The pursuit of a company's interest over the life of a company

Corporate Acquisition and Joint Ventures Commission

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National Report of India

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Introduction

The typical lifecycle of a company consists of various phases, as for example, startup, growth phase, maturity (mid- to large-size privately held company), IPO and listed phase, and finally the acquisition by another company.

The various stakeholders in a company – understood in a very broad sense including equity holders, debt holders, management, employees, advisors and public – have expectations in the company. According to the stakeholder-value-theory all these expectations of the stakeholders form the company's interest.

Undoubtedly, the expectations of the various stakeholders and, therefore, the company's interest change and develop over the life cycle of the company.

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors. For efficiency reasons, the general report is limited to the developments of certain stakeholders' expectations (see A to D in the below matrix)

The following matrix provides an overview of the stakeholders (A to D) and the phases (1 to 5) that are covered by this general report. At the same time it provides an overview of the structure of this questionnaire (chapters A to D, each having sub-chapters 1 to 5). Our goal is to shed light on one or several aspects of a specific stakeholder's interests in each phase so that, as a result, the entire questionnaire provides an overview of the development of the interests of the various stakeholders over the life cycle of the company and, thus, shows the development of the company's interest as such.

	1. Startup	2. Growth	3. Maturity	4. IPO / Listed	5. Acquisition
A. Equity holders	A.1	A.2	A.3	A.4	A.5
B. Debt holders	B.1	B.2	B.3	B.4	B.5
C. Management /	C.1	C.2	C.3	C.4	C.5

Employees					
D. Lawyers	D.1	D.2	D.3	D.4	D.5

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors.

A. Interest of equity holders

1. Start-up phase

1.1 In your opinion, what is an entrepreneur's typical reasoning for setting up a specific business association? Attract investments by third parties? Avoidance of personal liability? Tax reasons? Protect IP rights and technology?

An entrepreneur's reasoning for choosing a particular business association would include a mix of structural flexibility, avoidance of personal liability, tax considerations and potential investment. Typically, entrepreneurs in India prefer to incorporate private limited companies. This structure would limit the entrepreneur's exposure, while at the same time does not have as many compliance requirements as a public limited company. Further, venture capital funds and angel investors are more amenable to invest in private limited companies as it allows the separation of ownership and operations, and facilitates ease of exit with returns.

1.2 What kind of business association structures does your jurisdiction offer to equity holders (e.g., partnerships, corporation, LLC, etc.)?

An entrepreneur can structure his/her business as a (a) sole proprietorship concern; (b) partnership firm; (c) limited liability partnership entity; (d) private limited company; or (e) public limited company.

- ***What are the most crucial differences between these business association structures from an equity holder's perspective?***

Liability of owners in a sole proprietorship and partnership structure would be unlimited, while it would be limited in case of members of a limited liability

partnership, private limited company and a public limited company. While ownership and management is typically separated in limited liability entities, an equity holder can exercise influence over management by nominating directors on the board of the company in order to ensure that its interests remain protected.

- ***If statistics on the use of business association structures are available in your jurisdiction: which are the most commonly used business association structures for start-ups? Do you see a particular reason for the dominance of one specific structure?***

While no generally accepted statistics are available, the most commonly used start-up structure, in our experience, is the private limited company. Reasons are as mentioned in our responses to the queries above.

- ***In case of a corporation or LLC (in the following we simply refer to the "company"): are there any equity instruments other than common shares that are typically used for equity investments? Non-voting shares? Other forms of participation rights?***

A frequently issued instrument is convertible preference shares (convertible into equity shares). Under the Companies Act, 2013 ("**Act**"), such preference shares are not entitled to voting rights, except on those matters which directly affect the rights attached to such preference shares. However, investors contractually seek superior rights for preference shares, such as higher dividend entitlement, liquidation preference, dilution protection, amongst other things. Equity shares with differential rights with respect to dividend or voting rights form another class of equity instruments.

- ***Can equity investors remain anonymous (for example by the use of bearer shares)? Anonymous towards the company, other investors, the public? In the event equity investors cannot remain anonymous when holding shares, is there any alternative scheme that can be implemented to participate on an anonymous basis (for example, silent partnership schemes)?***

It is not permissible to make anonymous investments in a company.

