an IPO subject to the satisfaction of various conditions. Such conditions include:

(a) 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;

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

(c) The transferee entity will not issue/ reissue any shares, not covered under the scheme of arrangement;

(d) At time of the application for listing, there should be no outstanding warrants/ instruments/ agreements which give right to any person 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;

(e) The shares of the transferee entity issued in lieu of locked-in shares of the transferor entity will be subject to lock-in for the remaining period.

Note that there are additional conditions prescribed in relation to the unlisted company and an application by such company to SEBI to relax the requirement of making an IPO may only be made if such conditions are satisfied.

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

The following are the main advantages of adopting the route of a tribunal sanctioned scheme of arrangement:

- *Beneficial Tax Treatment:* 'Amalgamations' and 'demergers' are specifically defined under the Income Tax Act and if implemented in accordance with the conditions specified therein would, *inter alia*, provide the following benefits:

(i) no capital gains tax incidence on the amalgamating / de- merged company or its shareholders (who are issued shares in consideration for the merger or demerger). Also, the period of holding required to determine whether the shares sold are a long term or a short term capital asset will be computed by including the period for which that shareholder held shares of the amalgamating / demerged company, prior to the scheme;

(ii) subject to fulfilment of certain conditions, the amalgamated company may carry forward the accumulated business loss and unabsorbed depreciation of the amalgamating company(ies) for 8 years and an indefinite period from the date of amalgamation, respectively;

(iii) the companies can amortise the expenses of the amalgamation over 5 years from the date of amalgamation / demerger;

(iv) certain tax holidays or other tax benefits available to the amalgamating / demerged company(ies) as of the date of amalgamation / demerger will be available to the amalgamated / resulting company;

(v) one condition for claiming the above benefits in respect of demerger being the requirement to transfer assets and liabilities of the demerged company at book value immediately before the demerger. This condition has now been relaxed to allow resulting company to 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.

- *Single window clearance:* Judicial precedents under the corresponding provisions of the Companies Act (1956) have established that the provisions relating to schemes of arrangements under the Companies Act form a complete code in itself and are intended to be in the nature of 'single window clearance' for the purposes of the Companies Act. Essentially, companies should not be required to separately follow procedural requirements prescribed in other sections of the Companies Act, for various corporate actions that form part of the scheme.

- *Exemption from mandatory tender offer requirements:* Acquisition of shares under such a scheme of arrangement is exempt from the mandatory tender offer requirements under the SEBI Takeover Regulations, subject to satisfaction of certain conditions.

- *Transaction Costs:* In certain States within India, there is a cap on the stamp duty charges that are payable for a transfer implemented under a NCLT sanctioned scheme of arrangement.

The main disadvantages in a NCLT process are:

- *Time period:* The time period for the process before the NCLT is typically about 4 to 8 months and maybe further delayed because of objections raised before the NCLT, thereby delaying the whole transaction;

- *Disclosures:* The nature of disclosures that would have to be made are fairly extensive compared to a private process; and

- *Public scrutiny:* The fact that the terms of the arrangement are in the public domain and therefore open to scrutiny and challenge. The court also has the power 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.

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

Judicial precedents under the Companies Act (1956) have established that the role of the court was not merely a procedural one and it will not sanction a scheme merely because shareholders and creditors have accorded their consent. Some of the key principles in relation to the role of the court include the following (as laid out by the Supreme Court of India):

- that the scheme is fair;
- that the statutory provisions have been complied with;
- that the concerned meetings had the relevant material for the shareholders/creditors to make an informed decision;
- that the class of persons who attended the meeting were fairly represented;
- that the statutory majority was acting bonafide;
- that the scheme is not patently unfair or grossly prejudicial to the shareholders; and
- 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 to the scheme and hence would typically not question the strategic and commercial aspects of the scheme.

6. How are classes of shareholders and creditors determined?

Under the Companies Act (2013) companies are required to convene separate class meetings of shareholders and creditors to approve the scheme and the scheme would have to be approved by each class by the requisite majority in number representing three fourths in value. The issue as to 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 who have a commonality of interests, and to whom the company has offered the same compromise would be considered as persons within the same class. If persons are offered different rights and are subject to different terms, such persons would not be considered as being within the same class.

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

The merger of two banks is not undertaken under the provisions of Companies Act (2013) but under the Banking Regulation Act and RBI's guidelines/directions in this regard. In brief the process would be as follows:

- the draft scheme of amalgamation needs to be approved individually by the board of directors of the two banking companies by a two-thirds majority of the total strength of the board (and not just those present at the meeting).
- the scheme of amalgamation would then have to be approved by the shareholders of each banking company by a resolution passed by a majority in number representing two-thirds in value of the shareholders, present in person or by proxy, at a meeting called for that purpose.
- after the scheme of amalgamation is approved by the requisite majority of shareholders, it is required to be submitted to the Reserve Bank for its sanction, together with other information, including a valuation report (with a detailed computation), details of the price of the shares, where the amalgamated company is listed and such other information as the Reserve Bank may request.
- a dissenting shareholder is entitled, in the event of the scheme being sanctioned by the Reserve Bank, to claim from the banking company concerned, in respect of the shares held by the dissenting shareholder in that company, their value as determined by the Reserve Bank when sanctioning the scheme.
- The Banking Regulation Act and the RBI's guidelines/directions in relation to such mergers prescribe additional requirements in relation to the process and compliances, including notice and advertisement requirements, parameters for the board to consider while approving of the board, information required to be submitted to the RBI, etc.

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

- The board of directors would have to approve the restructuring including the terms of the draft scheme and the form of consideration payable - whether in cash or shares.
- Application to the stock exchanges and SEBI (in case of a listed company) for their respective comments to the scheme as highlighted above.
- The scheme along with the related documents is then filed with the relevant NCLT.
- The relevant NCLT will direct that meetings of the various classes of shareholders and creditors be convened to approve the scheme and notices are to be issued in this regard.
- Notice, including all information provided to shareholders/creditors for their approval, will have to be given 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. Such authorities are entitled to make representations before the tribunal (in case of any concerns on the scheme) within a period of 30 days of receipt of such notice.

After the majority in number representing three-fourths in value of each class of the shareholders and/or creditors have approved the scheme, the petition for final sanction of the scheme is filed with the NCLT. As mentioned earlier, in case of a listed company, for certain specified cases, the votes cast by the public shareholders in favour of the scheme should be more than the number of votes cast by public shareholders against it.

- Pursuant to filing of this petition, the NCLT will conduct a hearing prior to grant of sanction.

- Once the NCLT has sanctioned the scheme, it can be made effective, subject to the receipt of other regulatory and contractual approvals that may be required.

A copy of the NCLT order sanctioning the scheme is required to be filed with the RoC within 30 days of the date on which the drawn up order is prepared. Stamp duty is required to be paid on the order of the NCLT sanctioning the scheme. The rates of stamp duty payable various from state to state.

The Companies Act (2013) also provides for a "short-form" process for schemes of merger between a holding company and its wholly owned subsidiary. Such schemes may be approved by the Regional Director (Ministry of Company Affairs) instead of the NCLT and the procedural requirements are comparatively truncated.

9. 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 that employees approval be sought for a scheme and if the scheme provides that the employees of the transferor company become the employees of the transferee company without any interruption of services and the transferee company should extend status and benefits to the employees on terms which are not less favourable as was given to them by the transferor company, courts have been satisfied that their interests are protected. However, employees cannot be transferred without their consent, whether express or implied.

The legal proceedings instituted in the name of the transferor company will continue in the name of the transferee company and the name of the transferor company will be substituted by that of the transferee company.

10. Who may raise objections to a scheme of arrangement?

Objections to a scheme may be raised by stakeholders, regulators such as SEBI and the relevant stock exchanges (in case of listed companies), Regional Director or such other persons interested in the transferor and the transferee companies who approach the court with *bonafide* objections. With specific reference to the shareholders and creditors, the Companies Act (2013) provides that an objection may only be made by a member holding at least 10% of the shareholding or a creditor having outstanding debt amounting to at least 5%of the total outstanding debt.

11. Are cross border mergers allowed under Indian company law ?

Under the Companies Act (2013), permit mergers between a foreign company and an Indian company, provided that the foreign company is in such countries as may be notified from time to time by the Central Government & subject to the approval of the RBI. The RBI has further laid down regulations with additional conditions for such mergers.

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

The Companies Act (2013) provides that a scheme is required to clearly indicate an "appointed date" from which the scheme is to be effective and it would be deemed to be effective from such date. Further, the holders of the securities of the transferor company, who will be entitled to receive securities in the transferee company in lieu of their holding in the transferor company, are determined as of an identified date.

VI. Acquisition of Shares

1. What are the various modes of acquisition of shares of an existing company ?

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

2. What are the stages at which Indian companies typically seek to access 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.

3. What are the rules and regulations that are relevant to a fresh issue of shares by way of preferential allotment ?

The Companies Act (2013) mandates that a preferential allotment of shares or allotment of other securities, which includes fully or partially convertible debentures or any other securities convertible into shares, is subject to the prior approval of the shareholders by way of a special resolution. ^e price of the shares has to be supported by the valuation report of a registered valuer.

A company issuing shares or other securities on a preferential basis has to comply with the conditions applicable for a private placement under the Companies Act (2013) which includes, *inter alia*, (i) the issuance of a private placement offer letter in prescribed form; (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 subscription of the 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 shall only be made in dematerialized form and is subject to the SEBI ICDR Regulations and the Listing Regulations, which 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 determination of 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 the 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 under the applicable FEMA regulations. A post facto filing in the prescribed form would have to be made to the Reserve Bank for reporting the issuance of shares to foreign investors.

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

A seller may exit its investment in an Indian company in a number of ways. As a general rule, repatriation of the sale proceeds of a divestment from India is freely permitted subject to compliance with applicable pricing guidelines, though in certain circumstances approval of the Reserve Bank may be required. Some of the common exit options utilised by sellers are listed below:

- **Negotiated sale off the exchange or sale of shares of an unlisted company:**

  A seller may subject to compliance of non-debt regulations sell its equity instruments including equity shares, convertible debentures and preference shares to resident Indians or non-residents through a negotiated deal. **In this regard, please note:**

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

  (ii) *Non-resident to Resident:* A person resident outside India can transfer any equity instruments 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, without obtaining prior approval from the Reserve Bank.

  (iii) *Resident to Non-resident:* A person resident in India can transfer, by way of sale, equity instruments under the FDI Policy under private arrangement to a person resident outside India, subject to compliance with various stipulations under the extant exchange control regulations including sectoral caps, pricing guidelines, reporting requirements, etc.

- **Qualified IPO or sponsored ADR / GDR:**

  In case the target company is an unlisted company, the seller may require that the company undertake an IPO and list the shares on a stock exchange. In such cases, the seller would have the option to offer its shareholding in the target company for sale as part of the listing process or exit thereafter (subject to statutory lock-in for the prescribed period). A non-resident seller would require prior regulatory approval for such an offer for sale. Such an offer for sale can be undertaken without prior regulatory approval, if certain specified conditions are fulfilled.

  In case the target company is a listed company, the seller may require the company to support a sponsored ADR / GDR program, 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 / CDRs, subject to certain specified conditions.

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

- **Buyback by the company:**

  The investee company may buyback the shares held by the seller. Under the Companies Act (2013), a company can buyback only up to 25% of its paid-up equity share capital in a single year and not more than 25% of the company's paid up capital and free reserves. The buyback may 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 the company's free reserves. The debt owed by the company should not exceed twice its paid up capital and free reserves after such a buyback. Further, unless the buyback is of 10% or less and such a buyback has been authorised under a board resolution, it would require the approval of the shareholders. The buyback offer can be made: (a) from the existing shareholders on a pro-rata basis; (b) from the open market; or (c) by purchasing the securities issued to the 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.

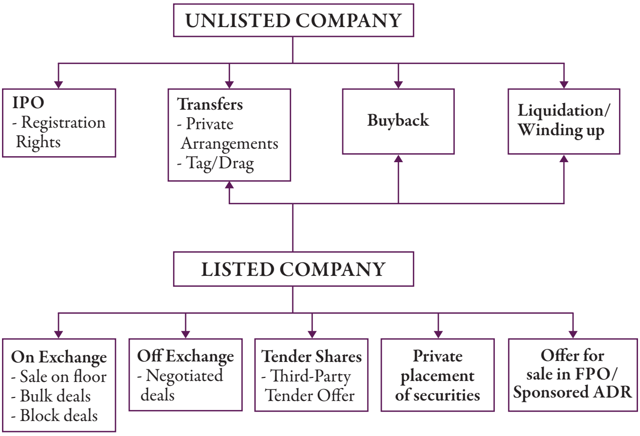
Private companies and unlisted public companies would also have to comply with the requirements of Rule 17 of the Companies (Share Capital and Debenture) Rules, 2014. Listed companies would have to comply with the provisions of the SEBI Buyback Regulations, as amended from time to time, which provides for additional conditions that need to be complied with in relation to limits on offer for buyback that can be made from the open market, buyback of physical shares or other specified securities, escrow account 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 the declaration. Further, companies with non-resident shareholders would have to ensure compliance with applicable foreign exchange rules / regulations.

