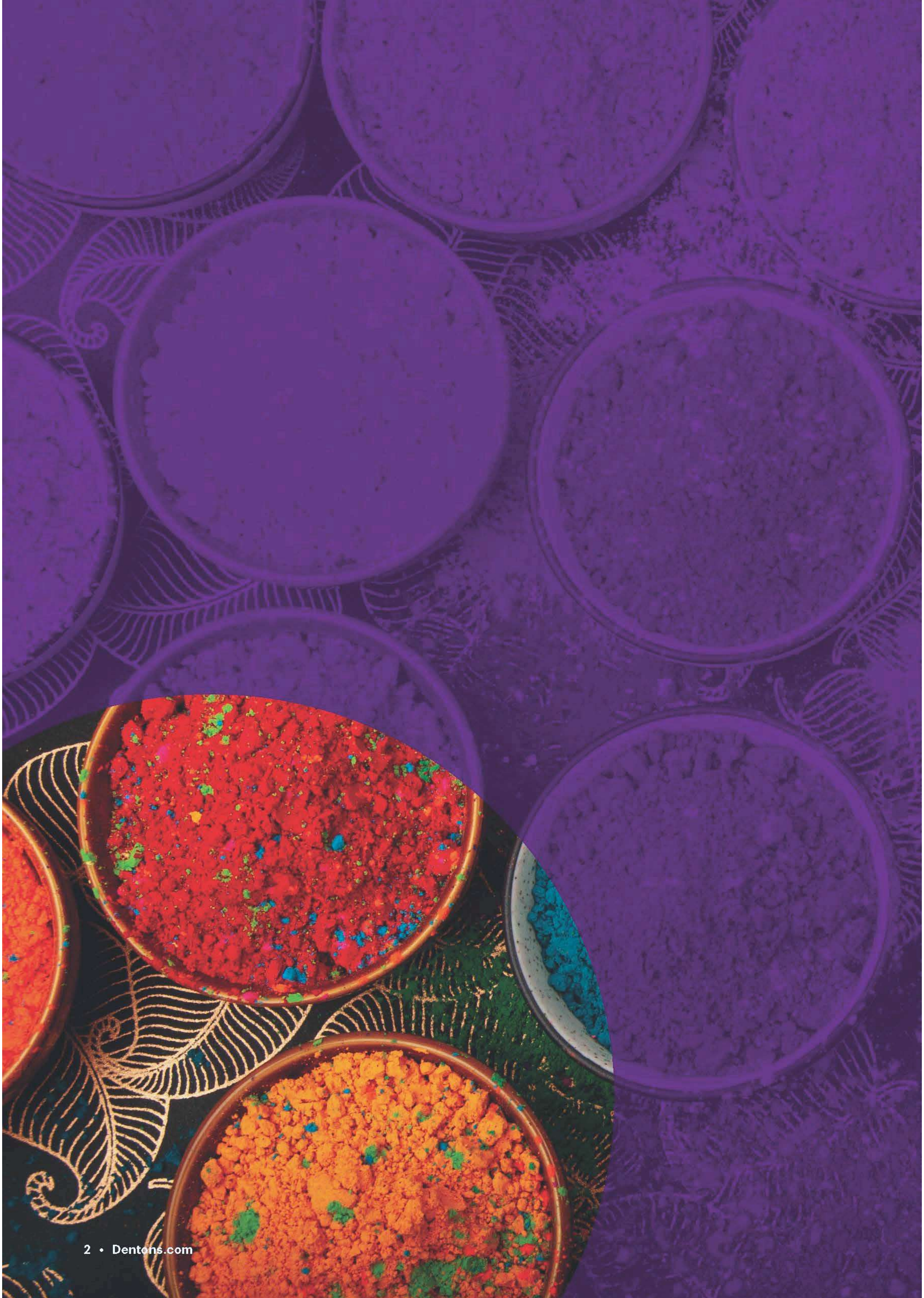

# A Reference Guide to Investing in India

Grow | Protect | Operate | Finance

**May 2023 | Strictly Confidential**



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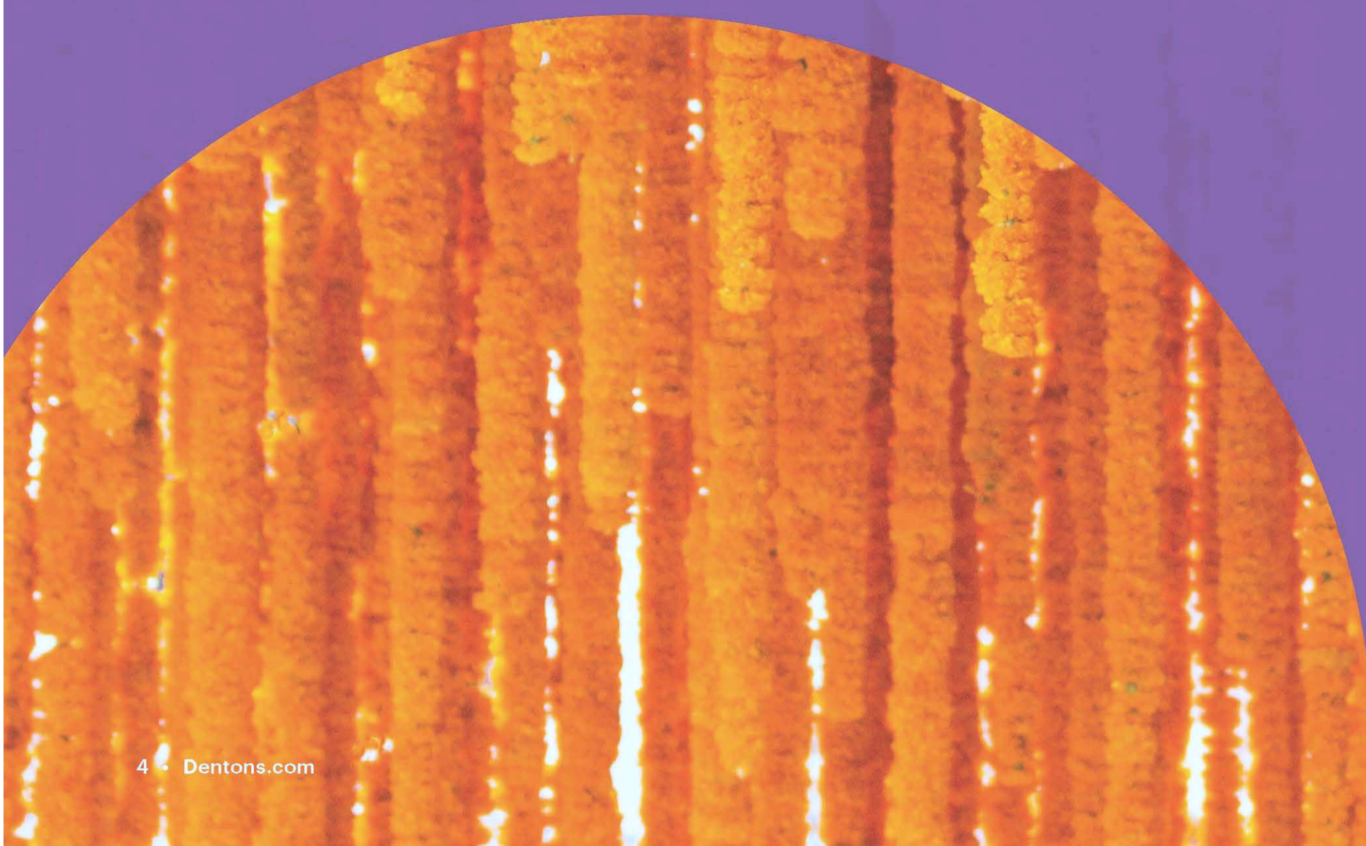

# Preface

Since liberalization in India, the growth of foreign investment in India has been exponential. Relatively lower wages coupled with special privileges pertaining to investments such as tax exemptions, etc. have provided a lucrative atmosphere which has aided such thriving growth in foreign investments. The foreign investments in turn have appositely contributed to the Indian economy, promoted innovation, inculcated competition and created employment. The Indian government, with an intent to supplement domestic capital, technology and skills with foreign direct investment, has placed a comprehensive policy framework on foreign direct investment which is known as the 'consolidated foreign direct investment policy' to encourage such investments for economic growth and development of the nation.

To give you a complete picture of the current legal framework for foreign investments in India, we have examined the existing applicable laws with respect to, inter alia, entry routes and eligible instruments, downstream investments, pricing guidelines, regulatory reforms for start-ups, foreign acquisition process and key considerations, key terms and conditions of definitive agreements and arbitration in India.

We are confident that this reference book will guide the new players in entering the Indian market.

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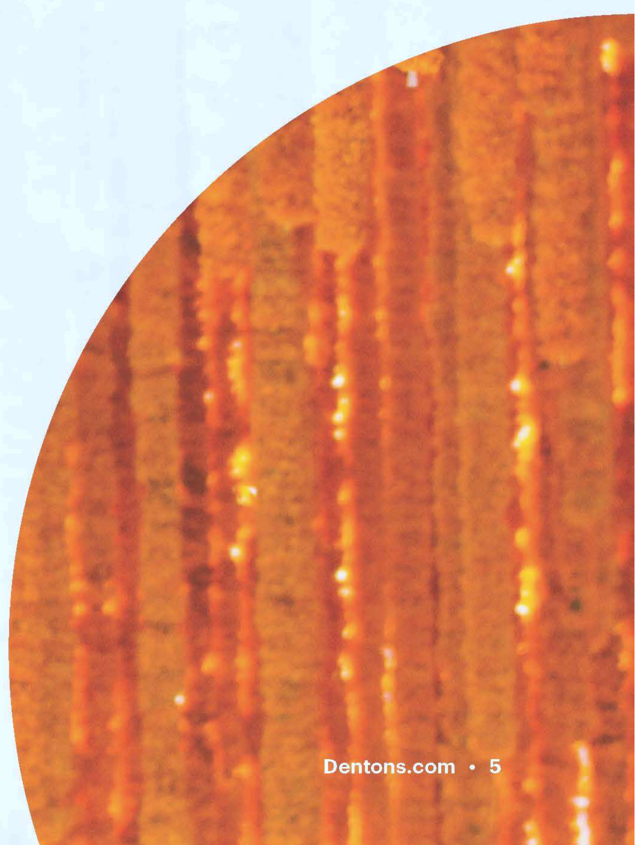
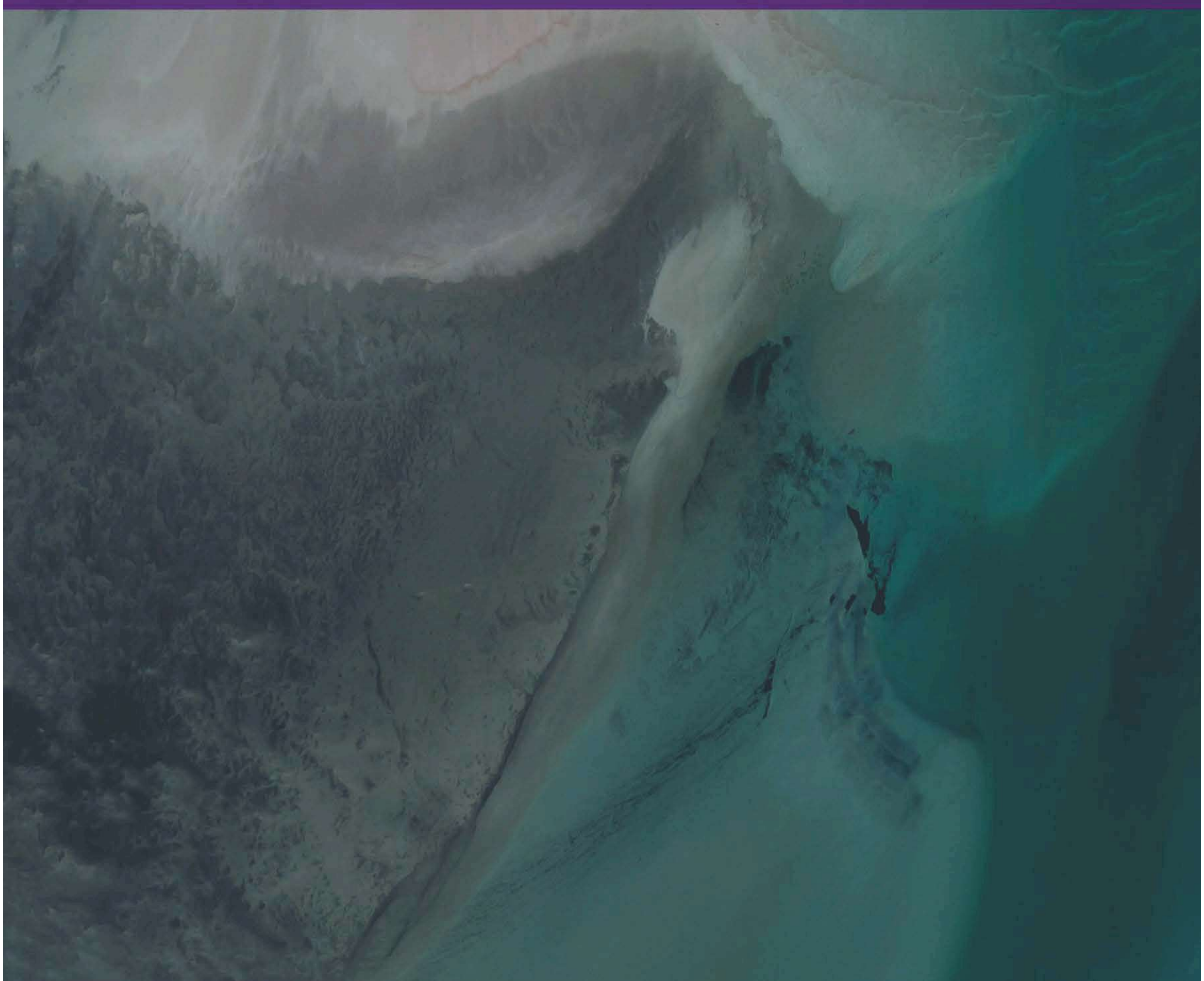
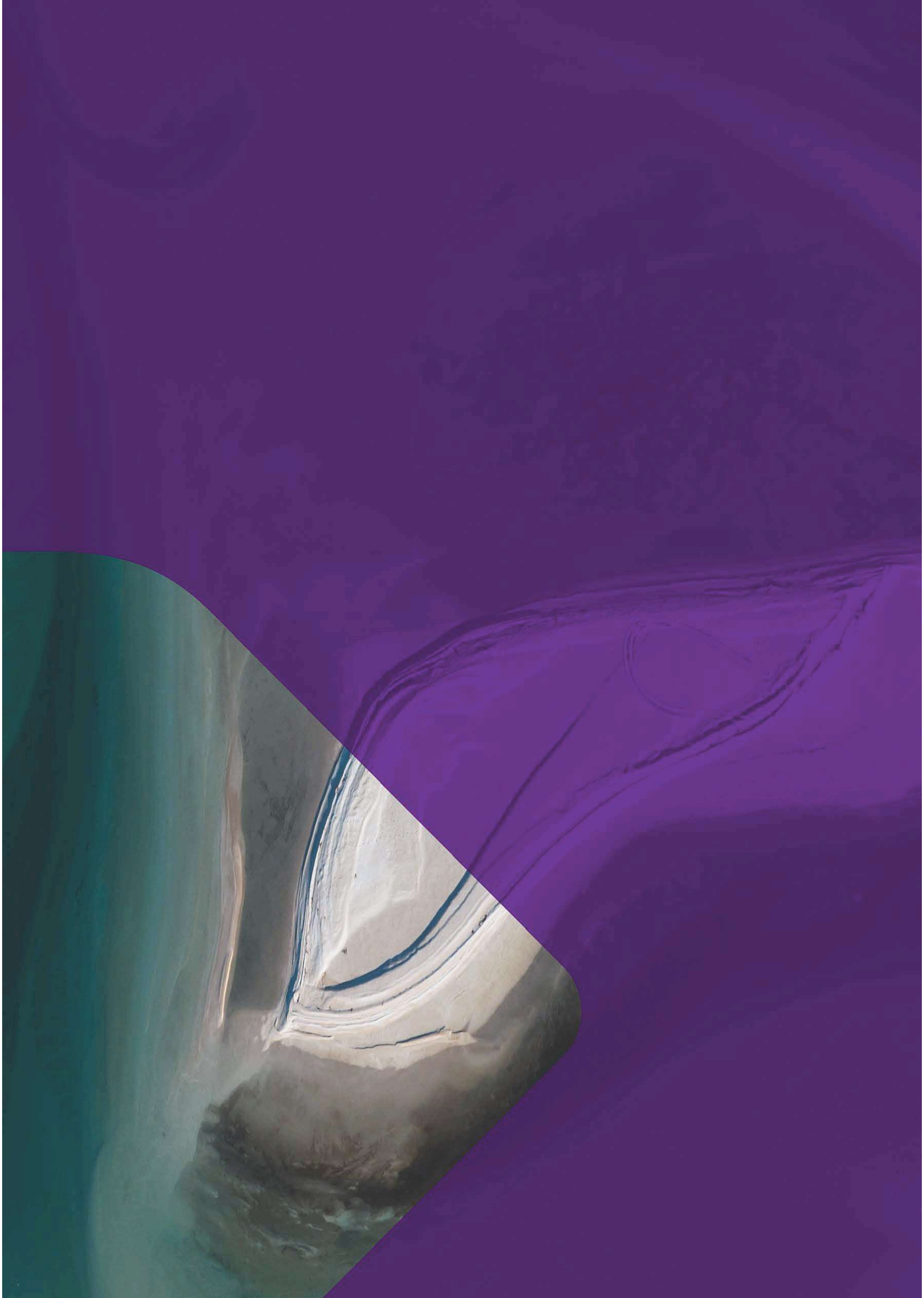


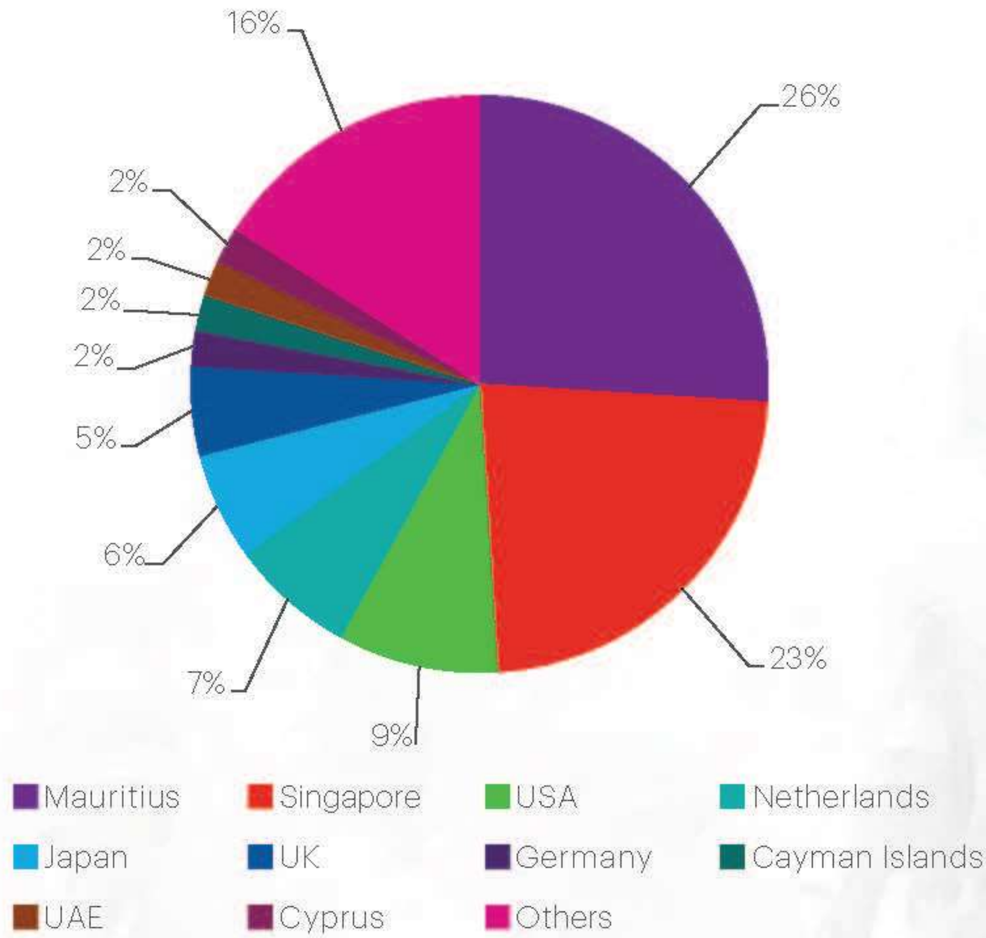
# Foreign Direct Investments in India — Introduction





# Investment trends – sectoral analysis

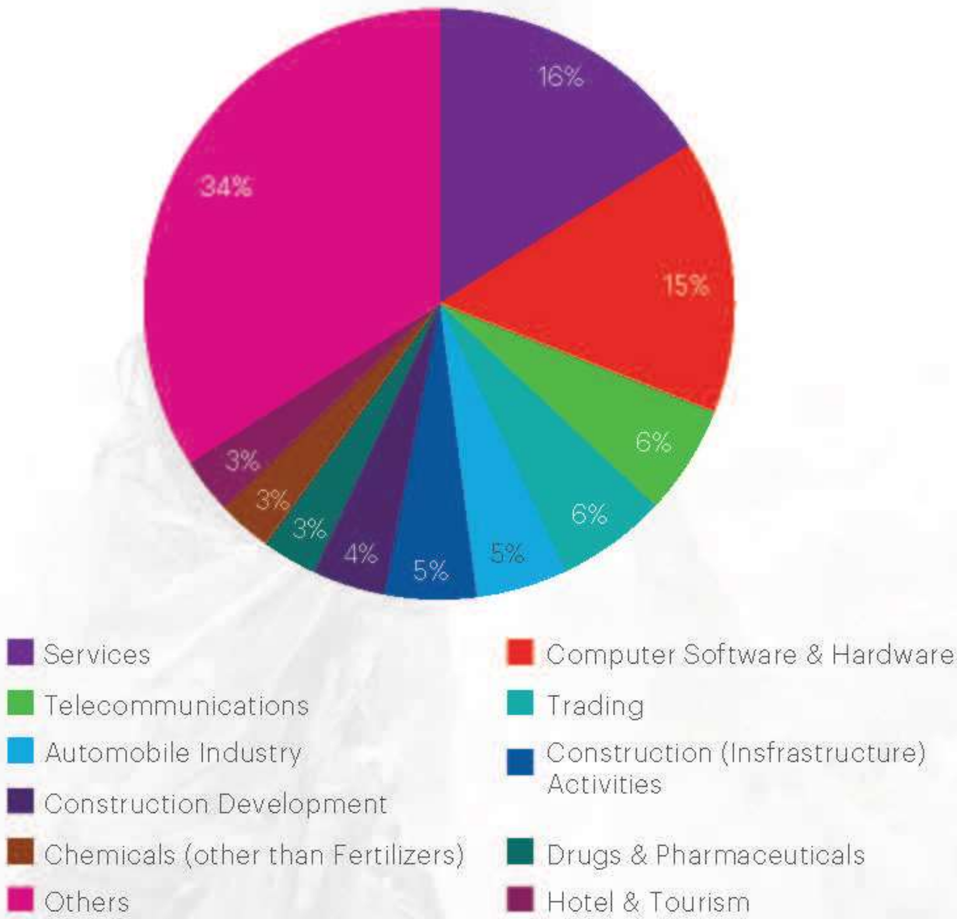
FDI Contribution by Countries




Source: Fact Sheet on Foreign Direct Investment (FDI) from April, 2000 to December, 2022, DPIIT, Ministry of Commerce and Industry, Government of India

For the period from April, 2000 to December, 2022, the cumulative FDI inflows in India (consisting of equity inflows, re-invested earnings and other capital) is at USD 903,937 Million, out of which the cumulative FDI equity inflows in India stands at USD 625,153 Million. For the said time period, Mauritius has contributed 26 per cent, followed by Singapore and United States of America who have contributed 23 per cent and 9 per cent, respectively, of the total FDI equity inflows in India.

