

# 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

...

- ☞ 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

# RESOLUTIONS OF DISPUTES IN INDIA

## 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'

**Thank you for your attention!**

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And while opportunities for doing business in India have led to many success stories, particularly from many large U.S. multinational business organizations, there remain numerous challenges in doing business effectively with India. To understand these challenges and to learn how to effectively do business in India, it is important first to learn how Indian firms and their managers conduct business. Business, as practiced in India, provides a useful model for Western business organizations planning to enter the Indian marketplace. In contrast to many Western transnational corporations with high Doing Business in India Guide. Download the latest Guide for 2020 to get detailed information. Home. Doing Business in India. Setting up Business in India. Types of Permitted Business Establishment. For companies to start a new business in India are required to apply for a name, LLP name search facility (of existing companies/ LLPs) is available on the MCA portal. The system will provide the list of similar/closely resembling names of existing companies/ LLPs based on the search criteria filled up. For registration of the name, RUN - LLP to be filed. The applicant must file e form RUN with the Central Registration Center (CRC), India for approval of name. The name reserved for the company shall be available for adoption of the name for a period of 20 days. India is ranked 77 among 190 economies in the ease of doing business, according to the latest World Bank annual ratings. Investment climate in India has also improved considerably since the opening up of the economy in 1991. With an aim to attract and promote FDI, GoI has put in place a policy framework on FDI, which is transparent, predictable and easily comprehensible. This toolkit covers information on Setting up Business in India such as types of permitted business establishments, commencing business in India by a foreign investor, foreign company incorporation process – LO/ BO/ PO, business... Doing business in India offers enormous opportunities for UK companies. However, India is a large and complex market. It should not be seen as one market, but a series of interconnected regional markets where the legislative and investment climate may change from one state to another. We're here to help you and by taking advice on how to do business in India from the right experts, UK companies – large and small – can succeed in India. In this guide to doing business in India, we have collected advice from a range of India market entry specialists. The key areas to consider are understanding t