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AN ANALYSIS OF LEGAL FRAMEWORK FOR PRIVATE EQUITY IN INDIA-KEY DEVELOPMENTS

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ABSTRACT

Private equity investments in India turn out to be increasing at a fast pace. According to some analysts, the increase might be ascribed to the way that organizations that are upheld by private equity reserves frequently show improvement over the ones that are not. In order to grasp the legal framework that controls private equity funds and investments, it is necessary to first appreciate the significance of such investments. The administrative structure managing private equity assets as well as investments in India has undergone significant modifications in the recent past. These amendments have mostly been included in the Companies Act, 2013[1], securities rules made by the Securities and Exchange Board of India, the Income-Tax Act, 1961[2], and the Foreign Exchange Management Act, 1999[3], among other pieces of legislation. It is the goal of this article to give a common structure for the regulatory framework by tracking legal advancements in the legislations that control private equity funds and the investments made with their proceeds.[4]

Keywords: Private Equity, Taxation, Competition, Corporate Law.

INTRODUCTION

Somewhere during 2010 and 2014, private equity ("PE") and funding interests in India extended at an accumulated yearly rate of 20 per cent, according to the Indian government. The reasons behind this are not difficult to ascertain. India offers a compelling development potential that is underpinned by a stable political as well as legitimate climate and is directed by a flourishing

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[1] The Companies Act, 2013 (Act 18 of 2013).

[2] The Income Tax Act, 1961 (Act 43 of 1961).

[3] The Foreign Exchange Management Act, 1999 (Act 42 of 1999).

[4] A.-K. Achleitner, R. Braun, N. Engel, C. Figge, and F. Tappeiner, 'Value Creation Drivers in Private Equity Buyouts: Empirical Evidence from Europe' [2010] Journal of Private Equity 17–27.

working-class customer narrative as well as a fast digitising and urbanising population, among other factors.[5] Recent developments have seen India rise to the top of the list of the world's 'developing markets,' in spite of rough macroeconomic conditions and a global economic slowdown. Due to the fact that liberalisation began more than 25 years prior and that a possible second period of development and change is on the way, India's flourishing economy gives particularly prolific ground for private equity firms to invest in. PE funds have been positive in India for a long and they keep on being so.[6]

A growing body of empirical data demonstrates that private equity-funded firms outperform their nonprivate equity-funded rivals in the Indian setting and that private equity reserves are turning into a critical wellspring of financing for Indian ventures. Maybe the most intriguing component of PE support's movement in India has been the modifying of the model regularly embraced by PE assets in the United States as well as Europe to adjust to the Indian administrative and lawful climate,[7] which has proven to be very interesting.[8]

"While the traditional PE model has been successful in developed economies, PE firms quickly realised that transplanting this model to India would prove difficult due to various legal constraints. Accordingly, PE firms in India have developed an alternate model...and customised [it] for India's complex regulatory and governance environment."[9]

A major trend on the administrative front has been advancement and justification for almost two decades and a half, but not without some setbacks along the way. A considerable influence on investor confidence in both people in general as well as private capital business sectors has been the consequence of switches in the legislative environment, particularly in taxes laws and regulations.[10] The purpose of this paper is to offer a significant level synopsis of late advancements in Indian regulation that affect private equity activities as well as transaction structure in the country.

[5] P. Aigner, S. Albrecht, G. Beyschlag, T. Friederich, M. Kalepky and R. Zagst, 'What Drives Private Equity? Analyses of Success Factors for Private Equity Funds' [2008] Journal of Private Equity 63–85.

[6] D. Beal, R. Eccles, G. Hansell, R. Lesser, S. Unnikrishnan, W. Woods and D. Young, 'Total Societal Impact: A New Lens for Strategy' (BCG 2017) <https://www.bcg.com/publications/2017/total-societal-impact-new-lens-strategy.aspx > accessed 29 January 2022.

[7] L. Bebchuk, 'The Myth That Insulating Boards Serves Long-Term Value Essay' [2013] CLR <http://heinonline.org/HOL/Page?handle=hein.journals/clr113&div=42&g_sent=1&casa_token=&collection=journals#> accessed 29 January 2022.

[8] F. Allen, 'Do Financial Institutions Matter?' [2001] Journal of Finance 1165–75.

[9] M. Anson, *Handbook of Alternative Assets* (2nd edn, John Wiley & Sons 2006).

[10] R. Brealey, S. Myers and F. Allen, *Principles of Corporate Finance*, (9th edn, McGraw Hill 2008).

Before we look at significant changes in the legal environment permitting private equity investments in Indian firms, it is necessary to provide a quick overview of the legal system. PE funds are governed by many regulations, the most important of which are the Companies Act, 2013 (after this "2013 Act"), securities legislation promulgated by the Securities & Exchange Board of India (hereinafter "SEBI," and the Income-Tax Act, 1961 (after this "ITA"). The Foreign Exchange Management Act, 1999 (after this "FEMA")[11] administers unfamiliar investment in India on the grounds that the Indian Rupee isn't completely convertible on the capital record.[12] Non-inhabitants (a larger part of PE reserves are non-occupants) are prohibited from making investments in India because of this restriction.

