

Doing Business in India

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TODAY

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LEGAL SYSTEM OF INDIA

Constitution

- ➡ Quasi-Federal
- ➡ Federal in character, Unitary in spirit
- ➡ Union, State & Concurrent Lists
- ➡ Unified judiciary; Federal appointments

Delegated Legislation

- ➡ Additionally, 'delegated legislation' recognises the exercise of legislative power by a Govt. agency, that is subordinate to the Legislature

Fields of Legislation

- ➡ 97 entries for Federal Govt.
- ➡ 66 entries for States
- ➡ 47 for both; Federal Govt. to prevail

Court System

- ➡ Supreme Court, highest appellate Court
- ➡ 24 State High Courts; adjudicate on appeals from lower Courts & Writ Petitions
- ➡ Lower Civil & Criminal Courts

INVESTING IN INDIA

3 Facts About: Deciding on India, for Investment

1

- Review economic & political Environment in India
- Understand the ability of investor to carry out operations in India, location of customers, and workforce

2

- Exchange Control Laws
- Corporate Laws
- Sector Specific Laws

3

- Indian Tax Laws
- International Tax Treaties India has entered into

INVESTING IN INDIA

Foreign Direct Investment in India

There is a short list of prohibited sectors in India; including the Atomic Energy, Lottery Business, Gambling & Betting, and manufacture of Cigars and tobacco products

Most other foreign investment may be made into an Indian Company, generally without seeking any prior approval of the Reserve Bank of India (RBI) or the Foreign Investment Promotion Board of India (FIPB); however, some investments may require a prior approval

INVESTING IN INDIA

Sector Issues

Automatic Route

- 100% foreign investment permitted for most sectors
- Some sectors have threshold requirements; insurance (49%), commodity exchange (49%) & credit information Companies (74%)

Partial Auto, Partial Govt.

- Telecom Services; beyond 49%
- Broadcasting; beyond 49%
- Single Brand retail trading; beyond 49%

Government Approval Route

- Defence - 49% investment with Govt. approval; beyond with CCS approval
- Railways, tea plantations, air transport services and ...
- Multi-brand retail trading ... conditions!

Other

Minimum capitalisation norms for foreign investment in certain industries like Non- Banking Financial Services & Development of Townships, Housing, Built-up Infrastructure and Construction & Development Projects

Additional Procedural Requirements

FDI may be direct or indirect, and FDI norms apply to both investments. Indirect FDI investment is referred to as downstream investment made by an Indian company, which is owned or controlled by non-residents, into another Indian company.

50% threshold is used. 'Control' often debated

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- ☞ Debt vs. Equity debate
- ☞ Pricing guidelines for share transfer to non-resident
- ☞ Partly paid share /debenture issued to non-residents, allowed
- ☞ FIRC, key document
- ☞ KYC, key requirement
- ☞ UIN, key number (30 day filing requirement)
- ☞ Shares to be issued within 180 days

INVESTING IN INDIA

Other Foreign Investment Options

FVCI

SEBI registered Foreign Venture Capital Investors, allowed to invest in Indian Companies, including CIC's in the Infrastructure Sector, AFC's and IFC's. Benefits include, free entry & exit pricing; lock-in exemption

NRI

Investments made by Non-Resident Indians on non-repatriable basis treated at par with domestic investments

FII, FPI & QFI

SEBI registered Foreign Institutional Investors, Foreign Portfolio Investors and Qualified Non-residents, exempted from FDI restrictions, to a great extent.

POEM

The Black Money Act, 2015 deals with undisclosed foreign income and assets of persons who are tax residents of India. Ramifications on foreigners and foreign companies who are Indian 'tax residents'. Test of 'place of effective management' applied.

A PRESENCE IN INDIA

Unincorporated & Incorporated

- ☞ Liaison Office
- ☞ Branch Office
- ☞ Project Office
- ☞ Limited Liability Partnership
- ☞ Partnership
- ☞ Trust

- ☞ Private Limited Company
- ☞ Public Limited Company

A PRESENCE IN INDIA

Incorporation Process

DIN & DSC

A Directors Identification Number and a Digital Signature is required to initiate the incorporation process

Incorporation

- Memorandum & Articles of Association
- Registered office address
- 2 shareholders & 2 Directors for Pvt Ltd Co.
- 7 shareholders & 3 Directors for Public Ltd Co.
- 1 Director Indian resident

Corporate Name Approval

- Approved by the Registrar of Companies
- Emblems and Names (Prevention of Improper Use) Act, 1950 compliance