## FDI equity inflows - Sectorwise

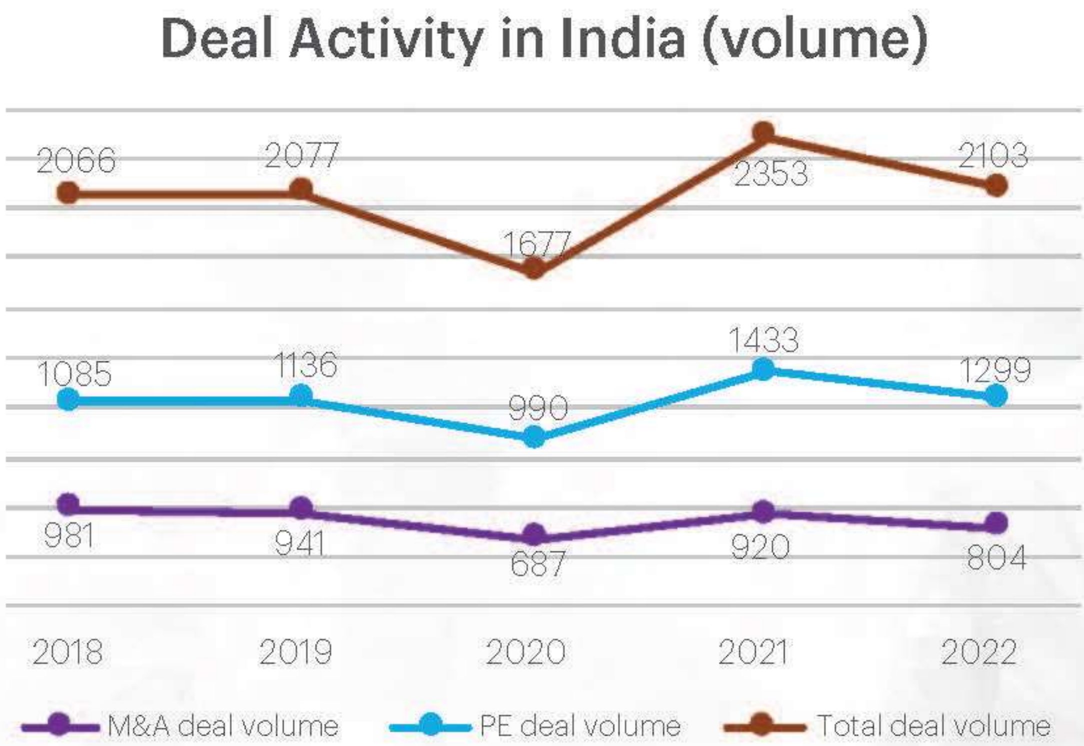



Source: Fact Sheet on Foreign Direct Investment (FDI) from April, 2000 to December, 2022, DPIIT, Ministry of Commerce and Industry, Government of India

With regard to the share of FDI equity inflows in India based on sectors, the service sector has fetched the highest at 16 per cent, followed by computer software and hardware sector at 15 per cent, and telecommunications sector at 6 per cent. Further, the trading sector and automobile industry sector have fetched 5 per cent each, whereas the construction (infrastructure) activities sector and construction development sector have attracted 5 per cent and 4 per cent respectively of the total FDI equity inflows in India.

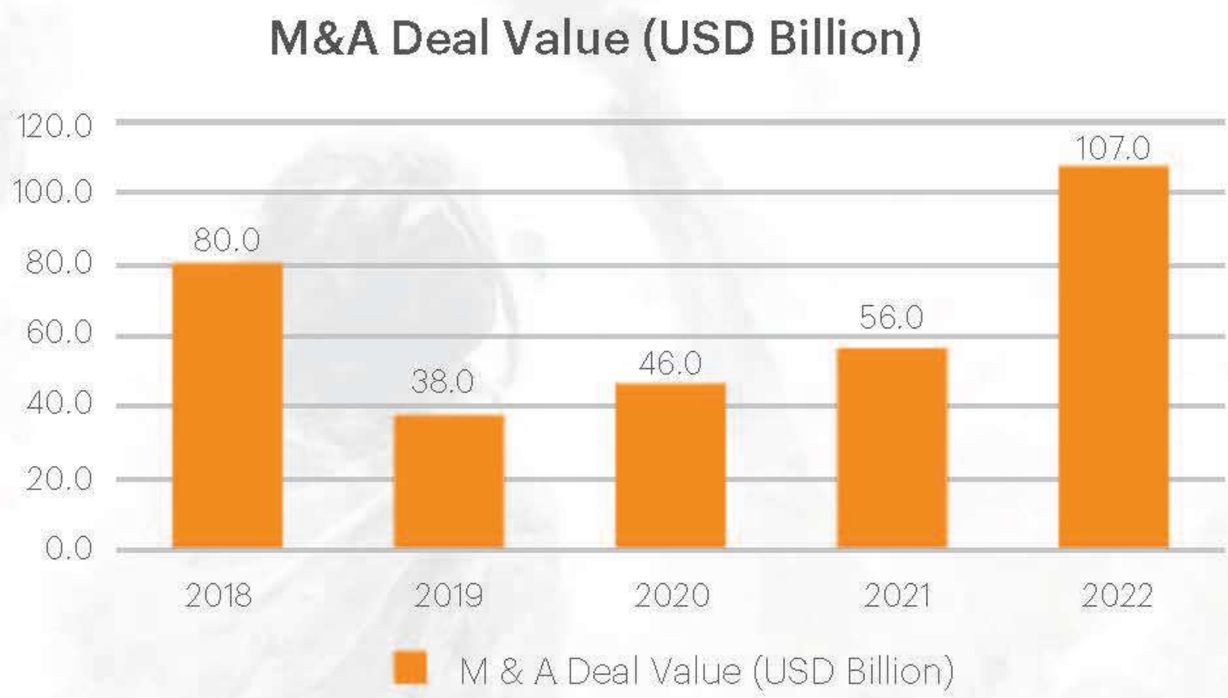
# Investment Trends

Deals in India




Source: Deals in India: Annual review for 2022, PwC

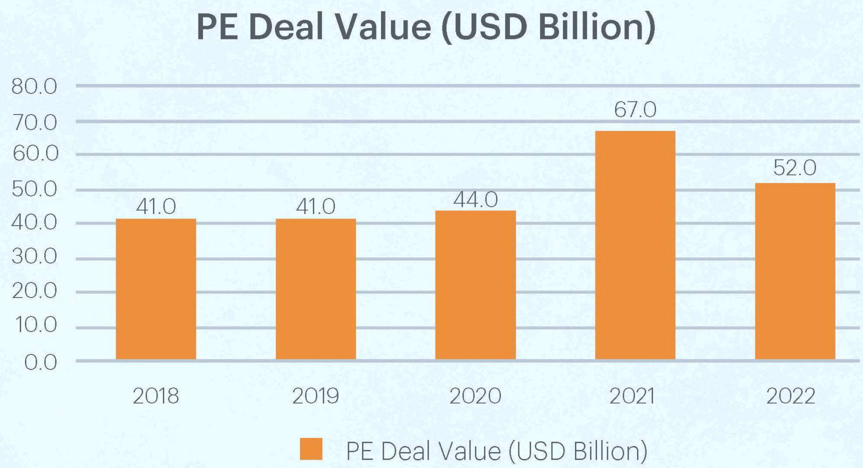
The total deals in India saw a slight decrease in terms of volume in 2022. The total number of deals recorded in the year 2022 were 2103 compared to 2353 in the year 2021. The M&A deal volume was recorded at 804 for the year 2022, compared to 920 in the year 2021. Similarly, PE deal volume witnessed a slight decrease from 1433 deals in the year 2021 to 1299 deals in the year 2022.




Source: Deals in India: Annual review for 2022, PwC

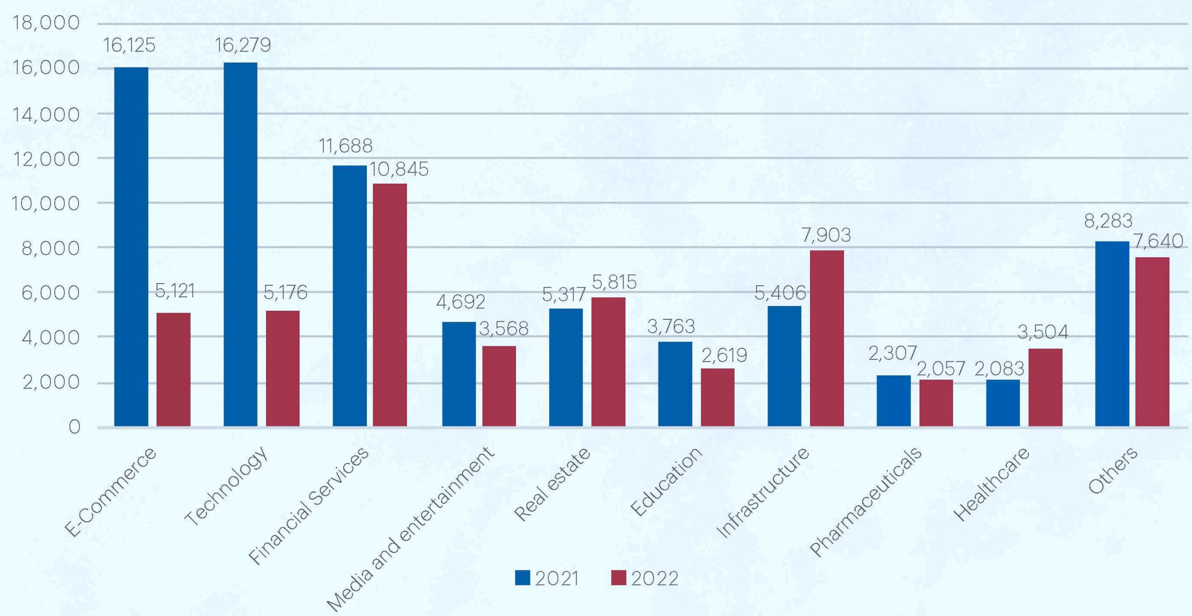
1While the M&A investments in 2022 took a slight dip from 920 to 804 in terms of volume, it recorded an all-time high in 2022 in terms of value. The value of M&A investments in 2022 has been recorded at ~USD 107 billion, ~91% higher than ~USD 56 billion recorded in 2021.

PE and VC Deal analysis



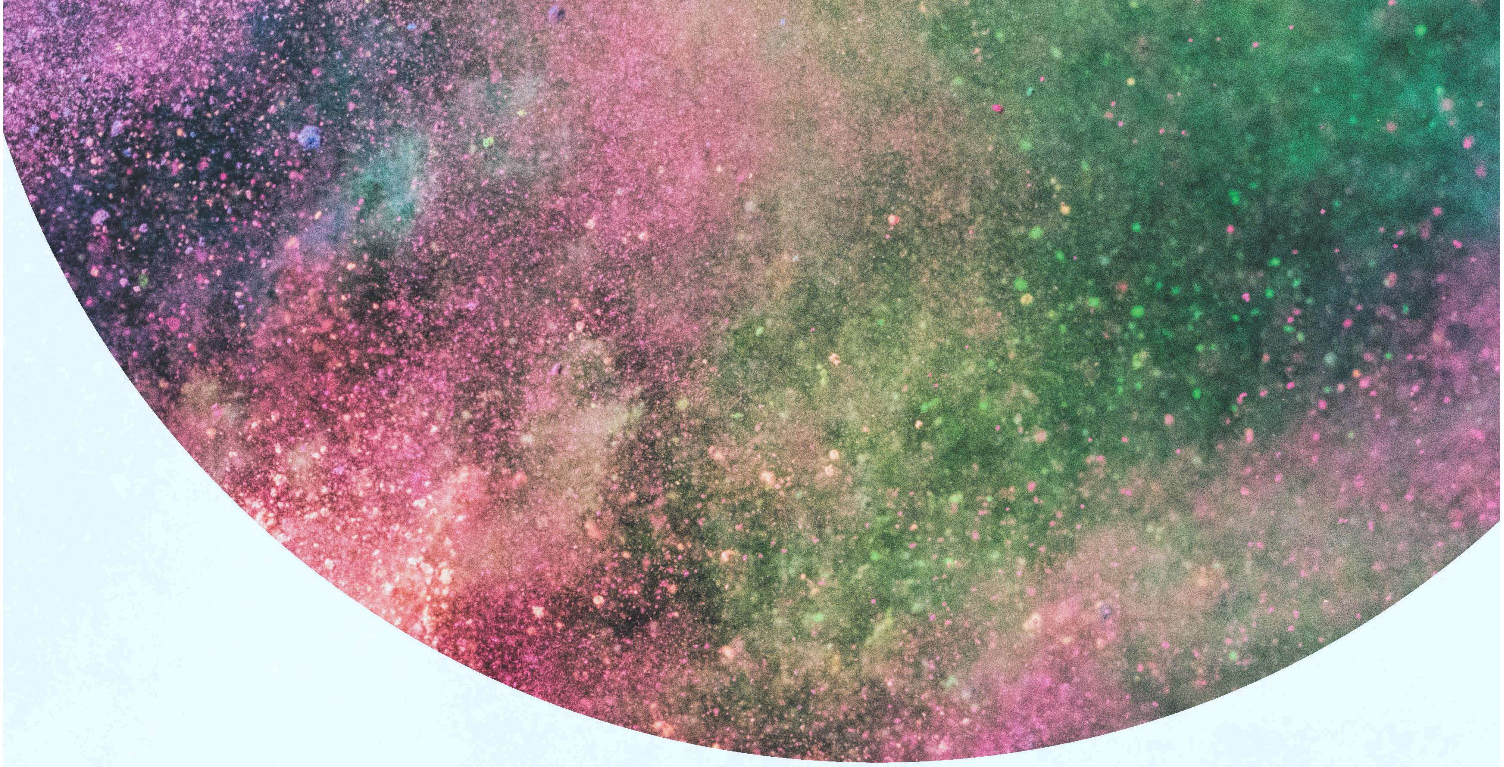

Source: Deals in India: Annual review and outlook for 2022, PwC

Similarly, PE investments recorded an all-time high in 2021, which took a dip in 2022. The value of PE deals in 2022 recorded USD 52 billion, 24.6% lower than USD 67 billion recorded in 2021.




Source: The IVCA-EY PE/VC roundup – December 2022

In PE deals, the top five sectors that contributed the most in terms of value in the year 2022 are: financial services, infrastructure, real estate, technology and e-commerce. The financial services sector recorded a value of USD 10,845 million in 2022 compared to USD 11,688 million in 2021. The infrastructure sector was recorded at USD 7,903 million in 2022 compared to USD 5,403 million in 2021. The real estate sector was recorded at USD 5,815 million in 2022 compared to USD 5,317 million in 2021. The technology sector was recorded at USD 5,176 million in 2022 compared to USD 16,279 million in 2021. Lastly, the e-commerce sector was recorded at USD 5,121 million in 2022 compared to USD 16,125 million in 2021.

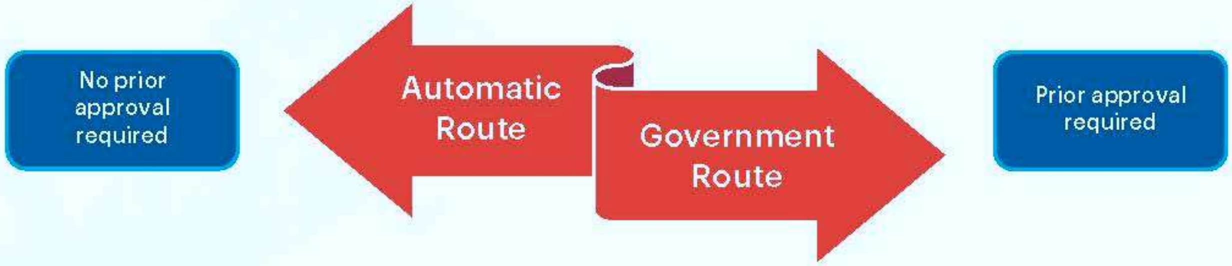


# An Introduction to FDI Policy and Non-Debt Rules

Since liberalization in India, Foreign Direct Investment ("**FDI**") inflows have grown consistently and in turn contributed to the Indian economy as well as swiftly aided in, inter alia, infusion of technology, better innovation, development of strategic sectors, competition and creation of employment. Therefore, with an intent and objective of supplementing FDI with domestic capital, technology and skills, the Government of India ("**GoI**") has put in place a comprehensive policy framework on FDI ("**Consolidated FDI Policy**") to aid such investments for economic growth and development of the nation.

The Consolidated FDI Policy is pronounced by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry ("**DPIIT**") is updated annually to be coherent with the regulatory changes. The Consolidated FDI Policy is released as amendments to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("**FEMA NDI Rules**") under the Foreign Exchange Management Act, 1999 ("**FEMA**"). In case of any conflict between the operative provisions of the FEMA NDI Rules and the notifications issued under the FEMA NDI Rules, such notifications will prevail. Additionally, the inward remittance and reporting requirements are detailed in the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 issued by the Reserve Bank of India ("**RBI**"). The regulatory framework of foreign investments in India thus consists of FEMA, rules and regulations thereunder, Consolidated FDI Policy, press notes and releases, and clarifications etc.

# Entry Routes




Foreign investments in India can be made by non-residents either through the automatic route or government route.

## Automatic Route

The Automatic Route refers to the entry route of foreign investments into India under which neither the concerned non-resident investor, nor the concerned Indian company require to seek any prior approval from the Reserve Bank of India or the Central Government for investments for the proposed investments ("**Automatic Route**").

## Government Route

The Government Route refers to the entry route of foreign investments into India which requires prior approval of the GoI, and such foreign investments received under this route shall be in accordance with the conditions stipulated under such approval ("**Government Route**").

Proposals for foreign investments under the Government Route are considered by the respective ministries or departments of the GoI. The company in which the foreign investment is sought to be made would have to make an application for prior approval on the National Single Window System ("**NSWS**").

The NSWS is a digital platform to guide investors in identifying and applying for approvals according to their business requirements. It serves as a 'One-Stop -Shop of Business Approvals' for the investors. The Know Your Approvals (KYA) module includes guidan ce for 32 Central Departments and 32 States in India. The portal hosts applications for approvals from 28 Central Departments and 20 State Governments, which can be applied through NSWS.

# Eligible Investors

With an intent to curb opportunistic takeovers/ acquisitions of Indian companies due to Covid-19 pandemic, the GoI amended the FDI policy of 2017 under the Press Note 3 ("**PN 3**") to regulate investments from countries which share land borders with India. The said amendment has thereafter been incorporated in the Consolidated FDI Policy of 2020 and the FEMA NDI Rules.

Subject to the Consolidated FDI Policy, any non-resident can invest in India with exception to the sectors which are categorically prohibited under the Consolidated FDI Policy ("**Prohibited Sectors**"). However, any non-resident investor, or a beneficial owner of an investment into India, or a citizen belonging to a country which shares land border with India, can invest only after seeking prior approval of the GoI under the Government Route.

In the event of transfer of ownership of any existing or future foreign investment in an entity in India, if the beneficial ownership falls within the restriction as discussed above, such change in beneficial ownership can be carried out only with the approval of the GoI.

Any non-resident Indian ("**NRI**") who owns and controls a company, trust and/ or partnership firm incorporated outside India can invest in India with special dispensation as available to non-resident Indian under the Consolidated FDI Policy.

Foreign Portfolio Investors ("**FPI**") may make investments in the manner and subject to the terms and conditions specified in Schedule II of FEMA NDI Rules.

Registered FPIs and NRIs can invest/trade through a registered broker in the capital of Indian Companies on recognised Indian stock exchanges as per the applicable Schedule under the FEMA NDI Rules.

A Foreign Venture Capital Investor ("**FVCI**") may make investments in the manner and subject to the terms and conditions specified in Schedule VII of FEMA NDI Rules.

# Eligible Instruments

| | |
|---|---|
| Equity Shares | Warrants and Partly Paid Shares |
| Compulsorily Convertible Preference Shares (CCPS) | Foreign Currency Convertible Bonds (FCCBs) |
| Compulsorily Convertible Debentures (CCDs) | Depository Receipts (DRs) |

Under the Consolidated FDI Policy, Indian companies can issue the following instruments subject to applicable schemes, conditions under the Consolidated FDI Policy and applicable rules and regulations under FEMA:

a. Equity Shares;

b. Fully, compulsorily and mandatorily convertible Preference Shares (CCPS);

c. Fully, compulsorily and mandatorily convertible Debentures (CCDs);

d. Warrants and Partly Paid Shares;

e. Foreign Currency Convertible Bonds (FCCBs);

f. Depository Receipts (DRs).

# Prohibited Sectors and Permitted Sectors

## Prohibited Sectors

Foreign investments in India is prohibited in the following sectors:

- Lottery Business including Government/ private lottery, online lotteries, etc.;
- Gambling and Betting including casinos etc.;
- Chit funds;
- Nidhi company;
- Trading in Transferable Development Rights (TDRs);
- Real Estate Business or Construction of Farm Houses[1];
- Manufacturing of cigars, cheroots, cigarillos, cigarettes, tobacco or tobacco substitutes;
- Activities/ sectors not open to private sector investment, for example; atomic energy or railway operations.

Foreign investment is also prohibited in case of any technology collaboration like a franchisee, trademark, brand name, management contract for lottery business, gambling and betting activities.

## Permitted Sectors

Subject to applicable laws, security and other specific conditionalities, FDI in India is permitted as indicated in the table in **Annexure A**, up to the limit indicated against each sector/ activity. FDI is permitted up to 100% through Automatic Route in sectors/ activities not listed below, subject to applicable laws, security and other specific conditionalities.

1. Real estate business shall not include the development of townships, construction of residential/ commercial premises, roads or bridges, and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

# Downstream Investments

'Downstream Investment' refers to indirect foreign investment, by an eligible Indian entity, into another Indian Company/ LLP, by way of subscription or acquisition ("**Downstream Investment**"). Downstream investment is when a Foreign Owned and/ or Controlled Companies ("**FOCC**") makes an investment in other Indian companies or limited liability partnerships. FOCCs need to comply with the NDI Rules, and any investment by an FOCC in the equity instruments of another Indian entity results in indirect foreign investment and entails certain compliances.