The 2013 Act, which came into effect in the first half of 2014, was passed in order to carry out a long-overdue revamp of India's prior company law (hence referred to as the "1956 Act") and to raise the overall level of corporate governance.[13]

(a) Private Placement

Because Indian company law bans private limited corporations from issuing company securities to the public at large[14], they obtain funds by issuing securities to a small group of people through a procedure known as "private placement." Understanding the mechanisms of share sale is critical to a smooth transaction since PE funds' investments nearly do include one.[15]

To avoid the requirements of the private placement as per the 2013 Act, firms have disguised their private placements as "rights issues."[16] While this speeds up the issuing process, it also raises a regulatory risk because it may contradict the legislative goal.[17] While modifications to the private placement system under the 2013 Act are now in the process, they don't really deal with the issues raised above.

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[11] FEMA (n 3).
[12] U. Axelson, P. Strömberg and M. Weisbach, 'Why Are Buyouts Levered? The Financial Structure of Private Equity Funds' [2009] Journal of Finance1549–82.
[13] S. Barnes and V. Menzies, 'Investment into Venture Capital Funds in Europe: An Explanatory Study' [2005] Venture Capital 209–26.
[14] J. Bartlett and E. Swan, 'Private Equity Funds: What Counts and What Doesn't?' [2001] The Journal Of Corporation Law 393–412.
[15] B. Black and R. Gilson, 'Venture Capital and the Structure of Capital Markets: Banks Versus Stock Markets' [1998] Journal of Financial Economics 243–77.
[16] A. Buchner, 'Equilibrium liquidity premia of private equity funds' [2016] *The Journal Of Risk Finance*, *17*(1), 110-128 < https://doi.org/10.1108/jrf-07-2015-0068 > accessed 29 January 2022.
[17] B. Buttonwood, 'What's wrong with finance? ' (Economist.com 2015) <https://www.economist.com/blogs/buttonwood/2015/05/finance-and-economics > accessed 29 January 2022.

(b) Directors' Liability

The fiduciary responsibilities of directors were taken from very well common law rules rather than being spelt explicitly in the 1956 Act. The 2013 Act formalised a corporation's directors' responsibilities and drastically enhanced the liabilities that a company's directors may suffer (in response to previous corporate governance problems).[18] Non-executive directors, for example, who are not engaged in the daily activities of a company,[19] may be held accountable if they are proven to just have awareness of something like the company's conduct in the event of corporate malfeasance.

Because a position just on the platform of a portfolio company is a basic deal term in PE deals,[20] PE funds had also taken notice of its very major danger that the nominee executives those who place just on panels of their own target firms will be exposed to obligations like a consequence of the increasing director liability regime enacted by the 2013 Act. [21]As a result, a rising number of private equity firms are requiring that their portfolio companies obtain "directors' and officers' liability insurance," along with compensation in case of any damage caused by their nominated directors.[22]

(c) Compulsorily Convertible Debentures

Compulsorily convertible debentures (hence referred to as "CCDs") have proven to be a popular investment vehicle for private equity firms operating in India.[23] According to Indian company law, some amounts of money due from a business are classified as 'deposits,' and onerous compliance requirements are imposed in order to secure the interests of the people who lend money to the firm.

[18] A. Braun, H. Schmeiser and C. Siegel, 'The Impact of Private Equity on a Life Insurer's Capital Charges under Solvency II and the Swiss Solvency Test' [2014] Journal of Risk and Insurances 113–58.
[19] Ibid.
[20] J. Cao and J. Lerner, 'The Performance of Reverse Leveraged Buyouts' [2009] Journal of Financial Economics 139–57.
[21] T. Chemmanur, K. Krishnan and D. Nandy, 'How Does Venture Capital Financing Improve Efficiency in Private Firms? A Look Beneath the Surface' [2011] Review of Financial Studies 4037–90.
[22] Ibid.
[23] BVCA, 'Private Equity Explained' (Bvca.co.uk. 2018) <https://www.bvca.co.uk/Our-Industry/Private-Equity > accessed 29 January 2022.

B. Exchange Control

The Reserve Bank of India (hence referred to as the "RBI") supervises foreign investment in Indian enterprises as per the Foreign Exchange Management Act (FEMA)[24]. A foreign direct investment (hereinafter "FDI") route into India, as well as through organizations enrolled with the Securities and Exchange Board of India (SEBI) as foreign portfolio investors (hereinafter "FPIs")[25] or foreign venture capital investors (hereinafter "FVCIs"), are all options for bringing in foreign capital into the country.[26]

(a) Optionality Clauses & Other Instruments

When it comes to investing in Indian firms, private equity funds have traditionally used a variety of downside protection and exit options.[27] If the PE fund does not get an exit within a certain period of time, it may exercise a 'put option,' which requires that the investee firm or its promoters purchase back the stocks owned by the fund. Foreign investors may benefit from products that include a put option because they may be able to exit their investments with a guaranteed return,[28] shielding them from the dangers associated with equity investments, according to the RBI's rationale. Despite the absence of clearness on their legitimacy, put choices attached to an expressed inner pace of return were a typical piece of Indian private equity bargain papers, despite the ambiguity surrounding their enforceability.

