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Foreign Investment Routes and Dispute Resolution

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Abstract
Investment is very important for the growth and prosperity of a nation. One of the economic aspects of globalization is increasing foreign investments in various forms. Domestic investment and foreign investment both are equally important. In the recent times due to the global recession most of the countries have not been able to pull investments. India has been able to attract better FDI's than the developed countries even during this period. Domestic investment may lead to the creation of domestic savings, consumption, and employment. Foreign Investment can decrease the domestic saving gap. The main objective of the study is to examine the trends and patterns of foreign direct investment in India. This paper attempted to make an analysis of investment routes and resolution of disputes in India. It also focuses on sectorial analysis and sources of investment.

Keywords: *Investment, Globalization, FDI, Savings, Consumption, Employment, Analysis, Source.*

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INTRODUCTION

Foreign Investment in Indian entities is generally in the form of equity or debt investment. Equity instruments provide the investor substantial rights and controls in the operations of the investee company. On the other hand, debt investments provide investors guaranteed returns, downside protection and security against the debt. In recent times alternative means to bank lending also emerged to cover for the debt needs of Indian companies. The Reserve Bank of India has undertaken strict measures in recent times to clean up the mess of Non-Performing Assets (**"NPA"**) in India. In this backdrop, a few banks have been put under RBI's Prompt Corrective Action (**"PCA"**) list, which has restricted their ability to lend. With domestic banks facing these strict constraints on lending, Indian entities are looking at foreign modes of investment.

Due to these changing dynamic, private debt funding has seen a substantial rise in the Indian debt scenario. The emergence of these debt platforms can also be attributed to the enactment of the Insolvency and Bankruptcy Code, 2016 (**"IB Code"**) in India, which provided creditors with substantive rights and enable them to ensure that these Indian companies do not go rogue. Debt investors are being compelled to look at various structures for debt investments into India as a result of changing dynamics of the Indian regulatory framework. Some of these regulatory requirements include concentration norms for foreign portfolio investors investing into Indian corporate bonds, thin capitalization norms for Indian corporates, minimum residual maturity for corporate bonds issued to foreign portfolio investors, enactment of the General Anti-Avoidance Rules under the Indian tax regime and applicability of the International Financial Reporting Standards (IFRS) to Indian companies. This paper discusses structures for offshore debt investors to invest in India.

INVESTMENT ROUTES

Foreign debt could be infused in one of the following ways:

i. Foreign Direct Investment (**"FDI"**) is investment through capital instruments such as equity, CCD and CCPS.
ii. Foreign Portfolio Investment is:
a) Investment by a person who is registered with the Securities and Exchange Board of India ("**SEBI"**) as a Foreign Portfolio Investor (**"FPI"**)
b) Investment by a person resident outside India through less than 10% of capital instruments of listed Indian company.

iii. Investment by Foreign Venture Capital Investor (**"FVCI"**)
iv. External Commercial Borrowing (**"ECB"**): is infusion of capital by direct lending or lending in exchange of rupee denominated bonds.
v. Rupee Denominated Bonds (Masala Bonds)

Foreign Direct Investment
Foreign Direct Investment is governed by the Foreign Exchange Management Act (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("**TISPRO Regulations**"). FDI investment is by way of investment: (i) through capital instruments by a person resident outside India in an unlisted Indian company; or (ii) in 10% or more of the post issue paid-up equity share capital on a fully diluted basis of a listed Indian company.

Investment by way of FDI is subject to entry route restrictions and sectoral caps. The TISPRO Regulations provide for the following two entry routes, and specify the sectors pertaining to each:
a) Automatic Route: no prior approval from either the RBI or the Government is required for investment by non-resident investors.
b) Government Route: prior approval is required from the Government for investment made by non-resident investors, and such investment shall be subject to the conditions stipulated in the approval.

Foreign Venture Capital Investors
It is investment through securities of an Indian company engaged in a few limited sectors or units of a Venture Capital Fund and / or OCDs of an Indian venture capital undertaking. The FVCI regime is regulated by the SEBI (Foreign Venture Capital Investors) Regulations, 2000 (**"FVCI Regulations"**) [1]. The regulations were enacted to incentivize foreign investment into venture capital undertakings and start-ups in India, by providing certain incentives to FVCIs who registered themselves with SEBI.