Downstream Investment by an eligible Indian entity, which is not owned and/or controlled by resident entity(ies), into another Indian company, would be in accordance with the relevant sectoral conditions on entry route, conditionalities and caps, with regard to the sectors in which the latter Indian company is operating. The FOCCs need to comply with pricing requirements under the FEMA NDI Rules. FOCCs can acquire from, or transfer capital or equity instruments to, Indian residents non-residents as well as other FOCCs. The FEMA NDI Rules provide for the pricing requirements in each case when the FOCC is transferring (i.e., exiting) its investment, however, the FEMA NDI Rules do not expressly provide for pricing when the FOCC invests in the Indian company by acquiring capital or equity instruments from a (a) resident; and (b) non-resident.

Downstream investments by eligible Indian entities/ LLPs will be subject to the following conditions:

- Notification of such Downstream Investment to RBI in Form DI within 30 days of such investment;
- Such investments to be duly supported by a resolution of the Board of Directors and a share-holders agreement, if any;
- Issue/ transfer/ pricing/ valuation of capital shall be in accordance with applicable FEMA/ guidelines issued by Securities Exchange Board of India ("**SEBI**");

- Eligible Indian entities making Downstream Investments (excluding debt raising in domestic market) are required to bring funds from abroad and not leverage funds from the domestic market;
- Downstream investments through internal accruals[2] are permissible, subject to the provisions of the Consolidated FDI Policy relating to foreign investment into Indian company engages only in investing in the capital of other Indian companies and Downstream Investment by an eligible entity which is not owned/ controlled by resident entities.

# Pricing Guidelines

As per the FEMA NDI Rules, the price of the equity instrument issued by an Indian company or transferred by a resident to non-resident, cannot be **less** than:

- the price calculated in accordance with the rules provided under the guidelines issued by SEBI for any Indian entity whose securities are listed over a recognized stock exchange.
- the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with SEBI or a practising Cost Accountant, in case of an unlisted Indian company.

The price of the equity instrument of an Indian company transferred by a non-resident to a resident, cannot be **more** than:

- the price worked out in accordance with the relevant SEBI guidelines in case of a listed Indian company;
- the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with SEBI or a practising Cost Accountant, in case of an unlisted Indian company.

The guiding principle of the pricing guidelines is that the person resident outside India is not guaranteed any ***assured exit price*** at the time of making such investment or agreement and shall exit at the price prevailing at the time of exit.

From a practical standpoint, a valuation report older than three to six months from the date of such transfer is not accepted by RBI.

# Indemnity Escrow and Deferred Consideration

Indemnity escrow and deferred consideration is dealt under Rule 9(6) of the FEMA NDI Rules. To encourage foreign investments in India, the GoI has allowed a settlement of not more than 25% of the total consideration which is made:

- on a deferred basis; or
- through an escrow arrangement.

Such an arrangement should not exceed eighteen (18) months from the date of the transfer agreement between the buyer and seller. Similarly, if the total consideration has been paid by the seller, the buyer may be indemnified by the seller for up to 25% of the total consideration for a period not exceeding eighteen (18) months. Further, the total amount of consideration paid for the shares should be in compliance with the applicable pricing regulations.

2. 'internal accruals' shall mean profits transferred to the reserve account after payment of taxes.

# Reporting Requirements

Indian entities or Indian residents receiving foreign investments or consideration towards transfer of shares are required to report the same with the RBI. All such reporting is required to be done through the Single Master Form (SMF) available on the FIRMS platform at https://firms.rbi.org.in. Details pertaining to some of the important reporting forms are set out below:

| Reporting Form: | Purpose: | Timeline: |
|---|---|---|
| FOREIGN CURRENCY – GROSS PROVISIONAL RETURN (FC- GPR) | An Indian company issuing equity instruments to a person resident outside India | Within 30 days from date of issuance of equity instruments |
| FOREIGN CURRENCY – TRANSFER OF SHARES (FC-TRS) | For transfer of equity instruments from resident to non-resident or vice-versa | Within 60 days of transfer of equity instruments or receipt/ remittance of funds whichever is earlier. |
| FORM FDI- LLP (I) | A Limited Liability Partnerships (LLPs) receiving amount of consideration for capital contribution and acquisition of profit shares | Within 30 days from the date of receipt of the amount of consideration |
| FORM FDI- LLP (II) | For disinvestment/ transfer of capital contribution of a LLP or profit share between a resident and a non-resident (or vice versa) | Within 60 days from the date of receipt of funds |
| FORM CN | A start-up company issuing Convertible Notes (CNs) to a person resident outside India or transfer of CNs of a start-up company by way of sale between a person resident in India and a person resident outside India | Within 30 days of issue or transfer |

# Regulatory Reforms for Start-ups

Start-ups are allowed to raise 100% (hundred percent) funds from Foreign Venture Capital Investors ("**FVCIs**") irrespective of the sector in which the start-up is engaged.

Startups are permitted to raise external commercial borrowings up to USD 3 million per financial year with a minimum average maturity period of 3 (three) years under the automatic route for any expenditure connected to its business, allowing Startups to access low-interest foreign loans instead of going through the daunting task of finding a suitable investor.

Only DPIIT-Recognized Startups are allowed to issue convertible notes to a person resident outside India. A 'Convertible Note' means an instrument issued by a Startup company acknowledging receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such Startup company, within a period not exceeding 10 (ten) years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.

# Introduction of National Single Window System (NSWS)

The NSWS is a digital platform to guide investors in identifying and applying for approvals according to their business requirements. It serves as a 'One-Stop-Shop of Business Approvals' for the investors. The Know Your Approvals (KYA) module includes guidance for 32 Central Departments and 32 States in India. The portal hosts applications for approvals from 28 Central Departments and 20 State Governments, which can be applied through NSWS.

The launch of NSWS was a much-awaited reform in the Indian business ecosystem which facilitates the investors, entrepreneurs, start-ups and existing players in obtaining necessary approvals, clearances and registrations for setting up and operating businesses in India. NSWS also provides for a platform where the investors can obtain clarifications in respect of the required approvals which is likely to simplify and streamline the application procedures and also addresses issues relating to accountability, transparency and responsiveness of various Governmental departments.

NSWS has made the process of obtaining approvals and clearances more efficient and reduced the prevalent irregularities caused by multiple Government offices and online portals, which resulted in lack of clarity, duplicity of information and delay in obtaining the necessary approvals, clearances and registrations by investors, entrepreneurs, and businesses in India. NSWS is in its initial phase of implementation and its viability is yet to be tested. Needless to say, the launch of NSWS is a progressive measure to boost various objectives of Indian Government, more particularly, the ease of doing business in India.

# CBDT proposes relief from angel tax pursuant to Budget 2023 amendment expanding scope to non-resident investment – Proposal out for public comments.

Prior to amendment by the Finance Act 2023 ("FA 2023"), the angel tax applied only to shares issued to a resident. FA 2023 amended the angel-tax provisions, with effect from tax year 2023-24, to extend it to issue of shares by a company to non-resident (NR) investors. FA 2023 also extended the exemption from angel tax to investments in a company by Venture Capital Funds set up in IFSC (specified funds).

Accordingly, CBDT proposes to amend Rule 11UA for valuation of shares for the purposes of section 56(2)(viib) of the Income Tax Act and accordingly notify the list of 'excluded entities'.

It is proposed to include 5 (five) more valuation methods, available for non-resident investors, in addition to the Discounted Cash Flow (DCF) and Net Asset Value (NAV) methods of valuation.

Price matching facility for both resident and NR investment: the price at which equity shares are issued by a company to the notified NR entity shall be adopted as FMV for the purposes of benchmarking equity investments by both resident and NR investors, subject to compliance of the following conditions:

a. the consideration from such FMV does not exceed the aggregate consideration that is received from the notified entity; and

b. the consideration has been received by the company from the notified entity within a period of 90 days of the date of issue of shares which are the subject matter of valuation.

On similar lines, price matching for resident and non-resident investors would be available with reference to investment by Venture Capital Funds or Specified Funds.

90-day window period for merchant banker valuation: Existing Rule 11UA requires merchant banker DCF valuation report as on the date of issue of shares. As per the press release, valuation report by the merchant banker of a date not more than 90 days prior to the date of issue of shares shall be accepted. While it is not expressly mentioned, it appears to apply to investment by both residents and NRs.

Providing Safe harbor valuation tolerance limit of 10%: To account for in variations due to forex fluctuations, bidding processes and other economic indicators, etc. which may affect the valuation of the unquoted equity shares during multiple rounds of investment. While it is not expressly mentioned, it appears to apply to investment by both residents and NRs.

Proposal to exclude certain NR investors from angel tax provision: CBDT shall notify following classes of NR investors who shall be excluded from the ambit of angel tax provisions:

a. Government and Government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled by the Government or where direct or indirect ownership of the Government is 75% or more

b. Banks or regulated entities involved in insurance business.

c. Any of the following entities, which is a resident of certain countries or specified territories having robust regulatory framework:

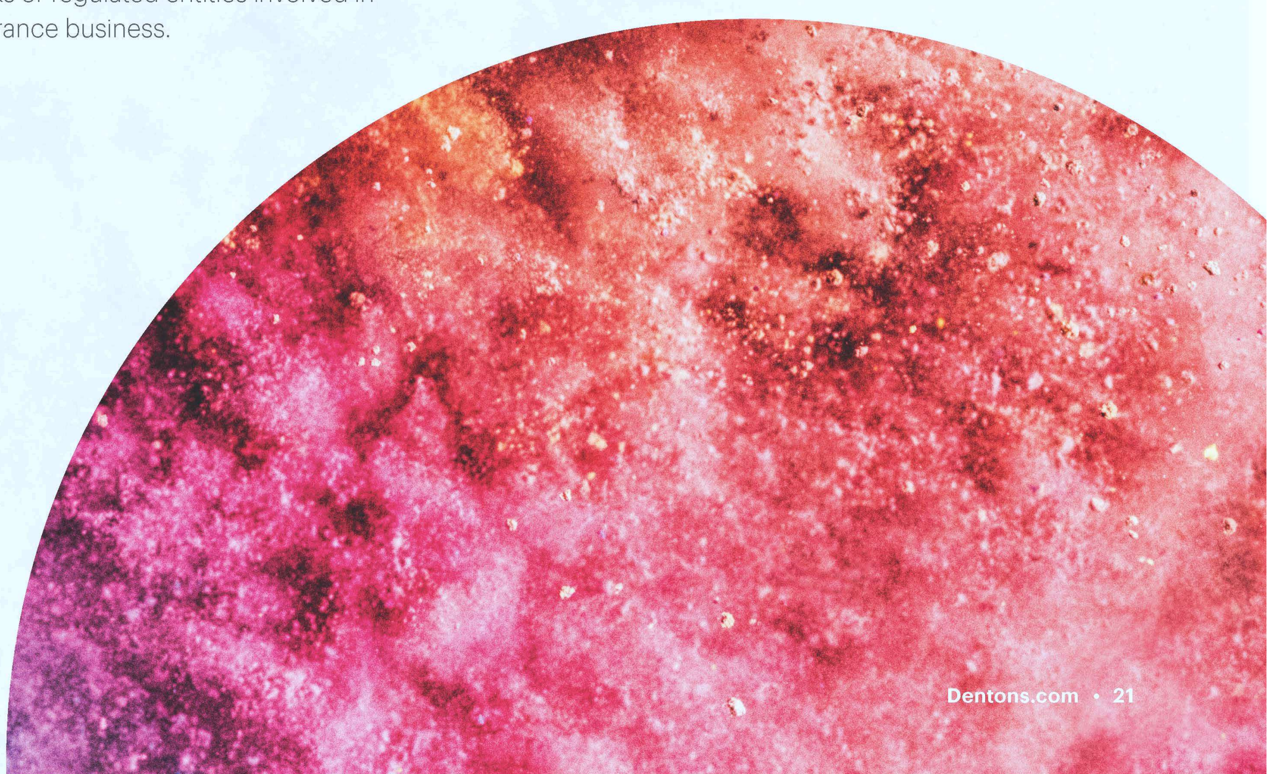
   i. Entities registered with Securities and Exchange Board of India as Category-I Foreign Portfolio Investors (Category 1 FPI).

   ii. Endowment Funds associated with a university, hospitals or charities,

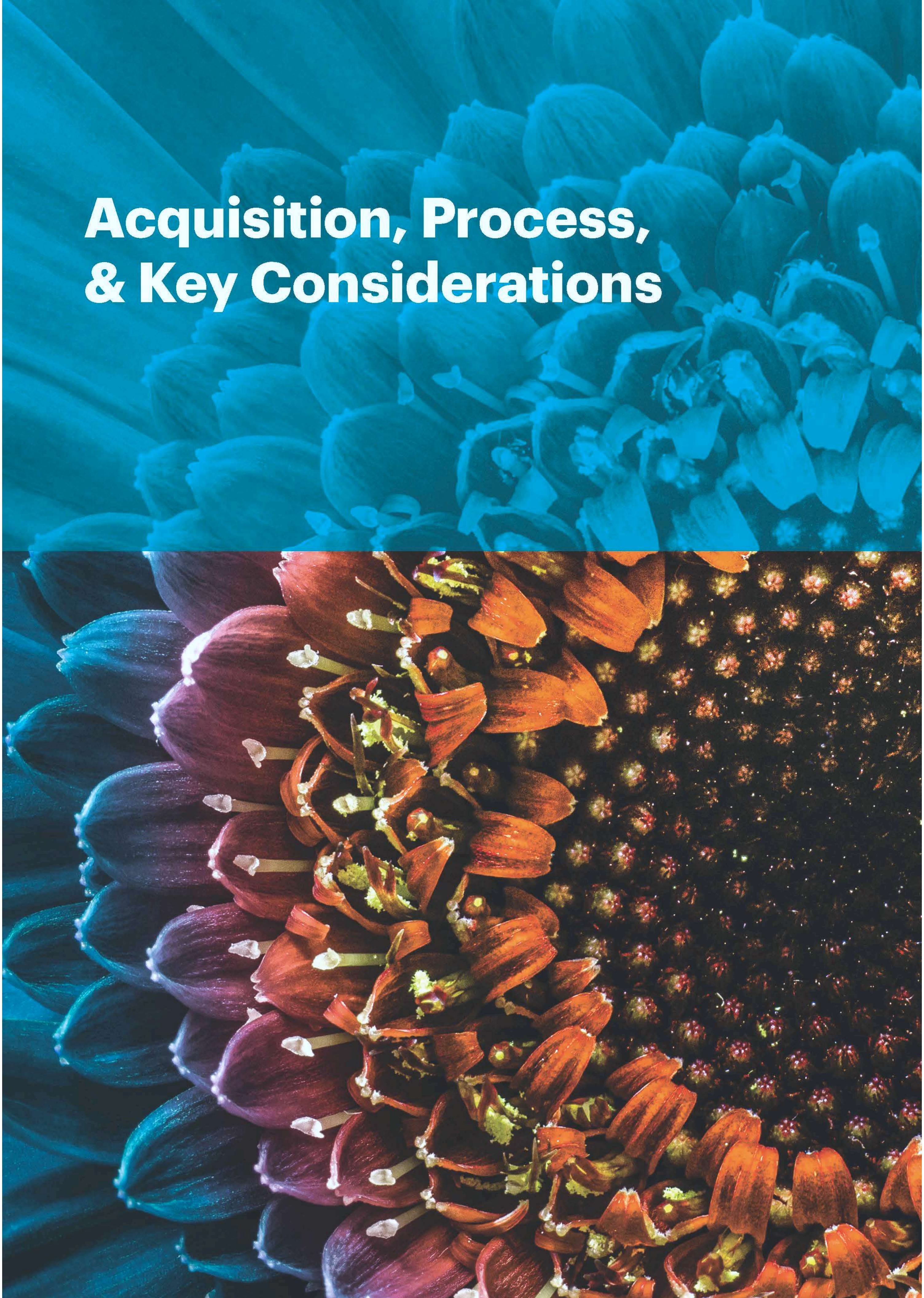
   iii. Pension funds created or established under the law of the foreign country or specified territory,

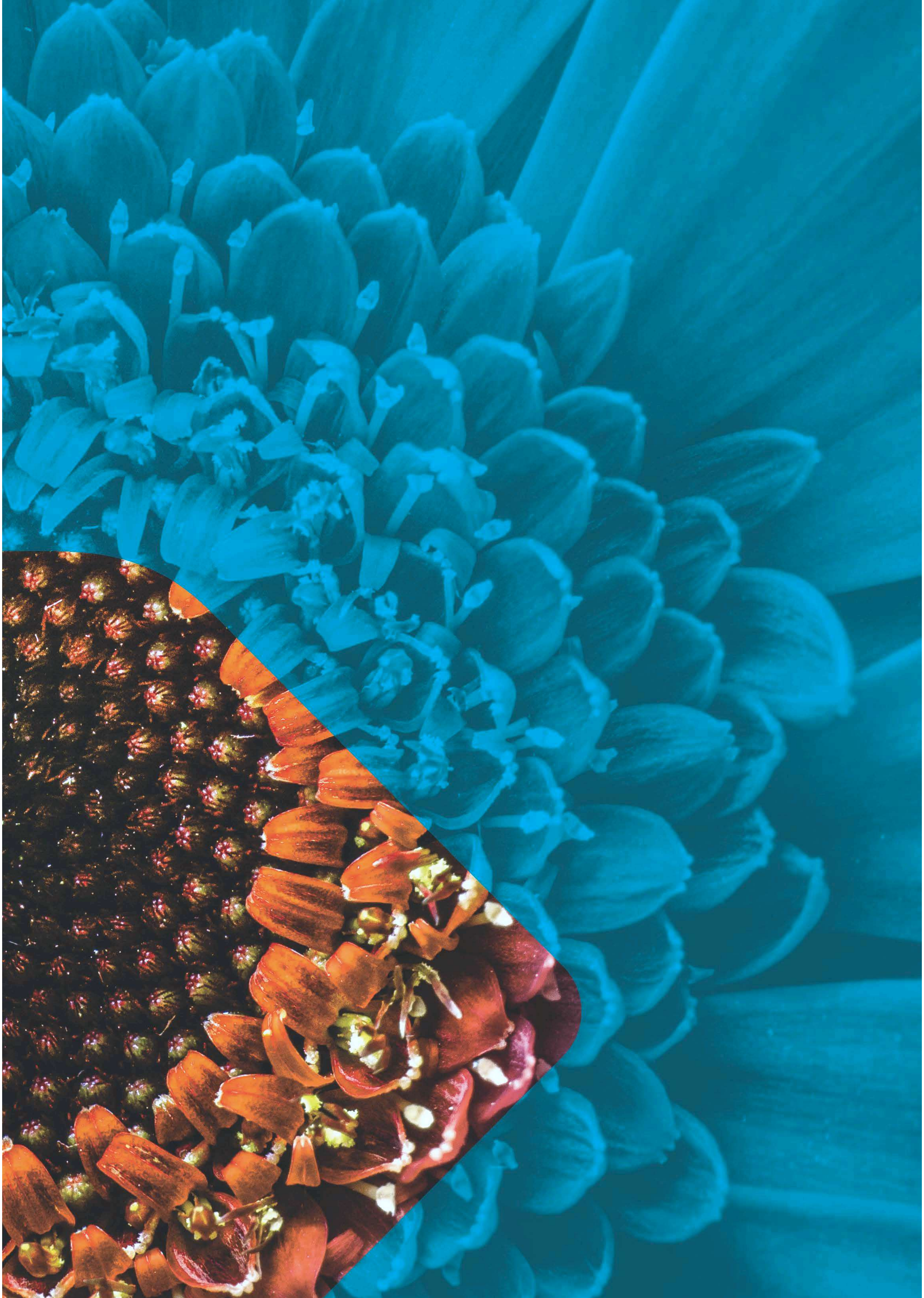
   iv. Broad Based Pooled Investment Vehicle or Fund where the number of investors in such a vehicle or fund is more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies.

d. Proposal to amend its earlier notification dated 5 March 2019 to extend non-applicability of angel tax provisions to consideration received by start-up recognized by DPIIT and fulfilling certain conditions from any person (i.e., not restricted to residents).



# Acquisition, Process, & Key Considerations

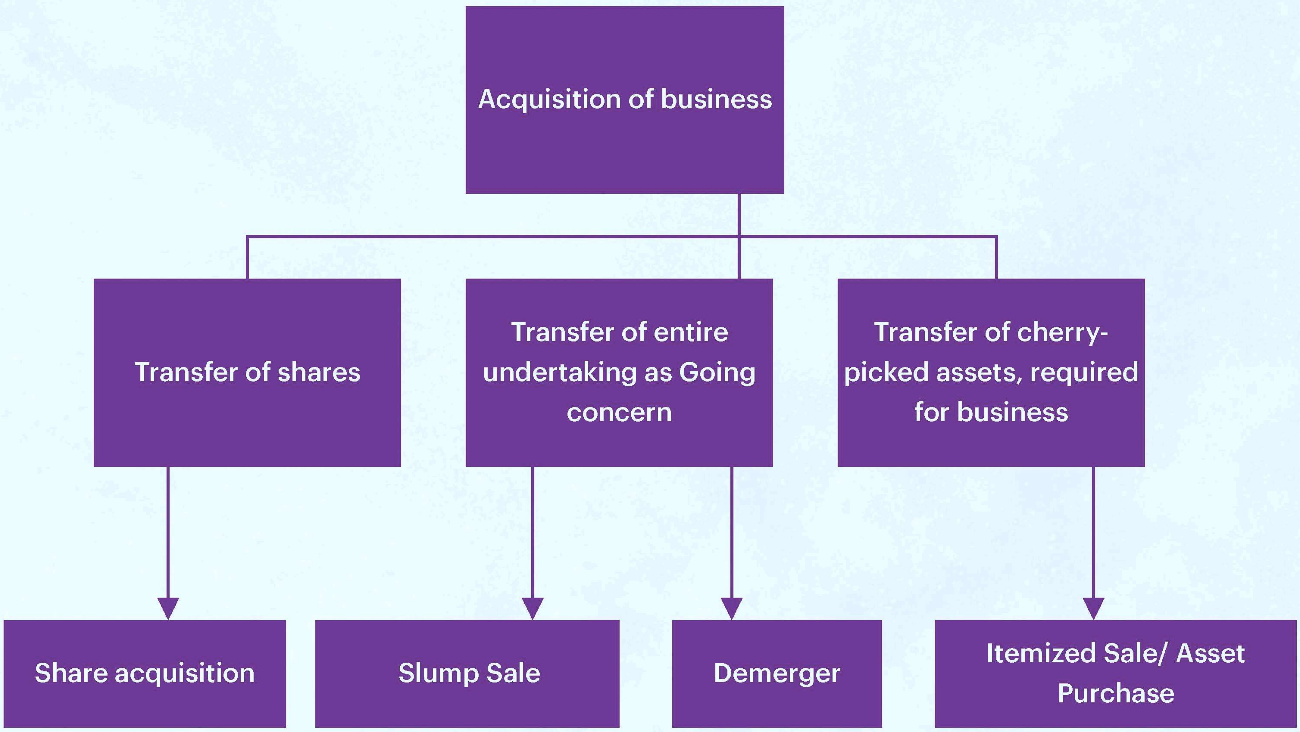




# Acquisition of a Business

Businesses can be acquired through the following ways

- Share acquisition;
- Business Transfer or Slump Sale;
- Asset Transfer;
- Demerger.