'Put options' were legalised by the RBI in 2014, subject to specific constraints, for example, a lock-in period and cutoff points on the cost at the hour of leave. The driving thought was that an unfamiliar financial backer won't be given the right to exit with a guaranteed return, as had been the case for many years.[29] Despite the fact that the sanctioning of put choices gave truly necessary clearness, the Reserve Bank of India's position against options that provide a definite return means that private equity firms still lack the ability to properly protect themselves against negative outcomes.[30]

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[24] A. Castello, 'BDC: The Private Equity for Small Investors?' (The Market Mogul 2017) <https://themarketmogul.com/bdc-private-equity/ > accessed 29 January 2002.
[25] J.-W. Chung, B. Sensoy, L. Stern and M. Weisbach, 'Pay for Performance from Future Fund Flows: the Case of Private Equity' [2012] Review of Financial Studies 3259–304.
[26] R. Coase, 'The Nature of the Firm' [1937] Economica 386–405.
[27] J. Cochrane, 'The Risk and Return of Venture Capital' [2005] Journal of Financial Economics 3–52.
[28] F. Cornelli, Z. Kominek and A. Ljungqvist, 'Monitoring Managers: Does It Matter?' [2013] Journal of Finance 431–81.
[29] J. Cao (n 20).
[30] C. Demaria, *Introduction to Private Equity* (John Wiley & Sons 2010).

The addition of partially paid-up shares and warrants to the list of acceptable securities for FDI in 2015 is another noteworthy development.[31] The utilization of warrants or to some degree settled up shares for FDI was prohibited before 2015, while the use of compulsorily convertible debentures (CCDS) was prohibited prior to 2015. It is necessary to meet certain conditions in order to use partially paid-up shares and warrants to raise foreign direct investment. These include determining their pricing in advance, and (ii) receiving twenty-five per cent of the total consideration amount come up, with the remainder of the consideration amount to be discharged within 18 months.[32]

(b) Changes to the FPI and FVCI regimes

A PE fund might potentially spend in India via the FPI or FVCI path if it is registered as an FPI or FVCI with the Securities and Exchange Board of India (SEBI).[33] Contributing through the FPI course permits private equity assets to exchange public-traded collaterals like stocks, though contributing via the FVCI course permits private equity assets to go into and exit from Indian organizations without consenting to the estimating rules for arrival as well as exit set up by the Foreign Exchange Management Act (FEMA).[34]

(i) Changes to the FPI regime

As per the Foreign Direct Investment (FDI) framework, restrictions are placed on how much unfamiliar investment may be made in Indian enterprises that operate in certain sectors (known as sectoral caps').[35] The government has traditionally prescribed sub-cutoff points' inside such by and large investment constraints to secure FPI investments in specific delicate areas where the public authority was worried about the instability created by the FPIs' 'hot money', which was seen to be a source of concern. For example, although the total ceiling on unfamiliar investment in the tactical business was 49%, foreign portfolio investors (FPIs) were simply permitted to put up to 24% in the area.[36] In 2015, the Indian government nullified as far as possible for foreign direct investment

[31] W. Draper, *The Startup Game – Inside the Partnership between Venture Capitalists and Entrepreneurs* (Palgrave Macmillan 2011).
[32] F. Cornelli, Z. Kominek and A. Ljungqvist, 'Monitoring Managers: Does It Matter?' [2013] Journal of Finance 431–81.
[33] D. Cumming, 'Contracts and Exits in Venture Capital Finance' [2008] Review of Financial Studies 1947–82.
[34] D. Cumming and S. Johan, 'Venture Capital Investment Duration' [2010] Journal of Small Business Management 228–57.
[35] Ibid.
[36] S. Davis, J. Haltiwanger, K. Handley, R. Jarmin, J. Lerner and J. Miranda, 'Private Equity, Jobs, and Productivity' [2014] *American Economic Review*, *104*(12), 3956-3990. <https://doi.org/10.1257/aer.104.12.3956 > accessed 29 January 2022.

