Private Mergers and Acquisitions in India: Overview

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Country Q&A | Law stated as at 01-Jul-2024 | India

Q&A guide to private mergers and acquisitions law in India.

The Q&A gives a high-level overview of key issues including corporate entities and acquisition methods, preliminary agreements, due diligence, acquisition agreements and main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, regulatory approvals, and environmental issues.

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Corporate Entities

1. What are the main corporate entities commonly involved in private acquisitions?

The primary corporate entity commonly involved in private acquisitions is a private limited company, with limited liability partnerships (LLPs) playing a smaller role.

Private Limited Company

Private limited companies can be incorporated as companies limited by shares or guarantee or as unlimited companies. The most common type is the private company limited by shares. Key features include limited liability for shareholders, a division of capital into shares, and relative flexibility in terms of corporate governance.

Private limited companies are the preferred choice in private M&A transactions due to their well-established legal framework, limited liability protection for shareholders, and the ease with which ownership can be transferred. The memorandum of association specifies share capital, share divisions, and subscriber details. The articles of association (articles) govern internal management, share transfers, and other operational matters. When acquiring a private limited company, amendments to the articles may be needed to facilitate the transaction.

Limited Liability Partnership (LLP)

Partners in an LLP are akin to shareholders, and designated partners are akin to directors. Capital is contributed by partners as capital contributions. LLP agreements govern partner rights, duties, and obligations, including provisions for capital contribution transfers and capital increases.

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LLPs offer flexibility and limited liability protection for partners, making them suitable for certain private M&A transactions. LLP agreements define the partnership's internal workings, including capital contribution transfers and adjustments. However, their use in private M&A transactions is less common compared to companies.

Merger of Companies and LLPs

The *Companies Act, 2013* (CA 2013), and the *Limited Liability Partnership Act, 2008*, provide provisions for the merger of companies and LLPs, respectively. These mergers require approval from the National Company Law Tribunal (NCLT).

Cross-Border Acquisitions

Cross-border acquisitions are subject to regulations of the Reserve Bank of India (RBI), which govern inbound and outbound acquisitions for companies and LLPs.

Choice of Entity

Private M&A transactions primarily involve private limited companies due to their robust legal framework, regulatory support for mergers, well-defined corporate governance structures, and limited liability safeguards for shareholders. While LLPs offer flexibility and limited liability protection, they are used less frequently.

Ways to Acquire a Private Company

2. How are private acquisitions commonly structured and what factors apply to the choice of structure?

The most common ways to acquire a private company are:

- Acquisition of shares and assets.
- Mergers and amalgamations.

Share and Asset Purchases

Acquisition of a target can be made by an asset purchase or a share purchase. The target's share capital can be acquired by purchasing existing shares or by subscribing to new shares. Other ways to acquire share capital, for example, minority squeeze-out and capital reduction, are tightly regulated and subject to principles set out by the courts from time to time. Therefore, a negotiated share purchase transaction remains the best way to acquire the share capital of the target.

In an asset purchase, specific assets of the target are acquired. Asset acquisition can be accomplished by:

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- A demerger. A demerger is the reverse of a merger or amalgamation, where the identified business of the target is transferred to the acquirer. A demerger can be implemented under the CA, 2013 mergers and amalgamations provisions.
- A sale of business as a going concern (also known as a slump sale). A slump sale involves the transfer of an undertaking including all assets and liabilities for a lump sum consideration without assigning values to individual assets or liabilities, except for regulatory or accounting reasons. The transaction is implemented in a business transfer agreement.
- An itemised sale of assets of the target. An itemised sale of assets is also referred to as cherry-picking assets, where the acquirer purchases only the assets that are of interest to it. Generally, no liabilities are assumed, unless this is specifically agreed to. The liabilities remain with the target.

Mergers and Amalgamations

This term is broadly used to categorise transactions which result in the combination of two or more legal entities into one. The result is the transfer of assets and liabilities of one entity (the merging entity) into another legal entity (the merged entity). The merging entity is generally dissolved after the transaction, without having to separately comply with the legal requirements of winding up under applicable laws. The shareholders of the merging entity are normally allotted shares in the merged entity. The CA, 2013 contains detailed provisions dealing with mergers and amalgamations. Within these regulations, a party can use a variety of structures. Mergers and amalgamations require the approval of the jurisdictional NCLT. This process typically takes ten to twelve months to complete. The CA, 2013 and Foreign Investment Regulations also provide the legal framework for a merger or an amalgamation of an Indian company with a foreign company and vice versa.

For further information, see *Private Mergers & Acquisitions Toolkit (India)*.

Share Purchases and Asset Purchases

3. What are the main advantages and disadvantages of a share purchase (compared to an asset purchase)?

Transfer of Assets/Liabilities

Share purchase. In a 100% share sale, all assets and liabilities of the company are automatically transferred to the buyer. The buyer may be exposed to unknown risks in a share acquisition. However, the risks associated with those liabilities can be mitigated by having representations, warranties, and indemnification provisions in the share purchase agreement.

Generally, share purchase transactions do not impact employees directly. There is no interruption in their service, and employees continue to receive the same compensation and benefits. Therefore, the requirement to pay retrenchment compensation under the *Industrial Disputes Act, 1947* does not apply to share purchase transactions.

Asset purchase. An asset purchase is not favourable from a seller's perspective, as the seller is left with potential liabilities but without the corresponding assets to discharge these liabilities. There is considerable flexibility in determining which assets

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or liabilities are excluded from the purchase. The buyer has the flexibility to cherry-pick the assets and liabilities it intends to purchase.

The buyer may also have identified employees to be transferred as part of the asset sale. The consideration for transfer of employees is arrived at based on the provisions laid down under the Indian taxation laws. The liabilities in relation to the employee are also transferred. However, these liabilities are typically set off against the consideration. For example, liabilities of the employer include accrued leaves, and accrued and unaccrued amount of gratuity. In India, gratuity is a statutory retiral/separation benefit, applicable to employees who have completed five years of continuous service with the employer. Gratuity is payable at the time of cessation of employment after an employee completes five years of continuous service. However, completion of five years of service is not necessary where termination of employment is due to death or disablement. Employers typically make a provision of gratuity in their books of account. The buyer typically obtains representation and warranties from the seller and seeks indemnity with respect to any tax claims that can be made against the buyer by the statutory authorities, post the asset sale.

Complexity of the Transaction

Share purchase. A share purchase has a simple and straightforward transaction structure and involves fewer documents than an asset purchase. The primary document is the share purchase agreement, which outlines the terms and conditions of the transaction. Other documents include a securities transfer form and filings with regulatory authorities. However, the representations and warranties sought from the sellers in a share purchase agreement are exhaustive.

Approval from the NCLT is not necessary, and there is no requirement to form a separate merger subsidiary to hold the business.