## Share acquisition

Share acquisition is a fairly simple process executed through share purchase agreements, transfer deed forms along with share certificates, where the parties are bound by the obligations stipulated in the said instruments. Such transactions can be privately negotiated and do not require any prior approval of the courts. Generally, entire or a portion of ownership of the target company is acquired through such contracts which involves buying and selling of shares. Consequently, the buyer acquires right to all licenses, registrations, contract employees of the target company. Such a transaction does not entail any separation of assets and liabilities, however, buyer is responsible for all the liabilities and any past liabilities existing in such target company continue to exist. The consideration amount is evaluated on a per share basis. This process provides an option for exit to the existing shareholders.

## Business Transfer or Slump Sale

Business Transfer or Slump Sale is a simple and private process executed through business transfer agreements, along side other agreements like intellectual property assignment agreement, employment agreement, conveyance deed, etc. Such transactions involve transfer of one or more business undertaking, a unit, or a division on going concern basis and a lumpsum amount is paid as consideration without assigning any individual values to the assets concerned. Such consideration is paid to the target company and not to its shareholder. However, licenses or permits are not transferred unless attached with the business understanding of the concerned principals. Generally, the seller is liable for all liabilities which are not specifically transferred.

## Asset Transfer (Itemised/ Asset Purchase)

Asset Transfer transactions are preferred by the buyer as it involves cherry picking of the identified assets in which individual values are assigned to such assets executed through business transfer agreements, along-side other agreements like intellectual property assignment agreement,

employment agreement, conveyance deed, etc. Similar to Business Transfer, the consideration for Asset Transfer transactions is paid to the target company and not to its shareholders. Such transactions do not entail transfer of licenses or permit. Further, losses cannot be carried forward under Asset Transfer transactions. While rights and liabilities may or may not be transferred in such transactions, the seller shall be liable for all liabilities which are not specifically transferred.

## Demerger

Demerger transactions are relatively lengthy involving splitting up of one entity into two or more entities executed through demerger framework agreement and scheme of demerger. Such transactions require prior approvals from the tribunals. The sellers cannot cherry pick assets and liabilities in such transactions. The seller may decide to unlock its core/uncore business into a new entity and hives-off target business to such new entity by way of tribunal approved scheme of merger. The buyer acquires such new entity housing target business through a primary or secondary share deal. Pursuant to the tribunal order, the transfer or obtaining of licenses and permits become relatively easy. Such transactions entail issue of shares of the transferee company or payment of cash consideration to the shareholders of the transferor company. The buyer shall be liable for the liabilities transferred with the demerged undertaking.

# Merger Control Analysis

## Notification to the Competition Commission of India ("CCI")

M&A transaction will need to be notified to the CCI if the assets or turnover of the parties to the transaction exceed certain specified thresholds.

## Threshold

Section 5 of the Competition Act provides for a financial threshold wherein, a direct or indirect acquisition of assets, control, shares or voting rights of an enterprise, or a merger or amalgamation of enterprises, which exceeds such specified threshold is defined as a 'combination' and must be notified to the CCI for its prior approval.

| Level | | Assets | Turnover |
|---|---|---|---|
| Enterprise Level | India | > INR 2000 crore | > INR 6000 crore |
| | Global | > USD 1B with at least INR 1000 crore in India. | > USD 3B with at least INR 3000 crore in India. |
| Group Level | India | > INR 8000 crore | > INR 24000 crore |
| | Global | > USD 4B with at least INR 1000 crore in India. | > USD 12B with at least INR 3000 crore in India. |

## Green Channel / Deemed Approval

The CCI has recently introduced a green channel or deemed approval process for transactions between parties that do not have any horizontal, vertical or complementary business overlaps in India (which would therefore be unlikely to cause an 'appreciable adverse effect on competition') – such deemed approval becomes effective upon submission to, and acknowledgement by, the CCI of a short-form filing.

## Void Transaction

Combinations that cause (or are likely to cause) an 'appreciable adverse effect on competition' (AAEC) in India are void and prohibited.

## Exemption

The notification to CCI and approval requirement is subject to certain exemptions, including based on the target company's assets (not more than INR 350 crore) or turnover (not more than INR 1000 crore) in India. The said exemption would be in force until 26th March, 2027.

## Timeline

There is no specific timeline within which notifications are required to be made to the CCI; however, transactions that trigger a CCI approval may not be completed without receipt of necessary approval from CCI.

## Responsibility

- In case of an acquisition, the acquirer is responsible for filing the notification.
- In case of a merger, amalgamation or a joint venture, the notification must be filed jointly by the merging or amalgamating parties.
- The same is to be followed in case of the JVs.

# Recent amendment vide the Competition (Amendment) Act , 2023 notified on April 11, 2023 ("**Amendment Act**")

The Amendment Act brought about the following changes in existing Competition Act, 2002 ("**Act**"):

- **Introduction of an additional threshold:** a 'value of transaction' threshold whereby any transaction, having net value in excess of INR 20 billion would also require the CCI's approval if the target has an express India nexus, i.e., fulfils the '*substantial business operations in India*' test.
- **Widening of the definition of 'control':** the definition of the term 'control' has been widened to include the ability of a group or enterprise (one or more) to exercise '*material influence*' in any manner whatsoever over another group or enterprise, either jointly or singly, such as in the affairs of strategic or commercial decisions of the other.
- **In terms of providing the notice of combination to the CCI, in the specified form, the term '*other document*' in relation to the execution of the agreement of the acquisition has been clarified:** The term 'other document' would mean any document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. If the acquisition is without the consent of the enterprise being acquired, it refers to any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights or where a public announcement has been made in accordance with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 made under the Securities and Exchange Board of India Act, 1992 for the acquisition of shares, voting rights or control such public document.
- **Reducing the time limit for obtaining combination approvals:** The Act provides that once a proposed combination is duly notified to the CCI, the CCI is required to (i) <u>form a prima facie view as to whether or not the proposed combination would have an AAEC within 30 working days</u>; and (ii) <u>after the CCI is satisfied that the proposed combination will not lead to any AAEC in the market, pass an order approving or disapproving a proposed combination within 210 calendar days</u>.

The Amendment Act has reduced and rationalised these timelines to 30 calendar days and 150 calendar days, respectively, from the date of notice to the CCI.

- **Broadening the 'relevant product market' definition:** Currently, the definition of 'relevant product market' covers products or services which are regarded as substitutable or interchangeable by the 'consumer'.

The Amendment Act has expanded this definition to include - the production or supply of goods and services which would also be considered substitutable by the 'supplier', due to the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices'.

- **Regulation of combination – Exemptions to venture capitalists and AIFs:** The Act earlier exempted acquisitions by public financial institutions, foreign institutional investors, banks, and venture capital funds from seeking CCI's prior approval if the acquisition is pursuant to any covenant of a loan agreement or investment, etc.

The Amendment Act now includes other categories, namely 'alternative investment funds' (AIFs), which would have the same meaning as assigned to it under the *Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012* as well as 'foreign portfolio investor', which would have the same meaning as assigned to it under the *Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019* under such exempted acquisitions.

# Process

## Mergers & Acquisitions

| | |
|---|---|
| Develop an acquisition strategy and search for potential targets | *Deal Structure Note* |
| Perform valuation analysis | *Valuation certificate* |
| Term Sheet Negotiations | *Term Sheet* |
| Due-Diligence | *Due-Diligence report* |
| Drafting and negotiation of Definitive Agreements | *SSA/SPA/SHA/BTA/ Merger Scheme* |
| Execution of Definitive Agreements | *Corporate resolutions and Stamp duty procurement* |
| Conditions Precedents Fulfillment - CP Documents | *Execution of CP documents and issuance of CP satisfaction notice (representation & warranties certificate corporate reslutions, other documents depend on deal to deal)* |
| Funding | *Proof of evidence (Bank transfer receipt)* |
| Closing/ Completion Fulfillment | *Execution of Closing documents (ADA amendment, corporate resolutions other documents depend on deal to deal)* |

**M&A**

## Joint Ventures

**Identify and evaluate a Partner**

↓

**Construct an effective operating structure, followed by Due-Diligence based on the JV structure**

↓

**Define the new nature of the business model, draft JV agreement and Negotiations**

↓

**Consider risk mitigation and build an economic system**

↓

**Term Sheet drafting, Negotiations and Execution**

**JV**

# Key Considerations

## Acquisition

### Buy-Side

The buyer should consider the following in transactions:

- To have a detailed due-diligence report to assess risks and non-compliance;
- Prepare well drafted term sheet;
- Business warranties from company/ promoters and holding company, if any;
- Warranty package should be palatable that should include fundamental warranties, tax warranties, business warranties, and title warranties;
- Certificate under section 281 of Income Tax Act;
- Clear title to shares;
- Ensuring all rights of the proposed seller under the existing share holder agreement transfers to buyer;
- Licenses duly obtained under applicable laws;
- All consents duly obtained from lenders/existing shareholders, if any;
- Robust Indemnity clauses.

### Sell-Side

The buyer should consider the following in transactions:

- Seller should ensure all risk highlighted under the due diligence are satisfied prior to seller transfers;
- Have a proper valuation of the company;
- All consents and licenses should be in order. If not, should be obtained prior to transfer;
- Seller to ensure it gets the right valuation of its shares;
- Have a robust compliance checklist for all intellectual property rights, licenses, material contracts and such other regulatory issues;
- Thresholds on indemnity;
- Limitation of liability;
- Continuity of business;
- Protection from competitors.

## Joint Ventures

### Representation & Warranties ("R&W")

Specific R&Ws may be made by one JV partner to the other JV partner and/or to the JV entity and vice versa. For e.g., financial standing of other partner, past criminal proceedings, bankruptcy chargers, etc.

### Non-compete

Generally, a non-compete obligations on the JV partners are seen in a JV agreement, putting reasonable restrictions on JV partners. A non-resident JV partner may insist non-compete provisions to be extended to the affiliates of the Indian JV partner.

### Non-Solicitation

Non-solicitation restrictions with regards to employee i.e. if the employee of the JV joins either party, then such party employing him/her will be in default.

### Intellectual Property ("IP")

The contribution by a JV partner may also be in the form of IP. Therefore, IP is one of the primary considerations of a JV. IP based license/assignment agreements form part of most JV's.

### Board Representation

Representation on the board of directors of a JV is dependent on the shareholding agreed to between the JV parties.

### Affirmative Voting Rights ("AVR")

Minority JV partner may seek certain AVR on certain reserved matters in a JV transaction. In a JV, the matters constituting the veto list are usually resolved by way of an unanimous vote, which is further resolved by systems to resolve a deadlock situation.

### Deadlock

Confronting and resolving a deadlock is one of the main concerns in a joint venture. A deadlock is usually faced where there are two parties having equal control of the JV entity and are in dispute, and neither of the party is willing to surrender control to the other. Some of the common methods to resolve deadlock are as follows:

- to give the chairman of the board a casting vote. If a common chairman cannot be decided, the parties may also opt for an independent person to take on the responsibility of the chairman.
- to refer the deadlocked matter to an independent reviewer, who is capable of taking an independent decision in view of the best interests of the company.
- a put or call option may also be considered as a method for deadlock resolution.
- adopt a dispute resolution mechanism; arbitration mediation and conciliation.

# M&A and Joint Ventures — challenges

## Regulatory Risks

Traversing through the regulatory risks that may arise in a M&A transaction which involves various/ different regulators, as in different cases regulators may have different views on control, resulting in an unwarranted uncertainties which is one of the major challenges.

## Corporate Governance

Assessment of the corporate governance standards of the target company is crucial for the acquiring company. The acquirer should also evaluate the dependence of the target company on the contracts with other promoter entities. If the target company relies heavily on contracts with promoter entities, then a thorough evaluation should be done to determine if such contracts are on arms-length basis or could result in significant erosion of value, which often poses as a major challenge in such transactions.

## Antitrust Issues

At an early stage of negotiations, parties should examine the anti-trust implication of the transaction including the need and timing of the filing and actions that need to commence prior to obtaining CCI's approval. If any anti-trust implications are foreseen, then the parties should allocate the anti-trust risk by either bringing about apposite modifications in the deal documentation to include clauses which require the buyer to undertake all measures to comply with anti-trust requirements or agreeing to a set of divestures as a condition precedent in order to mitigate any foreseeable anti-trust concern.

## Tax

Apart from the provisions of General Anti-Avoidance Rule ("**GAAR**"), the other aspects where the parties should be vigilant about the following:

- An incident of tax occurring in the case of indirect transfers; or
- Undervaluation of shares; or
- Transfer pricing adjustments in the case of group transfers.

# Exit of Foreign Investors

In any Venture Capital ("**VC**") and Private Equity ("**PE**") investments, exits play a crucial role and also remain a key challenge for the VC and PE investors. Some of the key factors in an exit are:

- Promoters negotiating expectations and rights of the new investors with the exiting or other continuing investors;
- Preference of the exiting VC and PE for a complete release and waiver of all past and future liabilities of the investee company, its promoters and the new investors and seeking representations, warranties and indemnities in furtherance of the same; and/ or
- Thorough due diligence by the new investor.

The most crucial exit challenges faced by the VC and PE investors include the following:

## Due-Diligence

One of the most common challenge that is faced by the VC and PE investors is to arrive at a consensus on the scope of the diligence exercise. It should be ensured by an existing investor to limit the scope of such diligence to the minimum and that exercise happens in a time-bound manner. Other challenges faced by the VC and PE investors are (a) obtaining active cooperation of the promoters; and (b) unavailability of secondary data. However, it is important for the buyer to obtain as much information on the credentials and background of the promoters in cases of exit.

## Warranties and Indemnities

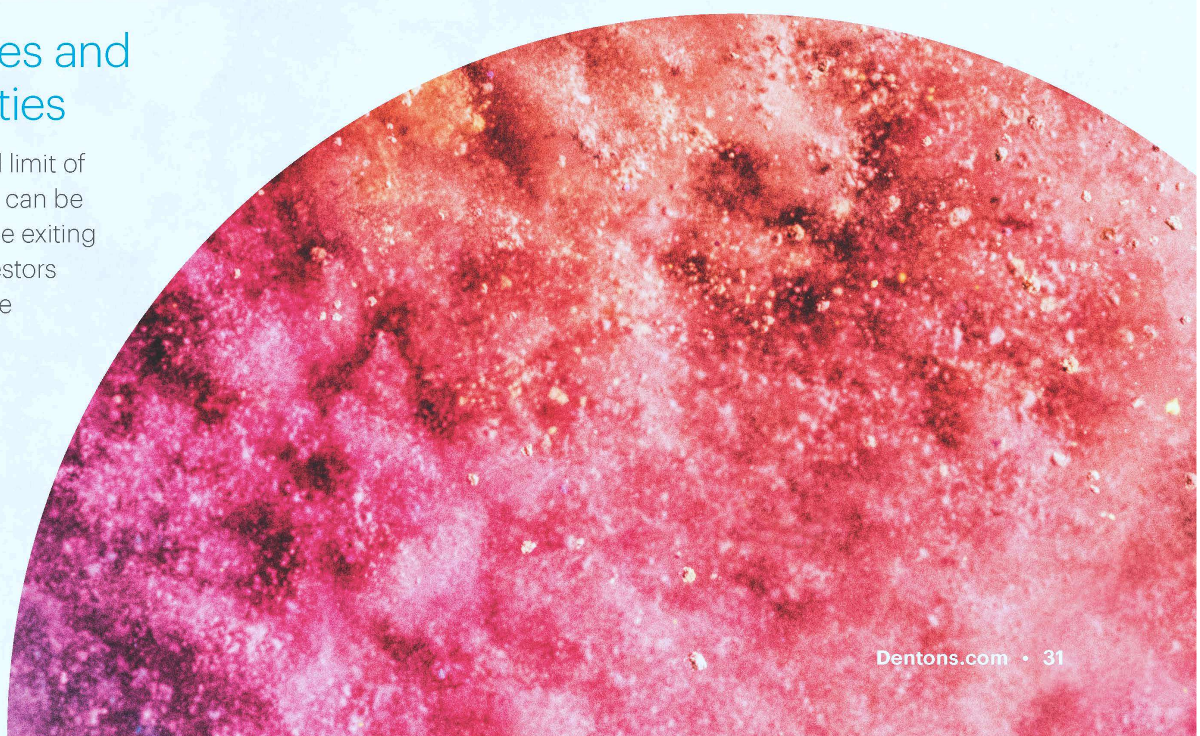
The nature and limit of warranties that can be sought from the exiting VC and PE investors depends on the kind of the investor concerned, (for e. g. : strategic investors, financial investors). The exiting investor should always aim to limit its representations and warranties against the ask by the incoming investor who would want a robust set of representations and warranties.

## Buyback

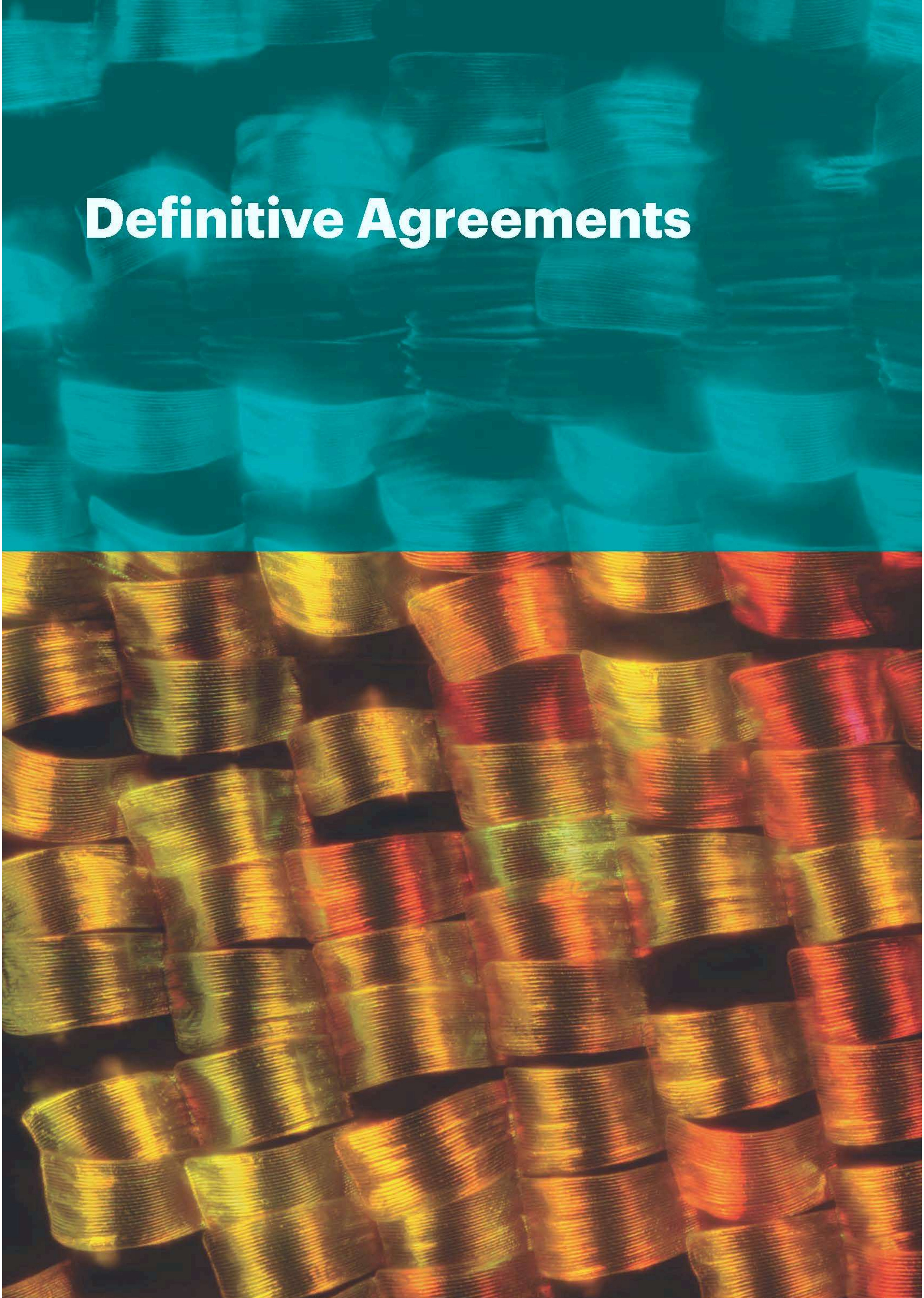
Ideally, the target companies should have enough resources and bandwidth to honour the buy-back commitments. However, CCPS issued to a foreign investor need to mandatorily be converted to equity and redemption of CCPS is not permissible under the Consolidated FDI Policy. Hence, it poses as a crucial challenge for the exiting VC and PE investors holding CCPS in the target company.

## Put/Call Options

Although, enforceability of put and call options have been recognized as valid contracts through clarifications by Securities Exchange Board of India and various judicial pronouncements, but such options still require co-operation from the promoters, and are also subject to compliance with the extant foreign exchange laws, including the pricing guidelines.



