Legal 500
Country Comparative Guides 2025

India

Investing In

Contributor

Cyril Amarchand
Mangaldas

Radhika Gaggar

Partner | radhika.gaggar@cyrilshroff.com

Anand Jayachandran

Partner | anand.jayachandran@cyrilshroff.com

Supriya Aakulu

Principal Associate | supriya.aakulu@cyrilshroff.com

Suja Nair

Associate | suja.nair@cyrilshroff.com

This country-specific Q&A provides an overview of investing in laws and regulations applicable in India.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

India: Investing In

1. Please briefly describe the current investment climate in the country and the average volume of foreign direct investments (by value in US dollars and by deal number) over the last three years.

India is a preferred destination for foreign investments due to its favourable demographics, large consumer market, and consistent growth trajectory. Ranking as the 15th largest recipient of foreign direct investment (FDI), the 4th highest recipient of FDI in greenfield projects and the 2nd highest recipient of FDI in international project finance deals in 2023 according to the World Investment Report 2024, India's foreign investment landscape is a product of various favourable policy reforms aimed at enhancing ease of doing business and infrastructure, rationalisation and digitisation.

Mauritius, Singapore, U.S.A, Netherlands, and Japan were top contributors to the FDI equity inflow in India for the financial year 2023–2024. Services (including financial, banking, insurance, non-financial/business, R&D, technology testing), IT/ITES, trading, telecommunication, automobiles, infrastructure construction development, drugs and pharmaceuticals, chemicals (other than fertilizers), and power are key sectors for FDI.

FDI inflow in India over the past 3 financial years (1st April to 31st March), as released by the Department for Promotion of Industry and International Trade (DPIIT) is set out below:

Financial Year	Volume of FDI (USD)
2023-2024	71.28 billion
2022-2023	71.35 billion
2021-2022	84.83 billion

2. What are the typical forms of Foreign Direct Investments (FDI) in the country: a) greenfield or brownfield projects to build new facilities by foreign companies, b) acquisition of businesses (in asset or stock transactions), c) acquisition of minority interests in existing companies, d) joint ventures, e) other?

All the aforementioned forms of FDI are prevalent in India, and the choice of structure is largely driven by commercial objectives. While earlier, joint ventures were prevalent given the investors' unfamiliarity with India and their preference for local partners, as the market has evolved and matured, control and 100% acquisition deals are quite routine.

3. Are foreign investors allowed to own 100% of a domestic company or business? If not, what is the maximum percentage that a foreign investor can own?

Foreign investors are permitted to own 100% of a domestic company in most sectors. FDI can be made into India via 2 routes: the automatic route (i.e., where FDI is permitted without any approval from the government); or the approval route (i.e., where FDI requires prior approval of the government). The route available depends on the sector in which the business of the investee entity falls and in some sectors, the percentage of foreign investment.

<u>Automatic route</u>: Sectors that fall under the 100% automatic route include IT/ITES, greenfield pharmaceuticals, insurance intermediaries, single-brand product retail trading, industrial parks, e-commerce (i.e., B2B e-commerce activities and marketplace model), renewables, non-scheduled air transport services, airports (greenfield/brownfield), manufacturing, telecom services and any other sector that is not specifically restricted or prohibited (*detailed below*). In certain sectors that fall under the automatic route, FDI is permitted only up to a specific threshold. For instance, FDI in the insurance sector is permitted up to 74% under the automatic route.

<u>Sectors prohibited for FDI</u>: FDI is prohibited in Indian entities engaged in: (i) lottery business; (ii) gambling and betting including casinos; (iii) chit funds; (iv) nidhi companies; (v) trading in transferable development rights; (vi) real estate business or construction of farm houses; (vii) manufacturing of tobacco or tobacco substitutes; (viii) activities or sectors not open to private sector investment, including atomic energy, railway operations (other than as specifically permitted); and (ix) foreign technology collaborations including licensing for franchise, trademark, brand name and management contract is also prohibited for lottery business, gambling and betting activities.

<u>Approval route</u>: Investments in sectors falling under the

approval route require the prior approval of the government and are subject to conditions that may be stipulated by the government in its approval, in addition to those specified in the regulations. Sectors that fall under the 100% approval route include mining and mineral separation of titanium bearing minerals and ores, publishing and printing of scientific and technical magazine or speciality journals or periodicals, financial services (where any part of the financial services activity is not regulated by a financial services regulator), etc. In certain sectors that fall under the approval route, FDI is permitted only up to a specific threshold. For instance, FDI in multi-brand product retail trading is permitted up to 51%, and in print media up to 26%, both under the approval route.