A share purchase transaction does not generally entail obtaining fresh business licences. Therefore, there is minimal business interruption. Share purchases may require government consents (depending on the industry) or third-party approvals in accordance with relevant change in control provisions in the underlying contracts. Share purchases may also involve more shareholder involvement.

Asset purchase. An asset purchase agreement details the transfer of specific assets, including tangible and intangible assets, and may require detailed schedules. An asset purchase is more time-consuming involving the preparation of a detailed asset listing, determining the most efficient manner to accomplish the transfer, calculating transaction costs, and obtaining a valuation for each asset. In addition, there are often separate assignments or agreements for each asset being transferred.

Asset purchases generally require more consents, both from within the company (corporate authorisations) and from external parties. These external consents may include approvals from contractual counterparties (for example, creditors) and consents necessary for business continuity. For example, if the asset purchase includes leased premises or contracts with key suppliers, consents may be needed to ensure a smooth transition. Transfer of employees will require specific consent from the employees being transferred. In a share purchase, consent of employees is not required.

An asset purchase carries the risk of failure to purchase all the assets a business needs to operate. It may also be difficult to separate the assets and the relevant contracts from the overall business and contracts of the target and to determine what is transferred and what is retained.

In some cases, post completion of the asset purchase, the purchaser may not have the requisite set-up to make use of the assets purchased. In these instances, the purchaser enters into a transition services agreement with the seller, where the seller agrees to provide certain services to the purchaser, for a specified time period, or until the purchaser has the necessary set-up to make use of the assets purchased.

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However, an asset purchase can be more efficient to complete if the shareholders are a heterogenous group. It avoids the requirement to engage in negotiations with multiple shareholder groups (for example, polarised groups under the control of different people or companies).

Mergers and amalgamations. The CA, 2013 provisions dealing with mergers and amalgamations allow great flexibility in structuring transactions. The CA, 2013 allows parties to incorporate capital reduction and minority squeeze-out provisions in accordance with the mergers and amalgamations provisions. There are some regulatory costs levied by the regulatory authority at the time of incorporation, which are charged on an ad valorem basis. These costs are taken into consideration at the time of merging two or more entities.

Mergers and amalgamations do not require the unanimous approval of all the shareholders involved. They require the approval of shareholders holding three-quarters in value of the total paid up capital of the company. This threshold is particularly useful when anticipating challenges in getting all the shareholders on board in a share purchase transaction. While a dissenting shareholder can challenge the merger or amalgamation before the NCLT, they must satisfy certain minimum shareholding thresholds to mount a challenge.

Tax Considerations

In private M&A transactions, both buyers and sellers must carefully consider tax implications that can significantly impact the overall deal structure and financial outcomes.

Share purchase. Sellers often prefer a share sale, as it generally results in a single tax event, capital gains tax on the sale of shares. This can be advantageous as it simplifies the taxation process and may lead to more favourable tax treatment. However, the specific tax treatment can vary depending on the period of holding the shares, relevant residency or jurisdiction, and the seller’s individual circumstances.

There may be significant savings on the stamp duty costs involved in a share purchase transaction. The government has recently implemented a uniform stamp duty structure for the purchase of shares at a certain percentage of the consideration amount.

In cross-border transactions involving a non-resident seller and buyer, sellers should be aware of potential withholding tax obligations. The purchaser is responsible for withholding tax on the purchase price and remitting it to the tax authorities. Delays or non-compliance can result in fines and interest charges. A valuation report will also need to be obtained with regards to the consideration price and the withholding made.

In global purchase transactions, a standalone share purchase agreement should be executed for the purchase of the Indian shares which will clearly state the India consideration. Ideally, the Indian consideration should not be combined with the global purchase consideration for Indian tax purposes.

Asset purchase. In an asset purchase transaction, stamp duty is levied on the individual assets being transferred. Stamp duty payable is usually a percentage of the market value of the assets and can vary between 1% to 3%.

Depending on the nature of the assets, Goods and Services Tax (GST) at the rate of 5% to 28% of the purchase price is payable. GST is borne by the purchaser and is paid to the seller along with the purchase consideration. The seller remits GST to the appropriate authority. After this, the purchaser can claim the input tax credit by making necessary filings with the appropriate authority.

Under Indian taxation laws, any sum paid over and above the fair market value is taxable in the hands of the seller as capital gains tax. Based on the duration for which the asset has been held by the seller, the capital gains tax can be classified as a long-term capital gain or short-term capital gain. In most cases, the consideration received by the seller from an asset sale is

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transferred to its holding company as dividend. The holding company will be required to pay tax on dividend. Typically, the tax on dividend is withheld by the Indian seller and is paid to the appropriate authority on behalf of the holding company.

Other Factors

For further information, see *Acquisition Structures: Comparing Asset and Share Purchases (India)*.

Auctions

4. Are sales of companies by auction common? What is the typical procedure and what regulations (if any) apply?

Sale of companies by auction is quite common. A bidding process is typically organised by the investment banker. The bidding process culminates in bidders submitting a detailed bid. A bid should be clear, precise, and address all aspects of the acquisition, including the source of financing. A shortlisted acquirer moves to the next stage, that is, the process of entering into exclusive negotiations with the seller to conclude the transaction. Bidders who provide evidence of a clear source of funding are likely to be selected in the bidding process.

It is advisable to adopt a fair and transparent bidding process to reduce future claims.

For further information on the auction process in India, see *Key Documents for Acquiring a Private Company (India): Auction Documents*.

Foreign Ownership Restrictions

5. Are there any restrictions on acquisitions by foreign buyers?

Foreign ownership of Indian companies is regulated under the *Foreign Exchange Management (Non-debt Instruments) Rules, 2019* (Foreign Investment Regulations). The government has progressively liberalised foreign investment norms. The current Foreign Investment Regulations allow 100% foreign investment in most sectors open for private investment. However, there are some sectors where prior approval from the government is necessary before a foreign investment can be made, or where foreign ownership of less than 100% is permitted. Under the current foreign investment policy, foreign investment of more than INR50 billion (about USD 601,437,500) must be reported to the RBI within 30 days of the date of issuance of equity instruments but not later than one year from the date of incorporation of the wholly owned subsidiary, regardless of whether the sector falls under the approval route or the automatic route.

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Foreign investment in a private limited company must come through the foreign direct investment (FDI) route, and not from other routes, for example, foreign portfolio investment. The Foreign Investment Regulations require non-residents to meet certain requirements relating to the following:

- **Equity instruments.** An Indian company can issue equity shares, convertible securities, and share warrants to a foreign investor under the automatic route. Any other type of instrument does not qualify as an equity instrument and is considered external commercial borrowing.
- **Pricing.** The equity instruments must be issued in accordance with the applicable pricing norms of the RBI.
- **Reporting.** Issuance of equity instruments must be appropriately reported under the *Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019*. The Form FCGPR must be filed with the authorised dealer bank within 30 days from the date of issuance of equity instruments. The RBI may levy a penalty for any delays in filing Form FCGPR, beyond the prescribed timeline.
- **Residency.** An entity of a country which shares a land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of that country, is restricted from directly or indirectly investing in India without prior government approval. These countries include:
    - China;
    - Afghanistan;
    - Bangladesh;
    - Pakistan;
    - Bhutan;
    - Myanmar; and
    - Nepal.