1.3 Once the entrepreneur has set up a company: what could be a typical focus of third party equity investors when they invest in a company in this phase?

Once the company has been set up and the initial funding has been received, investors focus on accelerating value creation and business growth, maintaining the

balance between investor protection and entrepreneurial autonomy, as well as preparing the company for the next round of investments from players such as private equity funds and strategic investors.

- ***What could typically be the friends', family's and fools' ("FFF") focus? Helping the entrepreneur to get his / her business going?***

The FFF focus is generally to support and encourage the entrepreneur to build his business. They are not usually interested in controlling the operations of the company and therefore, do not necessarily have voting rights or board representation.

- ***What could typically be the professional investor's focus?***

A professional investor's focus would be return on investment. Such investors tend to be involved in the decision making process of a company by way of board representation and exercise of affirmative voting rights.

- ***If there is a difference in focus among the various equity investors, how is this typically reflected in the legal relationship (be it corporate or contract law)? Are there legal instruments that are only used by certain investors (e.g., only by professional investors)?***

Professional investors such as venture capital funds are more involved in the decision making process of the company at the early stages of its growth. This is usually achieved by way of board representation and affirmative voting rights in the contracts executed. FFF are however, not usually interested in controlling the operations of the company and therefore do not necessarily have voting rights or board representation. Professional investors usually tend to invest in convertible instruments while FFF tend to invest in pure equity.

2. Growth phase

2.1 In your opinion, does the focus of the equity holders (e.g., the FFF or professional investors) shift in the growth phase (as compared to the start-up phase)?

Yes.

- ***If so, what could be a particular focus for equity holders in the growth phase? Protection from dilution?***

Investors typically become more focused on protection of their rights/ shareholding and therefore insist on enforceable anti-dilution protection rights, seeking opportunities to partner with a strategic investor or viable exit opportunities.

- ***In your experience, do the equity investors from the start-up phase participate in further capital rounds in the growth phase? Do they usually accept dilution? Do they usually cash out at this point in time?***

If the growth prospects of the company are good, existing investors typically participate in the future rounds of funding. If not, they would inevitably be subject to dilution. Some investors who have made a suitable return on their investment, seek to exit at the time of a further round.

2.2 In your jurisdiction, does the company law provide existing equity holders protection from being diluted in further financing rounds in the growth phase? If so, how are they protected? Is there a need for equity holders to seek protection on a contractual basis?

Indian company law provides that a company, in case of a further issue of shares, must first offer such shares to the existing shareholders of the company in proportion to their existing shareholding. Notwithstanding this, investors tend to seek anti-dilution protection, by way of contractual agreement.

2.3 When new potential investors offer to come on board during the growth phase, the existing equity holders may be reluctant to provide the information required to satisfy the potential new investor's need for valuation. The reason for the existing shareholders' reluctance may be, for example, that the required information contains (still) unprotected intellectual concepts, knowledge or ideas. In your experience, which legal instruments are used to find a balance between the potential new investor's need for information and the existing equity holders' wish to keep such information confidential? Do existing equity holders have legal means to prevent management from disclosing such information?

Typically, such information is disclosed to potential investors, but only once such disclosure is approved by the board of directors (which includes nominees of the existing equity holders) and upon the execution of an extensive non-disclosure agreement signed by the potential investors and their consultants (such as tax and legal advisors). In some cases, when there is a hesitation to share information, it is generally agreed that only certain restricted information rights will be provided to

such investor and that such investors will be restricted from disclosing this information. Existing equity holders can approach courts and try and seek an injunction to prevent management from disclosing information.