- **On an Indian stock exchange:**

  In the case of target companies which 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.

  A sale of shares over a stock exchange cannot typically be made to an identified buyer. A special provision has however been made for the consummation of large transactions on the exchange which are pursuant to private arrangements concluded off the exchange for the sale and purchase of shares of listed companies. 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 has to be concluded at a price which is within 1% 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 snap shot of the exit options available to a seller:



5. Are there pricing restrictions applicable to the subscription / acquisition of shares ? Are there special restrictions applicable to foreign investors ?

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.

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

Put and call options for the sale and purchase of shares of a public company are subject to the SCRA and SEBI notifications. SEBI has issued a notification under the SCRA to permit certain kinds of contracts of the 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 the conditions set out as below:

(i) the title and ownership of the 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 the actual delivery of the underlying securities; and

(iii) the consideration payable for the sale and purchase of securities should be compliant with the extant regulations dealing with valuation of securities.

Subsequently, optionality clauses in equity instruments being issued to non-residents have also been permitted under the FEMA regime, 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.

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

Typically an acquirer would enter into an agreement with the shareholders of the company to record and set out the mutual rights and obligations inter se the parties and the manner in which the company shall be managed and 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 rights would only be enforceable against the company if the same have been incorporated into the Constitutional Documents of the company. In case of acquisition of shares in sectors which require the prior approval of the Government, under FEMA details of any agreements between shareholders which have an effect on the appointment of the board or directors of the investee company, or on the exercise of voting rights, or of creating 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 the 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) provided that there can be no restriction 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.

8. Can an acquirer undertake a leveraged acquisition in India?

The ability of an acquirer to acquire shares by leveraging locally within India would be restricted because of the following factors:

(i) the 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 the limits on capital market exposure imposed upon the 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 extant foreign exchange regulations.

Subject to the rules against financial assistance and the 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.

9. Are there restrictions of insider trading applicable to the acquisition of shares of listed companies ?

The SEBI Insider Trading Regulations have replaced the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 with effect from May 15, 2015.

Yes, an "insider" (either on his own or on behalf of any other person) is prohibited 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 unpublished price sensitive information, or who has in fact received or had access to, unpublished price sensitive information 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 trading in securities for the purpose of the SEBI Insider Trading Regulations. Communication of unpublished price sensitive information in furtherance of legitimate purposes, performance of duties or discharge of legal obligations is not prohibited.

Price sensitive information is information which 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 periodical financial results, information as to 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 in that 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.

10. Can the acquirer undertake a due diligence exercise prior to the investment? Are there any 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 the provisions of the SEBI Insider Trading Regulations. The SEBI Insider Trading Regulations create a specific exemption on communication of unpublished price sensitive information in connection with a transaction 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 interest of the company; or

(ii) the transaction does not entail an open offer but the board of directors of the listed company is of the informed opinion that sharing of such information is in the best interest of the company and the information that constitutes unpublished price sensitive information is disseminated and made generally available at least 2 trading days prior to the proposed transaction being effected in such form as the board may determine to be adequate and fair to cover all relevant and material facts.

In such cases, the party receiving unpublished price sensitive information 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 (PAN) Number, or any other identified authorised by law if the PAN is not available. Certain matters in relation to any company would form part of public record and may be assessed by applying to the appropriate authority (such as the RoC or the stock exchanges) free of cost or on the 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.

11. What are the disclosures mandated in relation to the acquisition or disposal of shares of a target company? Are there special disclosures applicable to foreign investors ?

In relation to listed companies, the SEBI Takeover Regulations stipulate initial disclosure of the aggregate shareholding and voting rights if the acquirer and persons acting in concert with him acquire 5% 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% to shareholding or voting rights by an acquirer holding 5% and above, to be made in the prescribed format 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, employee and director of the company if the value of securities traded in one transaction or a series of transaction, over any calendar quarter, exceeds Rs. 1,000,000 (Rupees One Million) or such other value as may be prescribed. This disclosure has to be made within two trading days of the transaction. The disclosures made by a person under the SEBI Insider Trading Regulations includes 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 securities of the company.

For all companies, listed or otherwise, there is a requirement for maintaining of a return of allotment of shares in a prescribed format under the Companies Act (2013), whenever shares are issued (including to foreign investors). In addition, there exist certain intimation/reporting requirements under the foreign exchange regulations, depending upon the structure of the transaction at hand, including reporting regarding the foreign investor.

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

Yes, the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 permit payment of deferred consideration subject to compliance with the conditions therein including cap on the deferred component and the period within which the deferred payment will be completed.

VII. Takeover Code

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

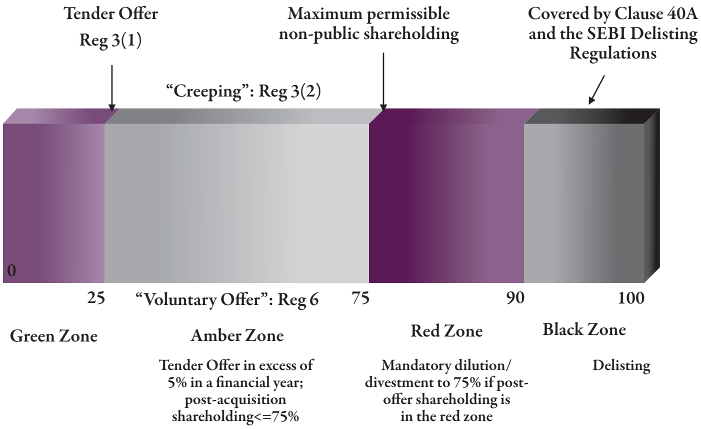
1. When does a tender offer under the SEBI Takeover Regulations get triggered?

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 (as illustrated in the diagram below):

(i) the acquisition by an acquirer (together with persons acting in concert) of 25% or more of the voting rights of the Target; and

(ii) when the acquirer (together with persons acting in concert) holds 25% or more but less than 75% of the shares or voting rights of the Target, acquisition of more than 5% of the voting rights of the Target in any financial year ending on March 31 of that year.

(iii) the acquisition of 'control' over the Target, irrespective of whether or not there has been any 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, the majority of the directors on the board of the Target or to control its management or policy decisions.



©cyril amarchand mangaldas

2. 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 acquisitions of shares/voting rights and/or control over a Target. The thresholds set out in Question 1 would apply with respect to indirect acquisitions also, 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.

3. 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% (as compared to or minimum of 26% for mandatory offers).

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

Yes. Any person holding less than 25% of the shares/voting rights in a Target can make a voluntary offer (as described in question 3) or a competing offer to an ongoing tender offer (as described in question 5).

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

Yes, a competing offer has to be made within 15 business days of the original offer. Such a competing offer may be made by any person (whether it be an existing shareholder or otherwise). There is a restriction on making an offer or entering into an agreement that could trigger an offer at any time after the expiry of the said 15 business days and until the completion of the original offer.

Once a competing offer has been made, the original and the competing offers are treated on par and the Target would have to extend equal levels of information and support to each acquirer. A 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 for a competing offer has to 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.

6. What is "creeping acquisition"?

Shareholders holding between 25% and 75% of a Target would be able to consolidate their shareholding by way of acquisitions of up to 5% of the voting rights of the Target in each financial year. This 5% acquisition may be made through negotiated purchases, preferential allotments or on-market acquisitions. The calculation of the 5% limit will be by way of an aggregation of the gross acquisitions of the acquirer and its persons acting in concert in that financial year. Acquisition pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 ("IBC") are exempt from the creeping acquisition limit of 5% for scheduled commercial banks (except regional rural banks) and government notified All India Financial Institutions.

7. 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 of or voting rights in, or 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 the acquisition of the 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. Consequently, 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, as also 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.

8. Are there any exemptions from the obligations under the SEBI Takeover Regulations?

The SEBI Takeover Regulations provide a rational tiered approach to transactions that are exempted from tender offer obligations. The exemptions typically cover cases involving: (i) ordinary corporate actions (such as rights issues and buy backs); (ii) acquisitions made in the ordinary course of business (such as an allotment of shares to an underwriter pursuant to an underwriting agreement); and (iii) transactions involving financial restructuring such as transfers between certain categories of persons, acquisition of shares by the lenders as part of debt restructuring as per RBI guidelines and acquisition pursuant to a resolution plan under IBC). Further, SEBI may, in its discretion, grant fact-specific exemptions.

9. How is the '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 Target shares;

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

(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 infrequently traded).

Indirect acquisitions, where the underlying Target is not a predominant part of the business being acquired, have been given price protection under the SEBI Takeover Regulations, subject to the payment of 10% 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 5 working days).

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

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

Any non-compete payments made or payable to the counter party to the triggering transaction necessarily have to 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 included in determining the offer price (subject to adjustments for corporate actions such as rights issues, stock splits, reductions of capital, and any payments of dividend).

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

A mandatory tender offer must be made for a minimum of 26% 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% of the Target's share capital. Further, the offer size is calculated on the basis of 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 tendering 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.

12. 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 shareholders of the Target.

13. 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. In case of competing offers, the Target is obligated to extend equal support to all acquirers.

The Target is also obligated to 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 authorized but unissued securities entitling the holders thereof to voting rights in the Target.

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

A tender offer is initiated by the making of a public announcement to the shareholders of the Target, specifying the tender offer price determined in accordance with the SEBI Takeover Regulations, followed by the publication of a detailed public statement containing prescribed details of the offer. The detailed public statement 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 the payment of the offer price, the tendered shares are transferred to the acquirer. Under the SEBI Takeover Regulations, the timeline for a tender offer would be approximately 57 business days, which may stand extended on account of intervening events. A typical timeline for a tender offer 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% 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% 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
Despatch 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
Completion of all tender offer requirements including payment to shareholders	Z + (<) 20 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 working days	Not earlier than Z + 50
Completion of underlying transaction giving rise to the tender offer without meeting 100% tender offer escrow cash deposit requirement	Not before payment to public shareholders and not later than (Z + 20) + 26 weeks

15. 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 has to contain a condition to the effect that in the event that the desired level of acceptance of the tender offer is not received, 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 acceptances, the acquirer cannot, during the offer period, acquire any shares in the Target, except under the tender offer and any triggering transaction.

16. In 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 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 the 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.

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

Delisting is the process of taking a listed company private by taking the shares of the Target the stock exchanges on which they are listed. Delistings are governed by the SEBI Delisting Regulations and require an acquirer to provide an exit opportunity to the public shareholders of the Target as part of the delisting. The SEBI Takeover Regulations permit an acquirer to launch a delisting offer upon triggering a mandatory tender offer. In the event that an acquirer intends to take a company private upon triggering a mandatory tender offer under the SEBI Takeover Regulations, the acquirer must declare its intention to launch a delisting offer in the detailed public statement for the tender offer. The acquirer must then undertake a delisting offer under the SEBI Delisting Regulations. If the delisting offer succeeds, then the company goes private and the acquirer does not need to undertake the tender offer. However, if such delisting offer fails, then the acquirer must launch a tender offer for the shares of the Target.

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

An acquirer would have to disclose an acquisition of 5% or more of the shares or voting rights in the Target within two working days of such an acquisition. An acquirer (taken with persons acting in concert) holding in excess of 5% would have to disclose every acquisition or disposal of shares representing 2% or more of the shares or voting rights in the Target. The acquisition of convertible instruments and encumbrances on shares would also attract disclosure requirements. Promoters are required to make an annual disclosure of their shareholding in the Target as of March 31 of each year. Promoters are also 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 a declaration an annual basis confirming that the promoter (or a person acting in concert) has not created any encumbrances other than these already disclosed.

VIII. Delisting

1. What are the kinds of delistings that may be effected?

There are four kinds of delistings permitted under the SEBI Delisting Regulations:

(i) voluntary delisting;

(ii) compulsory delisting;

(iii) 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.);

(iv) delisting for Small Companies (as defined below).

2. When and how can a voluntary delisting be effected?

The shares of a listed company may be voluntarily delisted by the promoter of a company from some or all of the stock exchanges, on which they are listed, only upon completion of a successful delisting offer in accordance with the provisions of the SEBI Delisting Regulations. If the shares cease to be listed on any recognised stock exchange, shareholders are required to be given an exit opportunity by way of a price determined by a reverse book building process, the procedure for which is outlined under the SEBI Delisting Regulations. A voluntary delisting offer is subject to the prior approval of the board of directors of the company and the shareholders with a 75% majority, through a postal ballot 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 of the company are listed are also required to be obtained.