Automatic and approval route: In certain sectors, FDI is permitted under the automatic route up to a specified threshold and under the approval route thereafter. For instance, defence, brownfield pharmaceuticals and satellite manufacturing and operation, all fall under the automatic route up to 74% and require government approval for any foreign investment beyond 74% and up to 100%. In private sector banking, FDI up to 49% is permissible under the automatic route and government approval is required for further investment beyond 49% and up to 74%.

Additionally, the DPIIT issued Press Note 3 (2020 Series) (PN3) dated April 17, 2020 which mandates the prior approval of the Indian government for any investment, regardless of sector, by an entity of a country sharing its land border with India (i.e., Afghanistan, Bangladesh, Bhutan, China (including Hong Kong), Myanmar, Nepal and Pakistan) (neighbor countries) or where the beneficial owner of an investment into India is situated in or is a citizen of any such neighbor country.

4. Are foreign investors allowed to invest and hold the same class of stock or other equity securities as domestic shareholders? Is it true for both public and private companies?

Foreign investors are only permitted to invest in equity shares, compulsorily convertible debentures/preference shares that are fully paid, and share warrants issued by an Indian company.

5. Are domestic businesses organized and managed through domestic companies or primarily offshore companies?

Domestic businesses are typically organized and managed through domestic companies. Foreign investors have the option to set up liaison offices, branch offices or project offices in India as well, subject to compliance with the guidelines issued by the RBI. These are relatively uncommon.

6. What are the forms of domestic companies? Briefly describe the differences. Which form is preferred by domestic shareholders? Which form is preferred by foreign investors/shareholders? What are the reasons for foreign shareholders preferring one form over the other?

i. Private Company: A private company's articles of association restricts the sale or transfer of its shares. Private companies cannot make public offerings of securities or invite members of the public to subscribe to its securities. Private companies have a minimum of 2 members and directors, and a maximum of 200 members.
ii. Public Company: The shares of a public company are freely transferable and a public company may invite members of the public to subscribe to its securities. A public company must have a minimum of 7 members and 3 directors and has no restriction on the maximum number of members. A private company which is a subsidiary of a public company is also regarded as a public company.
iii. Limited Liability Partnership (LLP): An LLP is an alternative corporate business form that provides the benefits of limited liability of a company and also the flexibility of a partnership (*detailed below*). An LLP is a body corporate formed with a minimum of 2 partners, and has perpetual succession. It is organized and operates based on an agreement. It is liable to the full extent of its assets but the liability of its partners is limited to the extent of their agreed contribution in the LLP, and no partner is liable on account of the independent or unauthorized acts of other partners. This form of business provides flexibility without imposing onerous compliance requirements.
iv. Partnership: A partnership firm is a form of a business organization wherein 2 or more persons come together to establish a business and divide profits amongst themselves in an agreed ratio. Creating a partnership firm is procedurally easier compared to other forms of business organizations such as a company or an LLP. Unlike an LLP where the liability of partners is limited to their agreed contributions, every partner in a partnership is liable, jointly with all the other partners and also severally, for all acts of the firm done whilst he is a partner. Partnership firms do not have perpetual succession (unlike companies and

LLPs).

Other forms include sole proprietorships, one person companies and non-profit/section 8 companies, which we have excluded from the list above for the sake of brevity.

Which form is preferred by domestic shareholders?

Typically, a private limited company is the preferred form of corporate organisation due to the established legal framework for such companies and relative flexibility (vis-à-vis public companies). Private companies can be converted to public companies if they grow and need to raise capital from an offer to the public.

Which form is preferred by foreign investors/shareholders?

Foreign investors typically prefer the private company form given the balance of limited liability, ability to control share transfers and less extensive filings and compliance requirements.

What are the reasons for foreign shareholders preferring one form over the other?

Foreign shareholders prefer an incorporated form (such as a company) over other forms of business organization (such as partnerships), *inter alia*, due to its limited liability protection to shareholders/members.

Within an incorporated form, foreign shareholders primarily prefer: (i) a private company over a public company as there is higher flexibility with respect to management structure, control over decision-making, fewer compliance/governance restrictions, restrictions on share transfers and availability of certain filing and compliance exemptions under Indian company law; and (ii) a private company over an LLP as there is more transparency, higher corporate governance, and regulatory compliance standards. Further, FDI is only permitted in LLPs engaged in sectors or activities where 100% foreign investment is allowed under the automatic route and there are no FDI-linked performance conditions. Therefore, LLPs cannot be used as an investment vehicle for FDI in several sectors.

7. What are the requirements for forming a company? Which governmental entities have to give approvals? What is the process for forming/incorporating a domestic company? What is a required capitalization for forming/incorporating a company? How long does it take to form a domestic company? How many shareholders is the company required to have? Is the list of shareholders publicly available?

