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India

Acquisition Finance

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

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India: Acquisition Finance

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

Despite uncertainties in the global economic environment, acquisition financing in India has shown resilience on account of India's domestic economic growth, evolving investor sentiment and ongoing regulatory and structural reforms.

The COVID-19 pandemic created a slowdown in the mergers and acquisitions market in India, causing a drop in acquisition financing. However, as India's economy began to recover, there was a surge in private equity investments in India, especially in sectors like telecommunications, technology, healthcare and pharma, retail and consumer products and renewable energy with venture debt also gaining traction, particularly for acquisitions in the startup and tech sectors, resulting in an increase in acquisition financing as well.

Sanctions against specific countries or entities has restricted access to international capital markets, affecting acquisition financing for companies in India involved in acquisitions linked to these jurisdictions. For example, sanctions on Russia (especially following the invasion of Ukraine) have disrupted financing for Indian companies dealing with Russian companies or assets.

Environmental, social and governance (ESG) considerations are an important part of acquisition financing, particularly as global investors push for sustainable and responsible investing. Indian companies are under increasing pressure to align acquisitions with ESG principles to attract both domestic and international capital. Green financing, such as green bonds and sustainability-linked loans, is becoming more prominent, especially in sectors like renewable energy and clean tech. This has influenced how acquirers structure deals and finance acquisitions, with due diligence increasingly including ESG assessments. Borrowers that fail to meet ESG criteria may face higher borrowing costs or limited access to capital.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

Higher withholding tax

The removal of the beneficial withholding tax regime on interest payments to foreign lenders has implications for cross-border deals, with foreign lenders demanding higher returns to compensate for the additional tax costs.

ESG compliance

The Securities and Exchange Board of India (SEBI) has introduced new ESG disclosure requirements for listed companies, including reporting on climate-related risks, carbon emissions, and social governance issues. The Reserve Bank of India (RBI) has also introduced a draft disclosure framework, urging banks and financial institutions to integrate ESG criteria into their lending decisions. This has had an impact on the acquisition financing market in India, with lenders offering preferential terms if the acquired company meets certain ESG standards.

Fraud risk management

The RBI has introduced revised directions on fraud risk management, which requires lenders to be more diligent in assessing the financial health and creditworthiness of companies before financing acquisitions.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

Where the acquisition of an Indian company is by another Indian company, Indian banks are not generally permitted to finance such acquisitions. Hence, financing for a domestic acquisition by an Indian company is provided by non-banking financial companies (NBFCs), foreign portfolio investors (FPIs) or alternative investment funds (AIFs). It is possible to secure such financing by security over assets of the target (unless the target is a public company) as well as shares of the target.

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Where the acquisition of an Indian company is by a foreign owned or controlled company (FOCC) incorporated in India, financing cannot be provided by Indian lenders. FOCCs may raise finance in the form of 'External Commercial Borrowings' (ECBs) for business acquisitions but ECBs cannot be used for equity investments in India. Therefore, the main source of acquisition financing for FOCCs is from FPIs subscribing to non-convertible debentures (NCDs). Such NCDs can be secured by security over assets of the target (unless the target is a public company) as well as shares of the target.

In the case of an offshore acquirer, Indian lenders cannot finance such acquisition and therefore, the international banks and foreign financial institutions / funds are involved. Typically, the offshore acquirer sets up a special-purpose vehicle outside India (FDI SPV) which avails financing to acquires shares of the Indian target through foreign direct investment (FDI) into India. However, such financing cannot be secured by a pledge on shares of the target, charge on assets of the target or guarantees from the target due to restrictions under Indian exchange control regulations. Accordingly, such loans are typically secured by the assets and shares of the FDI SPV, often coupled with a non-disposal undertaking in relation to the target shares held by the FDI SPV.

Where an Indian acquirer is acquiring an offshore target, such Indian acquirer can borrow domestically from banks, financial institutions and other lenders, subject to compliance with prescribed conditions. Further, ECBs can also be raised by the Indian company from recognized overseas lenders for the acquisition of an offshore target in compliance with the Indian regulatory framework governing ECBs. Creating security and providing guarantees are also permitted, subject to certain conditions, particularly where acquisition financing is raised by way of ECBs.

4. In your jurisdiction, due to current market conditions, are there any emerging documentary features or practices or existing documentary provisions/features which borrowers or lenders are adjusting or innovating their interpretation of, or documentary approach to?

No.