# Definitive Agreements

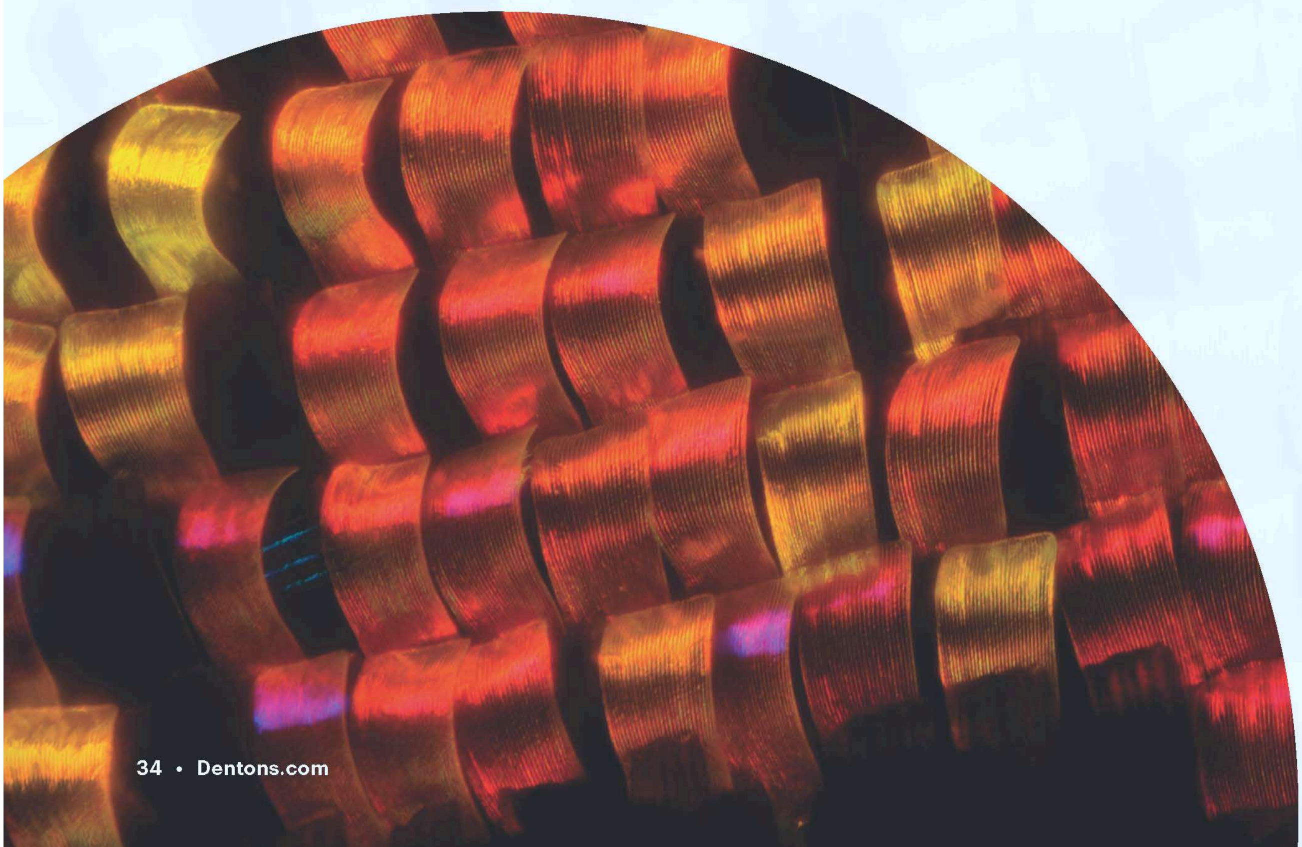


# Enforceability of the Term Sheet

In the case of *Zostel Hospitality Pvt. Ltd. (Zostel) and Ors. v. Oravel Stays Pvt. Ltd. (Oyo)*, the arbitral tribunal decided on the enforceability of term sheets. Oyo had entered into a term sheet with Zostel to acquire its assets including but not limited to intellectual property rights, customer data, property data, software etc., in which the preamble explicitly mentioned that such term sheet will not be binding. Further, the parties had agreed that the definitive agreements for the purpose of such acquisition for would be executed post due diligence that Oyo would conduct on Zostel. It was alleged by Zostel that despite complying with the obligations stipulated under the term sheet, Oyo failed to conclude the said transaction. However, Oyo claimed that various unpaid dues and other liabilities were identified post diligence and there were no definitive agreements executed between the parties to bind them in the said transaction.

The arbitral tribunal noted that the obligations stipulated in the term sheet were closing obligations and are distinct from additional closing actions which were enlisted as part of the definitive agreements. Further, Oyo conducted a due diligence on Zostel and had access to sensitive commercial information, creating a binding obligation on Zostel to provide such information to Oyo. Therefore, the term sheet in its entirety could not be said to be non-binding. Since the parties had consensus on the form of the definitive agreements and met most obligations for the proposed transaction, thus, the conduct of the parties post signing of such term sheet is indicative of the fact that the parties agreed to complete the proposed acquisition. Moreover, the tribunal noted that by virtue of fulfilling certain key closing obligations enlisted in the term sheet, the parties had waived the non-binding effect mentioned in the preamble of the term sheet. Hence, the tribunal held that the said term sheet was binding in nature.

In essence, the enforceability of a term sheet has to be considered on a case-to-case basis, taking into account the facts and circumstances of the case concerned. Despite its explicit mention of non-binding nature in the preamble of the term sheet in Zostel v. Oyo, the tribunal held the term sheet to legally binding and enforceable since on the grounds that certain obligations mentioned in such term sheet were duly performed by the parties.



# Key Provisions under SHAs and SPAs

## Liquidation Preference Rights

Under the definitive agreements, the investors prefer to have a liquidation preference clause for protecting their investment which triggers upon the occurrence of certain events. In ordinary terms, a liquidation preference right means that the investor will be entitled to receive the liquidation proceeds prior to any other shareholders of the company (promoters/founders) upon occurrence of a 'liquidity event'. As a standard practice, 'Liquidity event' includes any merger, acquisition, change in control or disposition of all or any of the property, assets or business of the company etc. Investors can opt for either '***non-participating preference***' or '***participating preference***' during a liquidity event. Under a 'non-participating preference' the investor shall be entitled to the investment amount along with the return as agreed under the contract and shall not be entitled to any other surplus amount in case the liquidation proceeds are higher than the return. Under the 'participating preference' option, along with a predetermined amount of return, the investor is also entitled to receive the surplus proceeds, available to the other equity shareholders of the company. This works in favor of the investors and generally opposed by the promoters.

The enforceability of liquidation preference rights has not been tested by the Indian courts yet. The Companies Act provides that only preference shareholders will be paid off before the equity holders in case of a liquidation event, however, this provision has been exempted for private companies in India provided that the constitutional documents of such private company clearly adopt this exemption. The enforceability of these preferential rights may also be questioned where the company is under insolvency. The Insolvency laws provides for a distribution waterfall for the distribution of liquidation proceeds, which ranks the equity holders at last i.e., after the creditors, employees, etc.

## Anti-Dilution

"Anti-dilution" protections are provided to the investors to protect the quantum of shareholding and the value of their investment at the time of further issuance of shares by the target company. There are two types of anti-dilution provisions: (a) full-ratchet and (b) weighted-average anti-dilution.

### Full-Ratchet

Full Ratchet Anti-Dilution adjustment is favorable to the investor and harsh on the promoters/company. Under Full Ratchet Anti-Dilution, if the company issues additional shares in the future at a price per share that is lower than the current investor's price per share, then the original investor must be issued such number of additional shares itself so as to keep its price per share constant at the new lower price. This may be difficult to enforce in case of investments by a foreign investor as the extant pricing guidelines provided under the FEMA regulations will apply at the time of further issuance.

### Weighted-Ratchet

Under Weighted Average Anti-Dilution adjustment, upon an issuance of shares at a price lower than the conversion price of convertible preference shares, the conversion price is lowered to a price that is an average of the price at which the company/issuer has issued shares, valuing the equity shares outstanding at the pre-adjusted conversion price. This option is more preferred by the promoters/company.

## Indemnity

The Contract Act defines indemnity as a promise to save another from loss basis the conduct of the promising party or any other third party.

Accordingly, the said promise holder is entitled to receive: (i) all damages he may be compelled to pay in a suit; (ii) costs which he may be compelled to pay in a suit when defending it; and (iii) all sums he may have paid under the terms of compromise. In each such event it is a prerequisite that he acts prudently as if the contract of indemnity did not exist.

When drafting an indemnity clause as an indemnifier, it would be important to consider the following:

- To clearly define the triggers for the indemnity obligation, which is to clearly define the loss to be indemnified;
- To set out buckets for time and monetary caps for indemnity;
- To specifically, exclude matters in the limitation of a liability clause: (i) actual or construction knowledge exclusion; (ii) contingent liability exclusion; and (iii) no double dip;
- A duty to mitigate; and
- The survival of the indemnity clause.

Similarly an indemnified party should consider the following whilst drafting an indemnity clause:

- To clearly define the triggers for the right to be indemnified – whether it triggers after the loss is incurred or it triggers the moment a third party claim is received;
- The buckets for time and monetary caps for the indemnity proposed by indemnifying party must not create a prejudice to the indemnified party. The specific indemnity items (as found during the due diligence) must not be subject to such time and monetary caps;
- To avoid a duty to mitigate, as it is not mandatory for claiming indemnity protection; and
- The survival of the indemnity clause.

## Damages

Briefly, the Contract Act, 1872 (Contract Act), states that where a contract has been broken and there is a breach the party who has suffered i.e. incurred a loss basis such breach is allowed to seek compensation for such loss or damage caused to him. However, such compensation must be proximate and foreseeable i.e.: (i) what naturally arose from the usual course of things from the breach of contract; or (ii) what the parties knew would likely result from the breach of such contract.

Further, no compensation can be given for remote and indirect loss or damage sustained by the breach. In estimating the loss or damage caused by the breach, the parties have to consider the means which existed for remedying i.e. mitigating the inconvenience caused by the non-performance / breach. The same principle applies where in the absence of a formal contract, obligations resampling those created by a contract are breached.

### Liquidated Damages

Further, when a contract has been broken, if a pre-determined sum is to be paid, the party complaining of such breach is entitled to such sum, from the defaulting party by way of reasonable compensation, not exceeding such sum whether or not actual damage or loss is proved to have been caused.

### Key Ingredients

breach + loss = claim for damages -> proximate + foreseeable + reasonable -> quantified only after considering mitigating factors.

# Idemnity and Damages: A Comparison

| Event | Indemnity | Damages |
|---|---|---|
| TRIGGER INGREDIENTS | Indemnity kicks in on the breach i.e. as soon as the liability has accrued.<br>It can be contractually decided when the said loss is deemed to accrue i.e. when the liability crystalizes.<br>Jet Airways: Indemnity is not necessarily given by repayment after prepayment. | Damages kicks in only after **breach + loss** being incurred by the non-defaulting party.<br>Where the loss is **predetermined**, i.e. liquidated damages is provided for the necessity to prove loss does not arise and the non-defaulting party is to be paid reasonable compensation not exceeding such sums. |
| CLAIM | Consequential, remote, as well as third party losses can all be claimed unless specifically excluded. | Law mandates: (i) reasonability; (ii) foreseeability/ proximity; and (iii) not considered for remote and indirect losses. |
| DUTY TO MITIGATE | No Duty to mitigate unless specifically provided for. | Duty to mitigate exists. |
| ACTS OF THIRD PARTIES | Can be extended to acts of third parties. | Can only be sought for the acts of the promisor. |
| CAPPED AMOUNTS | As indemnity under the law, is not subject to the reasonability, foreseeability/ proximity or indirect loss tests a capped indemnity works better than a liquidated damages clause. | No need to lead evidence as to loss, (unless the court is of the view that no loss would have occurred). However the cap acts as an upper limit and is still subject to reasonability tests. |

# Transfer Restrictions

## Right of First Refusal ("ROFR"):

The right of first refusal is a contractual obligation of a selling shareholder to first offer his/her stake to a shareholder that holds ROFR before selling to a third party by offering no. of sale shares, the price and other terms and conditions under the ROFR notice same as offered by the third to the selling shareholder. The ROFR holder will, however, have to match the price and terms offered by the third party. In the event, ROFR holder refuses the offer under the ROFR notice, the selling shareholder can sell the sale shares to third party. In a JV set up, this would usually be a common right granted mutually. By having this right, JV partners are given an opportunity to block the entry of any third party into the JV.

## Right of First Offer ("ROFO"):

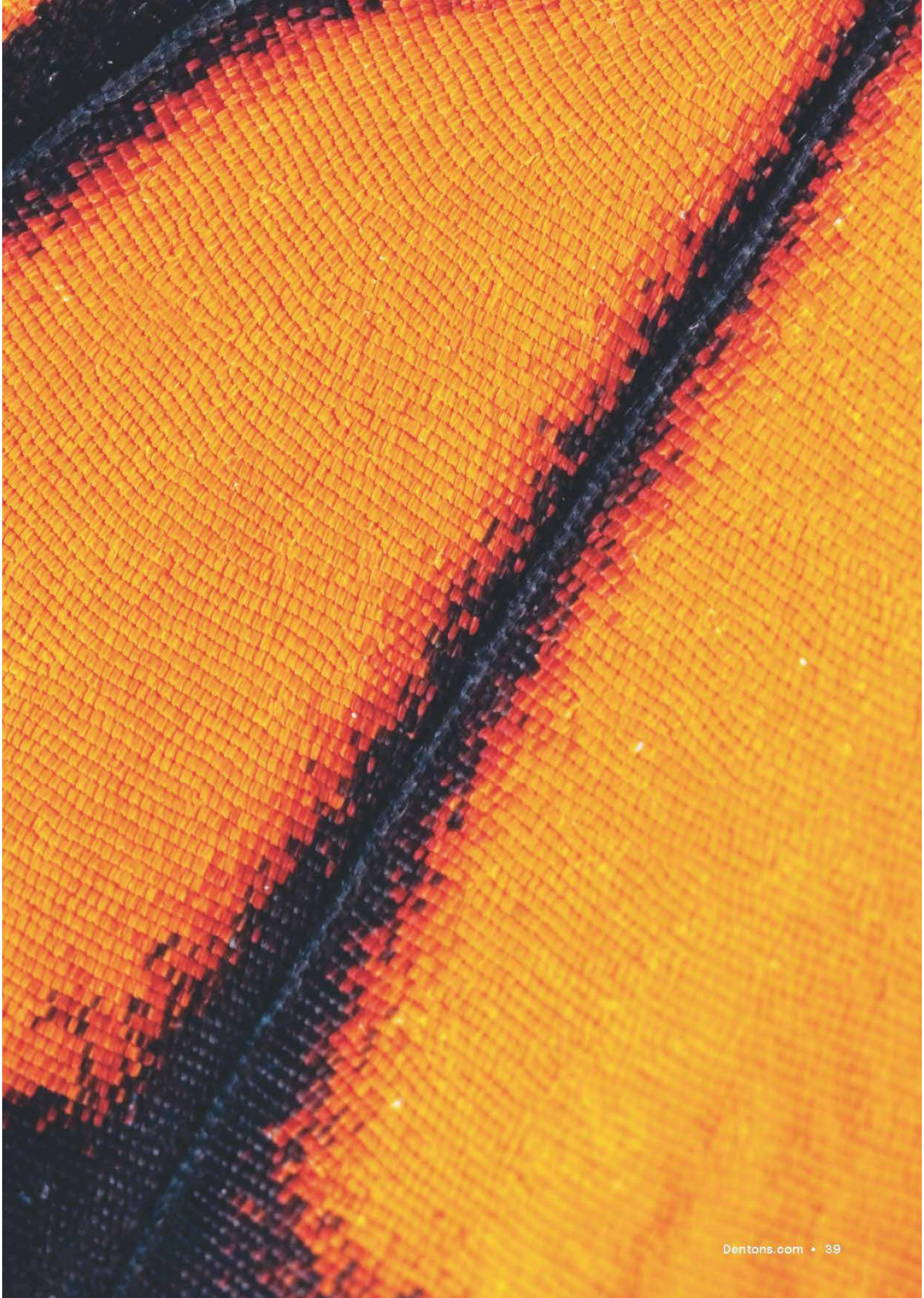
A ROFO is a contractual right which provides that in the event selling shareholder intends to sell its shares, the selling shareholder may only do so after offering the shares to the ROFO holder. The ROFO holder may choose a price and terms and respond to the selling shareholder accordingly. The selling shareholder is not under the obligation to sell the shares to a ROFO holder until it accepts the price and terms being offered by ROFO holder. The main difference between this right and a ROFR is that with a ROFO, the ROFO holder has a greater say in the price at which it purchases the relevant shares. In a JV, selling JV partner will usually have the option to reject the ROFO Holder's offer, having the first mover advantage is generally beneficial to the right-holder.

## Tag-Along Right

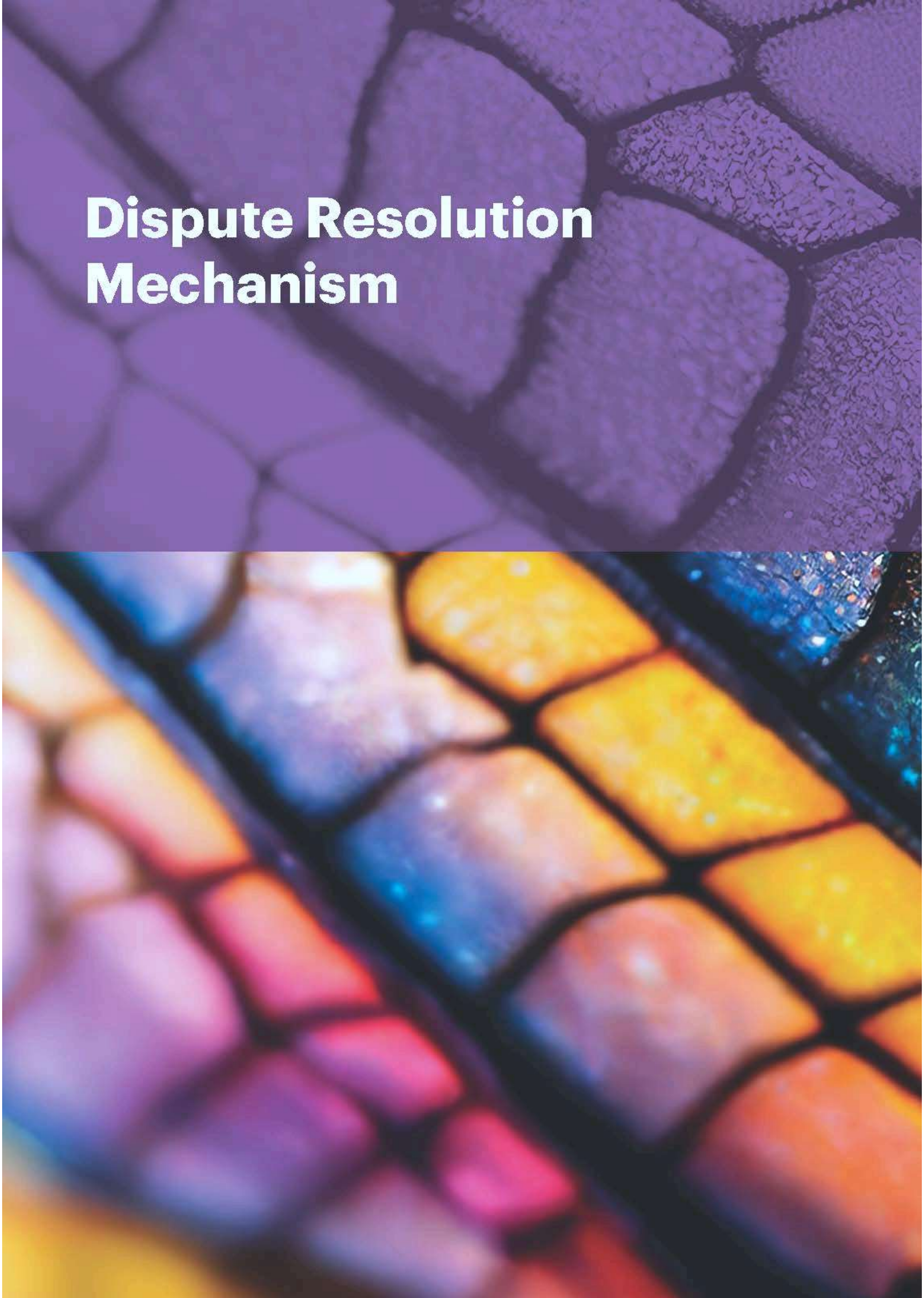
A tag along right grants the right-holder a right to 'piggy-back' on the sale of shares of another shareholder and sell their shares to a third-party purchaser on the same terms and conditions. In case, the selling shareholder sells controlling shares, a tag holder can have a full tag. In case the selling shareholder transfers part of its shares, a tag holder can have a pro rata tag. In case of a JV, since a non-selling JV partner, would generally avoid being placed together with an undesirable JV partner as a result of the selling JV Partner's intending to exit, through this tag right of a non-selling JV Partner, a Selling JV partner will be forced to consider the exercise of a tag along right when negotiating with a third-party purchaser.

## Drag-Along Right:

A drag-along right permits a drag right holder that is selling its shares, the right to force another shareholder to sell their shares alongside the right-holder. The said right allows the majority shareholders to force /drag the minority shareholder to sell their shares as well at a price determined for majority shareholders and on the same terms and conditions. In the context of a JV, drag along right provides the drag right holder, the ability to offer to sell a greater and perhaps controlling proportion of the JV Co, which may be more attractive to potential third-party purchasers.



# Dispute Resolution Mechanism



## Overview

Since India ranked 178 out of 189 countries globally in contract enforcement[3], commercial dispute resolution became an area of priority for Indian law makers. Along with enacting the Commercial Courts Act, 2015 to revitalize the commercial litigation ecosystem, steps were taken to promote arbitration as a quick and effective alternative to litigation. Today, arbitration has become the preferred mode of dispute resolution and foreign parties/investors have started resorting to including an arbitration clause in their agreements to resolve disputes in India.

## Effect of the 2015 and 2019 Amendment

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996. Part I of the Act applies to where the place of arbitration is in India. Part II applies where the place of arbitration is outside India. Almost two decades later, the Act was amended in 2015 and 2019 to undo the effect of conflicting judicial precedents and limit judicial intervention. The amendment also sought to give impetus to institutional arbitration in India with the object of making India a robust centre for arbitration. Amendments also granted arbitral tribunals the same powers as that of a court for granting urgent interim reliefs and further reduced the grounds for challenge of an award and ensured that no automatic stay of an arbitral award is granted upon filing of a challenge to the award in Court. Thereafter, the 2019 Amendment was brought into effect by which the government intended to make India a hub for faster resolution of commercial disputes and the key provisions were the designation and grading of arbitral institutions, timely conduct of proceedings, confidentiality of proceedings and qualification of arbitrators amongst others.