(FDI)[37] in certain sectors as well as supplanted them with composite limitations for unfamiliar direct investment in such areas. As a result, foreign portfolio investors (FPIs) are currently ready to take an interest in Indian undertakings up to the specified sectoral amounts, which is expected to result in increased capital inflow.[38]

Additionally, the Reserve Bank of India has proposed to enable foreign portfolio investors (FPIs) to take an interest in unlisted corporate securities given by Indian firms, a move pointed toward extending the nation's security market and making it more liquid. The Foreign Portfolio Investors (FPIs) route has been used by PE funds to make investments in Indian organizations through organized obligation instruments, mainly in the land area.[39] At present, FPIs are simply allowed to put resources into recorded or to-be-recorded corporate securities, just as in unlisted obligations of organizations occupied with foundation development. One disadvantage of using this path, notwithstanding, had been that the investee firm was required to have its bonds recorded on the stock exchange within a certain time period, which may not be viable for many enterprises to do.[40]

(ii) Changes to the FVCI regime

Private equity funds that invest via the FVCI route[41] may take advantage of various tax reductions as well as exclusions, including the capacity to utilize value-connected instruments in their investments and the ability to benefit from exemptions from certain securities regulations. FVCIs, then again, were simply approved to put resources into nine areas (alluded to as "Permitted Sectors" below). Recently, the Reserve Bank of India (RBI) authorised foreign direct investment companies to contribute outside of the Permitted Sectors, giving that the investee business met specific conditions,[42] as well as to put resources into endeavors working in the framework area. The deregulation of the FVCI route, although seeming to be targeted toward drawing in beginning phase hazard capital, has the effect of increasing the attractiveness of the route for private equity firms.[43]

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[37] C. Demiroglu and C. James, 'The Role of Private Equity Group Reputation in LBO Financing' [2010] Journal of Financial Economics 306–30.
[38] S. Davis (n 36).
[39] G. Fraser-Sampson, *Private Equity as an Asset Class* (John Wiley & Sons 2007).
[40] P. Gompers and J. Lerner, *The Venture Capital Cycle* (2nd edn , MIT Press 2006).
[41] J. Kocis, J. Bachman, A. Long and C. Nickels, *Inside Private Equity: The Professional Investor's Handbook* (John Wiley & Sons 2009).
[42] F. Easterbrook and D. Fischel, 'Voting in Corporate Law' [1983] Journal of Law & Economics 395–487.
[43] J. Eifert, (1986) 'Removal of General Partners: A Method of Intrapartnership Dispute Resolution for Limited Partnerships' [1986] Vanderbilt Law Review 1407–63.

(iii) Escrow/Deferred Payment

To enable indemnification for portrayals and guarantees or to take into account acquiring outs to current administration/advertisers in PE transactions, escrow or delayed payment arrangements are often included in the terms of the transaction. It was formerly necessary to get RBI clearance for any delayed payment agreement, and escrow arrangements lasting more than six months needed permission from the Reserve Bank of India.[44] The aforementioned revision is a positive improvement since it gives private equity funds (PE funds) additional freedom when structuring agreements that include a delayed payment or escrow element. More crucially, it eliminates the requirement to get RBI clearance in particular cases.[45]

(iv) Investments into AIFs

Alternative Investment Funds (hereafter "AIFs") are inland asset vehicles managed by the Securities and Exchange Board of India (SEBI),[46] and the vehicle has achieved great success in the long time since it was made. While AIFs might be coordinated as organizations, trusts, or limited liability partnerships, for tax reasons that will be discussed more below, AIFs are most often organised as trusts. [47]However, since the Federal Emergency Management Agency (FEMA) didn't explicitly acknowledge unfamiliar interests into trust vehicles, there was great concern among both the patrons of PE reserves and the financial backers in PE reserves (referred to as "limited partners" or "LPs" in industry vernacular).[48] This is a very welcome step that will provide a significant uplift to the Indian AIF sector since it would make it much easier for them to obtain capital from overseas limited partners.

C. Taxation

Throughout the long term, India has fostered a standing as a country with an eccentrically unpredictable tax environment. The situation is as yet one in which private equity funds are often

44 M. Ewens, C. Jones and M. Rhodes-Kropf, 'The Price of Diversifiable Risk in Venture Capital and Private Equity' [2013] Review of Financial Studies 1854–89.
45 Ibid.
46 E. Fama, 'Agency Problems and the Theory of the Firm', Journal of Political Economy [1980] 288–307.
47 E. Fama, and M. Jensen, 'Agency Problems and Residual Claims' [1983a] Journal of Law & Economics 327–49.
48 Financial Times, 'Private equity clings to '2 and 20' fee model' (Ft.com. 2017) <https://www.ft.com/content/f7dc242c-58a9-11e6-9f70-badea1b336d4 > accessed 29 January 2022.

unable to predict the result of tax investigations. Some of the most recent tax changes that have an influence on private equity funds are briefly discussed in the following section.[49]

(a) Changes in the Indo-Mauritian DTAA

The latest change to the Indo-Mauritian Double Taxation Avoidance Agreement (hereafter referred to as the "Indo-Mauritian DTAA") is without a doubt the most important development in tax law that has an effect on PE funds. PE funds have traditionally made investments in India via intermediate holding entities domiciled in Mauritius in order to profit from the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA) and, as a result, to prevent tax leakages in India.[50]

Noteworthy is that, as a result, capital increases on the offer of CCDs, subsidiaries, and different protections will keep on being absolved from the charge in India, regardless of the changes to the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA) that were recently passed. The revisions to the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA) demonstrate that the Indian government is taking a firm stance against tax planning tactics.[51]