The above rules do not apply to voluntary delisting by small companies (being companies with less than Rs. 100 million paid up capital and net worth not exceeding Rs. 250 million as on the last date of the preceding year, whose shares have not been traded for the preceding year and whose shares have not been suspended by any of the recognised stock exchanges having nationwide trading terminals for any noncompliance in the preceding one year) and SEBI has provided for separate and simplified norms for the same.

3. How is the reverse book building process effected?

The reverse book building process envisages the discovery of the price of the offer by inviting bids after providing a floor price. The price at which shares accepted through eligible bids that takes the shareholding of the promoter and persons acting in concert with the promoter to 90% is the final offer price. The tendering of shares by the shareholders and settlement of the same by the promoters is facilitated through the stock exchange mechanism as specified by SEBI.

4. When is a delisting offer successful?

The success of a delisting offer is dependent on: (a) acceptance by the acquirer of the price determined by the reverse book building process; (b) the post-offer acquirer shareholding constituting 90% of the total issued shares; and (c) participation by at least 25% of the public shareholders holding shares in demat form in the reverse book building process. However, the requirement of complying with points (b) and (c) mentioned above, would not be applicable if it is demonstrated to the stock exchanges that the letter of offer has been delivered to all public shareholders along with the proof of delivery. Companies which launch delisting offers and fail to reach the delisting threshold would still have to ensure compliance with the applicable public shareholding levels within the specified time period.

5. Can a delisted company relist its shares?

Upon voluntary delisting of its equity shares, a company cannot seek listing of any of its equity shares for a period of 5 years from the date of such delisting. Where a company has been compulsorily delisted, the company (and its whole time directors, promoters and companies promoted by any of them) cannot seek to list their equity shares or access the securities market for a period of 10 years from the date of such delisting.

IX. Competition Law

1. 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 made 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 from decisions of the CCI can be filed within 60 days, before the NCLAT (National Company Law Appellate Tribunal). Further, appeals from the orders of the NCLAT can be filed within 60 days, to the Hon'ble Supreme Court of India.

2. 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).

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

Section 2® of the Competition Act defines the "relevant market" as the market which may be determined by the CCI with reference to the 'relevant product market' or the 'relevant geographic market' or both. The "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 of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. The "relevant product market" is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

4. What are 'anti-competitive agreements'?

Section 3 of the Competition Act prohibits and renders void, agreements entered into between enterprises or persons or association of enterprises or persons with respect to the 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, which are engaged in identical or similar trade or provision of goods or services), including cartels, which directly or indirectly determine the purchase or sale price; limit or control production, supply, markets, technical development, investment or provision of services; share the market or source of production or provision of services; or directly or indirectly result in bid rigging or collusive bidding, are presumed to have an AAEC. Further, vertical agreements (agreements between enterprises or persons, or associations thereof, which are engaged at different levels of the production or supply chain) that cause or are likely to cause AAEC in India, are prohibited.

According to Section 27 of the Competition Act, the CCI may order the enterprises to discontinue and/or modify the agreement and/or impose a penalty which may be up to 10% of the average turnover for the last 3 financial years. However, in case of any agreement entered into by a cartel, the CCI may impose upon each enterprise or person which is in the cartel, a penalty of up to 3 times its profit for each year of continuance of such an agreement or 10% of its relevant turnover for each year of the continuance of such an agreement, whichever is higher.

5. What is 'abuse of dominance'?

Section 4 of the Competition Act prohibits abuse of a dominant position by an enterprise or a group. A 'dominant position' is defined as a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. A group or an enterprise is presumed to be abusing its dominant position if it imposes unfair prices (including predatory pricing) or unfair conditions on sale or purchase, limits or restricts production/technical development so as to detrimentally affect consumers or deny market access to its competitors.

The CCI may order the enterprise to discontinue such an abuse and/or impose a penalty which may be up to 10% of the relevant turnover for the last 3 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.

6. What is a 'combination' and how is it regulated?

Sections 5 and 6 of the Competition Act are the 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 notification issued by the MCA on March 4, 2016, would require a prior filing to the CCI as well as its approval.

Section 6 of the Competition Act *inter alia* provides that 'combinations' are required to be mandatorily notified by the parties to the CCI and prohibits combinations which cause or are likely to cause an AAEC within the relevant market in India. The procedure in relation to notification of combinations to the CCI is set out in the Combination Regulations. The CCI frequently issues amendments to the Combination Regulations and such amendments include widening the scope of certain exemptions from the notification requirement, clarifying the exact scope of certain exemptions and effecting changes to the filing requirements, including the filing fees.

The revised jurisdictional thresholds for the purposes of merger control filing before the CCI are as follows:

1. The Government of India, by way of the Target Exemption, has exempted combinations which would not require a prior notification to, and 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 assets of the value not exceeding INR 3,500 million in India **or** turnover not exceeding INR 10,000 million in India. It is pertinent to note that the Target Exemption is applicable until March 28, 2022.

2. The Target Exemption notification introduced on March 29, 2017 has also:

   - extended applicability of the Target Exemption to mergers and amalgamations; and
   - clarified that in case of acquisitions of a portion, division or business of an enterprise, the value of assets of the said portion or division or business (and not that of the selling enterprise in entirety), will be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds.

3. If the combination cannot avail of the Target Exemption, it may require mandatory notification to the CCI, if any of the following tests are met:

   - *Parties test* - The acquirer and target enterprise, or the merging entities including its divisions, units and subsidiaries jointly have either: (a) assets in excess of INR 20,000 million in India or turnover in excess of INR 60,000 million in India; or (b) worldwide assets in excess of USD 1,000 million, including at least INR 10,000 million in India or worldwide turnover in excess of USD 3,000 million, including at least INR 30,000 million in India; or
   - *Group test* - The group to which the target entity will belong post-acquisition or merger, has either: (a) assets in excess of INR 80,000 million in India or turnover in excess of INR 240,000 million in India; or (b) worldwide assets in excess of USD 4 billion, including at least INR 10,000 million in India or worldwide turnover in excess of USD 12 billion, including at least INR 30,000 million in India. The revised thresholds are provided in the form of a table below.

<table>
<tr><td rowspan="3">In India</td><td>Applicability</td><td colspan="2">Assets</td><td colspan="2">Turnover</td></tr>
<tr><td>For individual Parties (i.e. acquirer and target or merging entities) (Combined)</td><td colspan="2">INR 20,000 million</td><td colspan="2">INR 60,000 million</td></tr>
<tr><td>For 'Group' (to which target belongs post acquisition or merger)</td><td colspan="2">INR 80,000 million</td><td colspan="2">INR 240,000 million</td></tr>
<tr><td rowspan="4">In India and Outside India</td><td rowspan="2">Applicability</td><td colspan="2">Assets</td><td colspan="2">Turnover</td></tr>
<tr><td>Total</td><td>Minimum in India</td><td>Total</td><td>Minimum in India</td></tr>
<tr><td>For individual Parties (i.e. acquirer and target or merging entities) (Combined)</td><td>USD 1,000 million</td><td>INR 10,000 million</td><td>USD 3 billion</td><td>INR 30,000 million</td></tr>
<tr><td>For 'Group' (which the target will belong to post acquisition or merger)</td><td>USD 4 billion</td><td>INR 10,000 million</td><td>USD 12 billion</td><td>INR 30,000 million</td></tr>
</table>

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

Section 20(4) of the Competition Act sets out certain factors that the CCI shall consider, while determining if a combination causes or is likely to cause an AAEC in the 'relevant market' in India, including *inter alia*, the actual and potential level of competition through imports in the market, entry barriers to the market (regulatory and otherwise), degree of countervailing buyer power in the market, availability of substitutes in the market, market shares of each of the parties to the combination (individual and combined), likelihood of foreclosure/removal of competitors, extent of vertical integration in the market, etc. The CCI is also required to consider three positive effects that a combination could potentially give rise to, i.e. possibility of saving a failing business, nature and extent of innovation and relative advantage through contribution to economic development brought about by any combination having or likely to have an AAEC in India.

8. What are the transactions that require notification to the CCI?

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

- transactions relating to an acquisition of control, shares, voting rights or assets;
- transactions between two competitors where one is acquiring 'control' over another enterprise; and
- merger or amalgamation of enterprises.

Therefore, with effect from June 1, 2011, all acquisitions, mergers or amalgamations, which meet the prescribed thresholds (see table above), have to be mandatorily notified to the CCI prior to giving effect/consummating such transactions. By way of a notification dated June 29, 2017, the requirement to notify combinations within a 30-day period post the relevant trigger, has been done away with, until June 28, 2022. Accordingly, parties can now notify the CCI at any time, post:

(i) final approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned; or

(ii) execution of any binding definitive agreement or "other document" in relation to the acquisition.

In the event of a hostile acquisition, "other document" would mean any document executed by the acquirer conveying a decision to acquire. Further, where a public announcement has been made in turns of the SEBI Takeover Regulations, such public announcement shall be deemed to be the "Other document".

9. What is the process of merger filing?

The Competition Act provides for a self-assessment regime to determine the form of merger notification on the basis of market share of the transacting parties. Further, the Combination Regulations provides 3 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 2 million.

(ii) *Form II* – is a longer and more detailed, technical form which parties can opt to file, along with a filing fee of INR 6.5 million .

(iii) *Form III* - is a post-completion intimation form, which is filed within 7 days of an acquisition, share subscription or financing facility entered into by a public financial institution, registered FII, bank or registered VCF, under a covenant of a loan agreement or an investment agreement.

The obligation to notify the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

10. How long will the CCI review process take?

The CCI is required to form a *prima facie* opinion on whether a combination is likely to cause an AAEC within the relevant market in India within a period of 30 working days from the receipt of the notification. The 30 working day timeline, which constitutes Phase I, is not absolute as the CCI can "stop the clock" for further information and the time taken by the parties to submit further information is excluded from the 30 working day computation. The CCI has approved more than 500 Form I merger notifications to date, in Phase I. Where the parties to a combination propose a modification before the CCI reaches a *prima facie* opinion, the CCI will get an additional 15 days to evaluate the proposed combination. Further, the CCI has another 15 working 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 180 day review period). This has only been invoked

8 times by the CCI, where the combining parties had high market shares. It should be noted that the parties cannot complete the transaction until the earlier of: (i) a final decision by the CCI; or (ii) lapse of 210 days from the date of notification to CCI, (plus two 30-working day periods in case the parties do not accept the modification proposed by the CCI).

The CCI has stated in the Combination Regulations that it shall endeavour to clear combinations within 180 calendar days of filing a merger notification.

11. 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 published on 13 August 2019, has introduced the concept of a 'Green Channel' approval route. This will 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 could apply to only these transactions where the acquirer (and the acquirer group) has no existing interests in companies:

- that may be seen as competitors of the target's business;
- that operate in markets with vertical linkages to the target's business; or
- with complementary linkages to the target's business.

12. Are there any exemptions from mandatory pre-notification?

In addition to the transactions that can avail of the Target Exemption, the transactions falling under the following two categories are exempt from filing a notification under the Competition Act:

(i) *Transactions expressly exempt under the Competition Act:* Acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered FIIs, banks or registered VCFs, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the

CCI; and a post facto filing in Form III within 7 days of completion of acquisition is contemplated.

(ii) *Transactions that are 'ordinarily' exempt under Combination Regulations:* Transactions set out in Schedule I of the Combination Regulations are presumed not to cause AAEC in India and 'normally' do not require a notification according to Regulation 4 of the Combination Regulations. Such transactions include transactions such as acquisition of not more than 25% of shares or voting rights of a target company, made solely for investment purposes or in the ordinary course of business, not leading to control; acquisition of current assets in the ordinary course of business and intra-group acquisitions and mergers and amalgamations.

(iii) Specific exemptions have also been granted to: (a) combinations involving the Central Public Sector Enterprises (along with their wholly or partly owned subsidiaries) operating in the Oil and Gas Sectors; (b) reconstitution, transfer and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980; and (c) Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976.

13. 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.

14. What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if the combination does not cause an AAEC in the relevant market in India. In the event that the CCI is of the view that the combination results in an AAEC, it may disapprove of it and/or propose suitable modifications which 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 may be approved or disapproved by the CCI. 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.

15. What are the penalties imposed in the event of non-compliance with the provisions of the Competition Act?

In case of failure to intimate the proposed combination which exceeds the prescribed thresholds or consummation of whole or part of the combination, prior to receiving the CCI's approval, the CCI can impose a penalty up to 1% of the total turnover or assets of a combination, 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 10 million. Further, the Competition Act imposes personal liability on the responsible officers of a company, in case of a contravention by a company.

16. How is the procedure of the CCI and the 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 and the relevant rules made by the Central Government.

