DOING BUSINESS IN India

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In India, the following business structures are permitted:

1. Limited liability companies
2. Limited liability partnerships
3. Trusts
4. General partnerships
5. Sole proprietorship firms
6. Foreign company branch/representative offices

Limited liability companies ("LLCs") and limited liability partnerships ("LLPs") are commonly used as business vehicles by foreign investors for investment in India. Trusts are quite useful in structuring tax efficient investment vehicles.

India taxes are based on “residency”.

Profits of an LLC and LLP are presently taxed at 30% plus applicable surcharge and excess.

LLCs fulfilling certain criteria are also eligible to claim a reduced tax rate of 25%.

One of the key advantages of an LLP is that an LLP is not required to pay tax on distribution to its partners. Such distributions are treated as income in the hands of the partners and taxed accordingly.

However, an LLC is required to withhold tax at source on its distributions to its shareholders at about 17%. Such distributed income in the hands of the shareholders is exempt from payment of income tax.

A foreign national proposing to visit India, whether on a short or long-term basis for any purpose, will need to obtain the applicable visa. A visa is granted depending on the duration and purpose of visit to India. In almost all cases, visas need to be applied for in advance in the home country where the applicant is resident.

If a foreign national wants to stay in India and work on a long-term basis, he/she will need an employment visa. To be eligible for an employment visa, the foreign employee should earn a salary of more than USD 25,000 per year and should not be appointed to a job for which qualified Indians are available. A business visa is issued only for a short-term purpose, such as a visit to India to explore possible business ventures or where the foreign national is visiting India for technical meetings or to attend Board meetings, etc.

The visa application process differs, depending on the type of visa sought and the nationality of the foreign applicant. As a broad indicator for employment visas, the applicant has to submit (a) an appointment letter and employment contract from the Indian employer with details of the nature and
There are two major concerns while dealing with local and federal Government agencies. The first is corruption. Indian officials are known to delay even routine approvals unless their illegal gratification demands are met. To tackle this issue, the Government has taken steps to minimize interaction between the business community and officials. Several regulatory approvals are now issued on electronic / online portals and there is very little or nil interaction with the officials. The second relates to red tapism. The Indian regulators are extremely slow and bureaucratic. However, in the recent past, due to several steps taken by the Government, India has considerably improved its rankings on the worldwide doing business index.

Foreign Investment Review and Issues: Does the government review and approve foreign investments? What factors are considered?

India allows foreign investment in most sectors, barring a few. Broadly, India follows the below rules regarding foreign investment:

Almost all sectors (barring a few) are open to 100% foreign investment under the “automatic” route – i.e., no prior foreign investment approvals are required; only certain post investment declarations are necessary;

Up to 100% foreign investment is permitted in some sectors with prior foreign investment approval. For e.g., mining and printing / publishing of scientific and technical magazines.

100% foreign investment is not permitted but only a certain percentage of foreign investment is permitted, which necessary means that the foreign entity should establish a joint venture with an Indian partner. For e.g., only up to 74% foreign investment is permitted in brownfield pharma sector;

Foreign investment is prohibited in sectors such as real estate business, lottery and gambling and sectors in which private investment is not allowed.

Dealing with the Government: Identify major issues when dealing with local and federal governments.

There are two major concerns while dealing with local and federal Government agencies. The first is corruption. Indian officials are known to delay even routine approvals unless their illegal gratification demands are met. To tackle this issue, the Government has taken steps to minimize interaction between the business community and officials. Several regulatory approvals are now issued on electronic / online portals and there is very little or nil interaction with the officials. The second relates to red tapism. The Indian regulators are extremely slow and bureaucratic. However, in the recent past, due to several steps taken by the Government, India has considerably improved its rankings on the worldwide doing business index.
Dispute Resolution and Court Systems: Summarize the court system, including the use of juries and arbitration.

India follows a quasi-federal/provincial court structure. There is no jury system in India.

For civil disputes, an appeal would lie from the preliminary courts (such as District court/Small Causes court/Civil Judge court) to the High Court of the concerned State/province. The High Court of each State/province also has original jurisdiction for actions/litigation against the Government and its agencies. From the High Court of each State/province, an appeal will lie to the Supreme Court of India (the apex court). Judgments of the Supreme Court are non-appealable and binding on all other courts in India. In some cases, Supreme Court judgments also have the force of law.