One of the secondary effects of the change to the Indo-Mauritian DTAA is the resulting revision to the twofold tax collection aversion arrangement among India and Singapore (hence referred to as the "India-Singapore DTAA") becomes effective.[52] The capital gains obtained by Singaporean citizens from the offer of shares in an Indian firm are currently available in India rather than Singapore.[53] Over the last several years, Singapore has created a well-known area from which to make investments in India, and numerous private equity financial backers have decided to make their investments in India via Singapore-domiciled funds. As a consequence of the revision to the India-Singapore DTAA detailed above, it is probable that Singapore may lose its engaging quality as an area wherein to house PE reserves with an emphasis on the Indian market.[54]

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[49] S. Foley, 'Private equity begins to entice ordinary investors' (Ft.com. 2015) <https://www.ft.com/content/e85240c4-b150-11e4-831b-00144feab7de > accessed 29 January 2022.
[50] Ibid.
[51] A. Frean, 'State and private funds unite to back start-ups' (Thetimes.co.uk. 2018) <https://www.thetimes.co.uk/article/government-teams-up-with-private-equity-funds-to-help-tech-start-ups-vgsxph8x9 > accessed 29 January 2022.
[52] P. Gompers, S. Kaplan and V. Mukharlyamov, 'What do private equity firms say they do?' [2016] Journal Of Financial Economics, 121(3), 449-476 <https://doi.org/10.1016/j.jfineco.2016.06.003 > accessed 29 January 2022.
[53] R. Greenwood and D. Scharfstein, 'The Growth of Finance' [2013] Journal Of Economic Perspectives, 27(2), 3-28 <https://doi.org/10.1257/jep.27.2.3 > accessed 29 January 2022.
[54] R. Harris, T. Jenkinson and S. Kaplan, 'Private Equity Performance: What Do We Know?' [2014] The Journal Of Finance, 69(5), 1851-1882 <https://doi.org/10.1111/jofi.12154 > accessed 29 January 2022.

Aside from Mauritius and Singapore, private equity investors have likewise involved the Netherlands and Cyprus as middle holding organization nations while putting resources into India, according to a recent report. The Indian government, on the other hand, has said that it is reconsidering its tax arrangements with Cyprus and the Netherlands, according to news reports. This is in accordance with the public authority's situation against charge deal misuse.

(b) Characterisation of Income

If a private equity firm earns money through the sale of securities, the income received by the fund is often described in terms of "capital gains" rather than "business income".[55] Be that as it may, the models utilized by tax specialists to determine whether revenue is characterised as 'capital additions' or 'business pay' are exceptionally abstract, and this has been a steady wellspring of vulnerability for private equity firms throughout their existence.[56] Following years of the suit on this subject, the Indian tax specialists as of late created a bunch of booklets (hence referred to as "Tax Circulars") outlining objective criteria to be used by tax officials when determining how to characterise income. The purpose of the Tax Circulars was to provide taxpayers with clarity on the characterisation of their pay from the offer of stocks and other securities.[57]

According to the Tax Circulars, pay got from the offer of public traded securities will be treated as capital additions assuming the protections were held for a time of a year past their deal. Pay got from the offer of unlisted offers will be treated as capital increases, paying little heed to how long the shares were held previous to being sold.[58]

Thus, the Tax Circulars might have the contrary impact of what they were planned to have - by giving assessment authorities with the discretionary authority to challenge income characterisation on shapeless grounds, for example, 'validity' or regardless of whether the corporate cloak can be taken out, the Tax Circulars[59] may only serve to fuel further debate on this issue. The Tax Circulars

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[55] L. Fang, V. Ivashina and J. Lerner, 'Combining Banking with Private Equity Investing' [2013a] Review of Financial Studies 2139–73.
[56] F. Franzoni, E. Nowak, and L. Phalippou, 'Private Equity Performance and Liquidity Risk' [2012] Journal of Finance 2341–73.
[57] R. Galer, 'Prudent Person Rule's Standard for the Investment of Pension Fund Assets' [2002] Financial Market Trends , OECD 41–75.
[58] P. Gompers and J. Lerner, 'The Use of Covenants: An Empirical Analysis of Venture Partnership Agreements' [1996] Journal of Law and Economics 463–498.
[59] P. Gompers and J. Lerner, 'What Drives Venture Capital Fundraising' [1998a] Brookings papers on economic activity – Microeconomics 149–204.

make a great deal of ambiguity for private equity firms wishing to invest in 'control' transactions; it is yet other problem that the meaning of the word 'control' is itself quite ambiguous.[60]

(c) Pass-through status for AIFs

Following the implementation of the Securities and Exchange Board of India (Alternative Investment Funds Regulations, 2012 (hereinafter "AIF Regulations")[61], 'go through' status was allowed to all investment reserves enlisted as "investment assets" under Category I of the AIF Regulations, no matter what the area in which their portfolio organizations engaged in their principal business activities.[62]

This was a much anticipated and very welcome development, but it was not without its negatives, as was the case with the previous one.[63]