If a transfer of ownership of an entity in India, directly or indirectly, results in the beneficial ownership falling within the restriction stated above, subsequent change in beneficial ownership will also require prior government approval. The Ministry of Corporate Affairs, by way of an amendment in June 2022, mandated prior security clearance for any person who is a national of a neighbouring country and is proposed or has sought appointment as a director in an Indian company.

A non-resident investor cannot be provided with an assured exit price. However, a non-resident investor can be provided the option of an assured exit (subject to the mandatory lock-in period of one year or applicable sectoral regulations, whichever is longer). The exit price should be determined in accordance with the pricing rules under the instrument of transfer.

Indirect foreign investment is also a type of foreign investment, that is, where an Indian company that is owned or controlled by non-resident investors makes a downstream investment in another Indian company. Generally, the rules applicable to FDI also apply to indirect foreign investment.

For further information, see *Regulation of Foreign Investment in India*.

See also, *Quick Compare Chart, Regulation of Foreign Direct Investment in India*.

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Preliminary Agreements

6. What preliminary agreements are commonly made between the buyer and the seller before negotiating or executing the primary acquisition documents?

Letters of Intent

A letter of intent, often referred to as a memorandum of understanding or term sheet, is commonly made between the buyer and the seller before a contract. These preliminary agreements are generally non-binding except terms that are expressly made binding.

Clauses dealing with break-up fee, exclusivity, confidentiality, governing law, and dispute resolution are generally binding.

Exclusivity Agreements

Exclusivity agreements require parties to negotiate with each other exclusively, with a view to entering into a contract. The exclusivity is limited in duration and the parties are free to negotiate with third parties on its expiry.

An exclusivity agreement should be subject to stamp duty in accordance with the applicable law, for it to be enforceable before a court of law.

A non-breaching party can obtain an interim injunction order. While this provides immediate relief to the non-breaching party, the ultimate objective is to claim damages for breach.

Non-Disclosure Agreements

Typically, acquisitions entail parties exchanging commercially sensitive and publicly unavailable proprietary information. It is important to ensure that the recipient of this information uses it only in relation to evaluating the proposed transaction. Therefore, parties enter into a mutual non-disclosure agreement to set out the confidentiality obligations in relation to proprietary information. These agreements are binding. The standard provisions seen in non-disclosure agreements in global deals are almost entirely enforceable under Indian law.

For enforcement and remedies available for breach of non-disclosure agreements, see above, *Exclusivity Agreements*.

See also *Key Documents for Acquiring a Private Company (India)*.

Due Diligence

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7. How is due diligence typically carried out and what main areas does it usually cover?

Due diligence is typically carried out by the acquirer providing a checklist of information required, the target uploading the information in the data room, the acquirer's legal, tax, and financial advisors reviewing of documents, and preparing a due diligence report. The main areas covered under the requisition list for the purposes of the diligence are:

- Share capital and corporate structure.
- Business licences and registrations.
- Accounts.
- Financial arrangements.
- Key contracts.
- Tax.
- IP.
- Data protection.
- Employment and pensions.
- Real estate.
- Environment.
- Litigation and disputes.

For current trends in due diligence procedures, see also *Question 4*.

For further information, see *Due Diligence for Private Acquisitions in India*.

Consents and Approvals

8. What are the main consents and approvals typically required for an acquisition?

[Consider the following, in relation to share sales and asset sales as relevant.]

Corporate Approvals

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Approval of the board of directors (board) is required for a company to take over a company or acquire a controlling or substantial stake in another company (*section 179, CA, 2013*). If there is a transfer of shares, the duly signed and stamped securities transfer forms executed between the buyer and seller must be presented to the board for their approval.

Shareholder Approval

General restrictions. A private limited company is required to restrict the transferability of its shares (*section 56,of CA, 2013*). These restrictions are contained in the company's articles. The restrictions are generally expressed as a pre-emptive right in favour of the other shareholders. It is therefore necessary to ensure that these shareholders waive their pre-emptive rights before the share purchase transaction is completed.

Drag along rights**.** The majority shareholder has the right to accept an offer to buy their shares and to force the minority shareholder to accept that offer. These rights are exercised when an investor intends to acquire a significant stake in the company.

Tag along rights**.** Certain shareholders (usually minority shareholders) have the right to tag along with the selling shareholder and sell their shares on the same terms as the selling shareholder. The selling shareholder will be obligated to include these shareholders as part of the share sale.

Change of control approvals. Certain registrations and licences obtained by a company for its business operations, contemplate prior approval of the statutory or regulatory authority, if the share sale results in a change of control. In some cases, a company is required to inform the governmental authority once the change in control has taken place.

Change in control approval is also a contractual requirement in agreements with third parties, for example, lease deeds or vendor contracts.

Contractual Consents

A copy of a proposed merger or demerger must be served on the companies' creditors, and the consent of the creditors constituting at least three-quarters in value must be obtained (*section 230, CA, 2013*). Their consent must be obtained in a meeting of the creditors, unless the NCLT has waived the requirement to hold a meeting, in which case, the consents are collected in the form of an affidavit. If there is no creditors' meeting, the threshold of approval is 90% of creditors in value.

The CA, 2013 does not require that consent is obtained by creditors in a slump sale or an itemised sale of assets. However, their consent is required if there are contractual provisions between the company and the creditor to that effect. Financing agreements typically require the borrower to obtain the consent of the creditors before the transfer of an asset.

Regulatory Approval

A transfer of shares or fixed assets while tax proceedings are pending against a shareholder or the transferor company that holds those fixed assets, is void, unless the transferor company has obtained a no-objection certificate from the assessing officer (section 281, Income Tax Act). Purchasers typically require the sellers to obtain a no objection certificate. Alternatively, they may settle for an independent chartered accountant's certificate certifying the outstanding tax proceedings and tax demands to make a risk determination for not obtaining the no objection certificate. For entities operating within Special Economic Zones (SEZs) or Software Technology Parks of India (STPI), specific approvals and compliances related to these zones are paramount. SEZ and STPI units benefit from various tax incentives, customs exemptions, and regulatory relaxations. Therefore, any change in ownership or control of units often requires prior approvals from the authorities governing SEZs and STPIs. These approvals ensure that the new owner can continue to enjoy the benefits and incentives associated with the zone. Buyers and sellers engaged in transactions involving SEZ or STPI units should proactively engage with the relevant authorities to obtain the necessary

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approvals and maintain compliance with the unique regulatory framework governing the zones. Failure to do so can result in the loss of valuable incentives and benefits associated with operating within these specialised zones.