Post Incorporation

- Within 30 days, hold first Board Meeting
- Within 30 days, appoint first auditors
- PAN & TAN applications; tax purposes
- Bank Account opening

Issue of Securities

Options

- Compliance with Companies (Share Capital and Debenture) Rules, 2014. Some practical limitations on issuance of various securities

Debentures

- Secured or unsecured debt instrument
- ECB Guidelines to be followed

Equity Shares

- Common stock; typically carry voting and dividend rights
- Fully and compulsorily convertible preference shares and debentures treated at par with equity

Returns

- Dividend declaration
- Share buyback / Put Options
- Share redemption
- IPO

A PRESENCE IN INDIA

Directors of an Indian Company

Resident Director

- Mandatory, from incorporation, to have one Indian resident Director
- 182 days residence in India, in the previous calendar year

Directors' Report

- Performance & Financial Position of Company and related entities
- Confirmation on proper systems in Company
- Risk, exposure statement
- Manner of evaluation of performance

Duties

- Act according to Charter Documents
- Good faith obligation; avoid conflict of interest
- Exercise due & reasonable care, skill and independent judgement

Liabilities

- 'Knowledge' of contraventions, liability prescribed
- Fine
- Imprisonment too

A PRESENCE IN INDIA

3 Other Facts About: Indian Company Law

1 Consent of Board / Shareholders required for Related Party Transactions. Scope and definitions broad.

2 Companies with a net worth of INR 5 Billion+, or net profits of INR 50 Million+, required to spend at least 2% of average net profits made during the last 3 years towards its corporate social responsibility obligations

3 Class of members / depositors may initiate proceedings against the Company, its Directors, Auditors, Experts, Advisors or Consultants – Class Action

MERGERS & ACQUISITION IN INDIA



Share Purchase (and Sale) of existing or new securities (via subscription)

Asset Acquisition of whole or part of the assets, tangible / intangible of a company

MERGER & ACQUISITION IN INDIA

M & A Laws in India

Companies Act

- Sections 230 to 232
- National Company Law Tribunal; Fast track M&A
- Merger of Indian company with company incorporated in notified jurisdictions, is allowed; subject to RBI approval.

Takeover Code

- 5% threshold for disclosure of interest
- Open offer obligations at 25% of the voting rights

Listing Agreement

- Disclosure of scheme of merger / amalgamation / reconstruction one month before filing with Court

Insider Trading

- Connected person
- Access to unpublished price sensitive information (UPSI)
- Prohibition of communication of UPSI & trading in securities

MERGER & ACQUISITION IN INDIA

M & A Laws in India

Anti-Trust

- ➔ Competition Act, 2002 & CCI
- ➔ Anti-Competitive Agreements
- ➔ Abuse of Dominant Positions
- ➔ Combinations (M&A)

ODI

- ➔ Overseas Direct Investment by Indians is governed by the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004

Combination Thresholds

- ➔ Assets : INR 15 Billion (India) & \$ 750 Million overseas (at least INR 7.5 Billion in India) or INR 60 Billion (India) & \$ 3 Billion overseas (at least INR 7.5 Billion in India)
- ➔ Turnover : INR 45 Billion (India) & \$ 2,250 Million overseas (at least INR 22.5 Billion in India) or INR 180 Billion (India) & \$ 9 Billion overseas (at least INR 7.5 Billion in India)

Exchange Control

- ➔ If a foreign entity is involved FDI regulations need to be complied with.

MERGER & ACQUISITION IN INDIA

M & A - Taxes

Corporate Tax

- ☞ Amalgamation
- ☞ Asset sale, itemized or slump sale
- ☞ Share transfer
- ☞ Demerger / Spin-Off

Stamp Duty

- ☞ Insufficiently stamped document not admissible as evidence in India
- ☞ State specified stamp duty, for transfer of property
- ☞ Payable on Merger / Demerger of Companies

Sales Tax / VAT

- ☞ Payable, on purchase of movable assets or goods, by the seller

Others

- ☞ Service Tax?