5. Has there been a prevalence of "equity bidding" in acquisition financing (i.e., signing the acquisition agreement prior to securing financing) with the expectation of securing financing shortly thereafter? If in the US, would Xerox language be included in the acquisition agreement?

While there has been a prevalence of "equity bidding" in acquisition financing in India, the primary concern of lenders in an acquisition financing is to ensure certainty of the acquisition. Therefore, acquirers look to align the financing and negotiate the terms of the financing to the fullest extent possible prior to signing an acquisition agreement to ensure there is minimal gap between the financing and the acquisition. Selling shareholders would typically also expect to see financing commitments of the acquirers being in place on or prior to the date of acquisition.

6. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

Banks and non-banks must comply with the following requirements to be authorised to provide financing to Indian entities:

Banks

Banks in India must obtain a licence issued by the RBI under the Banking Regulation Act, 1949 (BR Act) and comply with applicable guidelines issued by the RBI.

Foreign entities seeking to carry out banking activities in India via wholly-owned subsidiary (WOS) must satisfy the RBI that the banking activities would be carried out in the public's interest, that the government or law of the country in which the foreign bank would be incorporated would not discriminate against banking companies from India, and that the banking company would comply with the applicable provisions of the BR Act. Foreign banks may also open branches in India subject to such branches obtaining a licence and having the prescribed amount of capital in India.

NBFCs

NBFCs in India must obtain a certificate of registration issued by the RBI under the Reserve Bank of India Act, 1934 and meet the prescribed minimum net owned fund requirements.

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AIFs

AIFs must obtain a certificate of registration from the SEBI in accordance with SEBI (Alternative Investment Funds) Regulations, 2012.

FPIs

In order to extend debt by subscribing to listed or unlisted NCDs issued by Indian companies as an FPI, an applicant must obtain a certificate from the SEBI, in the manner specified in the SEBI (Foreign Portfolio Investors) Regulations, 2019 (FPI Regulations).

Foreign Lenders

Other foreign lenders can make loans to an Indian company under the ECB regime. ECB can only be extended by "recognised lenders", i.e., residents of an FATF or IOSCO-compliant country, multilateral and financial institutions in regions where India is a member country and individuals who are foreign equity holders of a company. In addition, foreign branches or subsidiaries of Indian banks are permitted as recognised lenders only of foreign currency ECBs (except foreign-currency convertible bonds and foreign-currency exchangeable bonds) Such eligible foreign lenders providing ECBs to an Indian borrower are not subject to any local licensing or registration requirements.

7. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

India is an exchange-controlled economy and the advancement of loan proceeds into India and the repayment of principal, interest or fees from, in a foreign currency are strictly governed by the framework under the Foreign Exchange Management Act, 1999 (FEMA) and regulations issued by the RBI.

The ECB framework allows foreign lenders to extend foreign currency-denominated loans provided that they comply with the all-in cost ceiling and other prescribed conditions on end-use, minimum average maturity and security creation.

8. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

Foreign investment into Indian entities is governed by the Foreign Direct Investment (FDI) policy. The FDI policy permits such investments through two routes: the automatic route and the approval route. Sectors under the automatic route can attract foreign investment without government approval, whereas sectors under the approval route require prior government approval. Foreign investment is entirely prohibited in certain sectors, such as gambling, lotteries and tobacco production.

Foreign investments in India largely have to comply with sectoral caps, conditions prescribed for investing in a given sector (such as minimum capitalisation), pricing guidelines and reporting conditions.

The FDI policy was revised in 2020, making it mandatory to seek government approval for any direct or indirect investments where the investor or beneficial owner of such investment is based in a country that shares a land border with India.

Proceeds raised by Indian companies through issuance of NCDs to FPIs have end-use restrictions (namely, investment in real estate businesses, capital markets and purchases of land) if the NCDs are not listed on a recognised stock exchange in India.

ECB proceeds cannot be used for real estate activities; equity investment; investment in capital markets; and on-lending to entities for the above activities.

9. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

Refer to our response at #3 above.

10. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

Yes, Indian law permits a floating charge over all present and future movable assets of a company. In the event of default, this floating charge may crystallise into a fixed charge.

11. Do security documents have to (by law)

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include a cap on liabilities? If so, how is this usually calculated/agreed?

No.

12. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

Registration with the registrar of companies (ROC) for all asset classes

All charges created by an Indian company must be registered with the ROC within 30 days of its creation, in compliance with the Companies Act, 2013 (CA 2013). An unregistered charge will not be taken into account by the liquidator appointed under the CA 2013 or the Insolvency and Bankruptcy Code (IBC) or by any other creditor.

Registration with sub-registrar for mortgages

Certain types of mortgages are required to be compulsorily registered with the jurisdictional sub-registrar within prescribed timelines. A compulsorily registrable mortgage document which is not registered is ineffective and invalid and cannot be received as evidence of a transaction affecting a property.

Registration with the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) for charge over immovable, movable, intangible properties and assignment of receivables:

In order to gain the benefit of enforcement under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), lenders are required to file details of charges on the CERSAI portal.

Registration with the Information Utility

While not mandatory, it is advisable for lenders to register themselves with the Information Utility established under the IBC. A record of default obtained from the Information Utility can be used to evidence financial debt under the IBC for the purposes of initiating a CIRP.

Filing of forms with the depository participant for pledge over dematerialised shares

For the creation of a pledge over dematerialised shares, the pledge is required to be marked in the depository system with the depository participant by filing of requisite forms prescribed by Indian depositories.

13. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

Companies Act, 2013

A company in India may provide downstream, upstream or cross-stream guarantees in connection with financing availed by companies in India, subject to the following conditions:-

- The company's constitutional documents should permit the same.
- The Company must obtain the consent of its directors.
- In the event that such guarantee is to be provided by a company in connection with a loan taken by a "person in whom any director of the company is interested", such company shall comply with the following additional conditions:-

(i) Special resolution shall be passed by the shareholders;

(ii) The loan shall be utilised by the borrower for its principal business activities

However, the above conditions do not apply if the guarantee is being provided by (a) a holding company in respect of: (i) loans to its WOS; (ii) loan to subsidiaries from a bank or financial institution; and (b) a company in its ordinary course of business for repayment of any loan, provided that the interest charged on such loans is not less than the prevailing rate for government securities with a tenor closest to the tenor of the loan.

- A company is not permitted to provide a guarantee exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more, without obtaining the consent of its shareholders.

However, the above conditions do not apply if the guarantee is being provided by (a) a holding company for a loan to its WOS; or (b) banking companies, insurance companies, housing finance companies in the ordinary course of business; (c) a company engaged in the business of financing of companies or of providing

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infrastructural facilities.

FEMA

- An upstream guarantee by an Indian company for financing availed by an offshore parent/holding company is not expressly permitted under FEMA and hence, requires prior RBI approval.
- A downstream guarantee by an Indian company for financing availed by an offshore subsidiary or step-down subsidiary is permitted subject to compliance with prescribed conditions under the framework in relation to overseas investment issued by the RBI (OI Guidelines)

14. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

- Please refer to our responses at 3 and 9 above and 15 below.
- For corporate guarantees, a goods and services (GST) tax at the rate of 1% of the guarantee amount (if no fee is charged) or on the actual fee (when one exists) is payable.
- Any entity which is an assessee under the (Indian) Tax Act, 1961 or is required to obtain registration under central or state GST laws is required to obtain the prior consent of the relevant assessing officer/authority prior to creating a charge on any of its assets if there are any outstanding tax demands or proceedings.

15. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

- Under the CA 2013, a public company in India is prohibited from providing any financial assistance by way of loans, guarantees, security or other means for the purchase of its own shares or those of its holding company. This prohibition does not apply to a private company.
- Please refer to our responses at 13 above; the same conditions apply to providing security as well.
- The FEMA also restricts Indian targets from granting security, guarantees or financial assistance for the acquisition of their own shares by offshore investors for loans received from foreign lenders.

16. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

The CA 2013 includes limited exemptions to the prohibition on financial assistance by a public company for the purchase of its own shares or those of its holding company.

17. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt be clearly identifiable and/or segregated (e.g. by tranching)?

Yes, this is possible with clearly identified tranches and/or segregation of the debt.

18. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

The concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement is recognised in India.

19. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or

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assets is a foreign entity)?

No.

20. Please provide the main differences and considerations between bank loan financing and high yield bond/note financing for acquisition purposes in your jurisdiction, and how do they affect the structuring and documentation of the transaction?

As mentioned in our response at #3 above, the utilisation of bank loan financing for acquisition purposes in India is restricted. Loans from / bonds issued to non-bank lenders are the main sources of acquisition financing.

21. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

In accordance with the RBI's Master Direction – Reserve Bank of India (Transfer of Loan Exposures) Directions (TLE Directions) and subject to contractual restrictions, loans granted by Indian banks and NBFCs can be transferred, in full or in part, with or without the underlying security. Loans can be transferred in writing by way of novation or assignment, or loan participation.

Under Indian law, transfer of ECB exposures along with the underlying security is also permitted, subject to the transfer being to "recognised lenders" and obtaining the consent of the AD Bank. The TLE Directions do not apply to foreign lenders and, therefore, will not apply to the transfer of ECBs.

FPIs can transfer NCDs held by them to other FPIs as well as to Indian purchasers. In the event that the FPI has invested in NCDs under the Voluntary Redemption Route (VRR) and the NCDs are being sold to Indian purchasers, the amounts received by the FPI that correspond to 75% of the limits allocated under the VRR must remain in India.

22. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

The priority of claims may be contractually agreed among creditors and the underlying security document should provide the ranking of the claim. The terms of such security documents which prescribe ranking of claims may be enforced as a contractual arrangement.

Under the IBC, during the corporate insolvency resolution process (CIRP), the committee of creditors (COC) may take into account the priority and value of the security interest of a secured creditor. The priority of claims is left to the COC's commercial wisdom.

In case of liquidation, the IBC prescribes a pre-defined waterfall which dictates the distribution of assets of the corporate debtor. Under this waterfall, while the secured creditors are given priority (subordinate only to insolvency resolution process/liquidation costs and senior to all unsecured creditors), it does not discriminate among secured creditors. Further, the liquidator is required to disregard any contractual arrangements between creditors who are otherwise ranked equally under the waterfall, if such contractual arrangement disrupts the order of priority set out under the waterfall.

23. Is there a concept of "equitable subordination" in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

No, shareholder loans are not automatically subordinated in India. However, if such loans are from a 'related party, as defined under the IBC, then such 'related party', do not have representation, participation or voting rights in the COC constituted upon admission of an insolvency application in respect of the company by the jurisdictional National Company Law Tribunal (NCLT) under the IBC. It is common to require shareholders / related parties to execute contractual arrangements subordinating such loans.

24. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Choice of Foreign Law

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A contract between an Indian and non-India is permitted to be governed by foreign law, provided that such selection is not made to circumvent the provisions of Indian law. The transaction would still need to comply with certain provisions of Indian law, such as foreign-exchange control regulations and the CA2013.

Submission to Foreign Jurisdiction

Parties may submit to a foreign jurisdiction and the foreign court's judgement may be enforced in India. However, an Indian court may reject the enforcement of the foreign judgement if:

- it was not issued by the court of a competent jurisdiction;
- it was not issued on the merits of the case;
- it appears to have been founded on an incorrect view of international law or a refusal to recognise the laws of India in cases where the latter is applicable;
- the processes whereby it was obtained are opposed to natural justice;
- the judgement was obtained by fraudulent means; or
- it upholds a claim founded on a breach of any Indian law.

Waiver of Immunity

Immunity on the grounds of sovereignty or other similar grounds is often contractually waived. Such waivers are enforceable only if the relevant statute permits contractual waivers.

Enforcement of Foreign Judgments

A judgment by a superior foreign court in a territory recognised as "reciprocating territory" is capable of being enforced in India, as if rendered by a relevant Indian court. However, a foreign decree for anything other than payment of money (not being a penalty or fine) is not enforceable as a decree in India. A fresh suit will need to be filed in India where such foreign decree will be considered as factual evidence. To enforce a judgment pronounced by courts of territories not notified as reciprocating territories, a suit can be filed in Indian courts based on the foreign decree or on the original underlying cause of action.

25. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

Mortgage

Enforcement of mortgages must be decided by the civil court having ordinary original jurisdiction. Pursuant to an English mortgage, the mortgagor can attempt to sell the mortgaged property without court intervention if this has been contractually provided under the mortgage deed. SARFAESI allows secured lenders to enforce a mortgage without court intervention.

Hypothecation

SARFAESI allows secured lenders to enforce a hypothecation without court intervention. However, in practice, this may be difficult, given that possession of the hypothecated property remains with the security provider.

Pledge

Pledgee may enforce the pledge by selling the pledged shares after giving "reasonable notice", although what constitutes this would depend on the facts of each case. A pledge enforcement may be challenged based on the sale price. This can be mitigated by obtain a valuation report from a reputable valuer.