For criminal disputes, the matter would be investigated by the Police agencies and a trial would be held in the Magistrate court (or sessions court in some cases). Further appeals will lie to the High Court of each State and thereafter to the Supreme Court.

For commercial disputes, the court system will be the same as that applicable for civil disputes. Various Indian States have now established dedicated commercial courts as the court of the first instance to adjudicate commercial disputes. Alternate dispute resolution is very common and preferred for commercial disputes. The Indian arbitration law is modeled on the UNCITRAL model law on arbitration and is quite popular for ad hoc arbitrations. Institutional arbitrations are also popular.

Foreign Corrupt Practices: What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

Prevention of Corruption Act, 1988 (“PCA”) is the primary legislation dealing with anti-corruption in India. Under this law, if a Government official (which is very broadly defined) obtains any illegal gratification in discharge of his official functions, he/she will be subject to penalties in the nature of imprisonment, fines or both. The law also criminalizes using one’s personal influence over a Government official. Generally speaking, only the bribe taker is liable for penalties but the bribe giver is also often subject to sanctions as an “accomplice”.

The Prevention of Money Laundering Act 2002 (“PMLA”) was passed in India with the aim to prevent money laundering and restrict use of the proceeds of crime. PMLA criminalizes money laundering and prescribes strict penalties for violation of its provisions, including imprisonment of up to 10 years and the attachment or confiscation of tainted property.

PMLA also covers money laundering involving foreign entities. This is essentially split in two categories. The first category covers acts of money laundering, where the proceeds are remitted to India for acts committed outside India and is an offence under Indian and foreign law. The second category covers acts of money laundering committed in India, where the proceeds are transferred or are attempted to be transferred abroad.
India's central bank, Reserve Bank of India, and the Indian regulator for securities, Securities Exchange Board of India, have also prescribed specific anti money laundering regulations which are applicable to entities (such as banks, financial institutions and market intermediaries) that are regulated by them.

It is important to note that a company may also be held liable for an offence under the PMLA and the PCA. The persons in charge of such company and who are responsible for the conduct of its business, at the time of commission of the offence by the company, may also be held liable under the PMLA and the PCA.

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<th>Types of transaction: How may businesses combine?</th>
<th>Mergers and amalgamations are the most common form of business combinations. They can be implemented in a tax efficient manner if certain conditions are fulfilled. Share acquisitions are also commonly used when an acquirer intends to acquire ownership rights or control over a business. If an acquirer intends to purchase a particular business or assets, the purchase could be structured as a slump sale (sale of business as a going concern) or a demerger or an asset sale.</th>
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<td>Competition Law: How do laws impact competition?</td>
<td>India has a robust competition law regime. Indian law prohibits agreements that are considered anti-competitive. By doing so, it requires enterprises to be very careful while doing business with fellow competitors and customers. The regime also penalizes abuse of dominant position. An enterprise is said to have a dominant position in a relevant market if it is able to exercise control over any particular supply in the market. Lastly, consummation of business combinations of a certain size (including overseas combinations involving parent companies) can be consummated only after the Indian anti-trust regulator accords its permission.</td>
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<td>Employment Relations: Briefly summarize major laws impacting employment and employee relations.</td>
<td>Most employment laws in India are federal laws, which include laws relating to employee disputes, social welfare benefits, etc. States have the right to pass amendments to these laws, which then have specific local applicability. As a general overview, employment laws are based on factors such as applicable based on factors such as employee job profile, the employer business activity and the number of employees in the relevant company. Briefly, India’s employment laws may be categorized as follows: -Certain laws (such as the Factories Act, 1948) apply only to a factory that is engaged in manufacturing;</td>
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-Certain laws apply to an employee who qualifies as a ‘workman’ under the (federal) Industrial Disputes Act, 1947 ("ID Act"). A workman would generally be any employee inter alia engaged to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, but would not include an employee engaged in (a) a managerial or administrative capacity; or (b) a supervisory capacity and drawing wages more than INR 10,000 (approx. USD 160) per month. Typically, all employees who are not in a managerial or supervisory role would be considered as workmen; and

-Certain laws apply to all employees working in an establishment.