3. Maturity

3.1 *In your opinion, how does the equity holder base change between the start-up phase, the growth phase and the maturity phase? How does the focus of the equity holders change? Focus on fair distributions of earnings?*

Typically, in the start-up phase, the equity holders of a company are promoters and their friends and family. The equity shareholder base of a company widens to include domestic and foreign private equity funds, venture capital investors and angel investors in the growth phase, and to include portfolio investors, financial institutions and retail investors (for listed companies) in the maturity phase. In India, private equity funds and angel investors often invest in the equity of start-ups of certain industries, including *inter alia*, healthcare, technology, e-commerce and hotel industries after analyzing the potential risks and returns on equity investments. In the start-up phase, investors/equity holders generally focus on valuations, projections, performance, governance and growth of the company. In the growth phase, depending on the investment plan or investment structure pattern of the equity holder, the focus is usually on expansion, raising further capital, re-investment, returns on investment and, in certain cases, exit. In the maturity phase, equity holders focus shifts to participation in the restructuring of the company, or exit from the company. Equity holders in private companies may focus on going public and listing the company in the growth and maturity phase.

3.2 *In your jurisdiction, does the law provide for stricter corporate governance rules for large (privately-held) companies as compared to small companies? If so, what exactly triggers the application of the stricter corporate governance rules? In which sense are the corporate governance rules different / stricter?*

In India, privately held companies, whether with large shareholder groups or otherwise, are governed by same corporate governance rules.

3.3 In your jurisdiction, do (certain) equity holders (e.g., majority shareholders) have obligations towards (certain) other shareholders or the company (e.g., duty of loyalty)? Please explain such obligations.

In India, there are no such obligations on the equity holders towards other shareholders of the company.

3.4 Does the company have any means to control the circle of its equity holders (i.e., can the articles of incorporation prevent competitors from holding shares in the company?) or have such restrictions to be agreed among the other equity holders (e.g., shareholders' agreement)?

Under Indian law, a public company cannot impose restrictions on free transferability of shares, including transfers to competitors. However, in case of private companies, such restrictions are permitted. That being said, the shareholders of a company, whether public or private, can contractually agree to preclude shareholders from transferring their shares to competitors. Such restrictions are required to be incorporated in the articles of association of such company.

4. IPO / Listed phase

4.1 How does the focus of the shareholders change through the going public as compared to the maturity phase? Does the fact that a shareholder may at any time sell the residual value in its share (ideally) at a fair price in your opinion soften the focus on distribution of earnings? Does the focus shift from long term to short term?

Generally, in the listed phase, the focus of the shareholder shifts towards gauging market conditions, share prices and closely following the activities of the company as these factors would determine whether they wish to retain their investment or exit from the company. Dilution in an Indian IPO is usually of a smaller level, say 10% to 25%, as compared to IPOs in mature jurisdictions, like the USA and the UK. In addition, all Indian companies have promoters, who are the majority shareholders prior to the IPO and continue to remain the majority shareholders even after the IPO. As the majority shareholder or the promoter does not usually trade in the shares of the company and relies upon the distribution of earnings by

the company through dividends, the focus on distribution of earnings amongst the shareholders doesn't change.

4.2 In your jurisdiction, are there publicly available records on the identity of (certain of) the shareholders in a listed company? If so, does this in your opinion influence the shareholders' focus?

Yes, the websites of the stock exchanges in India provide limited information on the details of shareholders, as prescribed under Clause 35 of the listing agreement to be entered into between the relevant stock exchange and the listed company (the "**Listing Agreement**"). These include the names of the promoter, and their shareholding as well as all shareholders who hold more than 1% of the shareholding of the company. Yes, in our opinion, to an extent this information affects the shareholders focus as they may wish to re-invest or exit based on the confidence built in them after studying the nature of investors in the company.

4.3 An efficient allocation of resources requires a most accurate pricing of the shares. In this regard, are companies that are listed in your jurisdiction under an obligation to publish price-relevant information (ad hoc publicity)? If so, please provide a short overview of the respective rules including the exemptions from such obligation.

Yes, disclosure of price relevant/sensitive information is mandated by Clause 36 of the Listing Agreement and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, which shall soon be replaced by Securities and Exchange Board of India (Prohibition of Insider Trading Regulations), 2015 (to be effective from May 15, 2015) (the "**Insider Trading Regulations**"). As per the Listing Agreement, the company is required to communicate any price sensitive information and events or information affecting the performance or operation of the company to the stock exchanges, and the public. Therefore, any information that pertains to change in the general character of the business, any commencement of or change in the operations of the company, change in pricing of its goods or services, disputes or restructuring of the company is required to be made public and intimated to the stock exchanges.