## Enforcement of the arbitral awards

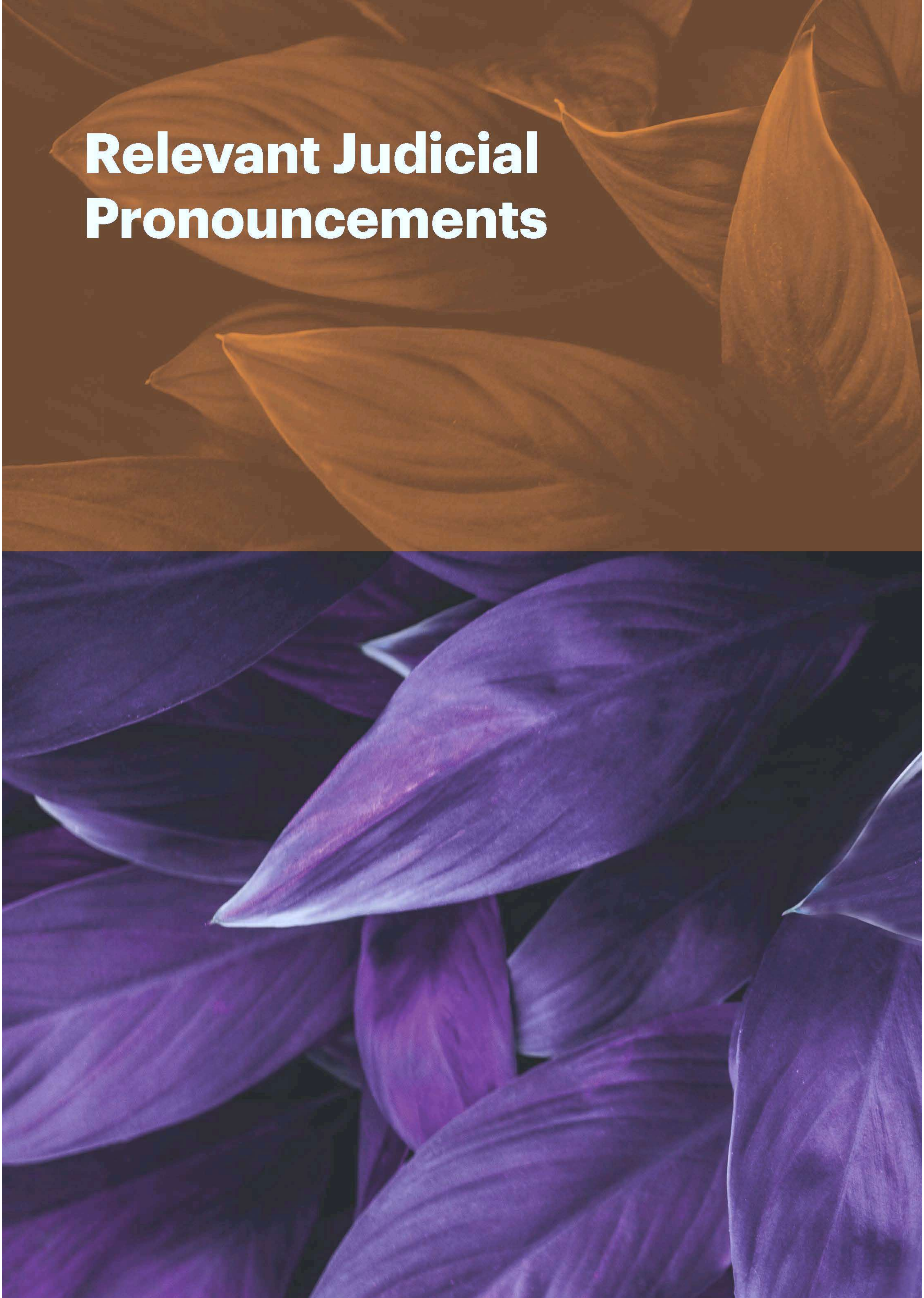
The 2015 and 2019 amendments have made the grounds for challenging an award very limited and created a facilitative environment for enforcement of domestic and foreign awards in India. By the 2015 amendment, there has been a major and significant change in the landscape on enforcement of arbitral awards and post-award intervention by Courts in India. There is no longer an automatic stay on an award upon filing of an application for challenging the award. Procedural requirements for enforcement of foreign awards have been relaxed. Period of limitations have been spelt out and there are judgements which state that there cannot be review on the merits of the award. In fact, in the sphere of foreign awards, cases where enforcement have been rejected by Courts are extremely rare. Hence, there is a major change in the perspective, both legislatively and judicially.

It is relevant to mention that despite being a country of 1.2 billion, the High Courts and Supreme Court in India have been extremely swift in disposing off applications for enforcement of arbitral awards. This paradigm shift took place when the Indian legislature realized that under the 1996 Arbitration Act the challenge to an award filed before the Courts took considerable time to get disposed off as the entire process was lethargic, unregulated and ad-hoc. A huge change was brought about in 2015 and 2019 whereby strict statutory timelines for completion of proceedings were introduced and the public policy defense was considerably narrowed down for declined enforcement. In fact, in other countries, the public policy ground is still very broad. Further, with this major change in 2015, there were commercial courts set up contemporaneously and one did not require to go to district court concerning exercise of original jurisdiction. Hence, the arbitrations proceedings would flow from the arbitral tribunal to the High Court/commercial courts of a particular State from which it would flow to the Supreme Court. So, India is certainly concerned with respect to foreign direct investment in order to provide an expeditious mode of dispute resolution and pursuant to these amendments, India's ranking by the World Bank has considerably gone up, making India a pro-arbitration jurisdiction.

Based on this broad overview, it can safely be surmised that arbitration in India has evolved to become a significant feature of commercial life and a facilitator for trade and commerce worldwide and must therefore be the preferred mode of dispute resolution in agreements/contracts governing foreign direct investment.

3. See Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287 ("**BCCI**")

# Relevant Judicial Pronouncements



# Object and Scheme of FEMA

Prior to FEMA, India had restrictive foreign exchange regulations that were prescribed under the Foreign Exchange Regulation Act, 1973 ("**FERA**") (which replaced its predecessor legislation Foreign Exchange Regulation Act, 1947, which followed a similar scheme and was enacted even before the nation came into being). The Supreme Court of India explained the context in which FERA was implemented in *Life Insurance Corporation of India v. Escorts Limited*[4] as below:

> *"4. The present state of Indian economy which has to operate under the existing world economic system is such that India needs foreign exchange and, lots of it, to meet the demands of its developmental activities. <u>It has become necessary to earn, conserve and build-up a reservoir of foreign exchange</u>. So the Parliament and the Executive Government have been taking steps, from time to time, <u>to regulate, to conserve and improve the foreign exchange resources of the country</u> and the proper utilisation thereof in the interests of the economic development of the country. The Foreign Exchange Regulation Act, 1973 was enacted for that purpose."*

In the backdrop of significant developments such as substantial increase in India's foreign exchange reserves and India adopting Article VIII of International Monetary Fund Articles of Agreement, which requires the members to remove restrictions on current account transactions, the Government decided to replace FERA with FEMA. FEMA has *"the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India"*.[5] Therefore, one must be mindful of the fact that FEMA, which ultimately deals with regulating flow of foreign exchange in and out of India, should be construed accordingly.

Indian Courts have, in recent judgments, taken note of the *"paradigm shift in the statutory policy"* with FERA being replaced by FEMA. In this context, the Delhi High Court held in *Cruz City 1 Mauritius Holdings v. Unitech Limited*[6], that, *<u>"The focus has now shifted from prohibiting transactions to a more permissible environment".</u>* The fundamental policy of FEMA no longer proscribes or prohibits Indian entities from expanding their business overseas and accepting risks in relation to transactions carried out outside India. And, as the title of FEMA suggests, the policy now is to manage foreign exchange. <u>Under FEMA, all foreign account transactions are permissible subject to any reasonable restriction which the Government may impose in consultation with the RBI.</u> It is now permissible to not only compound irregularities but also seek ex post facto permission."

Further, it may be noted that unlike FERA, no provision in FEMA prohibits or requires the non-enforcement of contracts which, to be fully performed, would require permission from the RBI to avoid any penalties imposed under FEMA. The Delhi High Court has, in *SRM Exploration Private Ltd v N & S & N Consultants SRO*[7] held as follows:

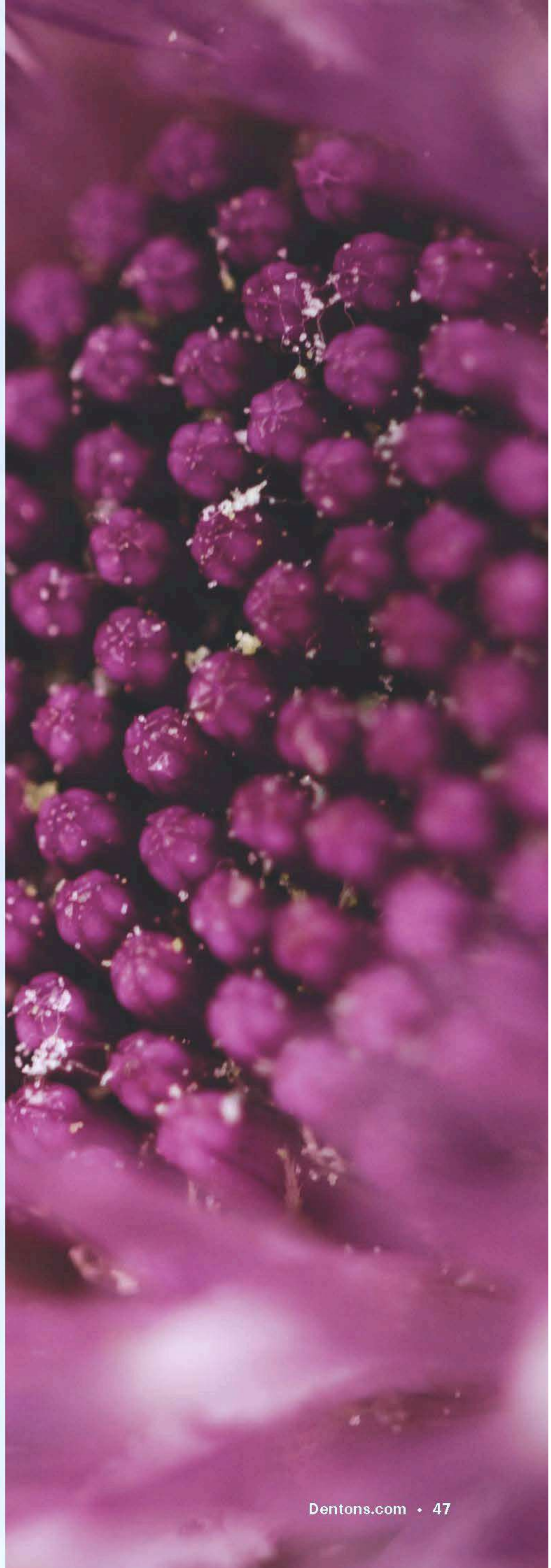
> *"12. We have perused the provisions of FEMA, 1999, Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA, namely, FERA 1973 vide Section 47 prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However, Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However, the legislature while re- enacting*

4. (1986) 1 SCC 264
5. FEMA, preamble

6. 2017 (3) Arb LR 20 (Delhi)
7. SRM Exploration Private Limited vs. N&S&N Consultants SRO: (2012) 129 DRJ 113.

*the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus, we are of the opinion that the plea of the appellant Company in this regard is without any force."*

It is a settled legal principle in India that regulations must be consistent with the scope, nature, object and scheme of the Act under which they are made[8].



8. Union of India vs. S Srinivasan: (2012) 7 SCC 683.

# Relevant Provisions under FEMA

The FEMA contemplates two kinds of transactions, namely, the Current Account Transactions as prescribed under Section 5 of FEMA and the Capital Account Transactions as prescribed under Section 6 of FEMA. It is the basic principle of FEMA that all Current Account Transactions are permitted unless prohibited and that all Capital Account Transactions are prohibited unless permitted.

Under the provisions of FEMA, Capital Account Transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India. Issue and transfer of shares fall within the scope of capital account transactions and are prohibited unless permitted under Section 6 of FEMA.

Under Sections 6(3)(b) and 47(1) of FEMA, the RBI has powers to make regulations to, inter alia, prohibit, restrict, or regulate the *"transfer or issue of any security by a person resident outside India"*[9]. As held by the Delhi High Court in Cruz City 1 Mauritius Holdings v. Unitech Limited[10], foreign exchange transactions, which are not expressly restricted under FEMA, or its regulations, are permitted.

Prior to the NDI Rules, the RBI, in exercise of its powers under Section 6 read with Section 47 of FEMA, formulated the Foreign Exchange Management (Transfer or Issue of security by a person resident outside India) Regulations, 2000 ("**FEMA 20**") to regulate the transfer and issue of securities of an Indian company by a person resident outside India. Regulation 10 of FEMA 20 provided for prior permission of RBI in certain cases for transfer of security.

9. Sections 47(1) and (2)(a) of FEMA also confer the RBI with general regulation-making power to carry out FEMA's provisions, including for the *"permissible classes of capital account transactions… … and the prohibition, restriction or regulation of certain capital account transactions under section 6.*
10. Cruz City 1 Mauritius Holdings vs. Unitech Limited: 2017 (3) Arb LR 20 (Delhi).

# Special Permission from the RBI

If a transaction is not covered by the general permission available under FEMA, special permission from the RBI can be applied for and obtained for such transactions. In addition to the powers of the RBI under Section 3 of FEMA[11] to provide special permission for dealings in foreign exchange, the RBI reserves the unqualified power to provide special permission in appropriate cases, for which general permission is not available, under Rule 3 of NDI Rules, which states that *"Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident outside India shall make any investment in India."* The rule includes the proviso that *"the Reserve Bank may, on application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary"*. As per Rule 2 (ac) of the FEMA NDI Rules, the term "investment" means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India. Therefore, Rule 3 of the FEMA NDI Rules empowers the RBI to provide special permission for transfer of security from a non-resident to resident.

The Supreme Court, in the case of *Life Insurance Corporation of India v. Escorts Ltd.*, has also recognized the principle that the RBI is the final authority to decide whether or not permission should be given for any transaction governed by foreign exchange regulations:

> *"The provisions of the Foreign Exchange Regulation Act (predecessor of FEMA) are so structured and woven as to make it clear <u>that it is for the Reserve Bank of India alone</u> to consider*

11. Section 3 of FEMA provides: *"…save as otherwise provided in the act, rules or regulations made thereunder, <u>or with the general or special permission of the RBI</u>, no person is permitted to- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized dealer; (b) make any payment to or for the credit of any person resident outside India in any manner; (c) receive otherwise through an authorized dealer, any payment by order or on behalf of any person resident outside India in any manner; (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person. "*

*whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and orders from time to time have been fulfilled and whether permission should be granted or not."*[12]

From the above FEMA NDI Rules and provisions under FEMA, it can be inferred that if in case under any transaction, the pricing guidelines are not being followed, the same can be validated by a special permission from RBI.

# Contracts in Contravention of FEMA

## Statutory Construction to be Considered

Section 23 of the Indian Contract Act, 1872 ("**Contract Act**") provides that any contract's object which is forbidden by law or contrary to public policy are void. However, it cannot be construed to be a blanket provision. India follows the common law principle which states that whether or not a contract violating a statutory provision is void is ultimately a question of statutory construction

The Madras High Court has quoted the following *"[it is] well settled that when an enactment merely imposes a penalty without declaring a contract made in contravention of it to be illegal or void, the imposition of penalty by itself and without more does not necessarily imply a prohibition of the contract. In such cases the question always is whether the legislature intended to prohibit the contract. This must be decided upon a construction of the Statute"*.

Insofar as principle of statutory construction for FEMA is concerned, it has been interpreted by the Delhi High Court in the *SRM Explorations*[13] and *Cruz City 1 Mauritius Holdings*[14] cases and it has been held that FEMA does not render void or unenforceable contracts which would require RBI permission to be performed, even when such permission is not obtained and even if the same would amount to a violation of the statute.

12. (1986) 1 SCC 264
13. [2011] 163 CompCas 97 (Delhi)
14. 2017 (3) Arb LR 20 (Delhi)

The Delhi High Court has also said that an argument that a contract is void and cannot be performed because doing so might subject parties to penalties under India's foreign exchange laws "has no legal force and is groundless". Also, the Supreme Court in the matter of *BOI Finance Ltd v. The Custodian*[15] has observed that a finding that the banks' failure to adhere to the directions under RBI circulars might subject them to penalties, but "that by itself, would not invalidate the contracts".

## Contracts Violating FEMA are not Opposed to Public Policy

The FEMA when introduced in 1999, replaced the earlier legislation on foreign exchange, the Foreign Exchange Regulation Act, 1992 ("**FERA**"). In respect to FERA, the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Company*[16] has held that:

i. Contravention of law alone will not attract the bar of public policy and something more than contravention of law is required;

ii. "public policy" entailed contravention of:
   - fundamental policy of Indian law; or
   - interest of India; or
   - justice or morality

iii. keeping in view the object underlying FERA and the principles governing enforcement of foreign exchange control laws followed in other countries, the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India.

In the *Cruz City 1 Mauritius Holdings*[17] case the Delhi High Court rejected the argument that violation of any provision of FEMA would fall foul of the public policy of India stating that, *"101. Although, this contention appears attractive, however, fails to take into account that there has been a material change in the fundamental policy of exchange control as enacted under FERA and as now contemplated under FEMA. FERA was enacted at the time when the India's economy was a closed economy and*

15. C.A.No.1753 of 1994 (SC)
16. AIR 1994 SC 860
17. 2017 (3) Arb LR 20 (Delhi)

*the accent was to conserve foreign exchange by effectively prohibiting transactions in foreign exchange unless permitted. As pointed out by the Supreme Court in Life Insurance Corporation of India v. Escorts Ltd. and Ors., the object of FERA was to ensure that the nation does not lose foreign exchange essential for economic survival of the nation. [With the liberalization and opening of India's economy it was felt that FERA must be repealed]."*

Allowing the enforcement of the foreign award, the Delhi High Court held that, *"103. With the liberalization of our economy, it was felt that FERA must be repealed and new legislation must be enacted. The Statement of Objects and Reasons of FEMA indicate that FEMA was enacted in view of significant developments that had taken place since 1993: there was substantial increase in the foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian Investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets. There was a paradigm shift in the statutory policy. The focus had now shifted from prohibiting transactions to a more permissible environment. The fundamental policy of FEMA no longer proscribes or prohibits Indian entities from expanding their business overseas and accepting risks in relation to transactions carried out outside India. And, as the title of FEMA suggests, the policy now is to manage foreign exchange. Under FEMA, all foreign account transactions are permissible subject to any reasonable restriction which the Government may impose in consultation with the RBI. It is now permissible to not only compound irregularities but also seek ex post facto permission. Thus, the question of declining enforcement of a foreign award on the ground of any regulatory compliance or violation of a provision of FEMA would not be warranted."*

Further, the application of the observation of the Supreme Court in *Renusagar* Case that violation of FERA, which has been enacted to safeguard the 'economic interests of India', would be contrary to public policy of India, is limited to the term 'public policy' as envisaged under the Foreign Awards (Recognition and Enforcement) Act, 1961 ("**Foreign Awards Act**"), which is not a statute at all relevant in the present day. Its closest parallel would be the Indian Arbitration & Conciliation Act, 1996 which is presently in force. The conditions of enforcement of a foreign award are set out in Section 48 of the Arbitration and Conciliation Act, 1996. The Delhi High Court has held in *Cruz City 1 Mauritius Holdings* case that the explanations to Section 48(2)(b) of the Act as amended/introduced by the Arbitration and Conciliation (Amendment) Act, 2015, have brought about a material change and further narrowed the scope of the term public policy: first, Explanation 1 has sought to replace the inclusive scope of the pre-amendment provision by an exhaustive one; second, interest of India is no longer included in the scope of public policy; and third, that examination of whether the arbitral award offends the Fundamental Policy of Indian law, does not entail a review on merits. The omission of 'interest of India' from the scope of public policy was based on the express recommendation of the Law Commission report that led to the Arbitration and Conciliation (Amendment) Act, 2015. Therefore, even if the Assured Return Clauses is contrary to the provisions of FEMA, this would not amount to a contravention of 'public policy' of India.

In fact, the Delhi High Court has held in *N & S & N Consultants S.R.O. v. SRM Exploration Pvt. Ltd.*[18] that a contract executed in violation of any provisions of FEMA or FERA could lead to prosecution of the parties, but it could not be said that the contract is null, void or cannot be enforced on that ground.

The Supreme Court in *Vijay Karia & Ors. v Prysmian Cavi E Sistemi SRL and Ors*[19] affirmed the ruling made by Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited (2017) 239 DLT 649* and held that:

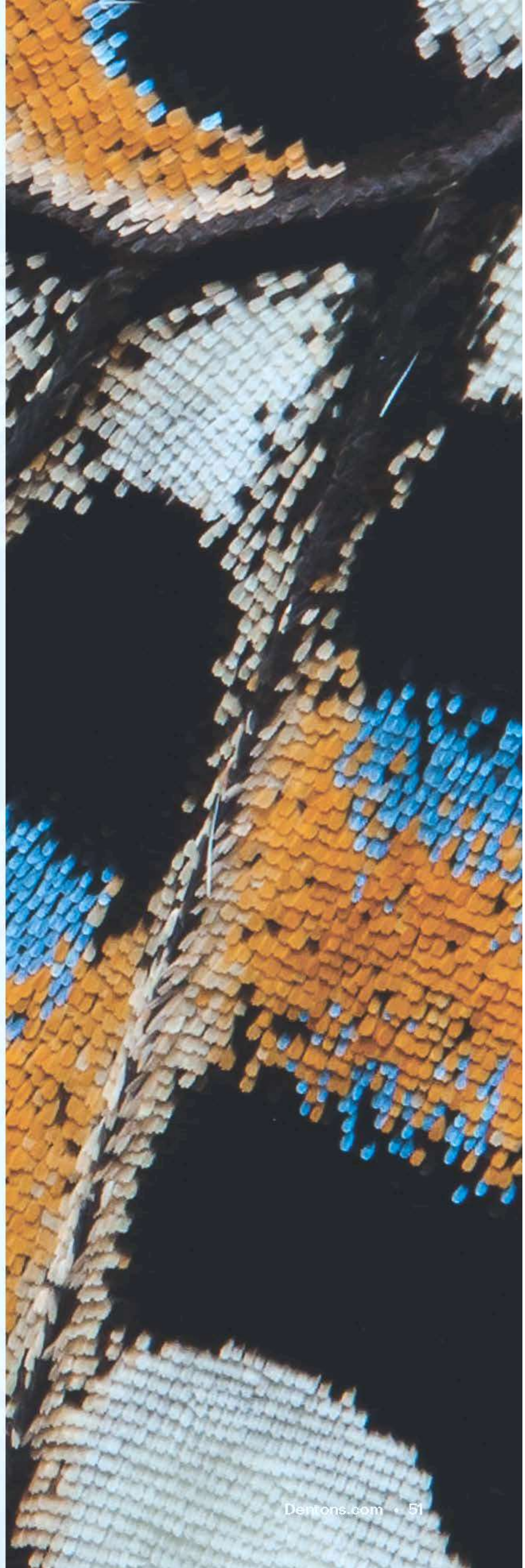
> *"A contravention of a provision of law is insufficient to invoke the defence of "contrary to public policy" when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country."*

18. [2011] 163 CompCas 97 (Delhi)
19. Civil Appeal No. 1544 of 2020 (Arising out of SLP (Civil) No. 8304 of 2019) and Civil Appeal No. 1545 of 2020 (Arising out of SLP (Civil) No. 8435 of 2019)

FEMA, unlike FERA, refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the RBI under FERA. The apex Court noted that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. If a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the RBI may be obtained post-facto if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law.

Even assuming that Rule 21 of the Non-Debt Instrument Rules (Pricing Guidelines) requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the fair market value of the shares, and a foreign award directs that such shares be sold at a sum less than the fair market value, the RBI may choose to step in and direct that the aforesaid shares be sold only at the fair market value and not at the discounted value, or may choose to condone such breach. Parties are contractually bound by the formula prescribed under Schedule X of the JVA for determination of fair market value. Further, even if the RBI were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or the NDI Rules would not arise as the award does not become void on that count.

From the above discussions, it may be inferred that violation of provisions of FEMA cannot be held to be opposed to 'public policy' of India. Moreover, if any special prior permission is required from RBI for performing a contractual obligation, such permission can also be obtained *post facto*.



# Damages for Breach of Assured Return Clauses – Enforceability of 'options'

Indian courts have time and again recognised absolute obligations and the allocation of responsibilities to parties in a contract. The Bombay High Court in the case of *Afshar MM Tacki v. Dharamsey Tricamdas*[20] held that a party cannot be excused from performing its bargain due to an eventuality which the parties expressly dealt with in the contract and where they had allocated risk accordingly.