The main legislation that is enacted by a State is the Shops and Establishments Act ("SEA"). The SEA deals with employee matters such as working hours, leave, weekly holiday, overtime, etc. At a federal level, the Industrial Employment (Standing Orders) Act, 1946 deals with similar aspects. India has laws governing minimum wages, manner and method of payment of wages, payment of annual bonuses, etc.

In terms of benefits, provident fund law makes it mandatory for an employee and an employer to contribute equally to a State established and operated provident and pension fund for employees earning below a prescribed threshold. In practice, usually all employees are part of this fund. Employees State insurance law provides medical benefit for employees earning below a prescribed threshold. Additionally, all female employees, whether in private or public sectors, are entitled to maternity benefits both in terms of paid leave and additional monetary payments. Upon cessation of employment in respect of employees who have been in service for a continuous period of 5 years or in the case of death, permanent disability, etc., the employer is liable to make a "gratuity" payment to the employee/legal heir. This amount is calculated at the rate of 15 days wages for every year of service subject to a cap of INR 1,000,000 (approx. USD 16,000).

The main laws and regulations governing business combinations include Indian company law (applicable to both privately held and publicly traded LLCs), Indian securities law (applicable to only listed or publicly traded companies), Indian tax laws (both direct and indirect tax laws), relevant State stamp duty law and Indian competition laws.

Further, exchange control laws are relevant for cross border transactions.
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<th><strong>Governing Law:</strong> What law typically governs the transaction agreements?</th>
<th>If the transactions agreements are between Indian parties, then the governing law would typically be Indian laws. If the transaction agreements involve at least one foreign party, they may be subject to a foreign law.</th>
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<td><strong>Filings &amp; Fees:</strong> Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees payable in connection with a business combination?</td>
<td>If the business combination is structured as a merger or an amalgamation, a petition needs to be filed with the jurisdictional court/tribunal for approval. The petition should also be filed with the federal (central) Government, the registrar of companies and the income tax department. These agencies are entitled to request for clarifications or raise objections with respect to the business combination. If the business combination meets the prescribed thresholds under competition law, it is required to be filed with the anti-trust regulator for its consent. If the business combination involves a cross-border aspect, the transaction should be reported to the exchange control authority. Combinations involving listed companies entail filings with the securities market regulator and the stock exchange on which the shares of such companies are listed. Filing a business combination with the relevant court/tribunal and the anti-trust regulator entails payment of regulatory fees of about USD 24,000 (INR 1,500,000). In addition, stamp duty is required to be paid on the court/tribunal order in the case of merger/amalgamation. This is usually calculated as percentage of the assets of the transferor company situated in the relevant state or the value of shares allotted to the shareholders of the transferor company, whichever is higher. Filings with the company registry should also be made, which will entail payment of regulatory fees. These fees are usually nominal and vary depending on the type of filing to be made. Filings with the company registry would be required even in respect of transactions structured as share transactions.</td>
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<td><strong>Information to be Disclosed:</strong> What information must be made public in a business combination? Does this depend on the structure used?</td>
<td>If a business combination is structured as a merger/amalgamation or a share acquisition, usually some aspects of the transaction will be made public. For e.g., a prior notice containing all the material aspects of a merger or an amalgamation is required to be sent to all the shareholders. This notice should be accompanied by an explanatory statement. Together, these documents will need to deal with aspects such as share exchange ratio, valuation aspects, rationale for the business combination etc. This will need to be filed with the company registry, which is a public repository of filings and information. In addition, acquisition of substantial shareholding / voting rights / control in a publicly traded company would trigger an open offer and in this regard a public announcement to...</td>
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An offer to buy shares of the public shareholders is required to be issued containing key aspects of the proposed acquisition. A privately held LLC is required to make certain annual filings with the company registry. Any change in shareholding from the previous annual filings can be accessible by the public even in respect of such LLCs.