X. Overseas Investments

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

The FEMA prescribes two categories of overseas investments: (i) direct investment outside India; and (ii) investments in foreign securities other than by way of direct investment. The aforesaid overseas investments may be made through: (i) the automatic route; and (ii) the approval route.

2. What is direct investment outside India?

Direct investment outside India or ODI refers to investments by residents by way of contribution to the capital or subscription to the memorandum of association of a foreign entity or by way of purchase of existing shares of a foreign entity, either by market purchase or private placement or through stock exchanges, but does not include portfolio investment.

3. Who is eligible to make ODI from India under the Automatic Route?

ODI can be made by any of the following under the Automatic Route:

(i) any company incorporated in India;

(ii) any entity created under an Act of Parliament;

(iii) any limited liability partnership incorporated under the LLP Act;

(iv) any partnership firm registered under the Indian Partnership Act; or

(v) any other entity as may be notified by the Reserve Bank.

Entities listed above are hereinafter collectively referred to as 'Indian Party'.

4. In which sectors is ODI permitted?

ODI is permitted in relation to bona fide activities in all sectors (other than as specified below) subject to the regulations governing the same.

ODI by Indian Parties in entities engaged in the 'real estate business' and 'banking business' is not permitted. 'Real estate' business 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.

Special conditions are applicable to investment by Indian entities engaged in financial services sector (in addition to the general terms and conditions as applicable to ODI described below) including *inter alia*:

(i) the Indian Party having earned a net profit during the preceding 3 financial years from financial services activities;

(ii) the Indian Party being registered with the regulatory authority in India for conducting the financial services activity;

(iii) the Indian Party having obtained approval from the concerned regulatory authorities both in India and abroad, for venturing into such financial sector activities;

(iv) the Indian Party having fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

5. What are the terms and conditions applicable to ODI by an Indian Party under the Automatic Route?

In terms of FEMA 120 and applicable notifications issued by the Reserve Bank, ODI made by an Indian Party is subject to, *inter alia* the following conditions:

(i) The 'total financial commitment' of the Indian Party in JV/WOS abroad may not exceed 400% of the net worth of the Indian Party as on the date of the last audited balance sheet.

However, in the event the total financial commitment of the Indian party exceeds USD 1 billion in a financial year, prior approval of the Reserve Bank would be required even if the total financial commitment of the

Indian Party is within the eligible limit of 400% of the net worth as per the last audited balance sheet.

(ii) ODI should be made in an overseas JV/WOS engaged in a *bona fide* business activity.

(iii) ODI is not permitted for companies engaged in real estate or banking business.

(iv) the Indian Party should not be (i) on the Reserve Bank's exporters caution list; or (ii) the list of defaulters to the banking system circulated by the Reserve Bank or CIBIL or any other credit information company as approved by the Reserve Bank; or (iii) under investigation by an investigation/enforcement agency or regulatory body.

(v) the Indian Party must route all transactions relating to the investment through only one branch of an AD to be designated by it.

(vi) the Indian Party must submit up to date returns in respect of all its overseas investments, in accordance with FEMA 120.

(vii) Indian Party shall make no direct investment in an overseas entity set up or accquired abroad directly as JV / WOS or indirectly as step down subsidiary located in the countries identified by the FATF as 'non co-operative countries and territories'.

6. How is 'total financial commitment' reckoned for the purposes of ODI? How is net worth calculated for purposes of ODI?

For the purpose of determining 'total financial commitment', the following are to be reckoned:

(i) 100% of the amount of equity shares;

(ii) 100% of the amount of compulsorily convertible preference shares;

(iii) 100% of the amount of other preference shares;

(iv) 100% of the amount of loan;

(v) 100% of value of guarantees other than performance guarantees issued by the Indian Party to or on behalf of the JV/WOS;

(vi) 50% of the value of performance guarantees issued by the Indian Party to or on behalf of JV/WOS, subject to certain conditions;

(vii) 100% of the value of the bank guarantee issued by a resident bank on behalf of JV/WOS of the Indian party, which is backed by a counter guarantee/collateral by the Indian party.

Net worth means paid up capital and free reserves.

7. Does the entire investment abroad have to be made in a single tranche?

ODI in one JV/WOS may be made in multiple tranches; however, the Indian Party should ensure that the sum of all tranches i.e. the total financial commitment, does not exceed the limit prescribed by the Reserve Bank.

8. What are the sources of funds from which ODI may be made?

Investment in an overseas JV/WOS may be funded out of one or more of the following sources:

(i) out of balances held in EEFC Accounts of the Indian Party;

(ii) proceeds of foreign currency funds raised through ADR/GDR issues;

(iii) drawal of foreign exchange from an AD in India;

(iv) capitalisation of exports;

(v) swap of shares (undertaken with the prior approval of the relevant authority, if the company is engaged in a sector under goverment approval route);

(vi) proceeds of ECBs / FCCBs and;

(vii) in exchange of ADRs / GDRs

In respect of points (i) and (ii) above, the ceiling of net worth will not apply.

9. Are there any valuation requirements in relation to the shares through which ODI is made?

For valuation of the shares of an existing company outside India, FEMA 120 requires the valuation to be ascertained as follows:

(i) If the investment is more than US$ 5 million, by a category I merchant banker registered with SEBI, or an investment banker or a merchant banker outside India and registered with appropriate regulatory authorities in the country in which the JV/WOS is registered or incorporated; and

(ii) In cases not covered in (i) above, by a chartered accountant or a certified public accountant.

10. Are Indian Parties permitted to remit funds for the purpose of participation in the bidding process for the acquisition of a foreign company?

An Indian Party eligible under the automatic route to make the proposed investment may remit an earnest money deposit or bid a bond guarantee for acquisition of a foreign company through bidding and tender procedure. Parties who are not eligible under the automatic route need to apply to the Reserve Bank for its approval. In the event that the Indian Party is successful in the tender process but: (a) the terms of the acquisition of the foreign company are not in conformity with the pre-conditions for ODI under the Automatic Route; or (b) the terms of the acquisition of the foreign company are different from the conditions on which the Reserve Bank granted approval to the Indian Party; then under such circumstances the Indian Party may make an application to the Reserve Bank for their approval.

11. Can an Indian Party issue guarantees in favour of its offshore subsidiary?

Guarantees are permitted to be given by an Indian Party that has equity participation in the JV/WOS, as well as by a group company, sister concern or associate entities of the investor company. Guarantees furnished may be corporate, personal or performance based. However, all financial commitments including all forms of guarantees (except performance guarantees as set out below) should be within the overall ceiling prescribed by the Reserve Bank and no guarantee is 'open ended' i.e. 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.

Indian Parties are permitted to issue corporate guarantees on behalf of their first level step down operating JV/WOS set up by their JV/WOS operating as either an operating unit or as a SPV under the automatic route. Further, the issuance of a corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries will be considered under the approval route provided the Indian Party indirectly holds 51% or more stake in the overseas subsidiary for which such a guarantee is intended to be issued.

12. Can an acquirer borrow funds for the purposes of ODI?

Indian banks are permitted to extend financial assistance to Indian companies for acquisition of equity in overseas JV/WOS or in other overseas companies, new or existing, as strategic investment.

13. Is an Indian Party permitted to pledge its shares in the offshore JV/WOS?

An Indian Party is permitted to pledge the shares it holds in its JV/WOS abroad as security for availing fund or non-fund based facilities for itself or the JV/WOS from an AD or a public financial institution in India or an overseas lender subject to compliance with specified conditions.

14. Can the investment in the overseas JV/WOS be made through an SPV?

The Reserve Bank has permitted the establishment of SPVs only for further investment/acquisitions of JV/WOS abroad under the automatic route.

15. Is portfolio investment overseas by a listed Indian entity permitted?

Listed companies are permitted to make portfolio investments up to 50% of their net worth as on the date of the last audited balance sheet in:

(i) shares; and

(ii) bonds/fixed income securities, rated not below investment grade by accredited/registered credit rating agencies, issued by listed overseas companies.

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

Resident individual satisfying the criteria prescribed under FEMA 120 are permitted to make overseas investment in equity shares and compulsorily convertible preference shares of a JV/WOS abroad. ODI by resident individuals cannot exceed the over all limit prescribed under the Liberalised Remittance Scheme by the Reserve Bank.

17. Can an Indian Party set up a step-down subsidiary / joint venture in India through its foreign entity (WDS/JV)directly or indirectly through step down subsidiary of the foreign entity?

No, the provisions of FEMA 120 as amended from time to time, dealing with the transfer and issue of foreign entity to residents do not permit an Indian Party to set up Indian subsidiary (ies) through its foreign WOS or JV not do the provision permit an Indian Party to acquire a WOS or invest in a JV that a heading has direct / indirect investment in India under the automatic route however, in such cases, Indian Parties can approach the Reserve Bank from prior approval through their Authorised Dealer Banks which will be considered on a case to case basis depending on the merits of the case.

XI. Intellectual Property

1. What is the law relating to protection of intellectual property rights in India?

India has a robust intellectual property regime with legislations in place to protect various forms of statutory intellectual properties including copyright, designs, patents, trademarks, and geographical indications. As a signatory to *inter alia* the Paris Convention and the TRIPS Agreement, India has made amendments and harmonised all intellectual property laws for compliance. Being a common law jurisdiction, India also affords protection to business goodwill and reputation represented by a mark, name or get-up under the law of passing off. In addition, the law also provides remedies for breach of confidentiality.

2. How are computer software and programs protected in India?

India recognizes and protects computer programmes, tables, and compilations including computer databases as literary works under the Copyright Act. Both the object and source codes can be protected as literary works and the term of protection extends to life of the author and 60 years. The owner of a copyright work is entitled to protect his copyright against unauthorized use and/or misappropriation of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages, and accounts of profits. The law also provides for criminal remedies against misuse. The law does not make registration of a work mandatory for protection or claiming damages against infringement. However it is recommended that every work is accompanied by a copyright notice.

Patent law also provides protection to computer implemented inventions and claims to methods are allowed. Whilst at present the jurisprudence from the European Patent Office is more acceptable, the U.S. position at times also finds favour. The rights provided by patent law bestow on the patentee, the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patent article.

3. What patent protection is available to a biotechnology company?

Inventions in the field of biotechnology are subject to the same criteria as any other invention relating to product and process. Certain exceptions to the rule, however, may be noteworthy, for e.g. an invention, the primary or intended use whereof would be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment, or forms part of traditional knowledge. Inventions that are new and novel[2], possess an inventive step[3] and have industrial application are patentable.

4. How are trademarks and service marks protected in India?

The Indian Trademarks Act, enforced on September 15, 2003 has extensive provisions for registration, protection, licensing, and assignment of trademarks. 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 Indian Trademark Act confers upon the registered proprietor exclusive rights to the use of the trademark, subject to any conditions imposed, and third party rights. The proprietor is entitled to take action for infringement of a trademark against unauthorised use and claim remedies such as interlocutory orders and damages. The law also takes care of issues of comparative advertising, misuse on advertisements and unfair and dishonest commercial practices.

The law also offers protection to goodwill and reputation under the law of passing off. Indian courts have recognized transborder reputation of an overseas trader and there are a

2 An invention is considered as new and novel if it is not anticipated by prior publication, prior use or prior public knowledge.

3 Having technical advancement.

number of judicial precedents wherein foreign proprietors and their trademarks have been protected on the basis of their worldwide business goodwill even in the absence of direct business presence in India. The protection also extends to unauthorised use in relation to trade names or domain names.

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

A right to restrain breach of trust or confidence is specifically saved under section 16 of the Indian Copyright Act and the principles to protect confidential information and trade secrets are now well settled. To obtain relief from a court of law, the burden is upon the plaintiff to:-

(i) identify what information he was relying on;

(ii) show that it was handed over in circumstances of confidence;

(iii) show that the information was of the type which could be treated as confidential; and

(iv) show that it was used without license or there is a threat that it would be misused.

Confidential information may be protected contractually as well as at common law. However it is always recommended that there are specific covenants included in defining a relationship (such as an employer/employee) to treat business information received during the term of employment as confidential.

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

Confidentiality provisions including requirements for personnel to return all confidential information and material to their employer at the time of termination of their employment are standard provisions enforceable under Indian law. Additionally, requirements preventing such personnel from utilizing such confidential information in their new job may also be imposed.

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

The owner of the intellectual property is entitled to civil remedies in the nature of injunctions, damages or accounts. The law allows a right owner to pray for temporary injunctions, (including ex parte orders) and appointment of court receiver to inspect the defendant's premises, look into books of accounts, etc. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright and trademarks. In addition, contractual remedies providing for indemnity against intellectual property infringement, replacement of infringing portion of software or other material with non-infringing material, etc. are common practice in India.