Other approvals required to be obtained at the time of making a foreign investment and anti-trust approvals are covered in *Question 9*, respectively.

Main Documents

9. What are the main documents in an acquisition and who generally prepares the first draft?

Share Sale

The main documents required are:

- The share purchase agreement (prepared by the buyer).
- A disclosure letter (prepared by the seller).
- The securities transfer form along with the share certificates (prepared by the buyer).
- The existing shareholders' waiver letters (prepared by the seller).
- A fresh set of articles (prepared by the buyer).
- An escrow agreement, if necessary (prepared by the escrow agent in conjunction with the buyer).
- Earn-out or compensation agreements with key employees of the target (prepared by the buyer).

A share purchase agreement typically includes (among others):

- Provisions in relation to acquisition of shares.
- Payment mechanism.
- Pre-emptive rights of the buyer (if the acquisition is not a 100% acquisition).
- Representations and warranties in relation to the shares and the business operations of the target.
- Non-compete restrictions.
- Indemnification obligations of the target in case of breach of representations and warranties.

Asset Sale

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The main documents required are:

- Business transfer or asset purchase agreement (prepared by the buyer).
- Relevant employment documents and employee consents (prepared by the buyer and seller).
- Assignment and assumption agreement, with respect to existing contracts in a slump sale (prepared by the buyer).
- Novation agreement, with respect to existing contracts in an asset sale (prepared by the buyer).
- A scheme of merger and amalgamation.

An Asset Purchase Agreement is more specific in nature (focusing on the assets being purchased) and includes (among others):

- The terms for sale and purchase of assets.
- The terms for the payment of taxes on the purchase of assets.
- Representations and warranties in relation to the assets being purchased.
- Indemnification obligations.

For further information, see *Key Documents for Acquiring a Private Company (India)* and *Private Mergers & Acquisitions Toolkit (India)*.

Acquisition Agreements

10. What are the main substantive clauses in an acquisition agreement?

Substantive Clauses

The main substantive clauses in an acquisition agreement are:

- Payment of purchase consideration and the form of payment, including purchase consideration hold-back and establishment of an escrow account.
- Conditions precedent to the acquisition.
- Closing and closing-related actions.
- Post-closing obligations.
- Representations, warranties, and covenants.
- Indemnities (particularly tax indemnities).

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- Governing law and dispute resolution process.
- Non-compete restrictions.
- Payment of costs and expenses.

Differences Between Share and Asset Acquisition Agreements

Share and asset acquisition agreements differ in:

- **The main commercial terms.** In a share acquisition, the primary commercial terms focus on the purchase of the shares of the target company. This includes the purchase price per share and the total consideration. In an asset acquisition, the commercial terms revolve around the specific assets being transferred, their valuation, and any assumed liabilities. The agreement may specify which assets and liabilities are included in the transaction.
- **Conditions precedent.** Share acquisition agreement conditions precedent may include obtaining regulatory approvals, shareholder consents, and compliance with any pre-existing agreements or contracts. Asset acquisition agreement conditions precedent often involve obtaining third-party consents, for example, landlord or supplier approvals, and ensuring the transferability of contracts and licences.
- **Warranties and indemnities.** Share acquisition agreement warranties and indemnities typically relate to the ownership and title of the shares being sold, and representations about the target company's financial and legal status. Asset acquisition agreement warranties and indemnities are more asset-specific. They cover the condition of the assets being transferred, the absence of liens or encumbrances, and representations about the business being conducted.
- **Special consideration arrangements.**Share acquisition agreement special consideration arrangements may involve earn-out provisions, where a portion of the purchase price is contingent on post-closing performance. Price adjustments and retentions are common in asset acquisitions. These mechanisms allow for adjustments to the purchase price based on post-closing reconciliations of asset values or working capital.
- **Non-compete provisions/restrictive covenant protection.** Share acquisition agreement non-compete provisions often focus on the shareholders or key management of the target company, preventing them from competing with the buyer. In asset acquisitions, non-compete provisions can be broader, covering both the seller (if remaining in the same industry) and employees who are transferring with the assets.
- **Completion arrangements.** Completion of a share acquisition typically involves the transfer of share certificates, updating of shareholder registers, and changes in board and management positions. Completion of an asset acquisition can involve physical transfer of assets, assignment of contracts, and taking possession of leased premises.
- **Post-closing obligations.** Post-closing obligations in share acquisitions often focus on the integration of the target company into the buyer's operations and addressing any outstanding issues. In asset acquisitions, post-closing obligations can include transitioning employees, notifying customers and suppliers, and ensuring business continuity.

It is essential for the parties to tailor agreements to the specific nature of the transaction and its associated legal and commercial considerations.

Warranties and Indemnities

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11. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Seller warranties or indemnities are typically included in an acquisition agreement. These include:

- Title to and marketability of the target's shares, assets, and properties.
- Organisation of the target and sellers.
- Capitalisation of the target.
- No conflicts or consents.
- Financial statements.
- Undisclosed liabilities.
- Absence of certain changes, events, and conditions.
- Material contracts.
- Condition and sufficiency of business assets.
- Inventory.
- Accounts receivable and accounts payable.
- Customers and suppliers.
- Insurance.
- Legal proceedings and governmental orders.
- Compliance with laws, adequacy of the regulatory permits.
- Employee-benefit plans and employee matters.
- Real property and leases.
- Taxes.
- Books and records.
- Related party transactions.
- Bank accounts and power of attorney.
- Environmental matters.

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For an asset sale agreement, the warranties or indemnities will be more specific in nature and will be limited to the assets being purchased by the buyer.

12. What are the main limitations on warranties?

Limitations on Warranties

The main limitations on warranties are:

- The statute of limitations.
- Disclosed matters.
- *De minimis* thresholds for making claims.
- Transactions involving non-residents. An amount of up to 25% of the total consideration can be set aside to meet indemnity payments. These payments must be made by or to non-residents within 18 months from the date the full consideration was paid, if the total consideration has already been paid. The total consideration finally paid for the transfer must comply with the pricing rules under the Foreign Investment Regulations (see *Factors in Choice of Consideration*).

Qualifying Warranties by Disclosure

Qualifying warranties by disclosure is standard practice. Unless otherwise agreed, the buyer may insist on an indemnity in certain cases even after disclosure.

13. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

There are two types of remedies that are fundamentally used in an acquisition transaction:

- **Claims for (liquidated or unliquidated) damages.** Generally, the court awards damages or compensation based on directness of damages and the mitigation measures of the non-breaching party. Indian contract law does not permit the payment of indirect, special, consequential, or punitive damages.

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- **Indemnities.** Parties to a contract can seek to address certain specific types of risks through an indemnity. The intention of an indemnity clause is to restore the non-breaching party to the same position as though no loss occurred. An indemnity is a contractual (and not statutory) right. Therefore, it should be specifically included in the contract. The principles of remoteness of damages and the duty to mitigate (which would otherwise apply to an award of damages) do not apply to indemnities.