4.4 It can be assumed that no jurisdiction requires listed companies to publish all price sensitive information. If this is correct in your jurisdiction, how does the law protect the market and its participants (including, the equity holders

in the company) from market abuse? Are there insider trading and market manipulation prohibitions? If so, please provide a short overview and, if you can, provide certain peculiarities about them?

We have set out above what constitutes 'price sensitive' information under the Listing Agreement in our response to Query 4.3 above. Separately, the Insider Trading Regulations, which prohibit insider trading practices in India, also provide that any information that pertains to the company or its securities (including information relating to dividends, financial results, change in capital structure and restructuring), which is not generally available, and which, when it becomes generally available, would materially affect the price of the securities is price sensitive information. An insider or other person may not communicate, provide, allow access to or procure in connection with a transaction, any unpublished price sensitive information of a company or its securities to any person including other insiders except for legitimate purposes, performance of duties or discharge of legal obligations. The Insider Trading Regulations, *inter alia*, provide guidelines for trading when in possession of price sensitive information, disclosures of trading to be made by insiders and so on. Certain initial disclosures must be made to the company by promoters regarding their shareholding. Continual disclosures must be made by promoters, employees and directors within two trading days of any transaction, if the value of the securities traded over any calendar quarter, aggregates to a traded value in excess of INR10,00,000, the company must notify such disclosures to the Securities and Exchange Board of India ("**SEBI**"). Also, a listed company is required to publish on its website, and intimate to the stock exchange where its securities are listed, a code of practices and procedures for fair disclosure of unpublished price sensitive information that it would follow.

5. Acquisition

5.1 In case a listed company (target) is approached by another company (bidder), the board of the target will have to decide whether it supports the offer (friendly offer) or not (unfriendly offer). What are the interests that the board of directors needs to take into consideration for this decision? Shareholders' interests only (e.g., offer price only)? The interests of other stakeholders (employees, community etc.)?

In India, the board of directors are required to consider the interests of the shareholders of the company as well the interest of the employees. The benefits extended to the employees should not be altered.

5.2 In case of an acquisition of the listed company (target) by another company (bidder), the shareholders' are at a disadvantage as they cannot communicate efficiently or act in concert (for example, regarding the rejection of a low offer). A rational bidder should try to use this disadvantage of the shareholders to his benefit. In your jurisdiction, how does the law protect shareholders of the target in case of public tender offers? (for example, is there a specific process for public takeover offers which provides protection? Does the bidder need to treat target shareholders equally? Are there, for example, minimum price rules and/or best price rules?)

Yes, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "**Takeover Code**") contains extensive provisions for protection of shareholders interests. For example, except when specifically exempted by SEBI or the Takeover Code, the acquisition of 25% or more shares or voting rights or acquisition of control of a listed company requires the investor to make a public announcement and offer, in the manner prescribed under the Takeover Code, to acquire atleast 26% of the shares from the target company's public shareholders, at the price and in the manner prescribed under the Takeover Code.

5.3 ***As mentioned above, a listing provides (ideally) liquidity for the company's shares and ensures a high level of information for a potential new investor. In fact, equity investors may invest in listed companies exactly for these reasons. In your jurisdiction, how is an equity investor protected from a delisting? Does the delisting require (qualified) shareholder consent? What are the deadlines for the delisting? Do issuers need to provide for an off-exchange trading for a certain period following delisting?***

In India, the SEBI (Delisting of Equity Shares) Regulations of 2009 and the subsequent amendments to these regulations issued by the SEBI regulate delisting and provide protection to shareholders from delisting. Except when exempted by SEBI, all public shareholders holding equity shares of the class which are sought to be delisted are given an exit opportunity in accordance with the regulations mentioned above. Prior approval/resolution of three-fourths of the shareholders is required for delisting, provided, however, such approval of the shareholders can be acted upon only if the votes cast by the public shareholders in favour of the proposal amount to atleast two times the number of votes cast by the public shareholders against it. Within one year of obtaining such approval, the application for delisting must be made to the stock exchange.