8. Does Indian law recognize transactions carried out electronically?

The IT Act grants legal recognition to electronic records if (a) the electronic records are made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference as well as electronic signatures (which include a digital signature). The law further provides that in case of contracts, wherein the communication, acceptance, revocation, etc. of proposals are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used. Thus, contracts will not be denied validity merely because they are in form of electronic records.

9. 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 treated as the first owner subject to certain exceptions. In case of work made in the course of the author's employment under a contract of service or apprenticeship, the employer is deemed to be the first owner of copyright, in the absence of any agreement to the contrary. However, if a photograph, painting, drawing, engraving or cinematographic film is made, for valuable consideration at the instance of any person, then such person is deemed to be the first owner of copyright, in the absence of any agreement to the contrary. Therefore, in an outsourcing scenario by a company to a third party contractor, it is advisable to ensure that the contractor has entered into employee contracts *inter alia* stating that intellectual property rights created on the job will vest with the contractor; and thereafter ensure that the third party contractor assigns such works to the company.

10. What are the relevant data protection laws in India?

The IT Act contains provisions relating to data protection and imposes civil liability for negligent handling of "sensitive personal information" and criminal liability in cases of disclosure of information in breach of a lawful contract.

Liability is thus imposed on a body corporate (possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates) in the event such a body corporate is negligent in implementing and maintaining reasonable security practices and procedures, thereby causing wrongful loss or wrongful gain to any person and pay damages by way of compensation to the person who is affected. The Central Government has also notified the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011*, which lay down directions to be followed by a body corporate for 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 secured access to any material containing personal information about another person by way of a lawful contract. In the event such a person discloses it without the consent of the person with the intent to cause, or having the knowledge that it is likely to cause, wrongful gain or wrongful loss, then such unauthorized disclosure may be punishable with an imprisonment of up to 3 years and a fine of up to INR 0.5 million.

XII. Employees

1. What is the general framework of employment laws in India?

The Indian Parliament as well as the legislature of the relevant state has the power to concurrently legislate on the subject of labour. Broadly, the key labour legislations in India can be grouped as follows:

Group I

Laws to provide basic protection to industrial workers:

(i) Factories Act;

(ii) Payment of Wages Act;

(iii) Minimum Wages Act;

(iv) Contract Labour Act;

(v) Employees' Compensation Act; and

(vi) Fatal Accidents Act.

Group II

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

(i) Industrial Disputes Act;

(ii) Industrial Employment (Standing Orders) Act; and

(iii) Trade Unions Act.

Group III

Laws providing social security and welfare of employees:

(i) Employees' Provident Funds and Miscellaneous Provisions Act;

(ii) Employees' State Insurance Act;

(iii) Payment of Gratuity Act;

(iv) Payment of Bonus Act;

(v) Maternity Benefit Act;

(vi) Sexual Harassment of Women at Workplace Act; and

(viii) Rights of Persons with Disabilities Act.

Group IV

General Law:

(i) Constitutional provisions relating to fundamental rights enshrined in the Constitution of India; and

(ii) Indian Contracts Act.

Group V

State Laws:

(i) Shops and Establishments Acts in force in various States;

(ii) State Labour Welfare Fund Act read with rules frames there under; and

(iii) State amendments to Central laws and certain statues that are state specific (and present only in some states) such at the Maharashtra Private Security Guards Act.

With the intention to improve the ease of doing business in India, the Government has proposed to consolidate the plethora of complex labour laws currently in existence in India, into the following four labour codes (Codes) viz.: (a) Labour code on Wages; (b) Labour code on Industrial Relations; (c) Labour code on Social Security & Welfare; and (d) Labour code on Safety and Working Conditions. Please note that these codes are currently at various stages of drafting and discussions and as on date are not in force. The Labour code on wages received the President's assent on August 8, 2019; it will be brought into force only once the appointed date for its implementation is notified by the Central Government.

2. Are there any restrictions on employment of foreign nationals in India?

Employment is permitted in India subject to the possession of a valid employment visa by a foreign national. Employment visas cannot be issued for routine, ordinary, secretarial or electrical jobs. They can be issued to skilled / qualified professionals or to persons engaged or appointed on contractual or employment basis and not otherwise.

A minimum salary threshold limit for grant of employment visa is currently USD 25,000 per annum (approx.). However, for non-factory establishments some categories of employees such as ethnic cooks, language teachers etc. have been exempted from the above threshold who are permitted to be sponsored for employment in India on a salary of less than USD 25,000 per annum (approx.).

In respect of foreign nationals engaged as teaching faculty at the level of Assistant Professors and above by the Central Higher Educational Institutions viz. 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), the minimum salary limit for grant of Employment visa will be USD 14,000 (approx.) per annum.

3. What are the statutory working hours prescribed under Indian labour laws and is there a requirement to pay overtime wages?

Indian employment laws typically provide for a maximum of 9 hours of work a day and 48 hours a week. However, this differs from state to state based on the provisions of the local Shops and Establishments Act applicable to the state in which the employee(s) is employed.

It may be noted that employment of women is restricted during the night. Recently however, certain states have allowed the employment of women during night shifts provided the employers obtain consent from such women employees and meet certain safety measures. Further, in some states, women employed in the IT/ITES sector have been granted an exemption from the work hour limits by way of government notifications issued in various states subject to the compliance of certain conditions issued by the local labour department's/police etc. These conditions typically include provision of transport services with security personnel, maintenance of data of all women employees who leave beyond the prescribed working hours and provision of other security features. Further, certain Indian Courts have held such restrictions or employment of women during night shifts to be unconstitutional under the Factory Act.

Employees who work in excess of the normal working hours are entitled to over-time wages, typically at the rate of twice the ordinary rate of wages (which is defined as per a prescribed formula for calculation of "ordinary rate of wages").

4. Are there statutory requirements for grant of leave or public holidays?

The Factories Act and the relevant Shops and Establishments legislations provide for annual leave with wages along with casual and/or sick leave to employees.

In addition to the weekly holidays and compensatory holidays prescribed under Indian statutes, the employees are also entitled to national holidays (as per the provisions of the local holidays act and/or government notifications). These compulsory holidays typically include Republic Day (January 26), Independence Day (August 15) and Gandhi Jayanthi (October 2) and typically 5 to 7 holidays from amongst a list of holidays specified by the relevant State legislations including the local National Festivals and Holiday Acts.

5. Are employees entitled to maternity /paternity leave?

The Maternity Benefit (Amendment) Act, 2017 (the "Maternity Amendment Act") which came into force on April 1, 2017amends the Maternity Benefit Act, 1961 ("MB Act"). The Maternity Amendment Act provides for an enhanced paid maternity leave ("Maternity Benefit") of 26 weeks to women employees covered under the MB Act for their first 2 children.

The Maternity Amendment Act also introduces Maternity Benefit for adoptive and commissioning mothers of 12 weeks from the date the child is handed over to the adopting mother or the commissioning mother, and mandates provision of creche facilities for every establishment having 50 (fifty) or more employees. Every establishment to which the MB Act applies is further obligated to intimate every woman employee of the benefits available under the MB Act at the time of their appointment. The Maternity Amendment Act also recognises the concept of working from home for women employees (post the period of Maternity Benefit) if the nature of work assigned to them is capable of being performed at home. It is noteworthy that 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 prohibits the dismissal/termination of services of women employees during their period of absence in accordance with the provisions of the act. Additionally, the act also provides for leave of varied durations in case of miscarriage, premature birth, medical termination of pregnancy, tubectomy etc. (in addition to maternity benefits and any other leave/benefits due to employees under the act).

6. 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 are offering shares globally on an uniform basis and require remittance by the Indian employee. Indian employees are permitted 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 subject to the condition that it does not involve remittance from India. Further, under the Liberalized Remittance Scheme of the Reserve Bank, resident individuals may make remittances through ADs up to USD 250,000 per financial year for investment in foreign securities.

7. Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Indian Contracts Act. However, the Supreme Court of India has held that agreements restraining an employee from carrying on the activities that are similar to that of his/her employer during the course of employment are enforceable but any non-compete restriction that operates after the termination of employment would be void and unenforceable.

8. How can the services of an employee be terminated?

The services of an employee can be terminated in accordance with the terms of his employment contract. However, if such an employee is covered under the relevant state's Shops and Establishment Act or if such an employee is a 'workman' as defined under the Industrial Disputes Act, then the termination will have to be undertaken in accordance with such a statute (however, the internal policies of the company would prevail in so far as the company policy is more beneficial than what is prescribed under applicable law), which sets out the minimum notice requirements/payment in lieu of notice and requirements for distribution of severance payments in case of retrenchment of workmen category employees.

9. Are severance payments statutorily required to be paid in India?

Under the provisions of the Industrial Disputes Act, a workman who has been employed for at least one year of continuous service is entitled 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 the manner prescribed 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.

XIII. Divestment/Winding up

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

The most pertinent laws are:

(i) *The Insolvency and Insolvency Code, 2016*

The procedure for winding up/ liquidation of corporate entities in India was governed by the provisions of the Companies Act, 1956. However, by way of a notification dated November 30, 2016, the relevant provisions of the Insolvency and Insolvency Code, 2016 (the "**Insolvency Code**") *inter alia* with respect to the insolvency resolution and liquidation of corporate debtors, were notified with effect from December 1, 2016.

The Insolvency Code sets out the process of insolvency of a corporate debtor that may be initiated by a financial creditor, operational creditor or a corporate applicant. A financial creditor has been defined as a creditor who has advanced a debt against the consideration of time value of money and an operational creditor has been defined as a creditor whom a debt in respect of provision of goods and services is due.

Upon the occurrence of a default to the extent of at least Rs. 100,000, an application may be filed with the National Company Law Tribunal ("**NCLT**") for initiating the process of corporate insolvency resolution ("**CIRP**") of such corporate debtor, prior to restructuring or liquidation.

The CIRP commences once the NCLT accepts the application in this regard by inter alia the company or its creditors. Upon commencement of the CIRP, there shall be a moratorium over institution of new suits or continuation of pending suits or any action to foreclose or enforce any security interest created by the company in respect of its property.

As a part of the CIRP, resolution professionals will be appointed and a committee of creditors comprising only unrelated financial creditors is constituted. A resolution plan is formulated which is to be approved by the committee of creditors by a majority vote of 66% by value. Upon approval of the resolution plan by the committee of creditors, the sanction of the NCLT will be obtained and thereafter the plan will be implemented by the company. In the event that the committee of creditors does not approve the resolution plan or decides to liquidate the company or, if the NCLT rejects the resolution plan, the company undergoes liquidation. Any person whose interests are affected by the contravention of the resolution plan by the company may make an application to the NCLT for liquidation of the company.

Any company may also undergo voluntary liquidation under the provisions of the Insolvency Code upon the passing of a special resolution of its members in general meeting and approval of such resolution by two-thirdsof the creditors (by value).

CIRP proceedings are required to be completed within a maximum period of 270 days. We have observed that there is a trend to use the CIRP mechanism as a 'pressure' tactic in the event a company is unable to pay its dues; such applications are increasingly getting settled, however it must be noted that an application cannot be withdrawn once accepted by the NCLT only with consent of 90% of the members of committee of creditors, after constitution of the committee

(ii) *The Companies Act, 2013 ("**2013Act**"):*

After the coming into effect of the Insolvency Code, the voluntary winding up of a company (when not due to a default) or the winding up of such company by the Central Government (in cases where the company has acted against the interests of India or the affairs of the company have been conducted in a fraudulent manner), are governed by Section 272 of the 2013 Act.

(iii) *The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 ("SARFAESI"):*

SARFAESI Act was enacted with the intent to provide banks or financial institutions (which are notified by the Government of India and already have a presence in India) to recover on NPAs without intervention by the court. SARFAESI provides for 2 important alternative methods for recovery of NPAs without the court's intervention: (i) taking possession of the secured assets of the borrower (in order to lease, assign or sell such assets), (ii) temporarily taking over the management or business of the borrowers until such NPA is recovered.

2. What are the judicial / regulatory bodies dealing with insolvency and bankruptcy / winding-up proceedings in India?

(i) The Debt Recovery Tribunals; and

(ii) NCLT.

3. Apart from winding up, what other options are available to stakeholders in a company to restructure or liquidate the company?

An Indian company can also be restructured/liquidated under, inter alia:

(i) by filing a scheme of compromise and/or arrangement under Sections 230 to 232 of the 2013 Act. The 2013 Act has introduced significant changes in relation to mergers and amalgamations of companies in India. Under the same, two or more small companies or a holding company and its wholly-owned subsidiary company are permitted to enter into a "fast track" scheme of merger or amalgamation by only having to obtain approval of at least 90% of the shareholders of the company. Such a scheme may be open to objections or suggestions from interested parties and the RoC and subject to approval by a majority representing nine-tenths in value of the creditors.