A key pre-incorporation step towards forming a company is identifying the type of company, place of incorporation and details of the proposed registered office of the company. Identification of factual details required for statutory compliances is also necessary such as identifying directors (including resident directors) and shareholders (please refer to the response to query 6 above), a unique company name, etc. Companies that meet certain thresholds are required to have independent directors, women directors, key managerial personnel and a company secretary as well.

Which governmental entities have to give approvals?

Company incorporation applications are filed with and subject to the approval of the Central Registration Centre (CRC), Ministry of Corporate Affairs (MCA). Upon verification, the CRC issues a certificate of incorporation containing, *inter alia*, a corporate identification number, date of incorporation, Permanent Account Number (PAN), for payment of taxes, and Tax Deduction and Collection Account Number (TAN), for collecting tax at source.

If the company proposes to engage in a business licensed by a specific regulator, additional approvals would have to be obtained for the entity to commence the licensed business from the relevant regulator.

What is the process for forming/incorporating a domestic company?

The process of incorporating a company in India involves the following steps:

i. Obtaining a Digital Signature Certificate (DSC) and Director Identification Number (DIN): It is mandatory for all directors to obtain a DSC, i.e., a digital equivalent of a wet-ink signature for electronically authenticating documents, prior to incorporation of the company. Every individual proposed to be appointed as a director should have a DIN, i.e., an identification number unique to each person, which is issued by the MCA. The DIN is necessary for the company's registration form.
ii. Name availability check: The availability of the proposed name of the company should be checked with the MCA. The name should not be similar to the name of any existing company and should be in accordance with the Companies Act, 2013 and the

Companies (Incorporation Rules) 2014.

iii. File incorporation documents with CRC: Once the proposed name of the company has been approved by the CRC, the memorandum of association and articles of association of the company and other duly executed and legalized (if required) incorporation related documents have to be submitted along with the incorporation form and fees (if applicable). No registration fee is required to be paid at the time of filing the form if the nominal capital of the company is equal to or less than INR 1,500,000 (~ USD 17,710).

iv. Notarization and Apostillation (if required): Notarization and apostilling of documents may be required in case the subscribers/directors of the company are foreign nationals. Investors should budget for time to collate and provide identification documents that conform to Indian legal requirements.

v. Certificate of incorporation: After verifying all the documents and forms submitted, the CRC will issue the certificate of incorporation of the company.

What is a required capitalization for forming/incorporating a company?

No minimum amount of capital is required for incorporating a company in India.

How long does it take to form a domestic company?

Incorporation of a company may take 3 to 4 weeks. This timeframe may be extended in case documents are to be notarized or apostilled for foreign shareholders/directors (if applicable). This timeline also depends on the accuracy of information submitted, whether the proposed name of the company is available, time taken to prepare documents, KYC checks, etc.

How many shareholders is the company required to have?

A public company is required to have 7 shareholders and a private company is required to have 2 shareholders.

Is the list of shareholders publicly available?

The list of the initial shareholders of a company is publicly available. Additionally, the list of shareholders of the company is disclosed every year as on March 31 in the company's annual return and is therefore available in the public domain (i.e., on the MCA portal) for both public and private companies. The shareholding pattern of listed entities is available on the website of the stock exchanges, which is updated as at the end of each quarter.

8. What are the requirements and necessary governmental approvals for a foreign investor acquiring shares in a private company? What about for an acquisition of assets?

Barring certain limited cases such as (i) proposals involving FDI in excess of INR 50,000,000,000 (~ USD 590,357,500); (ii) acquisition of shares pursuant to a merger/demerger; (iii) a merger or acquisition which requires antitrust approvals; and (iv) approval for investments from certain countries as stipulated under the PN3, foreign investors do not usually require government approvals to acquire shares in a private company engaged in an automatic route business. All investments are required to comply with the pricing guidelines provided under foreign exchange regime in India (FEMA Regime).

A foreign investor must establish an Indian entity to acquire moveable property/assets. With respect to immoveable property, a branch or office or any other place of business in India (other than a liaison office) of a foreign company established in compliance with applicable law may acquire immovable property in India that is necessary for or incidental to the activity carried on in India by such branch or office. Persons who are citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan or Democratic People's Republic of Korea cannot acquire immovable property, other than on lease not exceeding 5 years, without prior government approval. Any transaction involving an acquisition or transfer of immovable property by a non-resident must be through banking channels in India and is subject to applicable taxes and other duties and levies.

9. Does a foreign investor need approval to acquire shares in a public company on a domestic stock market? What about acquiring shares of a public company in a direct (private) transaction from another shareholder?