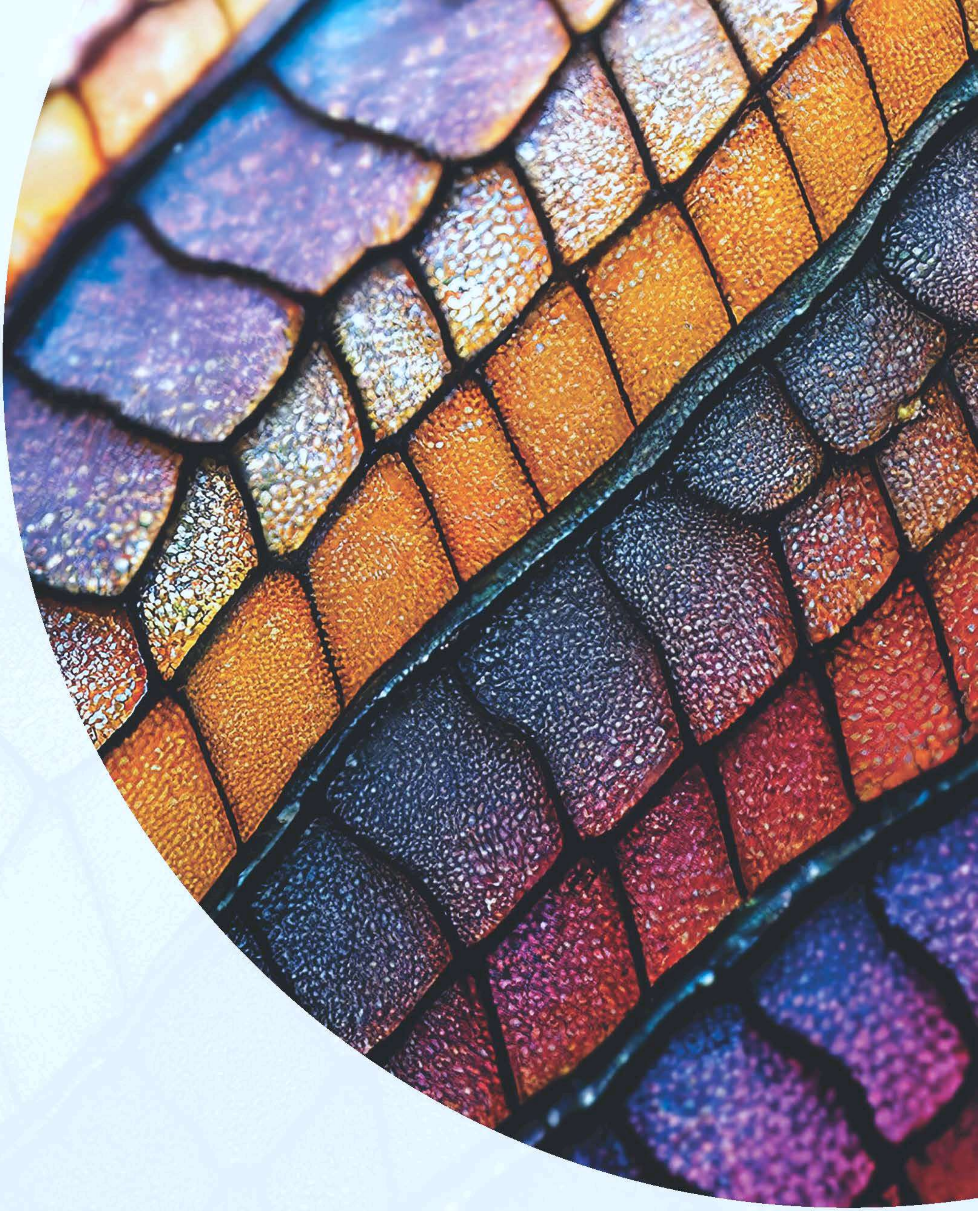
In the event the assured return desired by the foreign investor is an amount over and above the fair market value, it may be argued that in order to provide such assured return, special permission from RBI is required. In this regard, several judgments such as *SRM Exploration Private Ltd v N & S & N Consultants; Chet Ram Gupta v Motion Devi* (Delhi High Court Judgment); *Life Insurance Corp of India v Escorts*, have held that a contractual obligation, which requires RBI permission to be performed, does not violate Indian law if no permission is obtained.[21] The obligation remains valid and enforceable, and can be the subject of an action for damages for its breach.

In the judgment of *Shakti Nath v. Alpha Tiger Cyprus Investments No. 3*[22] the Delhi High Court upheld a party's right to claim damages under Section 73 of the Contract Act in addition to and not in substitution for any remedy available under the contract. Further, the High Court noted that since the party concerned was claiming was not exercising the put option but claiming damages for breach of contract under Section 73 of the Contract Act, the question of any violation of any RBI circular in relation to exercise of put option did not arise.

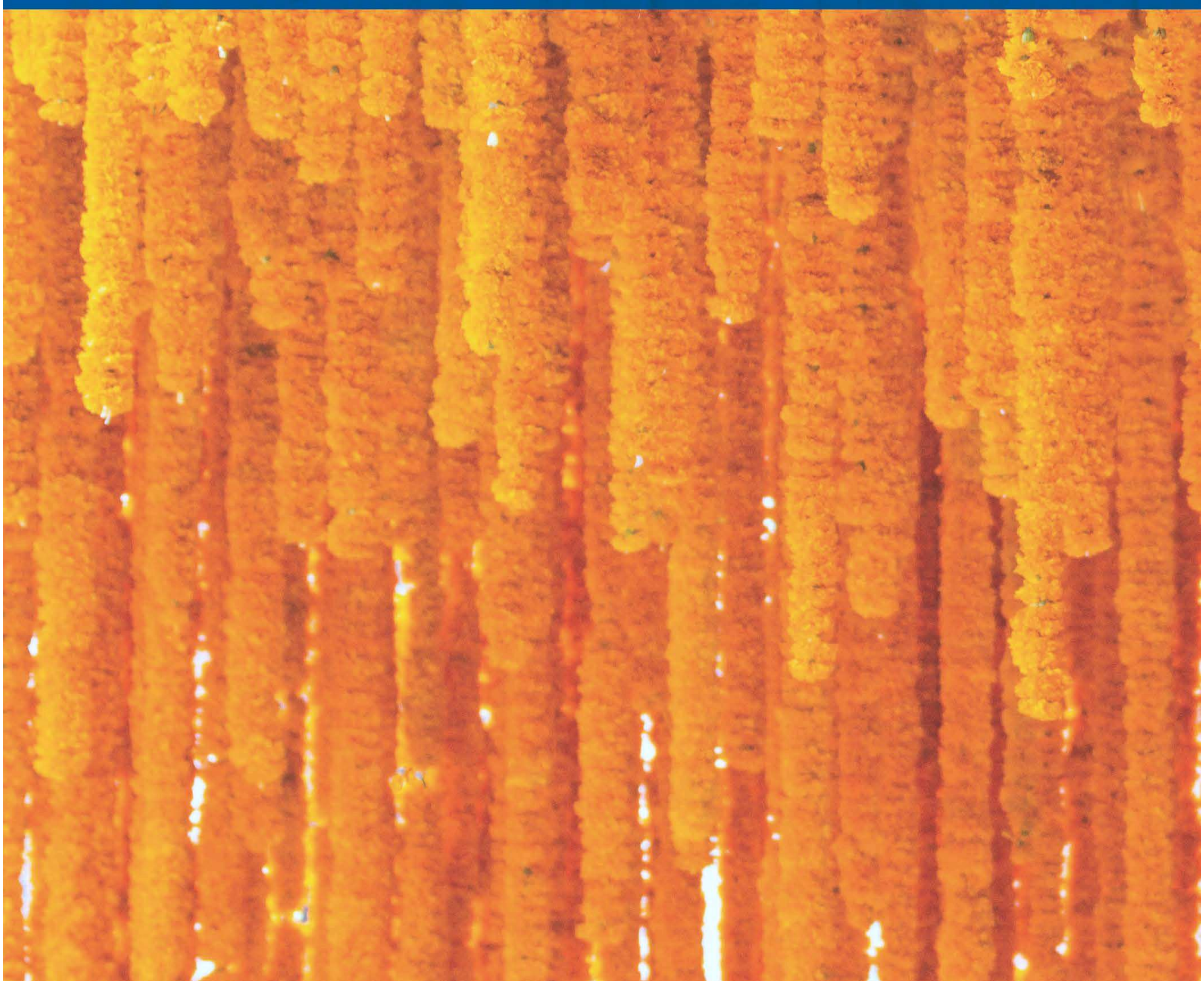
Further, in *NTT Docomo Inc. v. Tata Sons Ltd.*[23], the Delhi High Court upheld the decision of an arbitral tribunal to award damages for breach of the obligation to find a buyer for the shares held by Docomo, incorporated in Japan, in an Indian company, Tata Teleservices Ltd., in keeping with the contract. The High Court ruled out the RBI's opposition to remittance of damages by Tata Sons, an Indian entity, to Docomo without obtaining special permission from the RBI as the damages awarded to Docomo were higher than the fair market value of the shares, which Docomo had been directed to tender to Tata on receiving the amount. The High Court held that when an arbitral tribunal had decided that the sum award to Docomo was in the nature of damages and not the sale price of the shares, *"the question of having to seek the special permission of RBI did not arise"*. The High Court also upheld the consent terms filed by the parties by which Tata Sons had withdrawn its objections to the enforcement of the award and noted that, *"…The issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India."*

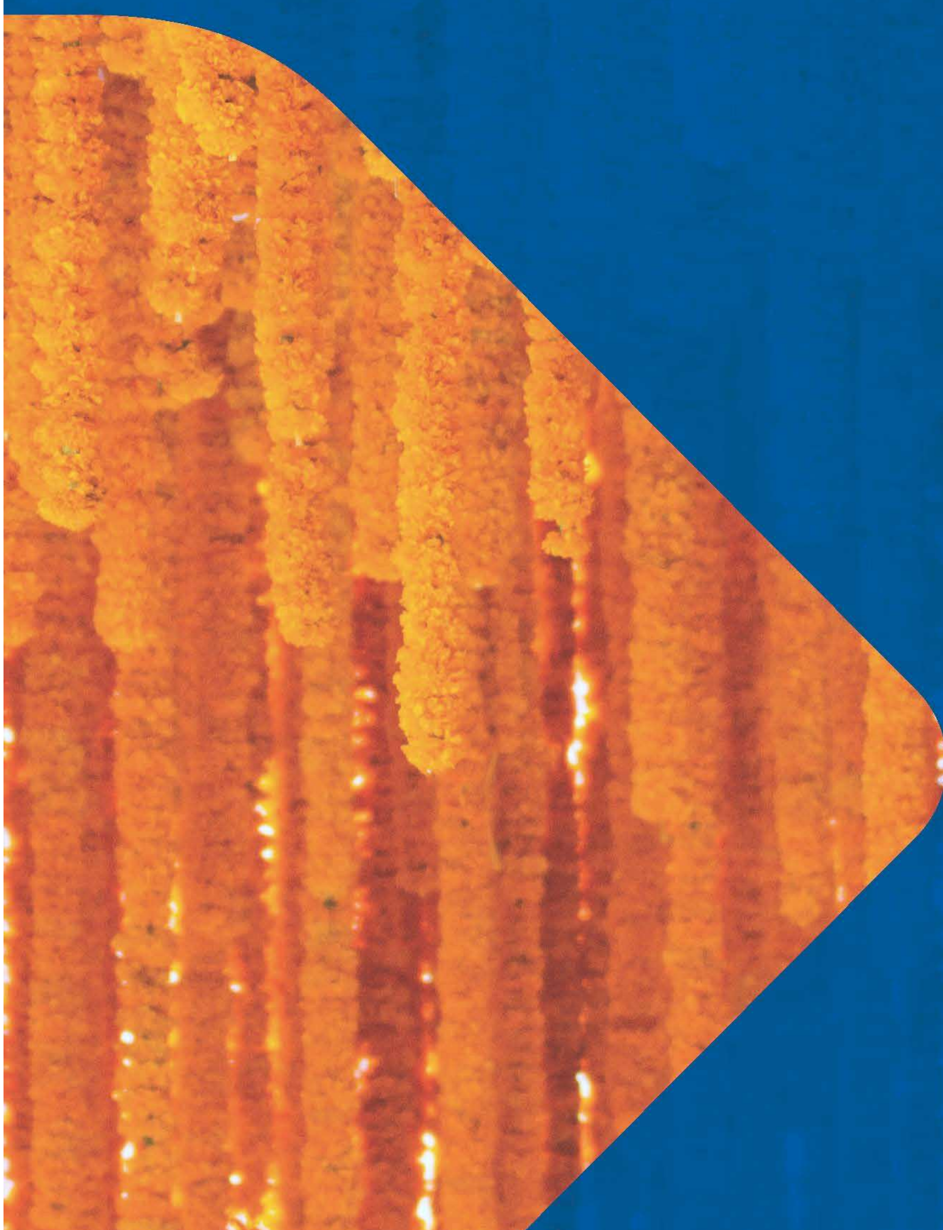
Therefore, in the event the language of the Assured Return Clauses indicates that a resident party is absolutely obliged to provide assured returns or IRR to the non-resident investor, such resident party cannot refuse to provide such assured return on the ground that the same is contrary to pricing guidelines under FEMA. In such cases, the non-resident will be entitled to damages under Section 73 of the Contract Act.

20. AIR 1947 Bom 98
21. SRM Exploration Private Ltd v N & S & N Consultants SRO (2012) 129 DRJ 113; Chet Ram Gupta v Motion Devi, MANU/DE/8622/2006; Life Insurance Corp of India v Escorts (1986) 1 SCC 264,
22. 2017 (164) DRJ 563
23. (2017) 3 CompLJ 526 (Del)



# Annexure A





This Annexure shows the permitted sectors for FDI, the percentage of equity or FDI cap and route through which such investments can be made. Certain key conditionalities, as applicable have been mentioned for the relevant sectors.

# Agriculture

## Agriculture and Animal Husbandry

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Floriculture, horticulture, cultivation of vegetables and mushrooms under controlled conditions; | 100% | Automatic |
| Production of seeds and planting materials; | 100% | Automatic |
| Animal husbandry (including breeding of dogs), Pisciculture, Aquaculture, Apiculture; | 100% | Automatic |
| Agro and allied sector services. | 100% | Automatic |

Riders:

- "Under controlled cultivation" includes: the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially; this includes protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically.

## Plantations

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| The following plantations:<br>• Tea;<br>• Coffee<br>• Rubber;<br>• Cardamom;<br>• Palm oil tree;<br>• Olive oil tree. | 100% | Automatic |

Riders:

- Prior approval of the state government concerned is required in case of any future land use change.

# Mining and Petroleum & Natural Gas

## Mining

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Mining and exploration of metal and non-metal ores. | 100% | Automatic |
| Coal and Lignite:<br>• For captive consumption;<br>• Setting up coal processing plants like washeries;<br>• Sale of coal. | 100% | Automatic |
| Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities. | 100% | Automatic |

Riders:

- Coal processing plants shall not sell washed or sized coal in the open market. Such coal shall be supplied to parties who are supplying raw coal for washing and sizing.
- Coal mining activities including associated processing infrastructure shall be subject to the relevant coal-specific and any other laws.
- Mining of titanium ores:
  - shall be subject to sectoral regulations and relevant mining laws;
  - value addition facilities (including manufacture of titanium dioxide pigment and titanium sponge) should be set up in India with transfer technology; [this condition shall be deemed to be fulfilled if raw materials are utilised to set up downstream industries in the country using technology available internationally]
  - disposal of tailings during mineral separation should be in accordance with the relevant atomic energy laws;
  - FDI is not permitted in the mining of "prescribed substances" listed in Notification No. S. O. 61(E) dated January 18, 2006;
  - "Associated processing infrastructure" includes coal washery, crushing, coal handling, and separation (magnetic and non-magnetic).

## Petroleum and Natural Gas

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Mining and exploration of metal and non-metal ores. | 100% | Automatic |
| Exploration activities and related infrastructure; | 100% | Automatic |
| Marketing; | 100% | Automatic |
| Pipelines for natural gas and petroleum products; | 100% | Automatic |
| Market study and formulation in the private sector; | 100% | Automatic |
| Petroleum refining by PSUs, without disinvestment in existing PSUs. | 49% | Automatic |

Riders:

- Activities in the private sector shall be subject to the existing sectoral policies and regulatory framework in the oil sector, government policy on private participation in the sector and the discovered fields of national oil companies.

# Manufacturing

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Self-manufacturing by investee entity. | 100% | Automatic |
| Contract manufacturing through legally tenable contract. | 100% | Automatic |
| Sale of products manufactured in India (wholesale/ retail), including e-commerce. | 100% | Automatic |
| Sale of food products manufactured/ produced in India (retail), including e-commerce. | 49% | Automatic |

# Defense

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Defence industry subject to the Industries (Development and Regulation) Act, 1951;<br><br>Manufacturing of small arms and ammunition subject to the Arms Act, 1959. | 100% | Up to 74%: Automatic;<br><br>>74%: Government route wherever it is likely to result in modern technology or other recorded reasons. |

Riders:

- Companies seeking new industrial licenses: automatic route up to 74%.
- Company not seeking new license or already possessing government approval: mandatory submission of a declaration with the Ministry of Defence in case of change in equity or transfer by existing investor to new foreign investor, up to 49%, within 30 days of such change. Raising FDI beyond 49% requires government approval.
- License applications to be considered by Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, in consultation with Ministry of Defence and Ministry of External Affairs.
- Foreign investment in defence shall require security clearance from Ministry of Home Affairs subject to Ministry of Defence guidelines. It shall be subject to scrutiny and government review on National Security grounds.
- Investee company should be self-sufficient in product design and development. Investee/ joint venture company and maintenance facility should have maintenance and life cycle support facility of the product being manufactured in India.

# Services Sector

## Broadcasting

### Broadcasting and Carriage Services

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Teleports. | 100% | Automatic |
| Direct to Home. | 100% | Automatic |
| Cable Networks. | 100% | Automatic |
| Mobile TV. | 100% | Automatic |
| Headend-in-the-Sky Broadcasting Service. | 100% | Automatic |
| Cable Networks. | 100% | Automatic |

Riders:

- Government approval is required in case of change in fresh foreign investment beyond 49%, or change in equity or transfer by existing investor to new foreign investor resulting in change in ownership pattern.

## Broadcasting Content Services

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Terrestrial Broadcasting FM (FM Radio). | 49% | Government |
| Up-linking of 'News and Current Affairs' TV Channels. | 49% | Government |
| Uploading/ Streaming of News & Current Affairs through Digital Media. | 26% | Government |
| Up-linking of Non-'News and Current Affairs' TV Channels/ Down-linking of TV Channels. | 100% | Government |
| News and current affairs newspapers and periodicals. | 26% | Government |
| Indian editions of foreign news and current affairs magazines. | 26% | Government |
| Scientific/ technical magazines, specialty journals/ periodicals. | 100% | Government |
| Facsimile edition of foreign newspapers. | 100% | Government |

Riders:

- 'Magazine' is a periodical, non-daily' publication containing public news or comments on it.
- Foreign investment is also subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information and Broadcasting dated December 4, 2008.
- Scientific/ technical magazines, specialty journals/ periodicals shall be subject to relevant guidelines issued by the Ministry of Information and Broadcasting.
- For facsimile edition of foreign newspapers, the owner of the original newspaper should be making the investment.
- Publishing the facsimile edition of foreign newspapers can only be undertaken by a company incorporated or registered in India; it shall be subject to the Guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile edition of foreign newspapers issued by Ministry of Information and Broadcasting dated March 31st, 2006.

# Civil Aviation

## Airports

(Applicable where there is no investment by a foreign airline).

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Greenfield projects. | 100% | Automatic |
| Existing projects. | 100% | Automatic |

## Air Transport Services

(Applicable where there is no investment by a foreign airline).

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline.<br><br>Regional Air Transport Service. | 100% | Up to 49%: Automatic;<br><br>>49%: Government route;<br><br>Up to 100% for NRIs: Automatic |
| Non-Scheduled Air Transport Services. | 100% | Automatic |
| Helicopter services/ seaplane services requiring DGCA approval. | 100% | Automatic |

Riders:

- Per Schedule XI of Aircraft Rules, 1937, an Air Operator Certificate may be granted to a company or body corporate provided that:
  - Registration and principal place of business are within India;
  - Chairman and at least two-thirds of the Directors are Indian citizens; and
  - Substantial ownership and effective control are vested in Indian nationals.

## Other Services under the Civil Aviation Sector

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Ground Handling Services. | 100% | Automatic |
| Maintenance & repair organizations, flying training institutes, technical training institutes. | 100% | Automatic |

Riders:

- Air Transport Services includes Domestic Scheduled Passenger Airlines, Non-Scheduled Air Transport Services, helicopter and seaplane services.
- Foreign airlines can participate in the equity of companies operating cargo airlines, helicopter and seaplane services.
- Foreign airlines can also invest in Indian companies operating scheduled and non-scheduled air transport services up to 49% of the Indian companies' paid-up capital, subject to the following conditions:
- Investment shall be through government approval route;
- 49% limit shall include FDI and FPI investment;
- Investments must comply with relevant SEBI regulations, and other applicable laws;
- Foreign nationals likely to be associated with such ventures shall be cleared from security view point before deployment;
- Technical equipment that might be imported for such ventures shall be cleared by the Ministry of Civil Aviation.
- Investment in M/ s Air India Limited :
- Any foreign investment (including that by a foreign airline) shall not exceed 40% except NRIs who are Indian nationals;
- Substantial ownership and effective control of M/ s Air India Limited shall continue to be vested in Indian nationals per Aircraft Rules, 1937.
- Any FDI in Civil Aviation shall be subject to Aircraft Rules, 1937.

# Construction Development: Townships, Housing, Built-Up Infrastructure

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Construction development projects. | 100% | Automatic |

Riders:

- Each phase of the development project is considered separate for FDI purposes:
  - FDI in real estate business, building farm houses and trading in transferable development rights is not permitted. This does not include real-estate brokering service, which is permitted.
  - Investor can exit on completion of the project or after development of trunk infrastructure.
  - Foreign investor can exit and repatriate foreign investment before completion of a project under automatic route, provided three-year lock-in period w. r. t each tranche of investment is complete. Repatriation of investment from one non-resident to another will not be subject to lock-in period or government approval.
  - Lock-in period does not apply to:
    - Hotels and tourist resorts;
    - Hospitals;
    - Special Economic Zones;
    - Educational Institutions;
    - Old Age Homes; and
    - Investment by NRIs.
  - Project shall conform with norms set by the State Government/ Municipal/ Local Body concerned.
  - Indian investee company can sell only developed plots, and shall be responsible for obtaining all necessary approvals.
  - State Government/ Municipal/ Local Body shall monitor compliance with aforementioned conditions by the developer. Completion of the project shall be per local bye-laws/ other regulations of the State Government.
  - Completed projects for operation and management of townships, shopping complexes and business centres are allowed 100% FDI under automatic route. Transfer of ownership of such projects from residents to non-residents is also allowed. The lock-in period for each tranche of investment and on movement of immovable property continues to apply.
  - Transfer as defined in the FDI policy includes:
    - Sale, exchange, relinquishment or compulsory acquisition of an asset under the law;
    - Extinguishment of any rights in the asset;
    - Transaction allowing the possession of immovable property in accordance with section 53A of the Transfer of Property Act, 1882;
    - Transaction by acquiring the shares of a company that has the effect of transferring immovable property.