(d) Onshore Fund Managers

As a rule, private equity firms prefer to locate their fund management organisations outside of the country because they are concerned about being presented with the tax risks related to having a long-lasting activity in India or being viewed as an Indian expense inhabitant.[64] As a result of the effect on fund structure, the Indian fund management business has relocated to other jurisdictions in order to lower tax liabilities. There have been two recent changes that have an influence on private equity fund managers. For starters, in 2015, the International Trade Administration (ITA) adopted a "substance-over-form" criteria for a corporate residence that depends on the 'spot of powerful administration ' (hereafter "PoEM") of a business.[65] While the PoEM test has not yet been implemented (it will become successful on April 1, 2017), the wide extent of the test implies that seaward private equity assets with coastal speculation warning elements might be hauled into the Indian tax net since charge specialists will believe them to be viably overseen from inside the Indian ward.[66] Like past issues inside the ITA, the issue is indeed the absence of lucidity that the

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[60] P. Gompers and J. Lerner, 'Risk and Reward in Private Equity Investments: The Challenge of Performance Assessment' [1998b] Journal of Private Equity 5–12.
[61] Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012.
[62] Ibid.
[63] P. Gompers and J. Lerner, 'An Analysis of Compensation in the U.S. Venture Capital Partnership' [1999] Journal of Financial Economics 3–44.
[64] P. Gompers and J. Lerner, 'Money Chasing Deals? The Impact of Fund Inflow on the Valuation of Private Equity Investments' [2000a] Journal of Financial Economics 281–325.
[65] J. Lerner, *The Architecture of Innovation: The Economics of Creative Organizations* (Harvard Business Review Press 2012).
[66] Ibid.

PoEM test creates.[67] As a result, the PoEM test may potentially serve to further incentivize private equity firms to locate their investment advisory organisations outside of the country's borders.

This leads us to the second recent change in Indian tax law that has anything to do with fund managers. Despite recent efforts by the Indian government to rationalise these qualification standards, the fund's sector continues to see them as burdensome.[68] Thus, it looks that private equity firms will keep on finding their asset chiefs in seaward areas for a long time to come.

(e) Anti-Avoidance Rules in general

The general anti-avoidance rules (hence referred to as "GAAR") were introduced into the International Taxation Agreement (ITA) in 2012[69], and they will become effective on April 1, 2017. In the case of PE funds, the GAAR represents by far the most important tax risk.

The current debate focuses on regardless of whether the GAAR will apply to foundations that fit the bill for anti-abuse arrangements found in tax settlements, for example, 'restricted advantage provisos.'[70] Specified that India is at present revising its significant tax deals, explanation from the Indian government and tax experts on the exact extent of the GAAR's appropriateness is awaited.[71] Following the implementation of the GAAR, private equity funds may be required to reconsider their present designs and check that they are adequately strong to endure assessment as per the GAAR.[72]

(f) Foreign Account Tax Compliance Act

After signing the Foreign Account Tax Compliance Act (hereafter "FATCA"), India included some FATCA provisions into the Internal Revenue Code of India (ITA) in 2015.[73] FATCA is a tax information collection initiative aiming at gathering information on nationals of the United States. As a result, resident Indian firms that have received direct or then again backhanded venture

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[67] M. Miles and M. Huberman, *Qualitative Data Analysis, An expanded Sourcebook* (2nd edn, SAGE Publications 1994).
[68] J. O'Brien, *Private Equity, Corporate Governance and the Dynamics of Capital Markets Regulation* (Imperial College Press 2007).
[69] P. Gompers, S. Kaplan and V. Mukharlyamov, 'What do private equity firms say they do?' [2016] *Journal Of Financial Economics*, *121*(3), 449-476 <https://doi.org/10.1016/j.jfineco.2016.06.003 > accessed 29 January 2022.
[70] R. Greenwood and D. Scharfstein, 'The Growth of Finance. *Journal Of Economic Perspectives*' [2013] *27*(2), 3-28 <https://doi.org/10.1257/jep.27.2.3 > accessed 29 January 2022.
[71] D. Hillier, M. Grinblatt and S. Titman, *Financial markets and corporate strategy* (2nd ed., McGraw-Hill Higher Education 2016).
[72] S. Johan, A. Knill and N. Mauck, 'Determinants of sovereign wealth fund investment in private equity vs public equity' [2013] *Journal Of International Business Studies*, *44*(2), 155-172. <https://doi.org/10.1057/jibs.2013.1 > accessed 29 January 2022.
[73] J. Lerner (n 65).

from occupants of the United States are subject to extensive reporting and compliance requirements under FATCA. It has a significant effect on onshore private equity reserves that contain occupant American limited partners (LPs) or restricted associations that are valuably constrained by inhabitant American companies.[74]

D. Distressed Deals

There has been a slew of legal developments that seem to be coming together at just the perfect moment to pique people's interest in this possibility.[75] For starters, the Indian government is making tremendous progress in improving the country's debt collection and company resolution rules as well as its legal and technological infrastructure. The Insolvency and Bankruptcy Code, 2015 (hereafter referred to as the "Insolvency Code"), which was recently passed, is perhaps the most notable change in this sector.[76]