The 2013 Act also permits outbound mergers, i.e. of the company incorporated in India with a company incorporated in a foreign jurisdiction. Such mergers would be subject to rules prescribed by the Central Government in consultation with the Reserve Bank;

(ii) While, a number of guidelines were prevalent for restructuring of a company which was under debt (for eg. CDR, SDR, S4A, JLF etc.), the Reserve Bank of India ('RBI') has on February 12, 2018 issued a circular on 'Resolution of Stressed Assets – Revised Framework', which, in view of the enactment of the Insolvency Code, introduce a harmonized framework substituting and withdrawing the existing guidelines for the resolution of stressed assets.

This circular was held to be ultra vires by the supreme court of India. The RBI has thereafter introduced a circular dated June 7, 2019 on 'Prudential Framework for Resolution of Stressed Assets' (Stressed Asset Framework). Going forward all resolution plans will be governed by Stressed Asset Framework.

The above circular imposes obligations on lenders in India to identify stressed assets at an early stage, and requires such banks to put in place Board-approved policies for resolution of stressed assets, including the timelines for resolution. The resolution plan (RP) could involve any actions/plans/reorganization including, but not limited to, regularisation of the account by payment of all overdues by the borrower entity, sale of the exposures to other entities/investors, change in ownership, or restructuring.

The above framework has introduced additional provisioning requirements as a capital disincentive to prevent renders from delaying resolution of stressed assets. RBI has also reserved the right to issue 'specific directions' to banks to initiate proceedings under the Insolvency Code.

(iii) through reduction of capital (pursuant to a scheme of buy back or otherwise).

XIV. Taxes

Section A: Direct Taxes

1. What are the laws relating to direct taxes in India?

Following are the legislations governing the direct taxes in India:

A. Income Tax

Income tax is payable on income and 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. Wealth Tax

Wealth tax is payable at the rate of 1% on specified assets if the net wealth exceeds INR 3 million. It is governed by the Wealth Tax Act, 1957.

Wealth tax has now been abolished by Finance Act, 2015.

C. Securities Transaction Tax

STT is payable on the taxable securities transaction at the specified calculated rates on the value of such transactions. For example, STT at the rate of 0.1% is payable on sale and purchase of equity shares on the stock exchange and at the rate of 0.2% on the sale of unlisted shares in an IPO.

2. 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 situated 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 in Question 3 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.

3. 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 through establishment of a branch office, project office or a liaison office. Alternatively, it may also incorporate an Indian company either as wholly owned subsidiary 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 the 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:

(a) Indian Company

Normal corporate tax rates

Taxable Income	Rates
Up to INR 10 million	31.20%
Above INR 10 million – Up to INR 100 million	33.38%
Above INR 100 million	34.94%

MAT

In the event a company's tax liability is less than 18.5% of its 'book profits', then instead of paying corporate tax at the above rates, the company is required to pay MAT on the adjusted book profits (as prescribed) at the following tax rates-

Book Profits	Rates
Up to INR 10 million	19.24%
Above INR 10 million – Up to INR 100 million	20.59%
Above INR 100 million	21.55%

Tax credit is available in respect of tax paid under MAT, for a period of 15 years.

DDT

A company is liable to pay DDT at 20.55% on the amount of dividend declared, distributed or paid to its shareholders.

(b) **Branch Office / Project Office**

A branch or a project office of the foreign company is considered as a permanent establishment in India. Therefore, generally, the income attributable to the 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	41.60%
Above INR 10 million – Up to INR 100 million	42.43%
Above INR 100 million	43.68%

MAT

Book Profits	Rates
Up to INR 10 million	19.24%
Above INR 10 million – Up to INR 100 million	19.62%
Above INR 100 million	20.20%

Tax credit is available in respect of tax paid under MAT, for a period of 15 years. MAT is not applicable on non-residents who do not have any business connection or permanent establishment in India.

(c) **Liaison Office**

As stated in response to question no. 3 (General Section), under the extent 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.

4. How are capital gains taxed in India?

Capital gains earned on the sale of a capital asset are subject to capital gains tax. The capital gains are computed by reducing the cost of acquisition, cost of improvement and sale-related expenses from the sale consideration. The capital gains can be classified into (a) short-term or (b) long- term, depending on the period of holding

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 (unlisted shares or immovable property being land or building or both)	Period of Holding (all other assets)
Long-term	> 1 year	> 2 years	> 3 years
Short-term	⩽ 1 year	⩽ 2 years	⩽ 3 years

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.

Further, in case of long-term capital gains, the cost of acquisition and cost of improvement is subject to indexation, which is the cost inflation multiplier prescribed for each year to increase the original cost of acquisition/ cost of improvement for inflation, subject to the residential status of the seller and the nature of asset being alienated. In case of long-term capital gains arising to a non-resident in respect of investment in convertible foreign exchange, the gains can be computed after taking into account the foreign exchange fluctuation as per the prescribed formula.

Tax incidence is generally higher in the case of short-term capital gains as compared to long-term capital gains.

Resident Company

Particulars	Listed Securities Rate of Tax (%)		Unlisted Securities and assets other than Securities Rate of Tax (%)
	Where STT has been paid	Where STT has not been paid	
Long-term capital gains	11.65%	11.65%[1]	23.30%
Short-term capital gains	17.47%	34.94%	34.94%

Non-Resident Company

Particulars	Listed Securities Rate of Tax (%)		Unlisted Securities Rate of Tax (%)	Other Assets Rate of Tax (%)
	Where STT has been paid	Where STT has not been paid		
Long-term capital gains	10.92%	10.92%[2]	10.92%	21.84%
Short-term capital gains	16.38%	43.68%	43.68%	43.68%

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.

5. Are all transfers of capital assets subjected 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 a 'transfer' are not subject to tax in

[1] In case of long-term capital gains arising from sale of listed securities, option is available to the taxpayer to compute the tax at the rate of 11.65% without taking indexation benefit. Alternatively, the taxpayer can compute his tax liability at the rate of 23.30% after taking the indexation benefit.

[2] The Revenue authorities have applied the rate of 21.84% in certain cases, especially where he non-resident investor has taken the benefit of foreign exchange fluctuation

India (on meeting of certain prescribed conditions). For instance:

- Transfer of capital asset by an Indian holding company to its Indian subsidiary or vice versa;
- Transfer of capital asset pursuant to an amalgamation, demerger, etc subject to fulfilment of prescribed conditions;
- Transfer of GDRs made outside India between non-residents;
- Transfer by way of conversion of bonds or debentures including foreign currency bonds into shares.

6. What are the tax implications of a transfer of shares 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, transfer of shares in a foreign company by a foreign seller, where the value of shares of foreign company derives, directly or indirectly, its value substantially from the shares of Indian company, would be subject to tax under the Indian tax laws. These provisions do not override the provisions of 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 the assets (whether tangible or intangible) located in India, if the value of such Indian assets exceeds INR 100 million, and represents at least 50% of the value of all the 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 tax is proposed to 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% 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 have been 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 overseas amalgamation, at least 25% of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company. In case of overseas demergers, shareholders holding at least three-fourth in value of the shares of the demerged foreign company continue to remain shareholders of the resulting company.

7. Which are the DTAAs entered into by India that provides beneficial tax treatment for capital gains on sale of shares of Indian companies?

As per the DTAAs signed by India, only the DTAA with the Netherlands provide 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 fulfilment of certain conditions, (i) the Dutch tax resident holds less than 10% 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 which provided tax benefits to the tax residents of such jurisdictions like Singapore, Mauritius and Cyprus, are no longer entitled to claim such tax benefits.

8. 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 the rate of 10%. However, on account of surcharge and education cess, the ETR would be 10.92%, 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..

9. 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-

- Interest on foreign currency loans, made during the period from July 1, 2012 to June 30, 2020 is taxable at a concessional rate of 5.46%, subject to fulfillment of certain conditions.
- Interest on foreign currency long-term bonds including long term infrastructure bonds, made during the period from October 1, 2014 to June 30, 2020 is taxable at a

concessional rate of 5.46%, subject to fulfillment of certain conditions.

- Interest on rupee denominated bonds issued before July1, 2020 is taxable at a concessional rate of 5.46%, subject to fulfillment of certain conditions.
- Interest on foreign currency loans received from the Government or an Indian concern not covered by the above is taxable at the rate of 21.84%.

The above rates are subject to any concessional rate available under any DTAA between India and the country of residence of the non-resident.

10. 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:

- Setting up of a unit in an SEZ for undertaking permitted activities, between April 1, 2006 to March 31, 2021;
- 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;
- Deduction of 100% of profits for 5 consecutive assessment years beginning with the assessment year relevant to the year in which business for collecting and processing or treating bio-degradable waste for generating power or producing bio-fertilizers commenced;
- Additional investment and depreciation allowance on setting up of manufacturing units in the backward states of Andhra Pradesh, Telangana, West Bengal and Bihar between April 1, 2015 to March 31, 2020;
- Setting up eligible start-ups engaged in innovation, development or improvement of products or processes

or services or a scalable business model with a high potential of employment generation or wealth creation, between April 1, 2016 to March 31, 2021.

11. What are the regulations related to transfer pricing in India in relation to International Taxation?

Cross border transactions with 'associated enterprises' fall within the ambit of Indian transfer pricing regulations and shall be undertaken having regard to the arm's length price ("ALP").

ALP means a price which 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, which includes equity participation, control, economic dependence, etc. In case any international transaction is undertaken by the taxpayer without having regard to the ALP, then the Revenue authorities are empowered to make appropriate adjustments to the income / expenses declared by the taxpayer.

The transfer pricing regulations require maintenance of prescribed documentation on a contemporaneous basis by the person who has entered into international transaction(s). 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 have been recently introduced for determination of ALP in respect of specific international transactions. The ALP determined as per the safe harbour rules would be accepted by the Revenue authorities. The specific international transactions include the following:

- provision of software development services and information technology enabled services;
- provision of knowledge process outsourcing services;
- intra-group loan to WOS;
- provision of corporate guarantee to WOS
- provision of contract R&D services, wholly or partly relating to software development or generic pharmaceutical drugs;
- manufacture and export of core auto components;
- manufacture and export of non-core auto components;
- low value adding intra group services.

12. Whether transfer pricing provisions apply to domestic transactions?

Yes, transfer pricing provisions are applicable to specified domestic transactions between resident taxpayers/ units of the tax payers, where the aggregate value of such transactions exceeds INR 200 million. The specified domestic transactions, include:

- inter-unit transfer of goods or services between two undertakings, wherein one of the undertaking is enjoying tax holiday;
- more than ordinary profits being generated in the course of business transacted between two parties which are closely connected, wherein 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 associated enterprise and the ALP, has to be filed with the Revenue authorities within the prescribed time limit.

13. Is there a tax on dividend?

Dividend income is exempt in the hands of the shareholders. DDT of 20.55% is required to be paid by the Indian company declaring dividends.

To mitigate the cascading effect of DDT, an Indian holding company is entitled to DDT credit when paying dividends, on the dividend received by the holding company, to the extent DDT has already been paid on such dividend by its Indian subsidiary.

Dividends received by a resident shareholder on which DDT has been paid by the company distributing tax is not chargeable to tax again in the hands of the resident shareholder unless the amount of dividends received by the resident shareholder exceeds INR 1 million. In case a resident shareholder (being a specified assesse)[3] receives dividend in excess of INR 1 million during any financial year, such dividend income shall be subject to an additional tax of 10%.

14. Whether GAAR is 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 been introduced under the Income Tax Act and is effective from April 1, 2017.

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:

- Creates rights or obligations, which are not ordinarily created between previous dealings at arm's length; or
- Results, directly or indirectly in misuse or abuse of provisions of the Income Tax Act; or
- Lacks commercial substance or is deemed to lack commercial substance, in whole or in part; or

[3] Specified assessee means person other than, a domestic company, or trust registered under section 12A or 12AA, or funds or institutions referred under section 10(23C)(iv), (v), (vi) and (via).

- Is entered into or carried out other than for bonafide purposes.

In case GAAR is invoked, the consequences could be severe and could include[4] -

- Denial of DTAA benefits;
- Disregarding, combining or re-characterizing steps in the transactions;
- Disregarding accommodating parties;
- Deeming persons who are connected persons in relation to each other to be one and the same person;
- Reallocating income or expenditure;
- Revising the place of residence of any party or situs of an asset;
- Looking through corporate structure;
- Treating arrangement as if not been entered into;
- Re-characterize equity or debt or accrual of receipts or expenditure, etc.

Residents and non-residents, both are allowed to approach the AAR to determine the applicability of GAAR.

Further, it has been provided that GAAR shall not apply to -

- an arrangement where the tax benefit arising to all the parties to the arrangement does not exceed INR 30 million in aggregate;
- FIIs who have not taken the benefit of a DTAA;
- a non-resident person who has made investment by way of offshore derivative instruments or otherwise, directly or indirectly, in an FII and
- 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

4 The list mentioned here is illustrative in nature

on which it has been entered into, in respect of the tax benefit obtained from an arrangement on or after the April 1, 2017.