Foreign investors registered with the Securities and Exchange Board of India as foreign portfolio investors may acquire listed shares on the stock market. Other foreign investors cannot acquire shares on the stock market unless they are already in control of the target company. Off market purchases (i.e., outside the stock exchange mechanism) are however permitted. Acquisition of shares, both on market as well as off market is subject to adherence with the entry routes, sectoral caps, pricing guidelines, documentation and reporting requirements, as applicable, under the FEMA

Regime. Reporting requirements may also be applicable under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations), subject to the quantum of shares acquired.

10. Is there a requirement for a mandatory tender offer if an investor acquired a certain percentage of shares of a public company?

Yes, in terms of the Takeover Regulations, a mandatory tender offer is required to be made: (i) if an acquirer proposes to directly or indirectly acquire shares or voting rights of a listed company, which takes the shareholding of such acquirer to 25% or more of the target company's share capital; (ii) if an acquirer already holds 25% or more of a listed company and directly or indirectly acquires shares or voting rights within a financial year which entitles such acquirer to exercise more than 5% of the voting rights of the target company; and (iii) in case of any direct or indirect acquisition of control over the target company. For evaluating these thresholds, the acquisitions by the acquirer and persons acting in concert (PACs) are aggregated. PACs comprise of persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

11. What is the approval process for building a new facility in the country (in a greenfield or brownfield project)?

Depending on the type of facility, sector, and location, a greenfield project may require various registrations, licenses, and approvals including:

i. approval from land authorities for use of land, approvals for the building structure, and layout including an occupancy certificate;
ii. operational licenses such as a factories license, registration for shops and establishments, trade licence, importer-exporter code, fire no-objection certificate, lift license, boiler license, legal metrology, food safety and standards, etc.;
iii. labour law related registrations including in relation to employee provident fund, gratuity, employee state insurance, contract labour etc.; and
iv. environmental clearances and consents including the consent to establish, consent to operate, hazardous waste management, environmental impact assessment, etc.

While brownfield projects may not always require fresh licenses, approvals, and registrations, the original licenses, approvals and registrations may stipulate that a prior/post-facto consent or intimation to the relevant authorities is applicable where there is a change in ownership/control/other information provided while obtaining it, and those conditions have to be complied with.

Where foreign investment is involved, in addition to the above, the approvals mentioned in query 8 will also apply. Specifically, the FEMA regime provides that additional approvals will be required, *inter alia*, for greenfield/brownfield projects in the following sectors:

i. <u>Insurance</u>: FDI in Indian insurance companies and insurance intermediaries is subject to obtaining necessary approvals from the Insurance Regulatory and Development Authority of India;
ii. <u>Railways</u>: Proposals involving foreign investment beyond 49% in sensitive areas from a security point of view, may require the consideration and approval of the Cabinet Committee on Security;
iii. <u>Defence</u>: Investment in the defence sector is subject to obtaining an industrial license under the Industries (Development & Regulation) Act, 1951; and
iv. <u>Pharmaceuticals</u>: Non-compete provision shall not be allowed in the pharmaceuticals sector, except under exceptional circumstances with government approval.

12. Can an investor do a transaction in the country in any currency or only in domestic currency? a) Is there an approval requirement (e.g. through Central Bank or another governmental agency) to use foreign currency in the country to pay: i. in an acquisition, or, ii. to pay to contractors, or, iii. to pay salaries of employees? b) Is there a limit on the amount of foreign currency in any transaction or series of related transactions? i. Is there an approval requirement and a limit on how much foreign currency a foreign investor can transfer into the country? ii. Is there an approval requirement and a limit on how much domestic currency a foreign investor can buy in the country? iii. Can an investor buy domestic currency outside of the country and transfer it into the country to pay for an acquisition or to third parties for goods or

services or to pay salaries of employees?

Whether a transaction may be foreign currency denominated or needs to be INR denominated depends on the nature of the transaction. Typically, a foreign investor can use any convertible currency to do a capital account transaction, provided the payment is made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India, in accordance with the FEMA Regime. That said: (i) for certain transactions such as remittance out of lottery winnings or remittance of income from racing or riding, etc., drawal of foreign exchange is prohibited; and (ii) payment and receipt in India for any current account transaction (other than a trade transaction) between a resident and a non-resident who is on a visit to India needs to be INR denominated. Payment for acquisition of immovable property by non-resident Indians or overseas citizens of India cannot be made through foreign currency notes. Payments from foreign investors in foreign convertible currencies to contractors and employees in India are typically converted to the domestic currency upon settlement by banks.

Is there a limit on the amount of foreign currency in any transaction or series of related transactions?