**Disclosure of substantial shareholdings:** What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In a publicly traded LLC, promoters and persons acting in concert with the promoters are required to disclose their shareholding within 7 working days from the end of the financial year. In addition, any person (regardless of whether he is a promoter or not), along with a person acting in concert with such person, holding more than 25% shares / voting rights are required to notify the stock exchange about their shareholding within 7 working days from the end of the financial year. In addition, regardless of whether a publicly traded company is a party to the business combination or not, it is required to notify the registrar of companies within 15 days of any change in shareholding of its promoters and other top ten shareholders.

Every LLC is also required to file its annual statements with the registrar of companies where it should disclose its shareholding details and changes in shareholding, if any, since the last disclosure.

**Duties of directors and controlling shareholders:** What duties do the directors or managers of a company owe to the company’s shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

In connection with a business combination, directors are required to act as per law, the company's Byelaws and in the interest of all the stakeholders. They should act keeping the best interests of the company in mind and should act with utmost care in discharge of their duties.

Controlling stakeholders do not have duties that are akin to a director. However, should their actions be perceived to be oppressive to the non-controlling shareholders or if their actions are against the interests of the company or by virtue of their actions, the company is mismanaged, 1/10th of the shareholders or shareholders holding 10% in the value of shares may prefer an application before a court of law seeking relief against any acts of mismanagement or oppression.

**Approval and appraisal rights:** What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholders holding not less than 3/4th in value are required to approve a merger or an amalgamation before it is presented to the court/tribunal for its approval. In addition, publicly traded companies are required to obtain the consent of their shareholders in case of disposal of "undertakings". This would apply in case of demergers and slump sales.

In respect of publicly traded LLCs, proposals involving sale of business / undertaking to promoter shareholders or other related parties are required to be approved by persons who are unrelated shareholders.
Break-up fees and reverse break-up fees can be built into business combinations involving privately held companies. These are privately negotiated, and parties are free to agree on any form/variation of these fees. However, in most cases the intent of such clauses would be to compensate the target/acquirer for the resources spent pursuing the transaction. Break-up fees are less common in publicly traded companies.

Private companies do not witness many hostile transactions. This is because such companies are closely held and any transfer of shares in respect of such companies is required to be in compliance with the company's Byelaws and would require the prior approval of the board of directors of the company.

The regulatory regime in India does not recognize any form of protection from third-party bidders in case of listed companies (unlike some other global jurisdictions).
| Conditional offers: What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional? | Parties to a combination involving a privately held LLC are free to agree on any conditions for closing the transaction. The condition could also relate to the acquirer securing the necessary funding to close (though it is rarely used).

However, an offer relating to a publicly traded company needs to be firmly backed by secured source of funding. In fact, the consideration needs to be parked in a separate escrow account set up for this purpose. Once an offer is made, it can be withdrawn in certain limited circumstances only. Lack of funding or failure to secure funding is not recognized as a reason for withdrawing the tender offer in deals involving publicly traded entities. |

| Financing: If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer’s financing? | In India deals, the sellers typically do not have any obligation to assist in the buyer’s financing. They may be expected to cooperate in case the outside financier decides to conduct a diligence on the target company. |

| Minority squeeze-out: May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process? | Squeeze out of the minority shareholders is possible in India, in the event a merger or amalgamation or a transaction involving the transfer of shares is approved by holders holding 90% of the shares. Unless a court of law has restricted the squeeze out, the dissenting or minority shareholders have to transfer of shares within 3 months to the acquirer entity. |

| Cross-border transactions: How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions? | Cross border transactions are generally structured as share purchase transactions. Further, foreign companies can merge with Indian companies and vice-versa. However, the central bank of India has not yet implemented the regulatory framework dealing with mergers of Indian companies with a foreign company. These regulations are expected to come into force very soon.

In addition to general commercial laws, Indian exchange control laws have a key role in cross border transactions. For e.g., if an Indian company were to acquire an overseas entity, the purchase price to be remitted out of India by the Indian company cannot exceed 4 times its “net worth” (i.e., aggregate of its paid-up share capital and free reserves). Any payment of consideration beyond this threshold will require prior permission of the concerned regulatory authority. |
### Waiting or notification periods:
Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In respect of publicly traded LLCs, acquisition of substantial shares, voting rights and control would trigger an open offer under the relevant takeover regulations formulated by the securities market regulator. This would entail making a public announcement regarding the proposed acquisition. The public announcement is required to be made on the day the decision to acquire shares/control/voting rights is taken. The open offer to tender shares should be kept open for at least 10 days subsequent to the making of the public announcement.