Guarantee

The liability of the principal debtor and the guarantor is co-extensive. Accordingly, the creditor can initiate enforcement directly against the guarantor without any recourse to the principal debtor. Guarantee can be enforced by way of a suit in the court having jurisdiction or where the instrument provides for arbitration, by instituting arbitration proceedings.

26. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

IBC

The IBC provides for the following procedures:-

- Corporate Insolvency Resolution Process: A resolution professional (RP) is appointed by the National Company Law Tribunal (NCLT), for the management of the borrower. The RP, in consultation with the COC, invites market participants to submit resolution plans for the purposes of restructuring and revival of the borrower. A resolution plan can propose various measures including, but not limited to, a change in capital structure by way of merger/amalgamation/demerger, debt restructuring, one-time settlement and transfer or sale of assets.
- Liquidation: A liquidator is appointed by the NCLT for

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the purpose of selling the assets of the company by way of a public auction or private sale.

CA 2013

The CA 2013 provides for the following procedures:-

- Voluntary Schemes of Arrangement and Compromise: A reorganisation/restructuring can be carried out through a contractual arrangement between the company, its shareholders and its creditors. The scheme must be approved by 75% of the creditors and shareholders, following which it can be sanctioned by the NCLT
- Voluntary or Compulsory Winding up: Voluntary winding up can be initiated by passing a resolution in the general meeting of a company and compulsory winding up can be initiated by filing a petition in the court, usually by a creditor, the company itself, or the ROC.

Stressed Assets Framework

The Prudential Framework for Resolution of Stressed Assets by the RBI applies to financial restructuring of distressed debtors. The framework envisages determination of a resolution strategy and the implementation of a resolution plan which may involve sale of exposure, change in ownership or restructuring and provide for treatment of creditors with differential security interest and a liquidation value to be paid to dissenting creditors.

27. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

IBC imposes a moratorium upon commencement of the CIRP. During this moratorium, the lender loses the ability to enforce its own security outside of the CIRP under IBC and is required by law to be a part of the CIRP.

28. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

Under the CIRP, the priority of claims is left to the commercial wisdom of the COC. In case of liquidation, the IBC sets out a predefined waterfall, per which only payment of insolvency resolution process/liquidation costs take priority to secured creditors.

29. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

IBC

The NCLT can set aside the following transactions:

i. Preferential transactions: Transactions not in the ordinary course of business that put any person in a better position than they would have been in the distribution waterfall, where entered into within 2 years (if involving related parties) or 1 year (if involving non-related parties) preceding the CIRP commencement date
ii. Undervalued transactions: Transactions not in the ordinary course of business where the company has gifted/transferred property at a value that is significantly less than the consideration paid by the company, where entered into within 2 years (if involving related parties) or 1 year (if involving non-related parties) preceding the CIRP commencement date.
iii. Extortionate credit transactions: Transactions where credit has been extended on extortionate terms, where entered into within 2 years preceding the CIRP commencement date.
iv. Transactions defrauding creditors: Transactions where the company deliberately enters into undervalued transactions to keep the assets beyond the reach of creditors or to adversely affect their interests.

CA 2013

The court can set aside the following transactions:

i. Fraudulent preference: Transactions between the company and a creditor in preference to other creditors within 6 months prior to the filing of a winding-up petition.
ii. Voluntary transfer: Transfer of property not in the ordinary course of business, in good faith or for real and valuable consideration, where transferred within 1 year prior to the filing of a winding-up petition.
iii. Floating charge: Floating charge on the undertaking or property of a company created within 12 months before commencement of winding up unless the company was solvent immediately after creation of the charge.

30. Are there any other notable risks or concerns for secured lenders in enforcing their rights under

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a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

See our response at #27 above. Additionally, in the event of the liquidation of a company, lenders could face substantial financial losses.

31. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

Stamp Duty

All financing documents are subject to the payment of stamp duty, which differs based on the Indian state where such financing document is executed. Additionally, if the financing is by way of bonds, stamp duty is also payable on the bonds under the Indian stamp law.

Documents executed outside India are not required to be stamped. However, if such document is subsequently brought into India, stamp duty will be payable depending on the state in which the document is received. Additionally, if a document is stamped in one Indian state and the original or a copy (including electronic copies) is brought into another in which stamp duty is higher, the differential stamp duty is payable.