Any remaining public shareholders holding such equity shares may tender shares to the promoter up to a period of atleast one year from the date of delisting and, in such a case, the promoter is required to accept the shares tendered at the same price at which shareholders were allowed to exit at the time of delisting.

A delisting offer is deemed successful only when the shareholding of the acquirer along with shares tendered by the public reaches 90% of the total shareholding of the company. An additional threshold of atleast 25% of the number of public shareholders tendering in the offer, for the offer to be successful is proposed to be included in the delisting regulations of SEBI. The timeline for completion of the delisting process is approximately 137 days, which is proposed to be reduced to 76 days pursuant to the proposed amendments to be SEBI delisting regulations.

B. Interest of debt holders

1. Start-up phase

1.1 ***In your experience, what could be the typical focus of the FFF in this phase? Helping the entrepreneur to get his / her business going? How is this focus***

reflected in the legal relationship? For example, will such debt holders be likely to refrain from asking for security? Is the agreed interest rate likely to correctly reflect the risks for the debt investor?

Typically, the focus of the FFF would be to help the entrepreneur startup his business as well as to ensure that the business plan of the entrepreneur and projections made reflect the expected returns. In many cases, the FFF may have an informal arrangement with the entrepreneur relating to the investment, returns, business plans, benefits and obligations. However, the legal relationship between the FFF and the entrepreneur may be documented in the form of term sheets, memorandums of understanding, formal agreements or by according rights and providing security to the FFF. Except in the case of loans from immediate family members, it is unlikely that the FFF will not ask for security. As the risks involved are high and the likelihood of a start-up being successful is contingent on several factors, usually, the interest rate may not correctly reflect the risks for debt investors.

1.2 In your experience, is it common for professional investors to act as debt holders in this phase? If so, how is the different focus of professional investors typically reflected in the legal relationship? What are the legal instruments commonly used in your jurisdiction to protect their interests? For example, is it common for the professional investors to request a personal security by the entrepreneur in case the company does not yet have (a lot of) assets to secure a loan?

In India, the business of lending is highly regulated by the Reserve Bank of India ("**RBI**"). Usually, venture capital funds and angel investors do not undertake lending activities, which are undertaken by banks and financial institutions in India. However, in India, some professional investors do subscribe to debentures issued by companies. The focus of such lenders is on securing the debt, primarily, by creating a charge on the assets of the company or by obtaining personal guarantees from the promoters of such start-ups.

2. Growth phase

2.1 In your experience, who provides debt in this phase and what could typically be their focus (e.g., high return on investment)?

Banks and financial institutions provide debt to companies even during their growth phase. Additionally, in the growth phase, debt is raised by private issues of bonds to existing shareholders or other persons. Certain investors, including the foreign venture capital investors and foreign portfolio investors can subscribe to debt instruments. While banks and financial institutions focus on returns through interest, bond holders may focus on redemption of their bonds or converting their debt to equity at the optimum time to seek best possible returns.

- ***Are the debt holders and their focus in the growth phase typically different from the ones in the start-up phase? Is it now mostly professional investors (and no FFF)?***

The focus of the debt holders remains the same, is receiving the payment of the principal debt and the interest thereon. It is generally a mix of both professional investors and FFF.

- ***If there is a difference, how could this be reflected in the contractual relationship? For example, do the interest rates or the security for the debt change?***

There is no difference in the focus. The interest rates and the security arrangements are contractually agreed upon by the parties.

2.2 What kind of security is commonly request by debt holders in this phase? For example, rather collateral (pledge, etc.) or personal guarantees by the entrepreneur? What is the reason for the preference of a specific kind of security?

Security is commonly requested in the form of mortgage over immovable property of the company (except where the debt holder is a foreign resident), corporate, personal and promoter guarantees or hypothecation or pledge of receivables and movable assets of the company.

2.3 During the growth phase, the burn rate of the company may be quite high and the company may continuously be at the verge of over-indebtedness.

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Will investors usually be willing to subordinate their debt? Usually only the entrepreneur / FFF from the start-up phase or also professional investors?

It is unlikely that investors (such as banks) would subordinate their debt.