This depends on the nature of the transaction. Some current account transactions have monetary thresholds beyond which approvals are required. The following transactions are subject to prior RBI approval:

- remittances exceeding 5% of investment brought into India or USD 100,000, whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses;
- remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India; and
- commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or 5% of the inward remittance whichever is more.

Is there an approval requirement and a limit on how much foreign currency a foreign investor can transfer into the country?

This depends on the nature of the transaction.

Is there an approval requirement and a limit on how much domestic currency a foreign investor can buy in the country?

There is no such prescribed statutory limit, and this will depend on the nature of the transaction.

Can an investor buy domestic currency outside of the country and transfer it into the country to pay for an acquisition or to third parties for goods or services or to pay salaries of employees?

This depends on the jurisdiction of the investor and the nature of the transaction.

13. Are there approval requirements for a foreign investor for transferring domestic currency or foreign currency out of the country? Whose approval is required? How long does it take to get the approval? Are there limitations on the amount of foreign or domestic currency that can be transferred out of the country? Is the approval required for each transfer or can it be granted for all future transfers?

Outward remittances from India can be done only through authorized dealer banks (i.e., entities licensed by the RBI to deal in foreign exchange or foreign securities). In terms of the FEMA Regime, no person can export or send foreign currency out of India or import or bring foreign currency into India without the RBI's special or generic permission. Further, all cross-border transactions should correspond with one of the purpose codes issued by the RBI, which indicate the nature and purpose of the transaction. A wrong purpose code may lead to increased scrutiny, delay in processing and/or transaction failure.

Whose approval is required?

An approval, if required, would typically be from the RBI or in some cases, by the authorized dealer banks to whom the RBI has delegated the power to provide approval.

How long does it take to get the approval?

While the duration required to obtain approval from the RBI will depend upon several factors, broadly, approval from the RBI typically takes 4 weeks to 12 weeks.

Are there limitations on the amount of foreign or domestic currency that can be transferred out of the country?

This depends on the purpose for which the currency is being transferred. There are no general limitations so long as the transaction is in compliance with the FEMA Regime and matches an appropriate purpose code, as mentioned above.

Is the approval required for each transfer or can it be granted for all future transfers?

Where required, the approval is typically granted for each transfer unless specified otherwise.

14. Is there a tax or duty on foreign currency conversion?

Yes, the service rendered in relation to conversion of foreign currency in India attracts Goods and Services Tax (GST) at the rate of 18% basis the specific valuation rule (i.e., difference in the buying rate or the selling rate, with the reference rate prescribed by the RBI for that currency at that time, multiplied by the total units of currency being converted or the prescribed slab method). However, no GST is applicable for inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers.

15. Is there a tax or duty on bringing foreign or domestic currency into the country?

Import of bank notes is restricted as set out above. However, authorised dealers may import bank notes without a license subject to fulfilment of prescribed conditions. Import of bank notes may attract import duty if it is beyond the permissible limit. Further, resident and non-resident passengers are allowed to bring currency into India up to prescribed limits.

16. Is there a difference in tax treatment between acquisition of assets or shares (e.g. a stamp duty)?

Yes. Acquisition of assets and acquisition of shares are different legal concepts under Indian law and are taxed differently. Acquisition of assets may be by way of an asset purchase (where assets are cherry picked for purchase and the consideration is identifiable for each asset) or a slump sale (where the entire business undertaking is purchased as a going concern for a lumpsum consideration). These are taxed differently as is set out in brief below:

Asset Purchase:

Direct Tax Implications: In case of asset purchase the tax treatment varies depending up on the nature of assets proposed to be transferred, i.e., depreciable assets, non-depreciable assets, business assets, etc.

a. For the purposes of computing capital gains arising from sale of depreciable assets, the sale consideration is to be reduced from the tax written down value (WDV) of the respective block of capital assets (Block). If the sale consideration exceeds the WDV of the Block, then the excess would be considered as short term capital gains, taxable at normal applicable rates of tax.
b. With respect to non-depreciable assets, the gains are typically computed as the sale consideration less the cost of acquisition of the asset transferred. Such gains are taxed at the applicable rates, where such assets (other than listed securities) are held for 24 months or less, prior to the transfer. Otherwise, such gains would be taxed as long term capital gains at the rate of 12.5% (plus applicable surcharge and cess).
c. Gains arising on the transfer of business contracts (like customer contracts) may be subject to tax as business income at applicable rates.
d. Further, the buyer entity may be required to withhold tax on the consideration payable for the acquisition of the assets, depending on the nature of asset, residential status of the buyer and seller, the transaction value, etc. Certain fair valuation rules may also apply in case of certain assets, like land, building securities, etc.

Indirect Tax Implications: GST ranges from 0% – 28% depending upon the nature of the assets.