Indemnity payments to a foreign party should be structured according to the Foreign Investment Regulations (see *Question 9*). A payment of damages under an indemnity may require the prior approval of the RBI.

Warranties and indemnity insurance or representations and warranties insurance are also emerging as an option to address the risks arising from breach of warranties. Increasingly, this is a key differentiator between various bidders and the bid that offers insurance is likely to stand a better chance of winning.

Time Limits for Claims Under Warranties

The statute of limitations generally prescribes three years for making monetary claims, subject to certain exceptions. However, parties to the transaction typically negotiate to align the limitation period with the relevant statutes. For example, the Income Tax Act allows an assessment officer to reopen assessment proceedings against a company up to seven years after the end of the relevant financial year. Therefore, the buyer typically asks for tax warranties for seven years from the end of the relevant financial year.

Signing and Closing

Conditions Precedent

14. What common conditions precedent are typically included in a private acquisition agreement?

The following common conditions precedent are typically included in a share sale agreement:

- Completion of due diligence to the satisfaction of the acquirer.
- Obtaining the necessary regulatory and corporate approvals, including anti-trust approvals (if applicable).
- Warranties being true and correct as on the closing date.
- Obtaining a valuation certificate to show compliance with the applicable pricing norms prescribed by the Foreign Investment Regulations.
- Resolving identified diligence findings, as agreed between the parties.

Main Steps at Signing and Closing

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15. What are the main steps at signing and closing in a private share sale and asset sale? What main documents are commonly produced and executed?

Signing

At signing, the following documents are typically signed or produced:

- A share purchase agreement or an asset purchase agreement.
- Relevant corporate resolutions approving the execution of the agreement and identifying authorised signatories.
- Proof of payment of stamp duty on the share purchase agreement or the asset purchase agreement.

The share purchase agreement and the asset purchase agreement lay down the mechanism for closing, which generally accounts for situations where closing takes place over a span of few days and cannot be achieved in a single day. Typically, the date of closing is the last date on which closing actions are completed by the parties.

These agreements also provide for a long stop date, that is, the date within which closing must occur. If all closing actions are not completed within the long stop date, the agreement is terminated, and the transfer of shares/assets will need to be unwound along with repayment of the consideration to the buyer, if already paid.

Closing

At closing, the following documents are typically signed or produced in a share sale:

- Proof of wire transfer of funds by the buyer to the seller.
- Payment of stamp duty on the transaction documents (other than the share purchase agreement).
- Relevant corporate resolutions taking on record the closing of the transaction.
- Securities transfer form (SH-4, under the CA, 2013).
- Resignation of the seller's nominees from the board of directors.
- Appointment of the buyer's nominees to the board of directors.
- Relevant employment agreements.
- The new articles of the company (if the acquisition is not a 100% acquisition).

The following documents are signed or produced in an asset sale:

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- Proof of wire transfer of funds by the buyer to the seller.
- Payment of stamp duty on the transaction documents (other than the asset purchase agreement).
- Relevant corporate resolutions taking on record the closing of the transaction.
- Relevant employment agreements.
- Evidence of transfer of assets to the buyer.
- Assignment of contracts entered into by the seller, in favour of the buyer.
- Issuance of invoice by the seller, in accordance with the applicable law.
- Handover of all information and documents in relation to the assets being acquired by the buyer.

Post-closing actions typically involve:

- Filing of a Single Master Form under the Foreign Investment Regulations with the authorised dealer bank. The Single Master Form must be filed within 60 days of receipt of funds or share transfer (whichever is earlier).
- Filing of relevant forms with the company registry.
- Working capital adjustments, if any, required to be made on the purchase consideration.

See also *Signing and Closing: Private Acquisitions (India)*.

Execution of Documents

16. How are documents executed by companies in your jurisdiction? Are there specific formalities to execute certain types of documents?

Different types of documents have different legal formalities. Documents which qualify as an instrument must be stamped in accordance with the relevant stamp act. The rate of stamp duty is prescribed by the federal government (if the instrument falls under the union list). The relevant state government is entitled to prescribe the rate of stamp duty if the instrument falls under the state list. The stamp duty should be paid at (or before) the time of executing the instrument. If the instrument is executed outside India, it must be stamped within three months of its receipt in India. An instrument which is not stamped under the relevant stamp law is not admissible as evidence before a court of law or an arbitral panel. In addition, a public authority can impound the document.

An instrument relating to a transfer of immovable property or intellectual property of a certain value must be registered with the jurisdictional sub-registrar's office and registration fees paid.

Any person authorised by the board can sign a document or instrument on behalf of the company. In some cases, the document must be stamped with the common seal of the company (if required under the company's articles).

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There are no special requirements for the execution of documents by foreign companies. The only additional requirement is that affirmations, for example, affidavits and declarations, are apostilled in accordance with the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Apostille Convention).

Transferring Title to Shares

17. What formalities are required to transfer title to shares in a private company?

The formalities under the articles and the CA, 2013 must be complied with. A waiver of pre-emptive rights by the other shareholders must be obtained (see *Shareholder Approval*). In addition, any contractual stipulations regarding share transfers must be complied with.

The CA, 2013 requires the transferor and transferee to deposit a duly executed securities transfer form with the target's board. The securities transfer form must be stamped at a certain percentage of the purchase consideration (including premium, if any). This is a federal levy and must be paid to the appropriate jurisdictional officer.

When the target's board have taken on record the duly stamped and executed Securities Transfer Form, the register of members and the register of share transfers must be updated to reflect the share transfers.

If the shares are held in dematerialised form, a securities transfer form is not required. Instead, the transferor and transferee must give the relevant transfer instructions to the relevant depository, who will carry these transfer instructions out in the electronic records it maintains.

From 30 September 2024, the shares of a private limited company (especially a wholly owned subsidiary) are required to be held in dematerialised form (that is, the shareholders must hold the shares in electronic form by that date). A buyer that is acquiring shares which are held in dematerialised form will need to open a "demat" account with a depository participant in India before the acquisition and will have to fulfill all the formalities in relation to the opening of demat account.

In some cases, the regulatory authorities (depending on the target's permits) and third parties (depending on contractual obligations) must be informed of the change in control within the timelines prescribed in the permits and contracts.

Seller's Title and Liability

18. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

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Shares are considered goods under the *Sale of Goods Act, 1930* (Sale of Goods Act). The following terms are implied by law as to the seller's title to the shares (unless the circumstances of the contract show a different intention):

- An implied condition that the seller has the right to sell the goods.
- An implied warranty that the buyer has quiet possession of the goods.
- An implied warranty that the goods are free from any undisclosed charge or encumbrance in favour of any third party.

(Section 14, Sale of Goods Act.)

Buyers typically ask for additional warranties in relation to title. The kind of additional warranties requested depends on the details of the transaction. These warranties are often heavily negotiated between the parties.

19. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements, or similar matters?

There are no clear rules. It may be difficult to hold a seller and its advisers liable for pre-contractual misrepresentation if the transaction agreement expressly excludes liability in relation to statements made before the conclusion of the agreement. Typically, the transaction agreement contains a clause which states that the transaction agreement overrides previous communications and statements made by the seller and their advisers. However, a seller and its advisers can be held liable for fraudulent misrepresentations.

Governing Law and Arbitration

20. Can a share purchase agreement provide for a foreign governing law? Is an arbitration provision usually included in private M&A documents?

Choice of Law

The basic legal principle is that Indian parties are bound by Indian law. It has been held that Indian parties contracting out of Indian law is against Indian public policy. However, an agreement can provide for a foreign governing law if the agreement is between an Indian party and a foreign party. A transaction governed by a foreign law must still comply with specific Indian requirements under, for example, the Income Tax Act, Foreign Investment Regulations, and *Competition Act 2002* (Competition Act).

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Typically, in an asset purchase agreement, where assets of an Indian company are being transferred to another Indian entity, the parties generally opt for an Indian governing law, even if the parent entities of such Indian subsidiaries are non-residents. In a share purchase agreement, where either of the parties is a non-resident, and provided that the non-resident party is situated in a sophisticated mature jurisdiction, the parties opt for the governing law of such non-resident party.

In addition, two Indian parties can choose a foreign law for arbitration, if the contract has a foreign element to it. Two Indian parties can also choose a foreign seat of arbitration. The most common non-Indian forums chosen are the International Court of Arbitration and the Singapore International Arbitration Centre.

Arbitration

India has a robust and independent arbitration system for domestic arbitration and international commercial arbitrations. Private M&A-related disputes are typically resolved through arbitration or alternative dispute resolution (ADR) mechanisms specified in the transaction documents. It is market practice to include arbitration provisions in private M&A documents. Arbitration is often preferred for its efficiency, confidentiality, and flexibility in resolving disputes that can arise during or after the transaction.

Arbitration clauses are generally enforceable, and India has a well-established legal framework for arbitration. The *Arbitration and Conciliation Act, 1996*, governs both domestic arbitration and international commercial arbitrations conducted in India. The Act provides clear guidelines for the conduct of arbitration proceedings and the enforcement of arbitration agreements.

Local courts typically respect the choice of jurisdiction specified in an arbitration clause. Indian courts have shown a pro-arbitration approach and are inclined to uphold the parties' autonomy in selecting their dispute resolution forum. When parties agree to arbitration, courts generally refrain from intervening in the arbitration process unless there are compelling reasons to do so.

In the event of a dispute, the parties select arbitrators, and the proceedings are conducted in accordance with the arbitration agreement and applicable arbitration rules. The arbitrator's award binds the parties and is recognised and enforced as a court decree.

India is a signatory to the New York Convention on the Enforcement of Foreign Awards. Therefore, Indian law recognises and enforces certain foreign arbitration awards.

For further information, see *Arbitration Procedures and Practice in India: Overview*.

Consideration and Acquisition Financing

Forms of Consideration

> 21. What forms of consideration are commonly offered in a share sale?

Forms of Consideration

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Cash is the most common form of consideration. Non-cash consideration, for example, a swap of shares, can be considered depending on the transaction structure. However, this remains a regulated activity under the Foreign Investment Regulations.

Factors in Choice of Consideration

Tax considerations are often the biggest factor in determining the choice of consideration. The Foreign Investment Regulations are an important factor. The Foreign Investment Regulations generally require consideration to be discharged by payment of cash through ordinary banking channels. Non-cash consideration is only allowed in certain situations. The consideration payable in a transaction should also comply with the pricing norms:

- **Transfer of a stake from a resident to a non-resident.** The price should be no less than the fair market value determined by an Indian chartered accountant applying an internationally accepted pricing methodology on an arm's length basis.
- **Transfer of a stake from a non-resident to a resident.** The price should be no more than the fair market value determined by an Indian chartered accountant applying an internationally accepted pricing methodology on an arm's length basis.

(Rule 21, Foreign Investment Regulations.)

These pricing norms also apply to the allotment of shares to non-residents in a private placement or on a preferential allotment basis.

Deferred consideration structures or earn-outs can be implemented under the Foreign Investment Regulations. These structures are allowed under the automatic route if the following conditions are met:

- The deferred consideration does not exceed 25% of the total purchase consideration.
- The deferment does not extend beyond 18 months.
- The final consideration that is settled by the parties complies with the pricing norms.

In an allotment of securities to a non-shareholder, the CA, 2013 envisages a valuation undertaken by a registered valuer and the shares allotted at fair value.

See also *Consideration and Acquisition Finance: Private Acquisitions (India)*.

Price Adjustments and Deferred Consideration

22. How is the price typically assessed and agreed? Is the price commonly adjusted?

Valuation

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The assessment of the purchase price in M&A transactions typically involves a valuation process conducted by qualified professionals. Chartered accountants, practicing cost accountants, or approved valuers, often from the panel maintained by the central government, are commonly engaged for this purpose. Valuation methodologies adopted should be internationally accepted or in line with prevailing market practices. A formal valuation certificate, issued by the valuer, reflecting the valuation and the methodology used, is an essential document in the transaction. In share sales, Indian exchange control regulations require that the valuation report should not be older than 90 days from the date of the share sale to ensure the accuracy of the valuation.

Fixed Consideration

Fixed consideration, also known as a locked-box mechanism, is common in private M&A transactions. Parties agree on a fixed purchase price at the time of signing the agreement, and this price remains unchanged at closing. This method provides certainty to both buyer and seller.

Price Adjustment

Closing account adjustment mechanism. In some cases, parties opt to agree a tentative purchase price at signing, but the final purchase price is adjusted post-signing based on the target's audited or finalised accounts. This adjustment reflects any significant changes in the target's financial position between signing and closing. There is less flexibility in undertaking price adjustments for share sales under Indian exchange control regulations.

Earn-out consideration. Earn-outs are contingent payments linked to specific milestones or performance metrics. Post acquisition, the buyer may retain the seller as a key employee or consultant to ensure the achievement of these milestones. Earn-outs can align the interests of both parties and facilitate a smoother transition.

For further information, see *Earn-Out, Locked Box, and Retention: Private Acquisitions (India)*.

23. Do buyers typically pay the price in full on closing, or is deferred consideration common?

Deferred consideration structures or earn-outs can be implemented under the Foreign Investment Regulations. These structures are allowed under the automatic route if the following conditions are met:

- The deferred consideration does not exceed 25% of the total purchase consideration.
- The deferment does not extend beyond 18 months.
- The final consideration that is settled by the parties complies with the pricing norms above.

