



What U.S. Lawyers Need To Know About Doing Business In India



M&A in India: Key Statistics

- Between April 2024 to March 2025, foreign direct investment (FDI) into India was US\$78.77 billion.
- Maharashtra, Karnataka and Gujarat are the top 3 states attracting FDI in India.
- Services, computer software and hardware, and trading sectors continue to attract the highest FDI.
- The United States is the top investing country after Mauritius and Singapore, which are used as intermediary jurisdictions.
- Deal activity (public and private) remains strong.

Cultural Issues

- Indian business structures and nuances
 - Most businesses are traditional, family-run businesses.
 - Hierarchically arranged business structures. Decision-making is at the top level.
 - Meetings are more informal.
 - Timelines are treated as indicative and may not always be met.
 - Communication issues - tendency to say “yes” to be polite.
 - Compliance levels, especially corporate and employment records, can be inadequate.

Cultural Issues

- Buy-outs
 - Offer higher premiums.
 - Offer key employment positions to the individual JV partners post buy-out.
 - Increasing in India due to lack of skilled successors or lack of interest of successors.
- Exits
 - Expect bargains/ hair-cut on the rate of return.
 - Preferably sell stake to a non-resident (no FEMA valuation requirements and lesser regulatory implications).

Entry into India - Entity Types

- Liaison/Representative office
 - Place of business to act as a channel of communications, represent the parent company in India and promote technical/financial collaborations.
 - Cannot undertake commercial, trading or industrial activities and cannot generate income. Must maintain itself out of inward remittances received from outside India.
 - Requires prior approval of the Reserve Bank of India (RBI). Power to approve has been delegated to authorized dealer banks.

Entry into India - Entity Types

- Branch office
 - Place of business to carry out research and render professional/consultancy/IT services.
 - Cannot conduct manufacturing business. Restrictions on acquisition of immovable property.
 - Requires prior approval of the RBI. Power to approve has been delegated to authorized dealer banks.
- Project office
 - For a specified duration and to complete a specific project in India. Restrictions on modes of funding of the project.
 - No approval required if established by a non-resident company and if: (i) contract is secured from an Indian company to execute a project in India; (ii) project has secured necessary regulatory clearances; and (iii) project is funded through permitted channels.

Entry into India - Entity Types

- Private limited company
 - Liability can be limited by shares or guarantee.
 - Separate legal entity having perpetual succession.
- Limited liability partnerships
 - Hybrid entity. Members have limited liability akin to a company but enjoy freedom to mutually agree to terms of existence akin to a partnership.
 - Separate legal entity having perpetual succession.

Foreign Investment - Regulated Sectors

- Key sectors in which FDI is prohibited: Lottery business; gambling and betting; real estate business; manufacturing of cigars, cheroots, cigarillos and cigarettes; atomic energy; and railway transport.
- Key sectors in which FDI is subject to sectoral caps or other conditions
 - Defence Industry - Up to 74% under the automatic route; above 74% under the government route if it is likely to result in access to modern or state of the art technology.
 - Pharmaceuticals - Up to 100% for greenfield and 74% for brownfield under the automatic route; above 74% for brownfield under the government route.
 - Multi-brand retail trading - Up to 51% under the government route.

Foreign Investment - Regulated Sectors

- Single-brand retail trading - Up to 100% under the automatic route.
- Insurance - Up to 74% for insurance companies under the automatic route; up to 100% for insurance intermediaries under the automatic route.
- Space - Up to 100% for manufacturing of components and systems/sub-systems under the automatic route; Up to 74% for manufacturing and operation of satellites, satellite data products, ground segment and user segment under the automatic route, and beyond 74% under the government route; up to 49% for launch vehicles and spaceports under the automatic route, and beyond 49% under the government route.

Foreign Investment - Other Conditions

- Up to 100% FDI is permitted under the automatic route in sectors not specifically listed.
- Investments need to comply with fair market value requirements - Any internationally accepted pricing methodology will work. Reporting requirements must also be complied with.
- Shares can be issued by an Indian company to non-residents against a lump sum technical know-how fee, royalty due for payment, other funds payable by the investee company (remittance of which does not require prior approval), import of capital goods/machinery/equipment (excluding second-hand machinery), pre-incorporation expenses, existing external commercial borrowings and shares of the investor.
- Issue of shares for non-cash consideration must be by way of preferential allotment and be authorized by the articles of association of the investee company. Entry routes, sectoral caps, pricing guidelines and other prescribed conditions must be complied with. Valuation reports are required for the shares and for the non-cash consideration.