2.4 Investors providing debt in this phase may wish to keep the possibility to participate in the potential valuation upside. How could this wish be accommodated in your jurisdiction? For example, are profit-participating loans or convertible loans commonly used instruments?

Yes, convertible debentures are commonly used instruments in India. Investors may subscribe to convertible debentures offered by companies to benefit from positive valuations in the future.

3. Maturity

3.1 In your jurisdiction, who is usually the debt holder in the maturity phase (e.g., banks)?

Debt holders in the maturity stage of a company typically include banks, financial institutions and subscribers to debentures/ bonds issued by the issuing debtor.

- ***Are the debt holders and their focus in the maturity phase typically different from the ones in the start-up or growth phase?***

While debt holders at all stages tend have a focus on returns on the debt investment, this is most prominently noticed in the maturity stage of a company. Debt-holders in the start-up and growth stage (more so since these include FFF and other non-bank debt holders) tend to give considerable focus to the potential growth of the company. However, debt holders in the maturity stage (owing considerably to the fact that these are mainly institutional players) tend to focus more on the current performance, credit history and repayment capacity of the debtor.

- ***If there is a difference, how may this be reflected in the contractual relationship?***

Debt agreements between debt holders and debtors in the maturity stage are generally one-sided in favour of debt holders. Debt holders are usually unwilling to accept any negotiation on the terms and conditions of the debt facility. Further,

debt holders seek to introduce stringent contractual terms to safeguard their debt investment. These include, amongst other things: (a) additional security/ collateral requirements; (b) board and management rights in the debtor; (c) extensive event of default provisions, including step-in rights and debt to equity conversion rights; and (d) prior consent requirements in case of any corporate restructuring, change in management and other strategic shifts.

3.2 Before providing debt to a company, the potential debt holder may require information about the company's financial status to assess the default risk. What financial information is publicly available for potential new investors who wish to invest in a privately-held company? Are financial statements available from public registers? Excerpt from the debt enforcement register? Tax returns? Do companies have means to influence the amount of publicly available financial information?

Audited financial statements of a company need to be filed with the Registrar of Companies ("**RoC**") on an annual basis. With respect to public limited companies, these financial statements (along with other filings made by the company with the RoC) are publicly available documents which can be accessed from the portal of the Ministry of Corporate Affairs (www.mca.gov.in). With respect to private limited companies, only the balance sheet is available for public inspection and the profit and loss account is not available to the public. Separately, banks and other lenders, while assessing a loan application from a potential debtor, regularly undertake a credit history checks on the debtor. For this purpose, they seek the assistance of credit information companies, such as the Credit Information Bureau (India) Limited. Companies do not have any means to influence the amount of publicly available financial information.

3.3 In your jurisdiction, is it common for privately-held companies to issue notes? Could you provide a short overview of the requirements and the procedure relating to the issuance of notes? Is the focus of note-holders any different from other debt holders?

While the term 'notes' is not generally used in India, debt instruments issued by companies in India are generally termed as debentures or bonds, which are essentially instruments executed by a company acknowledging its obligation to repay the sum as per specific terms and condition and at agreed coupon rates/ interest.

Debentures can be convertible (into equity)/ non-convertible, secured/ unsecured and redeemable/ non-redeemable. The power to issue debentures can be exercised on behalf of the company at a meeting of its board of directors, however the issue

of convertible debentures would need to be approved by a special resolution passed at a general meeting of shareholders of the company. Where a company issues debentures, it needs to create a debenture redemption reserve account out of its profits available for payment of dividend. Depending on the nature of the debenture issuance, various other requirements, including appointment of a debenture trustee (in case of public offer or offer to existing members exceeding 500 members), maximum redemption period for secured debentures, amongst others, are prescribed.

Apart from debentures/ bonds, another instrument used in India is Commercial Paper ("**CP**"). CP is an unsecured money market instrument issued in the form of a promissory note. Companies may issue CPs subject to certain eligibity requirements, including, st other things, minimum tangible net worth requirements and classification of borrowing account as a standard asset.