Subject to the above restrictions and the mutual understanding of the parties, the deferred consideration can also be deposited in an escrow account opened by the parties. In the authors' experience in the recent past, almost all our transactions had a deferred consideration. This is done to bind the sellers to certain performance linked conditions post-closing, in cases where the sellers would have sold their stake but not exited the target or to insulate the buyer from claims especially when there are adverse due diligence findings.

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Financial Assistance

24. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

A public company cannot give financial assistance (directly or indirectly) to a potential buyer of shares in that company or its holding company (section 67, CA, 2013).

Exemptions

This restriction does not apply to:

- A banking company lending money in the ordinary course of its business.
- A company providing money in accordance with any scheme approved by it for purchase of, or subscription to, fully paid-up shares in the company or its holding company, if these shares are held for the benefit of employees of the company or by the employees of the company.
- A company giving loans to its employees other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months, with a view to enabling them to purchase or subscribe to fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

Tax

Transfer Tax

25. What transfer taxes are payable on a share sale and an asset sale?

Share Sale

The securities transfer form must be stamped at a percentage of the purchase consideration levied by the federal government.

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Stamp duty is also payable on a share purchase agreement as the agreement is treated as an instrument. This is a state levy and states set specific rates. For example, if the share purchase agreement is being executed in the state of Karnataka, the stamp duty is capped at a certain amount.

Asset Sale

An NCLT order sanctioning an amalgamation, merger, or demerger is considered an instrument and subject to stamp duty under the relevant state stamp act. The stamp duty is calculated as a percentage of the value of the transferor company's properties located in that state, or a percentage of the value of shares issued to the shareholders of the transferor company (whichever is higher). However, certain state stamp acts do not have a specific entry dealing with stamp duty on NCLT orders. In these states, an NCLT order is treated like a conveyance and the stamp duty conveyance rate must be paid.

The business transfer agreement must be stamped on the *ad valorem* value. The range of stamp duty depends on the state-specific stamp legislation.

Registration fees are payable to the sub-registrar's office if immovable property is being sold or leased. The state governments have jurisdiction to levy the registration fee.

In some states, a bill of sale is provided (in addition to an asset purchase agreement) to evidence the sale of assets and stamp duty is payable on that bill of sale. However, this requirement has been removed in most states, and the sale of an asset takes place by entering into an asset purchase agreement.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate transfer tax liability?

Stamp duty is payable on the entire consideration and the amount of stamp duty payable varies from one state to the other. There is no requirement to pay stamp duty on individual assets. Some Indian states provide a more relaxed stamp duty regime for intra-group mergers and amalgamations.

Corporate Taxes

27. What corporate taxes are payable on a share sale and an asset sale?

Share Sale

Income tax is payable on the gains made by the seller. These gains are taxed as capital gains. The rate of taxation depends on the residency status of the seller and the holding period of the shares, as follows:

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- Long-term capital gains (LTCG) tax is payable if the unlisted shares are held for more than 24 months. While calculating LTCG, the acquisition cost can be indexed. This benefit is not available to non-residents while calculating taxable profits. However, the gains are calculated in the applicable foreign currency denomination.
- Short-term capital gains (STCG) tax is payable if the unlisted shares are held for less than 24 months.

There is a requirement to withhold applicable taxes when making payments to non-residents. The obligation must be discharged by the buyer of shares or assets. Payments made to a resident seller are generally not subject to tax withholding obligations.

India has also introduced indirect transfer taxes in 2012, but with retrospective effect from 1961. Under these provisions, an indirect transfer of an Indian company's shares is subject to Indian income tax if both:

- The overseas assets derived their substantial value from Indian assets. Substantial means at least 50% of the value of assets.
- The value of the Indian assets is at least INR100 million (about USD1,203,024).

The value of a share is determined according to the value of the share on the date on which the financial year ended, preceding the date of transfer of share.

Indian transfer pricing rules apply in a transfer of shares between associated enterprises under the Income Tax Act.

Asset Sale

Mergers and amalgamations can result in a taxable event in India if they involve a transfer of a capital asset in India. However, certain classes of mergers, amalgamations, and demergers have been specifically exempted from capital gains tax (if certain conditions under the Income Tax Act are met).

In a slump sale, the sale of an undertaking is subject to LTCG tax if the undertaking is held for at least 24 months. This is regardless of the holding period of individual assets. .

In an itemised sale of assets, the capital gains tax payable will depend on the holding period of the asset..

Indirect transfer taxes also apply in an asset sale (subject to certain exemptions under the Income Tax Act).

Indian transfer pricing rules apply in a transfer of assets between associated enterprises under the Income Tax Act.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate corporate tax liability?

India has entered into double taxation avoidance agreements (DTAAs) with many countries. These DTAAs provide for a mechanism to deal with cross-border taxation issues. The DTAAs with certain countries, for example, Singapore, Mauritius,

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The Netherlands, and Cyprus provide a favourable framework for taxation of capital gains. Investments into India are generally routed through these jurisdictions under these provisions.

A merger or amalgamation can be structured in a tax-neutral way by fulfilling the conditions under the Income Tax Act.

Resident shareholders can also avoid paying LTCG tax on the sale of shares by investing the gains in certain specified assets or bonds.

However, India has introduced the General Anti Avoidance Rules (with effect from 1 April 2017). This is an overarching legislative framework that impacts all types of corporate restructuring activities whose primary aim is tax avoidance. These rules apply to transactions of a certain value. The Income Tax Department needs certain approvals before it can invoke the General Anti Avoidance Rules.

Other Taxes

> 29. Are other taxes potentially payable on a share sale and an asset sale?

The definition of goods and services under the GST regime excludes shares and stocks from its scope. Therefore, no GST is payable on share purchase transactions.

In mergers, amalgamations, and demergers, no GST is incurred as this entails a transfer of an entire business as a going concern. Slump sale transactions are exempt from GST.

However, GST is payable on the sale of individual assets in an itemised sale of assets transaction. The rate of GST depends on the nature of assets transferred. GST ranges from 5% to 28%. However, GST paid on the sale of assets may be available as an input tax credit for the buyer (if certain conditions are met).

For further information, see *Tax: Private Company Acquisitions (India)*.

Employees

Information and Consultation

> 30. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

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Indian law categorises employees as "workers" or "non-workers," depending on the nature of the work they perform. Under the *Industrial Disputes Act 1947*, a person employed to do any manual, technical, skilled, or non-technical work is a worker, unless they are:

- Employed mainly in a managerial or administrative capacity.
- Employed in a supervisory capacity, drawing wages exceeding INR10,000 (about USD120) per month, or exercising functions that are mainly of a managerial nature.

All other categories of employees are considered as non-workers.

Indian law does not recognise an automatic transfer of workers during transfer transactions. Their prior consent is required. The law does not expressly address the issue of transfer of non-non-workers. However, the rules applicable to transfer of workers are generally followed even in the case of non-workers.