Withholding Tax

Subject to tax treaties, interest (but not principal) payable to a foreign lender by any Indian borrower is subject to tax at the hands of the foreign lender. The Indian borrower is under a legal obligation to withhold tax as per applicable rates while making interest payments and filing necessary withholding tax returns with the Indian income tax authority. The current applicable rate of withholding tax on interest is 20%, subject to any tax treaty benefits with the country of residence of the foreign lender.

32. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

Refer to our response at #31 above.

33. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

The main regulatory framework for acquisition of public companies in India is the SEBI (Substantial Acquisitions and Takeovers) Regulations, 2011 (Takeover Code). Other legislation that are relevant to public takeovers in India include:

i. CA 2013;
ii. Indian Contract Act, 1872;
iii. Income Tax Act, 1961; and
iv. Competition Act, 2002.

34. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

An indicative timetable under the Takeover Code would be as follows:-

Action	Timeline (days are working days)
The acquirer shall appoint a merchant banker prior to making of the public announcement	Prior to T
Public announcement by the acquirer for acquiring shares of the target company on the date of agreeing to acquire shares or voting rights in, or control over the target or within such other timelines specified under the Takeover Code. A copy of the public announcement shall be shared with the SEBI, the stock exchange and the target.	T
Last date by which the acquirer shall open the escrow account and deposit the consideration payable in the same.	T+3
Latest date by which the acquirer shall publish a detailed public statement in the newspapers. A copy of the same shall be shared with the SEBI, the stock exchange and the target	T+5
Last date by which the acquirer shall file a draft letter of offer with the SEBI. The acquirer shall also send a copy of the draft offer of letter to the stock exchange and the target.	T+10
Last date by which the SEBI can provide its comments to the draft letter of offer	T+25
Latest date by when the letter of offer shall be dispatched to the shareholders of the target.	T+32
Last date by when advertisement announcing the schedule of activities for the open offer shall be made.	T+36
Last date by which the tendering period (i.e., period within which the shareholders may tender their shares in acceptance of the open offer) shall start	T+37
Last date by when the tendering period will close and the acquirer is required to complete all requirements under the Takeover Code, including payment of consideration to the shareholders who have accepted the open offer.	T+47
Last date by when the merchant banker shall file a report with the SEBI confirming completion of various open offer requirements.	T+52

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An open offer, once made, can only be withdrawn in the following circumstances: (a) if the statutory approvals required for completing the open offer or the underlying transaction are refused; (b) if the acquirer, being a natural person, has died; (c) if the pre-conditions of the underlying transaction have not been met for reasons outside the control of the acquirer; or (d) if the withdrawal of the open offer is permitted by SEBI.

35. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

Under the Takeover Code, the acquirer is required to make an open offer for at least 26% of the target company.

The most commonly used squeeze-out method in India is the reduction of share capital. This involves a repurchase by the company of shares held by certain shareholders and a consequent cancellation of those shares. Such a scheme of reduction requires approval from the NCLT and at least 75% of the shareholders of the company.

36. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

While Indian companies are permitted to include higher thresholds of acceptable in their constitutional documents for all or certain matters, in general the level of acceptance to undertake the following actions are:-

i. Special resolutions: A shareholder holding 75% or more of the shares of the target can pass special resolutions.
ii. De-listing the target: SEBI prescribes the process for de-listing of equity shares, which requires, amongst other things, the approval of shareholders holding at least 75% or more of the shares of the target.
iii. Effecting squeeze out: Refer to our response at #35 above.
iv. Upstreaming guarantees and security: Subject to restrictions mentioned at our response at #3 above, once a company is de-listed and converted from a public company to a private company with the approval of shareholders holding at least 75% or more of the shares of the target, it may grant upstream guarantees and security without being subject to financial assistance restrictions.

37. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

The acquirer is required to open an escrow account and deposit an amount equal to 25% of the consideration for the first INR 500 crore and an additional 10% of the balance consideration. Deposits can be in the form of cash, bank guarantees or frequently traded securities.

38. What conditions to completion are permitted?

The acquirer may specify that the open offer has been made subject to certain conditions, with the most common condition being a minimum level of acceptance. The acquirer shall disclose all such conditions in the detailed public statement and letter of offer.

Contributors

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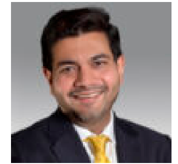

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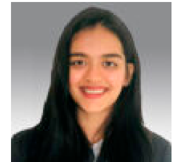

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