# Industrial Parks

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Industrial Parks. | 100% | Automatic |

# Satellites

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Satellites. | 100% | Government |

Riders:

- Establishment and operation shall be subject to Department of Space/ ISRO guidelines.

# Private Security Agencies

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Private Security Agencies. | 74% | Up to 49%: Automatic;<br><br>>49% up to 74%: Government |

Riders:

- FDI shall be subject to Private Security Agencies (Regulation) (PSAR) Act, 2005.
- "Private Security Agencies, "Private Security", and "Armoured Car Service" shall have the same meaning as under the PSAR Act.

# Telecom Services

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Telecom Services (including Telecom Infrastructure Providers Category – I). | 74% | Up to 49%: Automatic;<br><br>>49% Government |

Riders:

- FDI shall be subject to licensing and security conditions by licensee and investors, notified by Department of Telecommunications.
- Exception to the above rule: "Other Service Providers", which are allowed 100% FDI through automatic route.

# Trading

## Wholesale Trading

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Cash & Carry Wholesale Trading/ Wholesale Trading (including sourcing from MSEs) | 100% | Automatic |

Riders:

- Requisite licenses/ registrations/ permits to be procured from the State Government/ Government Body/ Government Authority/ Local-Self-Government Body
- Sales shall be treated as 'cash & carry wholesale trading/ wholesale trading' with valid business customers, only if made to the following (any one condition must be fulfilled):
  - Entities holding applicable tax registration;
  - Entities holding trade licenses;
  - Entities holding permits/ licenses for undertaking retail trade;
  - Institutions registered as a society or public trust for self-consumption.
- Complete records of sales to be maintained on a daily basis;
- WT of goods among companies of the same group shall be permitted provided that such WT does not exceed 25% of the wholesale venture;
- WT can be undertaken as per normal business practice, including extending credit facilities subject to regulations;

# E-Commerce Activities

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| E-commerce activities (including sale of services). | 100% | Automatic |

Riders:

- E-commerce entities must only engage in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.
- 100% FDI through automatic route is permitted in marketplace model of e-commerce.
- FDI is not permitted in inventory-based model of e-commerce.
- Digital and electronic network includes computers, television channels and any other internet application used in an automated manner.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- E-commerce marketplace may provide support services to sellers.
- E-commerce entity proving a marketplace shall not exercise ownership or control over the inventory. Inventory shall be deemed to be controlled by the marketplace if the entity owns more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
- Entity having equity participation by e-commerce marketplace entity or its group companies, or having control over its inventory through e-commerce marketplace entity or its group companies will not be permitted to sell its products on the platform run by such entity.
- In marketplace model, goods/ services sold electronically should provide complete information about seller; seller shall be responsible for any warrantee/ guarantee of goods and services sold.
- In marketplace model, payments for sale if facilitated by the e-commerce entity should be in conformity with RBI guidelines. E-commerce entities shall not influence the sale price of goods or services. The e-commerce entity should provide its own services, including cash back, at arm's length and in a fair and non-discriminatory manner.
- E-commerce marketplace shall not mandate that any seller sell any product exclusively on its platform;
- E-commerce marketplace with FDI shall maintain a report of statutory auditor by September 30 for the preceding financial year confirming compliance with e-commerce guidelines.

## Single Brand Product Retail Trading

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Single Brand Product Retail Trading ("SBRT"). | 100% | Automatic |

Riders:

- Products to be sold should be a 'Single Brand' only and should be sold under the same brand internationally (in one or more country other than India); this applies only to products branded during manufacturing.
- A non-resident entity or entities, shall be permitted to retail 'single brand' products either through owner or a legally tenable agreement between Indian entity and brand owner.
- Proposals involving foreign investment beyond 51% shall have 30% of the value of goods purchased, sourced from India. Statutory auditors shall ultimately check this quantum of domestic sourcing. This requirement must first be met as an average of five years' total value of the goods procured. After this period, the requirement must be met on an annual basis. The products sourced from India may be sold in India or exported. The Indian brands must be owned and controlled by resident Indian citizens and/ or companies which are controlled by resident Indian citizens.
- An SRBT entity operating through brick-and-mortar stores can also undertake retail trading through e-commerce, even before opening such stores subject to the condition that the stores open within 2 years of commencing online operations.
- Sourcing norms will not be applicable up to three years from commencement of business (opening of first store or start of online retail).

## Multi-Brand Retail Trading

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Multi-Brand Retail Trading. | 100% | Government |

Riders:

- Fresh agricultural produce may be unbranded.
- Minimum amount of FDI shall be US $100 million.
- At least 50% of the total FDI in the first tranche of US $100 million shall be invested in 'back-end infrastructure' within three years.
- Of the 30% of the total value of products sourced from India, a maximum of US $ 2. 00 million shall be invested in the same (at the time of installation, without providing for depreciation).
- Self-certification shall be maintained by the company, which shall be verified by statutory auditors.

- Retail sales outlets can only be set up in cities with population > 10 lakh as per 2011 Census, and may also cover an area of 10 kms around municipal limits of such cities.
- Government shall have the first right to procurement of agricultural products.
- State Governments and Union Territories need only to be guided by this policy and are free to take their own decisions regarding implementation of said policy.
- Retail trading would not be permissible for companies with FDI engaged in multi-brand retail trading.

## Duty Free Shops

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Duty-Free Shops. | 100% | Automatic |

Riders:

- FDI in Duty Free Shops is subject to compliance with conditions under the Customs Act, 1962 and other applicable laws.
- Duty Free Shop entity shall not engage in any retail trading activity in the Domestic Tariff Area of the country.

# Railway Infrastructure

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Railway Infrastructure. | 100% | Automatic |

Riders:

- FDI in Railway Infrastructure is open to private sector participation and is subject to sectoral guidelines of Ministry of Railways.
- Proposals involving FDI beyond 49% in sensitive areas from a security point of view shall be put forth before the Cabinet Committee on Security (CCS) by the Ministry of Railways on a case by case basis.

# Financial Services

## Asset Reconstruction Companies

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Asset Reconstruction Company (ARC) shall be one registered with the RBI under the SARFESI Act, 2002. | 100% | Automatic |

Riders:

- Persons residing outside India can invest in an ARC up to 100% through the automatic route.
- The SARFESI Act controls the investment limit of a sponsor, institutional investor and non-institutional investor in the shareholding of an ARC.
- Total shareholding of an individual FPI shall be below 10% of the total paid up capital.
- FPIs can invest in the Security Receipts (SRs) issued by ARCs. They may be allowed to invest up to 100% of each tranche in SRs issued by ARCs subject to RBI guidelines.
- All investments in this sector shall be subject to provisions of the SARFESI Act.
- Whole/ cash & carry trader can undertake retail trading subject to applicable conditions. An entity undertaking both WT and retail business must maintain separate books for both arms of business.

## Banking: Private Sector

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Banking: Private Sector. | 100% | Up to 49%: Automatic;<br><br>>49% up to 74%: Government |

Riders:

- The 74% limit includes Portfolio Investment Scheme (PIS) by FPIs/ NRIs and shares acquired before September 16, 2003 and IPOs, Private Placements, GDR/ ADRs and acquisition of shares from existing shareholders.
- Aggregate foreign investment in a private bank shall be maximum of 74% of the paid-up capital of the Bank. At least 26% of the paid-up capital will have to be held by residents except in a wholly-owned subsidiary of a foreign bank. These stipulations shall also apply to existing private sector banks.

# Banking: Public Sector

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Banking – Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Acts, 1970/ 80. Also applicable to State Bank of India and its associate banks. | 20% | Automatic |

# Credit Information Companies

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Credit Information Companies ("CICs"). | 100% | Automatic; |

Riders:

- FDI in CICs is subject to Credit Information Companies (Regulation) Act, 2005, and subject to clearance from RBI.
- Such investment or FPI investment is subject to the following conditions:
- A single entity should directly or indirectly hold below 10% equity.
- Any acquisition in excess of 1% must necessarily reported to the RBI.
- FPIs investing in CICs shall not seek representation on the Board of Directors based on their shareholding.

# Infrastructure Companies in the Securities Market

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Infrastructure Companies in the Securities Market. | 49% | Automatic; |

Riders:

- Foreign investment (including that by FPIs) shall be subject to the Securities Contracts (Regulations) (Stock Exchanges and Clearing Corporations) Regulations, 2012 and SEBI (Depositories and Participants) Regulations, 1996 as well as any other relevant regulations/ guidelines.
- Any undefined terms shall take on the meaning ascribed to them in the relevant Acts.

# Insurance

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Insurance Company. | 49% | Automatic; |
| Intermediaries and Insurance Intermediaries. | 100% | Automatic |

Riders:

- A foreign investor can hold up to 49% equity shares in an Indian Insurance company. Such investment shall be allowed through the automatic route subject to approval/ verification by the Insurance Regulatory and Development Authority of India.
- FDI in this sector shall be subject to the provisions of the Insurance Act and the condition that companies receiving FDI obtain the requisite license/ approval from the IRDAI.
- Control and ownership of an Indian Insurance company shall remain in the hands of a resident Indian entities. This is not applicable to Intermediaries and Insurance Intermediaries, whose composition of BoD and KMPs shall be specified by regulators.
- Foreign portfolio investment in an Indian Insurance company shall be governed by Chapter IV, Rules 10 and 11 read with Schedule II of FEMA Rules 2019 and SEBI (Foreign Portfolio Investors) Regulations, 2019.
- Any increase in foreign investment shall be in accordance with pricing guidelines issued by RBI under FEMA regulations.
- The foreign equity investment cap of 100% shall apply to entities such as insurance brokers and others specified by IRDAI.
- For entities such as banks whose primary business is outside the insurance area, the foreign investment caps shall apply subject to the condition that their revenues remain above 50% of the total revenues in any financial year.
- Insurance intermediary with majority foreign shareholding shall undertake that it is:
  - Incorporated as a limited company;
  - The Chairman of the Board, or CEO or Principal Officer or MD is a resident Indian citizen;
  - Not making payments to the foreign investor or any connected entity beyond what is permitted by Authorities, and is making the required disclosures about such payments.

## Pension Sector

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Pension sector. | 49% | Automatic; |

Riders:

- Foreign investment in Pension Funds is controlled by Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013.
- Entities bringing foreign investment u/ s 24 of the Act shall obtain necessary registration from the PFRDA and comply with any other related regulations.
- An Indian pension fund shall ensure that its control and ownership are with a resident Indian entity as determined by the applicable laws at all times.

## Power Exchanges

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010. | 49% | Automatic; |

Riders:

- No non-resident investor/ entity shall hold more than 5% of equity; such investment shall be in accordance with SEBI Regulations.

## White Label ATM Operations

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| White Label ATM Operations. | 100% | Automatic; |

Riders:

- Any non-bank entity intending to set up WLAs must have a worth of minimum Rs. 100 crore.
- If the entity also engages in any 'Other Financial Service, ' it shall also have to comply with the minimum capitalization norms applicable therein.
- FDI in WLAO shall also be subject to guidelines laid down in RBI Circular No. DPSS. CO. PD. No. 2298/ 02. 10. 002/ 2011-2012

# Other Financial Services

| Activity | % of Equity/FDI Cap | Route |
| --- | --- | --- |
| Financial Services regulated by RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator. | 100% | Automatic; |

Riders:

- Foreign investment shall be subject to minimum capitalization norms as specified by the concerned Government Agency.
- In case of any 'Other Financial Service' not regulated by a Financial Sector Regulator, there is doubt regarding the regulatory oversight or only part of the financial services activity is regulated, foreign investment up to 100% shall be allowed under Government approval route.
- Foreign investment limits for any activity specifically regulated by the Act shall be restricted by limits laid down in the Act.
- Downstream investments by any such entities shall be subject to sectoral regulations of FEMA (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

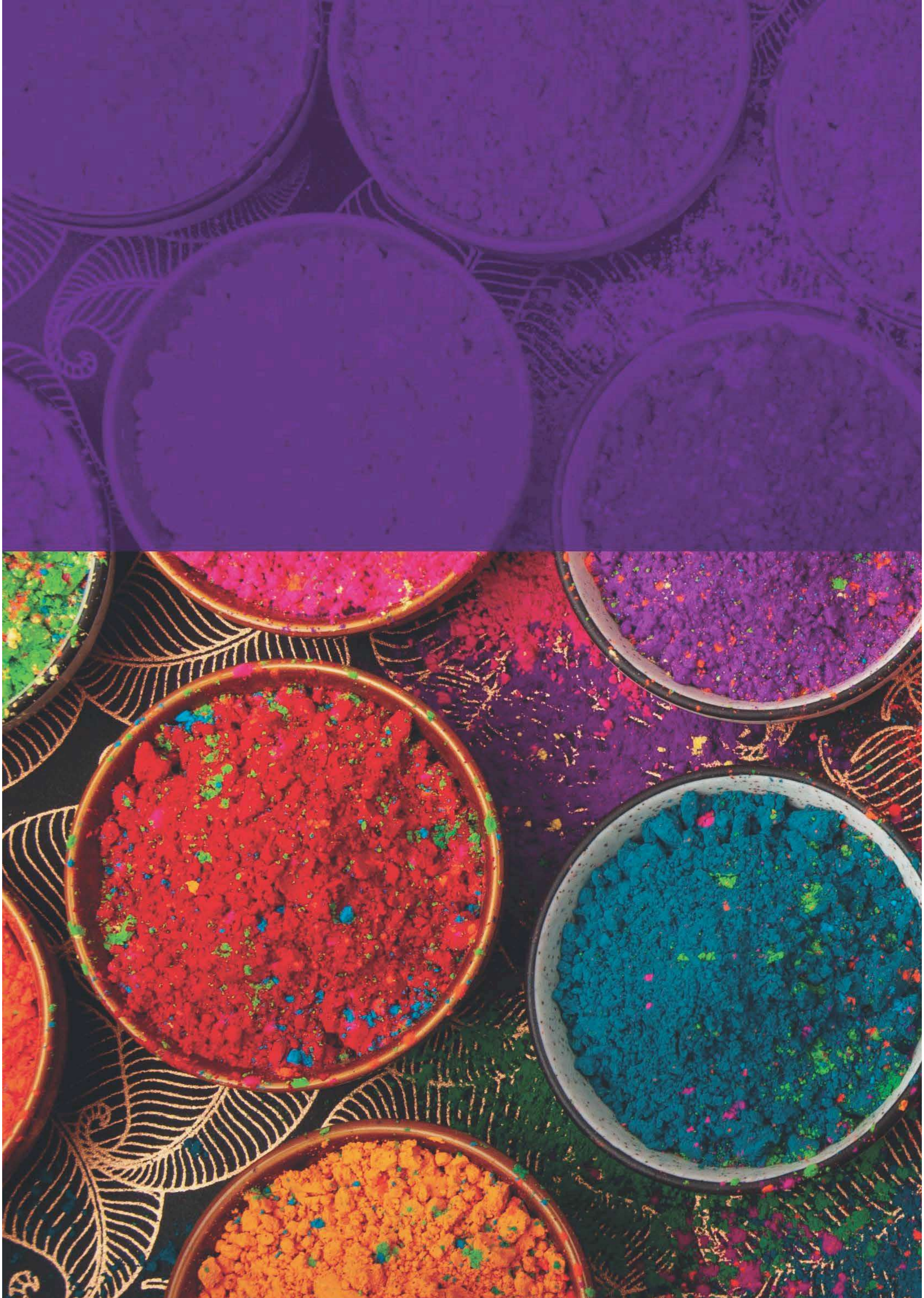
# Other Sectors

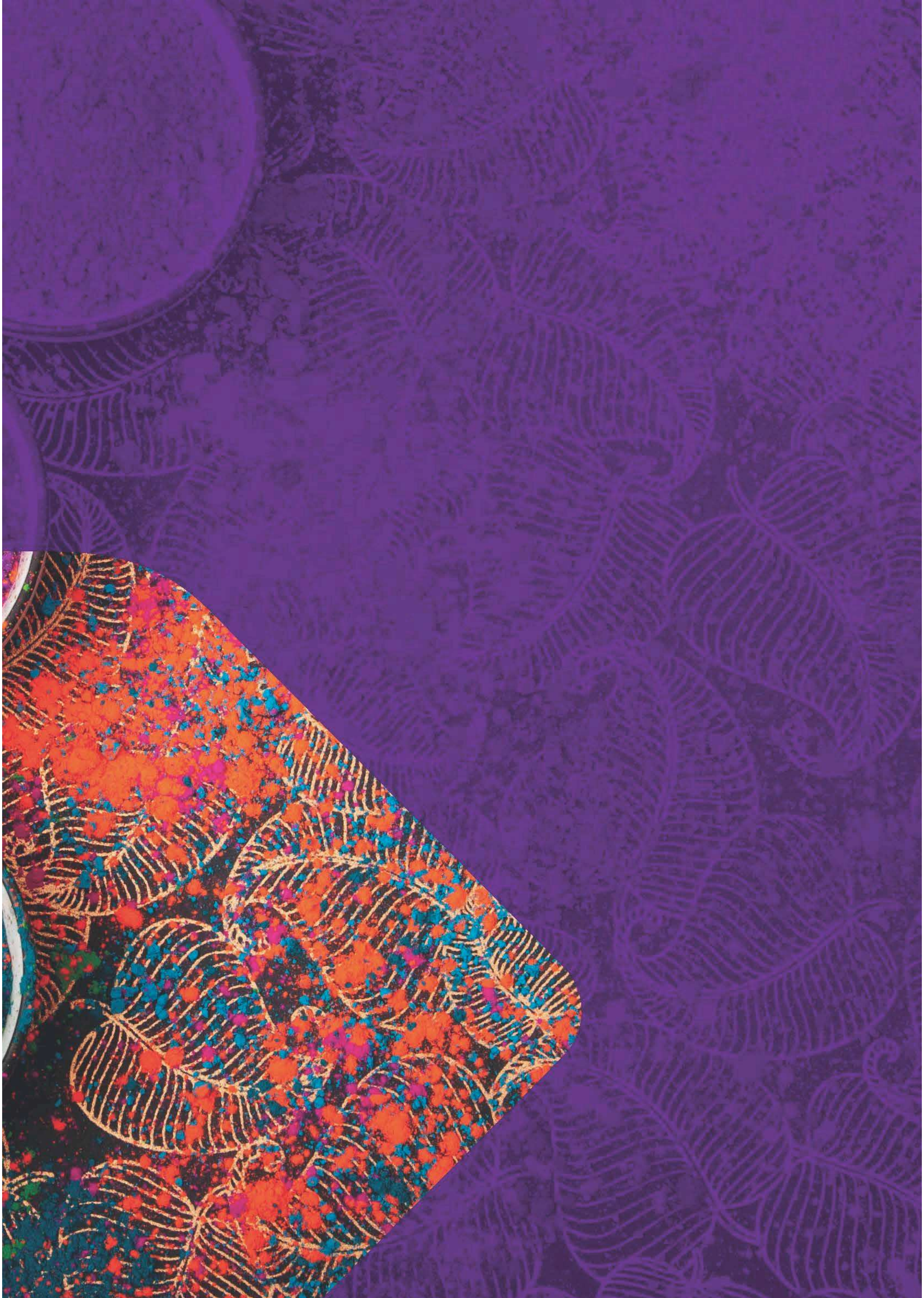
## Pharmaceuticals

| Activity | % of Equity/FDI Cap | Route |
|---|---|---|
| Greenfield. | 100% | Automatic |
| Brownfield. | 100% | Up to 74%: Automatic;<br><br>>74%: Government. |

Riders:

- Non-compete clause is not allowed in either route except with approval of the government in special circumstances.
- At the time of granting approval, Government may incorporate conditions for FDI in brownfield cases; some additional conditions for investment in brownfield pharmaceuticals:
  - Production level of National List of Essential Medicines (NLEM) drugs for the domestic market should be maintained over the next five years at an absolute quantitative level. Benchmark for the same is the highest among the levels of production over the last three financial years.
  - R&D expenses must be maintained in value terms for 5 years at an absolute quantitative level. Benchmark for the same is the highest among the levels of expenses over the last three financial years.
  - All information about transfer of technology should be provided to the administrative Ministry, who shall monitor the compliances of conditionalities.
- FDI up to 100% under the automatic route is permitted for the manufacturing of medical devices; hence, the aforementioned conditions shall not apply to such projects.





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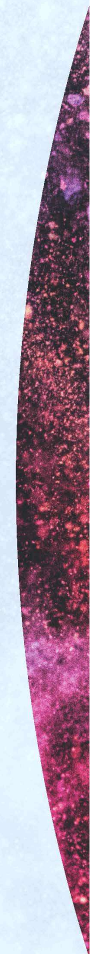

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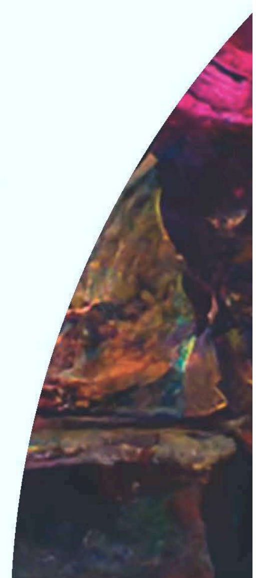

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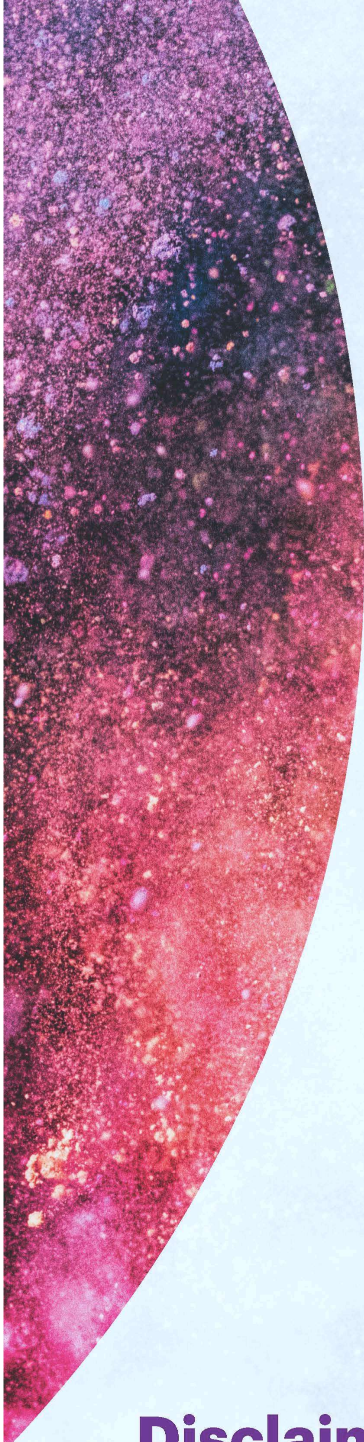

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