They are permitted to invest in far fewer sectors which does not include the following activities or sectors:
a) Non-banking financial companies, other than Core Investment Companies (CICs) in the infrastructure sector, Asset Finance Companies (AFCs), and Infrastructure Finance Companies (IFCs) registered with Reserve Bank of India;
b) Gold financing;
c) Activities not permitted under industrial policy of the Government of India; and
d) Any other activity which may be specified by the Board in consultation with the Government of India from time to time

Foreign Portfolio Investments
The FPI regime in India is governed by the SEBI (Foreign Portfolio Investors) Regulations, 2014 (**"FPI Regulations"**), which was enacted by merging the erstwhile foreign institutional investor route and the qualified foreign investor route. Erstwhile FIIs and QFIs were deemed to be Foreign Portfolio Investors ("FPIs") after payment of a conversion fees, and new foreign investors were required to register separately under these regulations.

Voluntary Retention Route for Investments by Foreign Portfolio Investors
The Reserve Bank of India (RBI) along with the Securities and Exchange Board of India (SEBI) introduced a new window called "Voluntary Retention Route" [2] to encourage Foreign Portfolio Investors (FPI) to lock their investments in India for a considerable period. Under this scheme, FPIs have been given greater operational flexibility in terms of instrument choices besides exemptions from certain regulatory requirements. The objective of the VRR channel is to attract long-term and stable FPI investments into debt markets while providing FPIs with operational flexibility to manage their investments.

External Commercial Borrowing
ECBs are commercial loans that are raised by certain eligible Indian companies from eligible non-residents. ECBs can be raised as plain vanilla loans, capital market instruments (such as floating rate notes, fixed rate bonds, non-convertible debentures, non-convertible, optionally convertible, or partially convertible preference shares and debentures), foreign currency exchangeable bonds, buyers' credit,

suppliers' credit, foreign currency convertible bonds and financial lease. RBI regulates the ECB route very closely. Hence, Indian entities can undertake the borrowings by confirming to various parameters such as minimum maturity, permitted and nonpermitted end-uses, maximum all-in-cost ceiling, etc.

Rupee Denominated Bonds [3] (Masala Bonds)

Indian companies and body corporates have also been permitted to issue RDBs (privately placed or listed as per host country regulations), also known as masala bonds, to certain eligible lenders. The two frameworks, on ECBs and RDBs, run separately. For example, limit of borrowing under the ECB framework would be separate from the borrowing under the framework for issuance of Rupee Denominated bonds overseas. Any corporate or body corporate is eligible to issue RDBs, including SEBI regulated Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs). Further, Indian banks are also eligible to issue RDBs by way of Perpetual Debt Instruments ("PDI"). [4]

DISPUTE RESOLUTION

Specific Relief Act

The Specific Relief Act, 1963 (**"Specific Relief Act"**) provides relief for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing civil law. Under the Specific Relief Act, courts are mandated to grant specific relief unless the limited grounds expressly bar the relief provided in the statute. Specific performance is an order of the court, which requires a party to perform a specific task in accordance to the contract. The aggrieved party may approach a Court for specific performance of a contract. The Court will direct the party in breach to fulfil his part of obligations as per the contract. While specific performance can be in the form of any type of forced action, it is usually used to complete a previously established transaction, thus, being the most effective remedy in protecting the expectation interest of the innocent party to a contract.

The Specific Relief Act was recently amended and received Presidential assent on August 1, 2018 ("Specific Relief Amendment Act") [5]. However, its provisions are yet to be notified. The Specific Relief Amendment Act has altered the nature of specific relief from an exceptional rule to a general rule, which will certainly ensure contractual enforcement. Some salient features of the Specific Relief Amendment Act are below:

a) Courts must grant specific performance of a contract when claimed by a party unless such remedy is barred under the limited grounds contained in the statute.
b) If a contract is broken due to non-performance of a promise by a party, the party suffering the breach has the option of substituting performance through a third party or through its own agency.
c) A suit filed under the Specific Relief Act must be disposed of by the court within 12 months from the date of service of summons to the defendant. Such period can be extended by 6 months after recording written reasons by the court.
d) No injunction can be granted by the court in relation to an infrastructure project if such injunction would cause delay or impediment in the progress or completion of the infrastructure project.

Contract Act and Damages

Under Indian law, parties can choose to opt for the remedy of specific performance or damages upon a breach of contract. The aim is to compensate the injured party through money for tangible and intangible losses caused. The remedy of damages for breach of contract is laid down in Sections 73 and 74 of the Contract Act. Section 73 states that where a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. However, no compensation is payable for any remote or indirect loss or damage. Section 74 deals with liquidated damages and provides for the measure of damages in two classes: (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any other stipulation by way of penalty. In both classes, the measure of damages is the reasonable compensation not exceeding the amount or penalty stipulated for.