Foreign Investment - Other Conditions

- 18/25 Rule on Deferred Consideration and Indemnity
 - Effective May 20, 2016, caps have been imposed on deferred consideration and indemnity pay outs in a cross-border share sale transaction.
 - Approval of the Reserve Bank of India is needed if: (i) consideration amount deferred or escrowed exceeds 25% or a period of 18 months from the date of the transfer agreement; or (ii) Seller's indemnity exceeds 25% of the total consideration or a period of 18 months from the date of payment of the full consideration.
- Press Note 3 of 2020
 - Introduced in April 2020, Press note 3 mandates foreign investors from a country which shares a land border with India to take prior approval of the Indian government for FDI into India. Aimed at regulating investments from China and may also cover investments from entities based in Hong Kong and Taiwan.

Foreign Investment - Other Conditions

- Unlike the CFIUS in the United States or the measures adopted by the European Union and the United Kingdom, Press note 3 is sector agnostic.
- *De minimis* threshold for beneficial ownership of, or indirect investment by, an entity or a citizen of a border sharing country has not been prescribed.
- Approval has been granted to around 25% of the applications made under Press Note 3. Approval timelines can vary from case to case but are typically between 3 to 6 months.

Deal Structures

	Asset Purchase	Slump Sale	Share Purchase
Mode	Itemized purchase of assets for an agreed price	Transfer of undertaking for a lump sum consideration	Purchase of equity shares by an agreement
Stamp Duty	Depends on value and location of transferred assets	Depends on location of business and value attributed to each asset in the business	0.015% of the purchase price of the shares
GST	Applicable	Not Applicable	Not Applicable
Successor Liability	Can be ring-fenced	Can be ring-fenced	Cannot be ring-fenced
Capital Gains Tax	Depends on the nature and location of the transferred assets, holding period and cost of acquisition	Special provision for computation of capital gains tax under Section 50B of the Income-tax Act, 1961	Depends on the holding period. Non-residents can explore beneficial provisions under the relevant DTAA.

Key Contractual Considerations

- Restrictive Covenants: Enforceable during the term of the contract. Clauses on non-solicitation of clients/customers and non-compete clauses may not be enforceable post-termination, but clauses on non-solicitation of employees are generally enforceable even after termination.
- Damages: Actual damages are awarded, but consequential damages are not awarded unless brought to the knowledge of the party beforehand. Liquidated damages are also awarded. Liability can be limited except in the case of a fundamental breach of a contract.
- Data privacy: Consent based regime. Focus is to protect individual's sensitive personal data or information exchanged in electronic form. New data protection law was recently enacted. Detailed rules outlining the compliance requirements are awaited.
- Enforcement: Foreign arbitral awards are more easily enforceable than foreign judgments. Need to assess whether interim reliefs should be obtained from a competent court in India pending arbitration proceedings.

Key Tax Considerations

- Manufacturing companies incorporated after October 1, 2019 are taxed at 15%. Existing manufacturing companies are now taxed at 22%. Claiming exemptions is not permitted.
- The applicable tax rate for limited liability partnerships is 31.20% which may increase to 33.38% or 34.94% after including the surcharge.
- Tax Treaty Pointers: Changes in India's tax treaties with Mauritius and Singapore. Investments made after April 1, 2019 are subject to the normal rate of tax. Alternative tax structuring jurisdictions include The Netherlands for equity investments and Mauritius for debt/interest income.
- Indirect Transfers: Tax may be attracted at an India level if on the specified date: (i) the value of assets located in India exceeds INR100 million (approx. US\$1.2 million); and (ii) represents at least 50% of the value of all assets owned by the entity whose shares are being transferred.

Key Employment Considerations

- At-will termination of employment does not exist in India.
- Categories of employees: Workmen; non-workmen; consultants; and contract labourers.
- Mandatory requirements on leave, holidays, facilities to be provided by employer, maternity benefits, policy of prevention of sexual harassment.
- Contracts are extremely important in the case of employees engaged in managerial and supervisory roles as India's employment laws usually do not provide for mandatory and statutory benefits/ pay-outs for such employees.
- Specific deeds of assignment are critical as future assignment of unidentified works for hire are not recognized.

Anti-Bribery Compliance - Comparative Analysis

Foreign Corrupt Practices Act, 1977	Prevention of Corruption Act, 1988
<u>Jurisdiction</u> : Extra-territorial reach.	<u>Jurisdiction</u> : Limited extra-territorial reach.
Covers bribes given to government officials.	Covers bribes given to public servants.
Due diligence and compliance programs to prevent violations.	N/A
<u>Penalty</u> : Corporations and business entities, fine of up to US\$25 million. Individuals are subject to a fine of up to US\$5 million and/or imprisonment for up to 20 years.	<u>Penalty</u> : Imprisonment up to 7 years and may also be liable to a fine.

Thank You

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