15. Whether India has a mechanism to determine the taxability or otherwise of a transaction in advance?

Yes, India does have a mechanism for determining the taxability or otherwise of a transaction in advance especially for non-resident taxpayers, to facilitate proper planning and avoid any future disputes. The various such mechanisms are listed below:

AAR

An advance ruling can be sought by a non-resident or a resident, in order to determine the tax treatment of a non-resident with whom a transaction has been undertaken or is proposed to be undertaken. Such an advance ruling, which is issued by an independent body called the AAR, is ordinarily binding on the taxpayer as well as the Revenue authorities. An advance ruling is only binding on the parties to whom it applies, although it does have a persuasive value for other transactions.

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:

- APAs will specify the determination of the ALP or the manner in which the price is to be determined. The ALP shall be determined on the basis of prescribed methods or any other non-prescribed method;
- 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;
- APA would be binding on the taxpayer and the Revenue authorities in respect of the concerned international transaction.

- 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).

16. What are the different ways of dispute resolution with the Revenue authorities available in India?

Normal Dispute Resolution

(a) *Appeal before the CIT(A)*

The company may lodge an appeal to the CIT(A) within 30 days from the date of the receipt of the order from the tax officer.

(b) *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.

(c) *Appeal before the HC*

The taxpayer may further appeal to the HC within 120 days of the ITAT order on a question of law.

(d) *Appeal before the SC*

This is the apex authority in India. If the taxpayer is aggrieved by the HC order, he may lodge an appeal to the SC within 90 days of the HC order.

Alternate Dispute Resolution

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 will not be available to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner.

MAP

Under a MAP, India and the Competent Authorities of the concerned treaty country negotiate until they reach an agreement acceptable to both the authorities. To facilitate the MAP, the GOI has specified rules which state that any resident taxpayer who is aggrieved by the actions of a foreign tax authority can apply to the prescribed Competent Authority in India to seek relief under a MAP.

To further facilitate the MAP, India has entered into MOUs with the Competent Authorities of USA, 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 USA, UK, Denmark, etc.

Another aspect to be considered is the time frame involved in the MAP. To address this, the MOUs with USA and UK provide a maximum period of 2 years to bring the MAP to a close. However, at a practical level, it has been observed that such issues have been pending for a long period of 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 the taxpayers can apply and disclose the additional income that has not been disclosed to the Revenue authorities, provided the tax on undisclosed amount exceeds the specified amount. The Settlement Commission, inter alia, has the power to grant immunity from penalty and prosecution. The taxpayer has to pay the full amount of tax and interest on the additional income disclosed before filing the application.

The Settlement Commission decides upon the admissibility of the application and in case of admitted applications, carries out the process of settlement in a time bound manner by giving opportunity to both parties. At present the benefit of the settlement mechanism can be availed by a taxpayer only once in life-time.

APA

APA can be entered into by the taxpayer with the Revenue authorities to avoid disputes in future (discussed in Q.15 above).

Section B: Indirect Taxes

17. 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 Customs Tariff Act, 1975 on the transaction value of goods unless otherwise specified.

The effective rate of custom duty on import of most non-agricultural products is 47.63%.

B. Goods and Services Tax ("GST")

India has adopted a dual GST model, with effect from July 01, 2017.It is a unified system of taxation which has streamlined the indirect tax regime in India, by subsuming most of the erst while indirect taxes like central excise duty, service tax, value added tax/sales tax, entry tax, etc. into a single regime.

In terms of the GST legislations intra-state supplies of goods and/ or services are subject to the simultaneous levy of CGST and SGST. Inter-state supply of goods and/ or services including imports are exigible to IGST. The GST rates notified for supply of goods or services are categorized under broad rate slabs of 5%, 12% 18% and 28%.

The GST legislations cover 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. The Government intends to include the said goods within the ambit of GST in near future. Presently, the Central Government is in deliberations with the States for the inclusion of the same. Once these products are subsumed within GST, the currently limited role of excise duty and sales tax in relation to such goods is expected to come to an end.

C. Excise Duty

Excise duty is imposed on the manufacture of goods specified under Schedule IV to the Central Excise Act, 1944, in India. 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 the 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 Federal level as well as the State level, as discussed below:

Value Added Tax

VAT is levied by states on the 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 state.

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%, against issue of Form C.

E. 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.

18. Whether royalties and/or fees for technical services received by a foreign company are liable to any indirect tax levies in India?

GST

A transaction in the nature of temporary or permanent transfer or permitting the use or enjoyment of intellectual property rights including transfer of copyright and technical knowhow is deemed to be a supply of services under the GST legislations.

The supply of such service pertaining to intellectual property right in respect of goods other than Information Technology software, shall be exigible to GST at the rate of 12%. However, supply of such service pertaining Intellectual Property right in respect of Information Technology software shall be exigible to GST at the rate of 18%.

If the aforementioned services are rendered to a foreign company then the same would qualify as export of service and would be in the nature of a zero rated supply, i.e. no tax is required to be discharged on such supply, subject to fulfilment of conditions prescribed in this regard.

19. Are there any indirect tax incentives for setting up new businesses in India?

There are various indirect tax incentives available for setting up of a new businesses in India which includes the following:

Foreign Trade Policy, 2015-2020

FTP provides for a suite of export promotion schemes such as the Advance Authorization Scheme, the Export Promotion

Capital Goods Scheme, the Duty Free Import Authorization Scheme, Deemed Export benefits etc.

In addition, there are various incentive schemes notified targeting specific manufacturing sectors such as handicraft, agricultural, pharmaceutical, electronic component, defence, consumer goods, and specified service sectors such as environmental, educational, communication, construction and related engineering services.

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 the various indirect tax benefits, *inter alia* including:

(a) Exemption from payment of import duties on imported goods;

(b) 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;

(c) Upfront exemption/ Refund of GST paid on the procurement of goods and services if such goods or services are meant to carry on the authorized operations.

Export Oriented Unit ("EOU") Scheme

The following indirect tax benefits are available to a Unit registered under the EOU Scheme:

(a) Basic customs duty exemption on imports of goods including capital goods and second hand goods subject to fulfilment of prescribed procedural conditions;

(b) GST and compensation cess exemption on import of goods including capital goods and second hand goods till October 2, 2018;

(c) Upfront exemption/ Refund of GST paid on domestic procurement of goods by EOU units, subject to fulfilment of procedural compliances prescribed in this regard;

20. Whether India has a mechanism to determine the indirect tax implications of a transaction in advance?

Yes, the legislations governing the levy of customs duty and GST, provide for a scheme of Advance Ruling where the non-residents/ foreign investors proposing to undertake business in India may approach the authorities under the respective laws for ascertaining their tax liability in India. 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.

The said facility has been extended to all persons registered or desirous of obtaining registration under the GST laws.

XV. Dispute Resolution

1. 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 authority, and regulators like SEBI (for the securities market) and tribunals like the National Company law Tribunal (for company and bankruptcy matters)being quasi-judicial authorities. A separate civil and criminal system exists in each state with the highest court for each state being the High Court. Appeals, whether statutory or discretionary from the High Courts lie with the Supreme Court of India, which is the apex judicial authority in India.

2. Do Indian courts recognize choice of law and jurisdiction clauses?

Yes, Indian courts generally recognize choice of law and jurisdiction clauses. However, with regard to choice of law clauses, 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, the same shall be invalidated on grounds of being opposed to public policy. Also, it is a settled position that as a matter of Indian public policy, Indian nationals contracting between themselves are not permitted to contract out of the application of Indian law. This rule extends to even wholly owned subsidiaries of foreign companies incorporated in India. Further, parties entering into contracts with Indian companies enforceable under a foreign law must note that if an action is brought under such contract in an Indian court, foreign law will have to be pleaded like an ordinary fact and proved by experts.

With regard to choice of jurisdiction clauses, it must be noted that parties, by agreement, cannot confer jurisdiction on a court which 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 on the basis of a contractual stipulation between the parties.

However, if two or more courts have jurisdiction over the subject matter, an agreement between the parties that the disputes between them shall be subject to one of such courts shall be valid, as long as it does not amount to an 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 as to the choice of forum where it is of the opinion 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 which exercise jurisdiction over the seat/venue, shall have exclusive supervisory jurisdiction over the arbitral proceedings, irrespective of any arrangement between the parties.

3. How are foreign judgments enforced in India?

A judgment rendered by a court outside India is conclusive as to any matter directly adjudicated upon, except:

- where the judgment has not been pronounced by a court of competent jurisdiction;
- where the judgment has not been given on the merits of the case;
- where the judgment appears on the face of the proceedings to be founded on an incorrect view of international law or that there has been a refusal to recognize the law of India in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where the judgment has been obtained by fraud; or
- where the judgment sustains a claim founded on a breach of any law in force in India.

It may be noted that Indian law recognizes the enforcement of only those foreign judgments which 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, but the United States of America has not been so declared. A judgment of a court in a jurisdiction which is not a reciprocating territory may be enforced only by instituting a new suit upon the judgment and not by proceedings in execution. The suit must be brought in India within 3 years from the date of the judgment in the same manner as any other suit filed to enforce a civil right in India.

4. What are the alternative methods of dispute resolution available in India?

Alternative methods of dispute resolution may be adopted by the parties to a contract. These may include resolution of disputes through appointment of mediators, 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 brings Indian law in tune with international principles on arbitration as well as recognition of foreign arbitral awards.

5. How are arbitral awards enforced in India?

Where the seat of the 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 applications to Act aside the award (3 months and an additional 30 days at the discretion of the court) has expire unless the award is stayed by court. Thus, only an execution proceeding needs to be initiated for the enforcement of such awards. The mere filling of an application to set aside are award does not render the award unenforceable, unless the court stays the operation of the award. 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 subject to their meeting the conditions of enforce ability under Indian law.

Note however that only foreign awards made in territories that have been specifically notified by the Central Government as reciprocating territories under the NY Convention / Geneva Convention are enforceable. So far the Central Government has notified around 51 countries as reciprocating territories for the purposes of enforcement of awards under the NY Convention or Geneva Convention (out of over 150 countries which are signatories to the NY Convention).

All other foreign awards which are not made in a convention country as provided above will be enforceable only through institution of a separate civil suit before the an Indian court. While the suit may be filed on the basis of the foreign award, such award will have only persuasive value and will not be binding on the Indian court.

6. 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:

- A party was under some incapacity;
- The arbitration agreement is invalid under the law to which the parties have subjected it, a failing any indication thereon, under the law for the time being in force;
- The applicant establishes 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;
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- The award contains decisions on matters beyond the scope of the submission to arbitration;
- Composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of the arbitration agreement or in the absence such agreement, was not in accordance with Part I of the Arbitration and Conciliation Act;
- If the court finds that the subject matter of dispute is not capable of settlement by arbitration; or
- The arbitral award is in conflict with public policy of India.

The Arbitration and Conciliation Act, before its amendment in 2015, provided that an award is in conflict with 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:

- fundamental policy of Indian law i.e. (i) compliance with statutes and judicial precedents, (ii) adoption of a judicial approach - which demands that a decision be fair, reasonable and objective, (iii) compliance with the principles of natural justice, and (iv) a decision which is not perverse or irrational, such that a reasonable person would have arrived at it;

- interest of India;
- justice or morality; and
- patent illegality i.e. (i) contravention of substantive law of India, (ii) contravention of the Arbitration and Conciliation Act, and (iii) 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:

- where the making of the award was induced or affected by fraud or corruption;
- where the award is in contravention with the fundamental policy of Indian law; and
- where the award is in conflict with the most basic notions of morality or justice.

An additional ground of challenge being patent illegality appearing on the face of the award, was also added, which 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) construction 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 which are enacted in national economic interest, (ii) disregarding orders or the binding effect of 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 amendment in 2015 clarifies that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on 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. 23rd October 2015, irrespective of when the arbitral proceedings commenced. The Arbitration and Conciliation Act was amended in 2019, whereby it was clarified that the 2015 amendments will not apply to arbitral proceedings which commenced prior to 23rd October 2015, and court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such court proceedings are filed prior to or after 23rd October 2015. A challenge to the constitutionality of the 2019 amendment to the Arbitration and Conciliation Act is presently pending before the Supreme Court of India.

Pending the decision of the Supreme Court of India on the 2019 amendment to the Arbitration and Conciliation Act, the circumscribed scope of public policy will apply only to a challenge to an arbitral award where the arbitral proceedings commenced after 23rd October 2015. Where arbitral proceedings commenced prior to 23rd October 2015, the broader scope of public policy set out above (the position prior to the 2015 Amendment) would be applicable to challenge proceedings.