4. IPO / Listed

4.1 Once a company is listed, the debt holders have a considerably higher level of information regarding the company's financial situation. One could expect that this reduces the risk for the debt holder. Thus, in your jurisdiction, do listed companies usually have to pay lower interests?

A higher level of transparency regarding a listed company's financial situation may be one of the grounds on which the listed company negotiates for lower interest rates. However, listing, per se, does not automatically result in a lowering of interest rates for a company. Private/ unlisted companies which show a positive financial track record and performance would equally be in a position to negotiate with debt holders for a lower interest rate.

4.2 In your jurisdiction, is it possible to list notes? Could you provide a short overview of the requirements and the procedure relating to the listing of notes? In your opinion, is the focus of holders of listed notes any different from the focus of other debt holders?

'Notes' are not generally used in India. However, in the Indian context, a similar concept would be the listing of bonds/ debentures. The applicable rules for listing of debentures would depend on whether the debentures are convertible (convertible into equity) or non-convertible debentures. Listing of convertible debentures typically follows a process similar to that of equity listing. General requirements and procedures for listing non-convertible debentures include, without limitation, the following:

(a) Application to one or more recognised stock exchanges for listing and chosing a designated stock exchange. In-principal approvals to be obtained.
(b) Arrangement with depository registered with SEBI for dematerialisation of debt securities that are proposed to be issued.
(c) Credit rating of at least investment grade to be obtained by SEBI registered credit rating agency.
(d) Draft offer document (containing material disclosures as required) to be filed with the designated stock exchange, and made public by posting on stock exchange website as well as website of issuer.
(e) All comments on draft offer document to be addressed and offer document to be filed with the RoC. Copy of the draft and final offer document to be forwarded to SEBI.
(f) Necessary advertisements to be made by the issuer on or before issue opening date.
(g) Under-writing arrangements, if any, to be disclosed.
(h) Trust deed for securing issue of debt securities to be executed by the issuer in favour of debenture trustee within 3 months of the closure of the issue.
(i) Issue to comply with terms and conditions of the Listing Agreement executed with the stock exchange whether debentures listed.

5. Acquisition

5.1 In your jurisdiction, what is commonly the effect of a public tender offer on listed notes. Do they have to be redeemed? Can holders of listed notes interfere in the process of a public tender offer? If so, by which means?

A public tender offer on listed debt securities is not a concept which is generally prevalent in India. Redemption of debt securities at any stage would depend on the terms and conditions of the debt securities issued.

5.2 In your jurisdiction, what is the typical influence of a public tender offer on existing credit facilities?

As mentioned above, this is not a concept generally prevalent in India.

C. Interest of management / employees

1. Start-up phase

1.1 Which are the most commonly used means to ensure that the management / key employees will not leave the company until the company reaches the growth or maturity phase? Are warrants or similar incentives granted during

this stage?

Companies in India are usually seen to adopt the following measures to retain management and key employees:

- Companies often adopt employee stock option schemes and plans and issue sweat equity shares to incentivize management and key employees;
- Companies also enter into non-compete agreements with employees. However, in India, such agreements are not enforceable beyond the tenure of the employment of such persons; and
- Retention policies including salary hikes, variable components to fixed salaries, performance based pay, strong human resource set ups and promotions are usually measures adopted by companies to achieve the foregoing.

1.2 It is likely that at this stage, there are not sufficient funds for remuneration of management / key employees. Is it common to grant warrant or stock incentive schemes in your jurisdiction? Is there any other scheme to liaise with this issue?

Yes, as stated in our response above, companies do adopt stock option schemes with a view to encourage and retain employees. There is no other established scheme adopted by companies. However, companies often contractually agree on plans to remunerate employees, including on a consultancy basis or on a commission basis.

2. Growth phase

2.1 In case new investors come on board in the growth phase and such investors request replacement of the current management: in such replacement, does the current management usually lose rights granted under an incentive plan? How broad are "bad leaver" provisions usually formulated?

If an investor seeks to replace any employees, the company is required to duly follow retrenchment procedures including the payment of adequate retrenchment payment applicable, depending in the state in which the company is situated. In this scenario, the management will not usually lose their rights under incentive plans, and the company may contractually re-negotiate the terms of their compensation. The incentive plan itself may contain provisions to address the

rights of the beneficiary in the event of change of control. In India, bad leaver provisions are usually contained in the articles of association of the company, the human resource policy adopted by companies and also in the contracts that the company executes with the employees.