Stamp Duty: Stamp duty rates are state specific; the rate of stamp duty applicable depends upon the state in which the assets are situated.

Slump Sale:

Direct Tax Implications: The gains are subject to capital gains tax in the hands of the seller at the rate of 12.5%, assuming that the undertaking has been held for more than 36 months. If the undertaking is held for 36 months or less, gains are taxable at the rate of tax applicable on the seller. In a slump sale, capital gains are computed by reducing the net worth of the undertaking from the higher of (i) actual sale consideration; and (ii) fair market value of the undertaking.

Indirect Tax Implications: Slump sales are not liable to GST.

Stamp Duty:

i. Stamp duty rates are state specific.
ii. The business transfer agreement (i.e., the agreement to sell) will be stamped basis the stamp duty rate applicable in the state in which the agreement is executed.

iii. Stamp duty on the documents for actual conveyance (i.e., the documents for transfer of ownership) will be determined based on the nature of the property being transferred (i.e., whether moveable, immovable or intangible property). In case of immovable property, stamp duty and registration fee will be payable at an *ad valorem* rate based on the market value of the property. To the extent possible, movables can be transferred by delivery of possession to the buyer.

Tax treatment for acquisition of shares:

Direct Tax Implications:

i. Gains arising from sale of shares are subject to capital gains tax at the rate of 12.5% (plus applicable surcharge and cess), where such shares have been held for more than 12 months (in case of listed shares) or more than 24 months (in case of unlisted shares). Otherwise, such gains would typically be taxed at the rates applicable to the seller if the shares have been held for less than 12 or 24 months, as set out above.
ii. Certain relaxations and benefits may be available as to taxation of gains arising from sale of listed equity shares, on a recognised stick exchange, subject to certain conditions. Further, a non-resident seller may claim beneficial provisions, if any, available in the tax treaty entered by India with the country of which such seller is a tax-resident.
iii. The buyer may be required to withhold tax on the sale consideration, depending on the nature of asset, residential status of the buyer and seller, the transaction value, etc. Further, shares need to be acquired at least at the fair market value, determined in accordance with the applicable Failure to comply with fair valuation norms may have adverse tax implications for both the buyer and the seller.

Indirect Tax Implications: Share transfers do not attract GST.

Stamp Duty:

i. The share purchase agreement will have to be stamped basis the applicable stamp duty rate of the state in which the agreement is executed.
ii. Stamp duty at the rate of 0.015% of the value of the shares is payable on the share transfer forms/delivery instruction slips executed for the share purchase.

17. When is a stamp duty required to be paid?

Instruments chargeable with stamp duty must be stamped before execution or at the time of execution. Stamp laws are state specific in India, and some states (e.g., Maharashtra) allow stamp duty to be paid immediately after/on the working day following the day of execution as well. Instruments chargeable with duty executed out of India (other than a bill of exchange or promissory note) must be stamped within 3 months of first being received in India.

18. Are shares in private domestic companies easily transferable? Can the shares be held outside of the home jurisdiction? What approval does a foreign investor need to transfer shares to another foreign or domestic shareholder? Are changes in shareholding publicly reported or publicly available?

Yes, the shares of private companies are easily transferable, subject only to contractual restrictions or restrictions in their charter documents.

In order to transfer certificated shares, the transferor and the transferee must execute and submit an instrument of transfer (i.e., Form SH-4), along with the share certificates to the company. Shares held in dematerialized form may be transferred with the assistance of a depository participant who is registered with the depositories, i.e., National Securities Depositories Limited and/or Central Securities Depositories Limited. Pursuant to a recent amendment, every private company which is not a small company as on March 31, 2023, is required to ensure that its shares are in dematerialized form by September 30, 2024. Therefore, going forward, share transfers are likely to be in dematerialized form rather than physical share transfers.

Can the shares be held outside of the home jurisdiction?

Yes, the share certificates of private Indian companies may be held outside India.

What approval does a foreign investor need to transfer shares to another foreign or domestic shareholder?

A foreign investor does not require approval to transfer shares to another foreign or domestic shareholder unless there are sectoral or other restrictions (e.g., as described in query 3).

Are changes in shareholding publicly reported or publicly available?

Changes in shareholding of private Indian companies are not publicly reported. However, details regarding changes in shareholding are typically shown in the company's annual return and may be obtained from the MCA portal after payment of requisite fees.

19. Is there a mandatory FDI filing? With which agency is it required to be made? How long does it take to obtain an FDI approval? Under what circumstances is the mandatory FDI filing required to be made? If a mandatory filing is not required, can a transaction be reviewed by a governmental authority and be blocked? If a transaction is outside of the home jurisdiction (e.g. a global transaction where shares of a foreign incorporated parent company are being bought by another foreign company, but the parent company that's been acquired has a subsidiary in your jurisdiction), could such a transaction trigger a mandatory FDI filing in your jurisdiction? Can a governmental authority in such a transaction prohibit the indirect transfer of control of the subsidiary?