Another important innovation that works in tandem with the Insolvency Code is the framework established by the Reserve Bank of India (in its capacity as banking regulator) to allow banks to assume control of failing corporate debtors. Strategic Debt Restructuring (hereafter "SDR") is a structure that allows banks to change over [77]their obligation into value, hold onto the authority of borrowers, and eliminate their current supervisory crews once defaults by borrowers reach specified criteria, according to the Financial Times. As a result, the SDR compels banks to sell their stakes to delinquent debtors in order to leave the situation. For private equity firms, this gives a chance to purchase businesses at attractive values from banks who have been anxious to eliminate bad debts from their books as well as convert them into profit. Considering the way that the SDR plot has been used extensively to far, the industry anticipates a major increase in troubled 'Mergers & Acquisitions' (hereafter "M&A") activity.[78]

A number of initiatives have been launched by the government to encourage investment in asset rehabilitation companies (hence referred to as "ARCs"). The government has recently put forward to empower support to claim the full capital of an ARC, as well as to allow foreign investment in ARCs up to 100 percent through the automatic method, and to allow foreign institutional investors (FIIs) to participate in 100 percent of the security receipts issued by ARCs.[79] It is hoped that these

[74] T. Perkins, *Valley Boy – The Education of Tom Perkins* (Gotham Books 2008).
[75] Ibid.
[76] The Insolvency and Bankruptcy Code, 2015 (Act 31 of 2016).
[77] H. Shefrin, *Beyond Greed and Fear* (Oxford University Press 2002).
[78] O. Gottschalg, 'Just How Bad is IRR?' [2012] Private Equity International 36–8.
[79] S. Grossman and J. Stiglitz, 'On the Impossibility of Informationally Efficient Markets' [1980] American Economic Review 393–408.

steps would assist ARCs in attracting some much-needed finance. Because of this development, numerous private equity groups from across the globe have already shown significant interest in investing in the company. In summary, these factors portend very energizing times for private equity finances dynamic in the disturbed, reverse, and exceptional circumstances sectors of the economy.[80]

E. Antitrust

The Competition Commission of India (hereafter referred to as "CCI"), India's antitrust regulator, is becoming more important for private equity firms. Notifying the CCI and securing its clearance causes deal timescales to be extended, as well as an increase in transaction expenses. The exemptions from the need to inform transactions for the approval of the CCI have been a significant development in this field in recent years.[81]

Although the Combination Regulations in all actuality do accommodate specific exceptions from telling the CCI, the CCI's determination practice over the course of 2015 tended to narrow the scope of these exclusions, to such an extent that PE exchanges that pass the Boundaries were more likely than not to expect the notice to the CCI in the first place.[82] This was made possible by a 2016 amendment to the Combination Regulations, which effectively eliminated exclusions accessible to PE assets in this respect. Prior to this change, private equity firms that invested up to 25% in an organization (without acquiring authority) were avoided the commitment to inform the SEC. This threshold has now been reduced to 10%.[83]

F. Dispute Resolution

For international investors, India's delayed dispute settlement procedure has proven to be a source of frustration. Over the course of the last time, the Indian government has put forth an exhibited attempt to strengthen the country's conflict settlement procedures. The following are a few imperative improvements around here.[84]

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[80] Ibid.
[81] S. Guo, E. Hotchkiss and W. Song, 'Do Buyouts (still) Create Value?' [2011] Journal of Finance 479–517.
[82] L. Harris, 'A Critical Theory of Private Equity' [2010] Delaware Journal of Corporate Law 259–93.
[83] M. Mietzner and D. Schweizer, 'Hedge funds versus private equity funds as shareholder activists in Germany — differences in value creation' [2014] Journal Of Economics And Finance, *38*(2), 181-208 <https://doi.org/10.1007/s12197-011-9203-x > accessed 29 January 2022.
[84] D. Najar, 'Private equity managers' fees: estimation and sensitivity analysis using Monte Carlo simulation' [2016] Review Of Quantitative Finance And Accounting, 48(1), 239-263. <https://doi.org/10.1007/s11156-015-0549-6 > accessed 29 January 2022.

(a) Changes in the Arbitration & Conciliation Act, 1996

Problems in the design of the Arbitration and Conciliation Act, 1996 (hence referred to as the "Arbitration Act")[85], along with significant court dissent over the translation of its arrangements, have hindered arbitration in our country from achieving its full effectiveness. This had been exacerbated by the disarray of the degree of a test to an unfamiliar arbitral judgment in Indian courts, just as the allowed level of association or help by an Indian court while such arbitrations were pending.[86] In the year 2015, the public authority adjusted the Arbitration Act to unequivocally characterize the limitations on the power of Indian courts to look at arbitral verdicts rendered by foreign-seated arbitrators. Additionally, the Arbitration Act has been amended to explicitly state that the arbitrators of a foreign seated arbitration may choose whether or not to grant Indian courts restricted powers to concede provisional help concerning the discretion and that such between time alleviation might be acquired from Indian courts of higher jurisdiction.