### Sector-specific rules: Are companies in specific industries subject to additional regulations and statutes?

Please refer to our response under “Government influence”. In addition, by way of example, companies in sectors like insurance, banking and non-banking financial companies are subject to regulations framed by the relevant industry regulator.

### Tax issues: What basic tax issues are involved in business combinations?

Transactions structured as mergers and amalgamations can be devised in a tax efficient manner by complying with the conditions prescribed under Indian income tax law. If these conditions are met, the unabsorbed losses and depreciation of the transferor company (i.e., the company being merged into the successor entity) can be carried forward and set-off against the profits of the transferee company (i.e., the resulting and successor entity from the merger).

In case of share acquisition transactions, profits made by the seller would usually result in payment of capital gains tax. The rate of capital gains tax will depend on the period of holding the shares and the residency status of the seller and/or buyer and tax treaties (in case of cross-border transactions). The rate of capital gains tax could be lower than the usual rate of 30% in case the shares are held for more than 3 years or be subject to tax at the rate of 30% if the shares are held for less than this period.

If itemized assets are sold (i.e., the transaction is structured as an Asset Sale), individual holding period will be considered for levying tax, thereby making the structure slightly tax inefficient. In addition, itemized sale of assets generally results in an indirect tax outgo (such as a goods and services tax).

### Labour and employee benefits: What is the basic regulatory framework governing labour and employee benefits in a business combination?

Generally speaking, under Indian law, in case of change in ownership, the employer should obtain the consent of the workmen for the transfer. If a workman refuses to be transferred, then the current employer has the option to terminate their services by complying with the regulatory framework (such as payment of severance compensation, notice, etc.).

Further, under the ID Act, where the ownership or management of an entity changes hands, such as in a share acquisition structure or merger, the new employer has to ensure that:
- Continuity of service is recognized for all impacted workmen, as this is relevant for the provision of certain statutory welfare benefits;
- The terms and conditions of service applicable to the workmen after the transfer cannot be less favorable than those applicable immediately before the transfer; and
- Under the transfer terms or otherwise, in the event of future termination of employment, the new employer is liable to pay to the workman compensation on the basis that the service has been continuous and not interrupted by the transfer.

If the new employer does not comply with the above conditions, the workmen who have been in continuous service of one year immediately before the transfer are entitled to notice of 1 month (or payment in lieu thereof) and compensation (computed at 15 days wages for every year worked or part thereof in excess of 6 months).

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<th>Restructuring, bankruptcy or receivership: What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?</th>
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<td>Under Indian insolvency law, any creditor (for e.g., secured or unsecured, financial or operational, and domestic or foreign) of the corporate debtor may initiate insolvency proceedings on a payment default of minimum INR 100,000 (approx. USD 1,600) by the debtor. During the insolvency resolution proceeding, the board of directors of the corporate debtor stands suspended and its powers are exercised by an insolvency resolution professional, who by and large acts on the directions of the committee of creditors. During the insolvency resolution proceeding, approval of at least 75% of the committee of creditors is required for transfer of any shares of the corporate debtor to a third party. Hence, any acquisition of an entity in bankruptcy proceedings can occur only if 75% of the committee of the creditors have approved the acquisition. Further, Indian insolvency law has recently been amended to exclude certain persons from acquiring assets of the corporate debtor during liquidation of the corporate debtor. Hence persons such as promoters, holding company, subsidiary company, associate company or related party of the corporate debtor, guarantors of the corporate debtor, willful defaulters, etc., are barred by statute from acquiring assets of an entity in bankruptcy proceedings.</td>
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<th>Anti-corruption and sanctions: What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?</th>
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<td>Indian law does not prescribe any special legislation which deals with anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations. All provisions of the relevant anti-corruption legislation viz., the PCA will apply in connection with business combinations as well.</td>
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