XVI. Miscellaneous

1. Are there any restrictions on foreign ownership of land?

A foreign entity is not permitted to acquire immoveable property in India (other than through a lease for a term of not exceeding 5 years) without the prior permission of the Reserve Bank. However, a foreign entity which has established a branch office or other place of business (other than a liaison office) for carrying on any activity in India can acquire immoveable property in India which is necessary for or incidental to the carrying on of such activity subject to certain conditions. A declaration in the prescribed form has to be filed with the Reserve Bank. An Indian subsidiary set up by a company resident outside India would be an Indian resident and is permitted to acquire immoveable property necessary for and incidental to its business. Similarly an LLP set up by a company resident outside India would be an Indian resident and is permitted to acquire immoveable property necessary for and incidental to its business.

2. What are the anti-money laundering standards applicable in India?

Pursuant to the Prevention of Money Laundering Act (which was brought into effect on July 1, 2005), SEBI and the Reserve Bank have issued detailed guidelines on Anti-Money Laundering Standards which apply to every banking company, financial institution and other intermediaries (including merchant bankers, underwriters, portfolio managers, trustees and other such entities registered with SEBI). The detailed guidelines are in line with international requirements in relation to prevention of laundering.

Further, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 has been enacted to check the prevalence of black money in India and imposes certain stringent obligations on undisclosed foreign income and assets. The Indian government is also actively taking various other measures to eliminate black money.

Additionally, following the recommendations of the Financial Action Task Force (FATF) and consistent with the changes made in jurisdictions such as the Russian Union and the United Kingdom, a new requirement has been introduced under the companies Act, 2013, requiring every Indian company to file with the Registrar of companies a return of significant beneficial owners in the company.

3. Does India have anti-corruption laws?

Yes. India has anti-corruption legislations. The Prevention of Corruption Act, 1988 is the principal anti-corruption legislation in India. This, together with the Indian Penal Code, which is a substantive criminal code, deals with bribery/corruption related offences in India. There also exist special statutes like the Representation of People Act (which regulates the conduct of elections) and a vast body of subordinate legislations formulated as service rules which are applicable to various categories of public servants. These rules, *inter alia*, seek to regulate the giving and the acceptance of gifts and hospitality by public servants (including elected representatives). Further, the Companies Act, 2013 has also lead to the establishment of the Serious Fraud Investigation Office (SFIO), which is empowered to detect, investigate and prosecute white-collar crimes and frauds.

4. Do companies require an industrial license?

Except for the industries falling within the following categories, all industrial undertakings are exempt from obtaining an industrial license:

- industries reserved for the public sector. These are limited to atomic energy and certain aspects of railway transport;
- industries retained under compulsory licensing. These include distillation and brewing of alcoholic drinks, cigars, and cigarettes of tobacco and manufactured tobacco substitutes, electronic aerospace and defence equipment, such as, defence aircraft, warships etc. as financed by the ministry of defence side press note no.1 (2019 Series) issued by the OIPP. industrial explosives, and specified hazardous chemicals; and

- where the industry attracts locational restrictions.

5. Are there any industry-specific licenses that are necessary?

Yes. Examples of industry-specific licenses are:

- license from the Department of Telecommunications for telecom (basic and cellular) operating companies;
- license from the Insurance Regulatory Development Authority for insurance companies;
- registration with the Reserve Bank for banks and NBFC;
- registration with SEBI for mutual funds and venture capital funds;
- registration with the Food Safety and Standards Authority of India for restaurants, etc; and
- registration with the Real Estate Regulatory Authority for developing any project over land.

6. Are there any registrations required for activities not falling under the industries specified above?

These would be regular business related registrations, some of which are common to all industries and some would be specific to certain activities proposed to be carried on and the location of the industry.

Illustratively, some of the standard registrations for an establishment proposing to undertake business activities would include:

- Income Tax registrations (PAN, tax deduction and collection account number);
- Goods and Services Tax Registrations; and
- license under the Shops and Establishment Act of the relevant state in which the establishment is located.

A manufacturing unit would ordinarily also require registration/license/consents under the Factories Act, the different environmental protection legislations, etc. depending on the nature and location of the unit.

Glossary

1993 Scheme	Issue of Foreign Currency Convertible Bonds and Ordinary Shares Scheme, 1993
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, DIPP, the Reserve Bank or such other regulator as may be required.
APR	Annual Performance Report
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 DIPP and/or the Reserve Bank
Banking Regulation Act	Banking Regulation Act, 1949
BIFR	Board for Industrial and Financial Reconstruction
CBDT	Central Board of Direct Taxes
CCI	Competition Commission of India
Central Excise Act	Central Excise Act, 1944
Central Excise Tariff Act	Central Excise Tariff Act, 1985
Central Sales Tax Act	Central Sales Tax Act, 1957
CFC	Controlled Foreign Corporation

CIBIL	Credit Information Bureau (India) Limited
CIT (A)	Commissioner of Income Tax (Appeals)
CLB	Company Law Board
Code of Civil Procedure	Code of Civil Procedure, 1908
Companies Act (1956)	Companies Act, 1956
COMPAT	Competition Appellate Tribunal
Companies Act (2013)	Companies Act, 2013
Competition Act	Competition Act, 2002 as amended by Competition (Amendment) Act, 2007
Combination Regulations	CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended from time to time.
Constitutional Documents	Memorandum of Association and Articles of Association
Contract Labour Act	The Contract Labour (Regulation and Abolition Act), 1970
Copyright Act	Copyright Act, 1957
CSR	Corporate Social Responsibility
CST	Central Sales Tax
Customs Act	Customs Act, 1962
Customs Tariff Act	Customs Tariff Act, 1975
Designated Depository Participant	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
DDT	Dividend Distribution Tax
DR	Depository Receipts

DRP	Dispute Resolution Panel
Drugs and Cosmetic Act	Drugs and Cosmetics Act, 1940
DTAA	Double Taxation Avoidance Agreement
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.
ED	Enforcement Directorate
EEFC Accounts	Exchange Earner's Foreign Currency Accounts
Employees' Compensation Act	Employees' Compensation Act, 1923
Employees' State Insurance Act	Employees' State Insurance Act, 1948
Employees' Provident Funds and Miscellaneous Provisions Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
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
FEMA 120	Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004

FEMA 20	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
FII	Foreign Institutional Investor
Finance Act	Finance Acts in the relevant years
FIPB	Foreign Investment Promotion Board
FIRC	Foreign Inward Remittance Certificate
FMV	Fair Market Value
Foreign Trade Policy	Foreign Trade Policy 2004 – 09
FPI	Foreign Portfolio Investor
FPO	Follow on Public Offer
FVCI	Foreign Venture Capital Investor
GAAR	General Anti Avoidance Rules
GDP	Gross Domestic Product
GDRs	Global Depository Receipts
Geographical Indication of Goods (Registration and Protection) Act	Geographical Indication of Goods (Registration and Protection) Act, 1999
GST	Goods and Service Tax
INR	Indian Rupee
Income Tax Act	Income Tax Act, 1961
Income Tax Rules	Income Tax Rules, 1962
Indian Contract Act	Indian Contract Act, 1872
Indian Partnership Act	Indian Partnership Act, 1932
Indian Penal Code	Indian Penal Code, 1908
Indian Telegraph Act	Indian Telegraph Act, 1885
Industrial Development and Regulation Act	Industrial (Development and Regulation) Act, 1951
Industrial Disputes Act	Industrial Disputes Act, 1947
Industrial Employment (Standing Orders) Act	Industrial Employment (Standing Orders) Act, 1946

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
IRDA	Insurance Regulatory and Development Authority
IT Act	Information Technology Act, 2000
ITAT	Income Tax Appellate Tribural
ITES	Information Technology Enabled Product and Services
IVCU	Indian Venture Capital Undertaking
JV	Joint Venture
KYC	Know Your Customer
Liberalised Remittance Scheme	Liberalised Remittance Scheme for resident individuals issued by Reserve Bank vide A.P. (DIR Series) circular No.64 dated February 4, 2004, as updated and amended from time to time.
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
Maternity Benefit Act	Maternity Benefit Act, 1961, as amended from time to time.
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
Minimum Wages Act	Minimum Wages Act, 1948
M&A	Mergers & Acquisitions

MCA	Ministry of Corporate Affairs
MF	Mutual Fund
MFI	Microfinance Institution
MNC	Multinational Corporation
NBFC	Non-Banking Financial Company
NCDs	Non – Convertible Debentures
NCLT	National Company Law Tribunal
NPA	Non Performing Asset
NRI	Non Resident Indian
OCB	Overseas Corporate Body
OCD	Optionally Convertible Debentures
ODI	Overseas Direct 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
Portfolio Investment Scheme	Published as Schedule 2 to FEMA 20
Postal Ballot Rules	The Companies (Passing of the Resolution by Postal Ballot) Rules, 2011
Press Council Act	Press Council Act, 1978
Prevention of Corruption Act	Prevention of Corruption Act, 1988
Prevention of Money Laundering Act	Prevention of Money Laundering Act, 2002

PPP	Public Private Partnership
QFI	Qualified Foreign Investor
QIB	Qualified Institutional Buyer
R&D	Research and Development
RD	Regional Director
RFC account	Resident Foreign Currency Account
Representation of People Act	Representation of People Act, 1951
Research and Development Cess Act	Research & Development Cess Act, 1986
Reserve Bank	Reserve Bank of India
Revenue	Income tax or commercial taxes authorities as the case may be
RoC	Registrar of Companies
SARFAESI Act	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
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 Buyback Regulations	SEBI (Buyback of Securities) Regulations, 1998
SEBI Delisting Regulations	Securities Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI ICDR Regulations	Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009
SEBI FII Regulations	Securities and Exchange Board of India (Foreign Institutional Investors) Regulations, 1995

SEBI FVCI Regulations	Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000
SEBI Insider Trading Regulations	Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015
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 at Workplace Act	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
SEZ	Special Economic Zone
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SPV	Special Purpose Vehicle
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.

STP	Software Technology Park
STT	Securities Transaction Tax
Target Exemption	An exemption from the notification requirement under the Competition Act, introduced by way of notification S.O. 480 (E) dated March 4, 2011
TRIPS	Trade Related Intellectual Property Rights
Trade Marks Act	Trademarks Act, 1999
Trade Unions Act	Trade Unions Act, 1926
UNCITRAL	United Nations Commission on International Trade Law
Unlisted Public Companies (Preferential Allotment)	Unlisted Public Companies (Preferential Allotment)
Amendment Rules	Amendment Rules, 2011
VAT	Value Added Tax
Unlisted Public Companies (Preferential Allotment) Rules	Unlisted Public Companies (Preferential Allotment) Rules, 2003
VC	Venture Capital
VCF	Venture Capital Fund
VCU	Venture Capital Undertaking
WOS	Wholly Owned Subsidiary

Offices of Cyril Amarchand Mangaldas

Mumbai

Peninsula Chambers,
Peninsula Corporate Park, GK Marg,
Lower Parel, Mumbai - 400 013, India
Tel: +91 22 2496 4455
Fax: +91 22 2496 3666
Email: cam.mumbai@cyrilshroff.com

3rd Floor, Lentin Chambers,
Dalal Street, Fort, Mumbai - 400 001, India
Tel: +91 22 2265 0500
Fax: +91 22 2265 9811
Email: cam.mumbai@cyrilshroff.com

New Delhi

4th Floor, Religare Building,
D-3, District Centre, Saket,
New Delhi - 110 017, India
Tel: +91 11 6622 9000
Fax: +91 11 6622 9009
Email: cam.delhi@cyrilshroff.com

Bengaluru

3rd floor, Prestige Falcon Towers,
19 Brunton Road, Off MG Road,
Bengaluru, Karnataka - 560 025, India
Tel: +91 80 2558 4870
Fax: +91 80 2558 4266
Email: cam.bengaluru@cyrilshroff.com

Hyderabad

8-2-622/5/A, 3rd Floor, Indira Chambers,
Road No. 10, Banjara Hills,
Hyderabad - 500 034, Telangana, India
Tel: +91 40 6730 6000
Fax: +91 40 6730 6002

Email: cam.hyderabad@cyrilshroff.com

Chennai

2nd Floor, ASV Chamiers Square,
87/48, Chamiers Road, R. A. Puram,
Chennai - 600 028, India
Tel: +91 44 6668 4455
Fax: +91 44 6608 3490
Email: cam.chennai@cyrilshroff.com

Ahmedabad

3rd Floor, Infrastructure House,
Next To Adani House,
Near Mithakhali Six Roads,
Navrangpura, Ahmedabad - 380 009, India
Tel: +91 79 2648 7900
Fax: +91 79 2648 7990
Email: cam.ahmedabad@cyrilshroff.com

Notes

Notes

cyril amarchand mangaldas
advocates & solicitors

www.cyrilshroff.com

offices: mumbai • new delhi • bengaluru • hyderabad • chennai • ahmedabad