Consent of workers or non-workers is not required under a share transaction, as this involves no transfer of workers or non-workers. However, their consent is required in asset transactions that involve their transfer. Also, certain enterprises with trade unions enter into a settlement agreement dealing with rights of workers. The settlement agreement must be complied with.

Transfer in a Business Sale and Other Protections

31. Are employees automatically transferred to the buyer in a business sale? What other protection do employees have against dismissal in the context of a share sale or asset sale?

Workers are provided with certain protections in the context of a share or asset sale. Under the Industrial Disputes Act, a worker who has been in continuous service for at least one year cannot be dismissed unless the following conditions are met:

- The worker is given one month's notice, or salary in lieu of notice.
- The worker is paid retrenchment compensation calculated as 15-days' average pay for every completed year of continuous service or any part thereof in excess of six months. Under the Industrial Disputes Act, one year of continuous service is read as 240 days (for the first year). If a worker has completed 240 days in their first year of employment, they are considered to have completed one year of continuous service. For any period after that, the compensation is calculated on a six-month basis. For example, if a worker has been employed with a company for 20 months, they are entitled to 30 days of retrenchment compensation (15 multiplied by two).
- The employer must report the dismissal to the local labour officer.

However, the above rules do not apply if it is shown that:

- The worker's services are uninterrupted despite the transfer of ownership.

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- The worker's terms of employment are no less favourable than their previous terms.
- The new employer recognises the worker's previous employment for the purpose of benefits and awards.

In addition to the Industrial Disputes Act, the relevant state Shops and Establishment Act also sets out certain requirements. The Shops and Establishments Act of most states also provides the necessary legal framework regarding employee dismissals.

The legal framework described above sets the minimum compensation payable to a worker when they are dismissed. However, parties can agree to a better severance package than the one provided under law.

The law requires prior approval from the jurisdictional labour officer if the retrenchment is proposed by a factory that has employed on average 100 or more workers per working day for the preceding 12 months.

For an overview of key employment law issues to consider in any acquisition between two parties in a cross-border context, see *Employees (Private Company Acquisitions) Toolkit (International)* .

Pensions

32. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private Pension Schemes

Indian labour and employment law requires every establishment employing 20 or more persons to make provident fund contributions. The employer and the employee contribute an equal amount to a provident fund scheme established by the government. The rate of contribution is fixed at a certain percentage of basic wages. Employees are also entitled to receive gratuity calculated as a percentage of their salary at the end of five years of continued employment with the relevant employer. This gratuity is capped at a certain amount per employee. India has also established the Employees State Insurance scheme. This scheme requires both employers and employees to make certain contributions to a centrally administered insurance scheme. Employees or their legal heirs can rely on insurance in case of death or disablement.

Pensions on a Business Transfer

The acquirer must ensure continuity of service to employees. The terms of employment must not be less favourable than those offered by the previous employer. Retrenchment compensation is payable to the relevant employee if these conditions are not met. The statutory social security and pension contributions (for example provident fund, pension, and gratuity) must be honoured by the new employer. These benefits are either paid out at the time of acquisition, or recorded in the books of the acquirer as payable. Most transactions record these benefits in the books of the acquirer as payable to ensure that the transfer does not result in interruption of service to employees.

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Competition/Anti-Trust Issues

33. Do private acquisitions have to be notified to a competition law regulator in certain circumstances?

Triggering Events/Thresholds

The Competition Act regulates combinations. The Competition Act confers extra-territorial jurisdiction on the regulator over combinations based on assets in India and turnover from India.

At present, under the standard notification test, a transaction is notifiable to the CCI if the parties breach the *asset* and *turnover thresholds* and no exemption applies. For further information see, *Merger Control: India Quick Compare Chart*.

The CCI recently amended the definition of a combination by introducing the concept of deal value threshold. Any merger or acquisition in which the value of transaction, in which the acquisition of shares, control, voting rights, or assets of an enterprise, merger, or amalgamation exceeds INR20 billion (about USD240 million) will be classified as a combination and a prior approval from the CCI is required. However, the enterprise being acquired should have substantial business operations in India. The term substantial business operations in India is yet to be clarified by the CCI.

Where either the value of assets or turnover of the enterprise being acquired, taken control of, merged, or amalgamated in India is not more than that value as prescribed, the acquisition, control, merger, or amalgamation will not constitute a combination.

A combination that causes or is likely to cause an appreciable adverse effect on competition is prohibited and is void.

***De minimis*/small-target exemption.** This is available where the value of assets being acquired, taken control of, merged, or amalgamated does not exceed INR4.5 billion (about USD53 million) in India, or the turnover from India is not more than INR12.50 billion (about USD149 million). This exemption is currently available up to 07 March 2026.

Notification and Regulatory Authorities

Any enterprise intending to enter a combination must notify the *Competition Commission of India* (CCI) and seek its permission for consummating the combination.

The CCI regulations also exempt certain categories of combinations that are ordinarily not expected to have an appreciable adverse effect on competition.

The CCI must make a decision regarding the combinations within 210 days of notification to it. However, the CCI must formulate a prima facie view about the combination within 30 days of notification of the combination. Generally, the CCI keeps to this time period.

Substantive Test

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The CCI takes the following factors into consideration when determining if a combination will have an appreciable adverse effect on competition:

- If it creates barriers for new entrants in the market.
- If it drives the existing competitors out of the market.
- If it leads to foreclosure of competition by hindering entry into the market.
- If it leads to accrual of benefits to consumers.
- If it leads to improvements in production or distribution of goods or provision of services.
- If it causes promotion of technical, scientific, and economic development by means of production or distribution of goods or provision of services.

For more information, see *Competition Law in India: Overview*.

Environment

34. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

India has a range of umbrella legislation, for example:

- The *Environment (Protection) Act, 1986*.
- The *Air (Prevention and Control of Pollution) Act, 1981*.
- The *Water (Prevention and Control of Pollution) Act, 1974*.
- The *National Green Tribunal Act 2010*.

The broad principle under these statutes is that the occupier of the land is liable for contaminated land. However, government has tried to hold the causer of the contamination liable. For example, under the Guidelines on Implementing Liability for Environmental Damage due to Handling and Disposal of Hazardous Waste and Penalties, the occupier can be excluded from liability if they prove that the contamination was caused by the previous occupier or owner. For this reason, it is important that the buyer carries out environmental due diligence (among others), prior to acquiring the target. Typically, environmental due diligences are common where the target is engaged in the business of manufacturing goods, waste disposal, packaging and re-selling goods, and business activities of a like nature.

In a share sale, the buyer acquires all the liabilities, including environmental liabilities. Environmental liabilities can be excluded in asset acquisitions, depending on the transaction structure. However, given the risk of liability attaching to the occupier, it is best to have robust environmental warranties.

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For more information, see *Environmental Law and Practice in India: Overview*.

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RESOURCE HISTORY

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Law stated date updated following periodic maintenance.
This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 01 August 2024.

Law stated date updated following periodic maintenance.
This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice 1 December 2024.

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