Yes, there are a few mandatory FDI filings which are to be made through the Single Master Form (SMF) available on the Foreign Investment Reporting and Management System Portal (FIRMS Portal).

A filing in Form FC-TRS is required to be made with the RBI on the FIRMS Portal through the SMF in case of transfers between:

i. a person resident outside India holding equity instruments on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and
ii. a person resident outside India holding equity instruments on a repatriable basis and a person resident in India.

With which agency is it required to be made?

The FDI filings are required to be made with the RBI (through the relevant authorized dealer bank).

How long does it take to obtain an FDI approval?

Where an FDI approval is required, the DPIIT prescribes an indicative timeline of 12 weeks from the date of submission of the application (without factoring in stop clocks for time spent by applicants in removing deficiencies in the proposals/supplying additional information, as required). In practice, the approval process typically takes ~ 4 to 9 months, subject to factors such as the sector for which the application is made, approvals under PN3 (if required), and other nuances of the application. This is primarily attributable to the level of scrutiny involved and the interplay between several departments and ministries in the decision-making process.

Under what circumstances is the mandatory FDI filing required to be made?

i. When an Indian company issues equity instruments to a person resident outside India as FDI, such issuance is to be reported in Form FC-GPR in the SMF within 30 days from the date of issue of the equity instruments.
ii. Every Indian company that has received FDI in the previous year(s) including the current year is required to submit an annual return on foreign asset liabilities in Form FLA with the RBI by July 15 each year.
iii. Transfers of equity instruments between a person resident outside India holding equity instruments on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis/a person resident outside India holding equity instruments on a repatriable basis and a person resident in India is to be reported in Form FC–TRS within 60 days of transfer of equity instruments or receipt/remittance of funds whichever is earlier.
iv. Mandatory FDI filings are also to be made through requisite forms for reporting of: (a) conversion of external commercial borrowings into equity; (b) issuance of employee stock options and sweat equity shares; (c) issue/transfer of depository receipts; (d) receipt of consideration for capital contribution, acquisition of profit shares and disinvestment/transfer of capital contribution or profit share by LLPs; (e) issuance of units of an investment vehicle to a person resident outside India; (f) purchase/transfer of equity instruments by non-resident Indians or overseas citizens of India on stock exchanges in India; (g) downstream investment by an Indian entity or investment vehicle in another Indian entity, i.e., indirect foreign investment for the investee entity; and (h) issue/transfer of convertible notes.

If a mandatory filing is not required, can a transaction be reviewed by a governmental authority and be blocked?

No.

If a transaction is outside of the home jurisdiction (e.g. a global transaction where shares of a foreign incorporated parent company are being bought by another foreign company, but the parent company that's been acquired has a subsidiary in your jurisdiction, could such a

transaction trigger a mandatory FDI filing in your jurisdiction?

Typically, there is no requirement of a mandatory FDI filing in India for such global transactions. That said, if such transaction falls within the purview of the PN3 restrictions, prior approval of the Indian government will be required. In addition, if there is any change in the significant beneficial ownership of the Indian company, the same will have to be reported to the Registrar of Companies in the prescribed form.

Can a governmental authority in such a transaction prohibit the indirect transfer of control of the subsidiary?

If all legal and regulatory requirements are met, the governmental authorities typically will not prohibit such an indirect transfer.

20. What are typical exit transactions for foreign companies?

Typical exit transactions for foreign companies from India include:

i. initial public offerings;
ii. private sales, including trade sales or strategic sales; and
iii. mergers.

While a buyback of shares and liquidation of the company are also typically documented in shareholders' agreements as potential exit options, these modes are not usually practically implemented as an exit route in India unless the options above become impracticable.

21. Do private companies prefer to pursue an IPO? i. on a domestic stock market, or ii. on a foreign stock market? iii. If foreign, which one?

Domestic stock exchanges are strongly preferred to pursue IPOs. The BSE (formerly Bombay Stock Exchange) has more than 5,200 listed entities (inclusive of both equity and debt segments). Domestic stock exchanges are preferred majorly due to better valuation in Indian markets, supportive regulatory climate, and for generating credibility for the company. Many Indian companies which had previously transferred their ownership and operation to overseas jurisdictions due to favourable conditions are now 'reverse flipping' to India, i.e., repatriating the ownership and headquarters of the company back to India. Most reverse flips are being undertaken with the aim of listing the companies on Indian stock exchanges. While recent amendments to the Indian laws i.e., the '*Direct Listing of Equity Shares of Companies Incorporated in India on International Exchanges Scheme*' allows Indian companies to list on identified international exchanges (presently, India International Exchange and NSE International Exchange in GIFT-IFSC), this is quite recent and the general trend is to pursue domestic listing.