Insolvency Code

The Insolvency and Bankruptcy Code, 2016, (**"IB Code"**) is a welcome overhaul of the erstwhile fragmented and time-consuming bankruptcy regime in India. The IB Code is a comprehensive legislation as it consolidates the existing laws relating to insolvency of companies, limited liability partnerships, and individuals into a single legislation. Some of its most noteworthy features are:

a) **Time Bound Resolution [6]:** The Bankruptcy Code creates time-bound processes for insolvency resolution as every insolvency resolution process must conclude within 180 days of commencement, which is extendable by another 90 days in case of delay. This amendment marks the onset of a colossal change in the corporate insolvency regime, and has renewed faith amongst investors, both nationally and internationally.

b) **Streamlined Processes:** The resolution process is conducted by an Insolvency Resolution Professional (**"IRP"**); and the National Company Law Tribunal (**"NCLT"**) adjudicates insolvency resolution for body corporates. The Bankruptcy Code establishes a specialised Insolvency and Bankruptcy Board of India (**"IBBI"**) [7], which is responsible for the regulation of various aspects like formulating rules and regulation of insolvency professionals.

c) **Regulatory & Legislative Impetus**: The Central government, RBI and NCLTs have added teeth to the Bankruptcy Code by ensuring that its implementation is smooth and efficient. With their inputs, the Bankruptcy Code is not merely an amendment to a statue but an overhaul of the entire regime. The legislature, RBI, SEBI, and the judiciary have presented a unified front, unprecedented in India so far. Any apparent loopholes are being plugged at the earliest and the law is evolving rapidly.

Arbitration

Due to the huge pendency of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. The current Arbitration & Conciliation Act, 1996 (**"A&C Act 1996"**) was enacted to make both, domestic and international arbitration, more effective in India. Broadly, A&C Act 1996 covers the following recognized forms of arbitration:

a) **Ad-hoc Arbitration** is where no institution administers the arbitration. The parties agree to appoint the arbitrators and either set out the rules, which will govern the arbitration or leave it to the arbitrators to frame the rules. Ad-hoc arbitration is quite common in domestic arbitration in India and continues to be popular. This allows the parties to resolve the dispute in a faster cheaper and efficient manner [8].

b) **Institutional Arbitration** refers to arbitrations administered by an independent arbitral institution. Institutions such as the International Court of Arbitration attached to the International Chamber of Commerce in Paris (**"ICC"**), the London Court of International Arbitration (**"LCIA"**) the American Arbitration Association (**"AAA"**), the Hong Kong International Arbitration Centre (**"HKIAC"**) and China International Economic and Trade Arbitration Commission (**"CIETAC"**) are well known world over and often selected as institutions by parties from various countries. Within India, Singapore International Arbitration Centre or the Mumbai Centre plays greater role for International Arbitration.

c) **Statutory Arbitration** refers to scenarios where the law mandates arbitration. In such cases the parties have no option but to abide by the law of the land. It is apparent that statutory arbitration differs from the above types of arbitration because (i) the consent of parties is not required; (ii) arbitration is the compulsory mode of dispute resolution; and (iii) it is binding on the Parties as the law of the land. Sections 24, 31 and 32 of the Defence of India Act, 1971, Section 43(c) of The Indian Trusts Act, 1882 and Section 7B of the Indian Telegraph Act, 1885 are certain statutory provisions which deal with statutory arbitration.

d) **Foreign Arbitration** is where the arbitration proceeding is seated in a place outside India, such a proceeding is termed as Foreign Arbitration. The provisions of

Part I of A&C Act 1996 are not applicable to foreign awards and foreign seated arbitrations where the arbitration agreement was entered into on or after September 6, 2012 [9]. This has considerably reduced the level of interference by Indian courts in foreign arbitrations. Awards passed in such foreign seated arbitrations would not be subject to challenge under the A&C Act 1996.

CONCLUSION

In conclusion, the changes proposed by the RBI would provide debt inflows into India a major push. Further, the concentration norms have been enacted and successfully implemented in other financial services sectors to avoid systemic risk in the financial markets by encouraging diversification among investors, but limits on investment into issuances seems to be far excessive, and may prove to be the death knell for not only the debt segment for FPIs, but an important avenue for fund raising for Indian corporates. The Introduction of progressive legislation is intended to improve the efficiency of debt funding in India. The new amendments will bring significant changes at the macroeconomic level in in the country, and it will morph into something that will drive this country towards a new age of economy. However, what this road of growth might lead to is yet to be seen.

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