When combined with the more pro-arbitration posture adopted by Indian courts, these modifications provide confidence to private equity firms contemplating unfamiliar situated mediations including Indian parties that should be authorized by means of the courts of the country where the arbitration was held. But it should be noted that the revisions to the Arbitration Act have not defined nor clarified the idea of seat of arbitration, and as a result, arbitration provisions in transaction documents must be carefully drafted in order to stay away from ill-defined situations in their understanding.[87]

(b) National Company Law Tribunal

The National Company Law Tribunal (hereafter referred to as "NCLT") was established by the 2013 Act to take the position of the Company Law Board.[88] It is important to note that the NCLT has jurisdiction over other civil courts in India, which is a first in the country.[89] The making up of the National Company Law Tribunal (NCLT) can possibly be a turning point in Indian corporate

[85] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).
[86] Ibid.
[87] R. Harris, T. Jenkinson and R. Stucke, 'Are Too Many Private Equity Funds Top Quartile?' [2012] Journal of Applied Corporate Finance 77–84.
[88] J. Hawley and A. Williams, 'Universal Owners: Challenges and Opportunities' [2007] Corporate Governance: An International Review 415–20.
[89] S. Guo (n 81).

prosecution - it may bring about a more smoothed out and compelling scene were to contest business debates.[90]

G. Anti-Corruption Laws

The potential of enforcement proceedings under the United States' Foreign Corrupt Practices Act of 1977 (hereafter "FCPA")[91] and the United Kingdom's Bribery Act, 2010[92] is a developing cause of worry for private equity firms and restricted accomplices. These statutes, in essence, subject private equity firms to liability if their accomplices in different countries participate in degenerate activities.[93]

Direct or indirect bribery of a 'foreign official' to achieve an illegal economic benefit is prohibited under the Foreign Corrupt Practices Act (FCPA)[94], which applies to both American corporations and their executives and employees. The Department of Justice of the United States has been extremely aggressively pursuing prosecutions under the Foreign Corrupt Practices Act (FCPA) against huge firms and has also been levying exorbitant penalties in recent years.[95]

To avoid this risk, private equity firms might consider doing rigorous due diligence on their portfolio businesses to determine if they have a history of degenerate exercises - in specific cases, a scientific review by experts might be required. For documentation purposes, it is necessary to obtain adequate cover by obtaining promises from promoters as to corrupt practices.[96]

III. CONCLUSION

Despite the fact that it has been more than a fourth of a century since India originally opened its economy, our commercial rules, which regulate company transactions and private equity transactions, are still being revised and tweaked on a regular basis. Indian economic liberalisation has proceeded continuously, irrespective of whatever political party is in command at the Centre.[97]

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[90] T. Hellman, 'A Theory of Strategic Venture Investing' [2002] Journal of Financial Economics 285– 314.
[91] Foreign Corrupt Practices Act, 1977.
[92] United Kingdom's Bribery Act, 2010 (c. 23).
[93] Y. Hochberg, , A. Ljungqvist and A. Vissing-Jorgensen, 'Information Holdup and Performance Persistence in Venture Capital' [2014] Review of Financial Studies 102–52.
[94] The Foreign Corrupt Practices Act 1977 (15 U.S.C. §§ 78dd-1).
[95] Ibid.
[96] R. Prince, 'Financial Engineering And Strategy Development Are Key To Portfolio Valuation' (Forbes 2015) <https://www.forbes.com/sites/russalanprince/2015/06/22/financial-engineering-and-strategy-development-are-key-to-portfolio-value-creation/ > accessed 29 January 2022.
[97] V. Ivashina and A. Kovner, 'The Private Equity Advantage: Leveraged Buyout Firms and Relationship Banking' [2011] Review of Financial Studies 2462–98.

However, India has received significant criticism throughout the years for its languid speed of changes, as well as it has gotten substantially more analysis for the speed with which administrative activity is taken.[98] It has become more important for Indian transactional lawyers to play a part in this dynamic environment, which combines unprecedented transformative potential with regulatory flexibility. Today's private equity transaction lawyer must contend with a continually moving administrative and tax climate, while likewise shielding their customers from any adverse results coming about because of these moving sands of time. Consequently, while structuring a private equity transaction in India, it is critical to regularly review established doctrines and conventional market stances on a variety of legal concerns.[99]

However, the continually shifting environment does not always create issues all of the time.[100] It often brings with it new possibilities as well as new methods of organising transactions.

[98] Ibid.

[99] J. Tirole, *The Theory of Corporate Finance* (Princeton University Press 2006).

[100] A. Sheen and S. Bernstein, 'The Operational Consequences of Private Equity Buyouts: Evidence from the Restaurant Industry' (Anderson.ucla.edu. 2014) <https://www.anderson.ucla.edu/Documents/areas/fac/finance/BernsteinSheen%20-%20Restaurants.pdf > accessed 29 January 2022.