22. Do M&A/Investment/JV agreements typically provide for dispute resolution in domestic courts or through international arbitration?

International arbitration (which may be foreign seated) has become the most preferred dispute resolution mechanism for parties entering into transnational M&A/investment/JV agreements, incorporating appropriate arbitration clauses that cater to the unique aspects of multidimensional transactions.

23. How long does a typical contract dispute case take in domestic courts for a final resolution?

The length of legal proceedings in India is dependent upon various factors such as the work load of the judges, jurisdiction of the court (metropolitan courts tend to be faster), complexity of the dispute (number of witnesses and experts) etc. Generally, the original jurisdiction courts may take ~ 2 to 5 years to decide contract disputes, including commercial suits. Delays are common, orders are subject to further appeals, and all orders are capable of being challenged all the way to the Supreme Court, which can take about 7 to 10 years in total.

24. Are domestic courts reliable in enforcing foreign investors rights under agreements and under the law?

Yes, Indian courts are reliable in enforcing the rights of foreign investors provided that such rights fall within the ambit of applicable law. Typically, when it is a foreign arbitral award that is being enforced in India, the chances of it being set aside are low, and India has adopted a pro-enforcement approach. With respect to enforcing the rights of parties, domestic and foreign investors are treated equally.

25. Are there instances of abuse of foreign investors? How are cases of investor abuse

handled?

Indian legal regime does not differentiate between foreign and domestic investors. It has sufficient investor protections, granting representative rights to shareholders in relation to cases of oppression, mismanagement, or conduction of affairs of a company in a manner prejudicial to shareholders. Foreign investors also have the ability to approach Indian courts for relief and are entitled to represent themselves before the jurisdictional National Company Law Tribunal through class-action suits in cases of abrogation of shareholders' rights. Given the above, there is limited ability to abuse foreign investors.

26. Are international arbitral awards recognized and enforced in your country?

Foreign arbitral awards are recognized and enforced/executed in India through 2 conventions – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) and the Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). Part II of the Arbitration and Conciliation Act, 1996 (A&C Act) pertains to enforcement of awards made under the 2 aforementioned conventions. When a binding award is received by a party from another country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory that has been notified as a convention country by India, the award would then be enforceable in India. In India, there has been a pro-enforcement approach towards foreign arbitral awards and very few foreign awards have not been enforced.

For enforcement of foreign arbitral awards in India, an application for enforcement must be moved by the award-holder to the court, under section 47 of the A&C Act along with the relevant documents including the original award and arbitration agreement or duly authenticated copies thereof, evidence as may be necessary to prove the award, and a duly translated copy of the award (if the award is in a foreign language).

Following the submission of the application for enforcement of the foreign award, the other party may raise objections under section 48 of the A&C Act and seek refusal of the award. The grounds for seeking refusal of a foreign arbitral award are: (i) the incapacity of the parties to the arbitration agreement or the arbitration agreement being invalid under the applicable law; (ii) the party against whom the award is invoked was not given proper notice of the appointment of arbitrator or of the arbitral proceedings or was otherwise unable to present the case; (iii) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement or as per the law of the country where the arbitration took place; and (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, the court may refuse enforcement of foreign award if it finds that (i) the subject-matter of the dispute is not arbitrable in India; or (ii) the enforcement of the award would be contrary to the public policy of India. Upon the court being satisfied that the foreign arbitral award is enforceable, the award is deemed to be a decree of the court.

27. Are there foreign investment protection treaties in place between your country and major other countries?

According to data from the United Nations Conference on Trade and Development regarding international investment agreements, India has, over the years, signed 88 bilateral investment treaties (BITs) with a majority of jurisdictions. As on date, 8 BITs are in force and 3 BITs have been signed, but yet to be enforced. Further, 14 treaties with investment provisions between India and many significant jurisdictions including the European Union, Association of South-East Asian Nations, Singapore, Japan, United Arab Emirates, etc., are in force as of date, and 6 more have been signed but yet to be enforced. India is also a signatory to several investment related instruments including the New York Convention and Trade Related Investment Measures, 1994.

Contributors

Radhika Gaggar
Partner

radhika.gaggar@cyrilshroff.com

Anand Jayachandran
Partner

anand.jayachandran@cyrilshroff.com

Supriya Aakulu
Principal Associate

supriya.aakulu@cyrilshroff.com

Suja Nair
Associate

suja.nair@cyrilshroff.com