Indian Securities Market

1. IPO / Further Public Offering - ICDR Regulations, Companies Act & SCRR
2. Eligibility for IPO - Assets, Profits, Net worth, Size of Issue & 'No Name Change'
3. Minimum Offer - 2 Million securities, Size 1 Billion, Book Building process & 60% to QIB
4. Promoters Contribution
5. Lock-in Restrictions - Promoters contribution & Lock-in
6. Offer for Sale
7. Credit Rating
8. Pricing
9. Disclosure Requirements
10. Filing of Offer Document
11. Listing on Exchanges Outside India
12. Foreign Companies Listing in India
13. SME Listing

Direct Tax Considerations

1. Corporate Tax (and personal Income Tax)
2. Dividend & Share Buy-Back
3. Capital Gains
4. Interest, Royalties & Fees for Technical Services
5. Withholding Taxes
6. Wealth Tax
7. DTAA's
8. GAAR
9. Authority for Advance Rulings

Indirect Tax Considerations

1. Central Sales Tax
2. Value Added Tax
3. CENVAT
4. Service Tax
5. Customs Duty

EMPLOYMENT ISSUES IN INDIA

Employing People

Employment Laws

- About 20 odd legislations (Federal & State) apply to any establishment
- Some are general, some industry specific
- Compliance varies

Non-Compete

- Post employment restrictive covenants are difficult to enforce

Employee Documentation

- Employment Agreement
- NDA / Ancillary Agreements
- Employee Handbook / Policies

Stock Options

- ESOP's
- Foreign Company ESOP's possible to grant, RBI requirement

INTELLECTUAL PROPERTY IN INDIA

Convention & Treaties

- Berne Convention
- Universal Copyright Convention
- Paris Convention
- PCT
- Madrid Protocol

Copyrights

- In original literary, dramatic, musical or artistic works, cinematograph films, and sound recordings
- Registration not essential
- Employer first owner, of employee work product

Patents

- Invention - Novelty, Non-Obviousness (inventive step) & Industrial application
- Inventor or Assignee may file for Patent
- Parallel imports
- Design protection under Design Act, 2000

Trademarks

- NICE classification of goods
- Service marks protected
- Domain name serves the same function as a trademark'
- No trade secret protection (only via contract)

ENVIRONMENTAL LAWS IN INDIA

Laws

- Environment (Protection) Act, 1986
- Environmental Impact Assessment (EIA)
- Air & Water Act
- Coastal Regulation Zone

Municipal Authorities

- States legislate on land and water issues, therefore, laws may vary from state to state

Hazardous Substances

- Various rules govern handling and management of hazardous substances
- Compliance with Public Liability Insurance Act, 1991 – strict liability in case of accident

Penalty

- Article 21 Constitution provides that citizens may enjoy pollution free air and water
- National Green Tribunal, for cases relating to environmental protection conservation

Recourse to Litigation

Jurisdiction

- ☞ Territorial jurisdiction
- ☞ Pecuniary jurisdiction
- ☞ Subject matter jurisdiction
- ☞ Original & Appellate jurisdiction

Specific Relief

- ☞ Individual civil rights may be enforced under the Specific Relief Act, 1963; including specific performance of an enforceable contract

Interim Relief

- ☞ Prima facie case
- ☞ Irreparable injury
- ☞ Balance of convenience

Damages

- ☞ Section 73 & 74, Contract Act
- ☞ Compensation may not be for remote or indirect loss / damage
- ☞ Principle of mitigation & restitution applied
- ☞ Liquidated Damages recognized

RESOLUTIONS OF DISPUTES IN INDIA

Arbitration Option

Law

- Arbitration & Conciliation Act, 1996, based on the UNCITRAL Model Law
- New York Convention on the Recognition & Enforcement of Arbitral Awards, of 1958
- Limitation Act, 1963

Enforcement

- Limited options to challenge a duly constituted arbitration, and its subsequent award

Arbitration

- Institutional arbitration; ICC, LCIA, AAA, SIAC, HKIAC, as also FICCI, ICAR, etc.
- Statutory arbitration; under certain statutes
- Foreign arbitration; BALCO judgement, and after

Foreign Judgements

- 'Reciprocating Territory' judgements executed in India under Section 44A, CPC
- Other foreign judgements enforced by filing a suit under Section 13, CPC
- USA is not notified as a reciprocating territory

TRADE WITH INDIA

Franchise

- ➔ No specific law, however, several laws may apply - primarily driven by contract

PE Issues

- ➔ Care may be taken that no Permanent Establishment is created in India for taxation purposes

Foreign Trade Policy

- ➔ Foreign Trade (Development & Regulation) Act, 1992
- ➔ Director General of Foreign Trade (DGFT); issues licenses for import & export
- ➔ EOU, EHTP, STP, BTP and SEZ Schemes

SEZ Scheme

- ➔ Duty Free enclave
- ➔ No license for import
- ➔ Service Tax, Customs & other tax exemptions
- ➔ Supplies from DTA to SEZ, treated as 'exports'

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