2.2 Upon implementation of an incentive plan, the rights related to the shares that the management will be entitled to receive are usually subject to vesting. Is there any specific vesting period that is applied in your jurisdiction or is the vesting period usually linked to a liquidation event (such as an IPO)?

There is a vesting period of one year for companies in India.

2.3 In certain jurisdictions the management may fall out of labor relationship since it is developing executive duties for the company and/or may hold certain stock of the company (it might fall in a special labor relationship or corporate relationship). Is this the case in your jurisdiction? If so, is the loss of labor rights compensated by special laws or by contractual means?

Yes, in India, typically the employees at the managerial level are compensated under the terms of the contract, whereas employees who are categorized as workman are compensated under various statutes.

3. Maturity

3.1 In your jurisdiction, do the various corporate bodies (e.g., board of directors, directors, management) have

- ***an obligation to "act in the best interest of the company"? If so, how is the "interest of the company" defined? Is it the interest of all stakeholders (including the interests of all equity holders (e.g., holder of non-voting shares), debt holders, management, employees and public) or just the shareholders? Are only long term interests taken into account or also short term interests?***

Yes, the Act prescribes that director of a company should act in good faith with a view company to promote the objects of the company, for the benefit of its members as a whole, and in the best interests (long term) of the company, its employees, as well as the community.

- ***"fiduciary duties" or a duty to treat equity holders equally? How are these defined?***

While the law does not define 'fiduciary duties' or the 'duty to treat equity holders equally', fiduciary duties have been interpreted by Indian courts to include loyalty of the directors to its equity shareholders and the company and the display of utmost good faith towards the company.

3.2 In your jurisdiction, how are conflicts of interest addressed by the law? Are the rules on conflicts of interests for listed companies applied to non-listed companies? Have the rules on conflicts of interests become more rigid in recent years?

Conflicts of interest are addressed under Indian law by the Act and the Listing Agreement through extensive restrictions on and regulation of related party transactions and of course, mechanisms of timely and adequate disclosures. Measures such as approval of the board, and approval of atleast three fourths of the shareholder base in case of transactions over specified thresholds have been taken and the definition of the term 'related parties' has been widened recently. The definition of related parties includes directors and key managerial personnel. Usually, companies adopt policies to ensure transparency in related party transactions. Yes, the laws relating to related party transactions and corporate governance have become more rigid in the recent past.

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3.3 In your jurisdiction, is it common to put in place incentive plans for key management and employees or are they only entitled to receive a cash bonus (usually based on individual and overall performance)? Do incentive plans provide tax advantage for the company?

In India, it is quite common to create incentive plans (cash or shares) to motivate key employees. Plans can be specific, where the key employees know, in advance, what standards need to be met to receive the incentive or where the amount can be substantial and only earned and paid upon the attainment of a performance standard that is set. There are no special tax benefits or incentive's for company's opting for such plans.

4. IPO/ Listed phase

4.1 It is our understanding that when a company goes from a private to a public setting it implies considerable changes for management and employees. In your experience and within this framework, what is the most significant change for management and employees? Does going public usually increase the total amount of the compensation and/or does it usually change the structure of the compensation (cash, shares, warrants, etc.)?

In the listed phase, companies have to adhere to the provisions of the Listing Agreement, which, *inter alia*, provides for appointment of independent directors, compliance with laws prescribed by SEBI relating to employee benefit schemes, protection for whistle blowers and so on. Therefore, in the listed phase, transparency is higher, therefore beneficial to employees. However, more stringent board procedures and disclosure mechanisms must be followed by the management and the employees. Any change in the structure of compensation would usually depend on the performance of the company and the limitations set out under the Act on managerial remuneration. However, listing may usually not have a bearing on the same.

4.2 Following the IPO the management is constantly assessed by the performance of the share price. Also the management's pay may to large extent depend on the share price performance. One could expect that management may abstain from taking any steps that are likely to weaken the share price – even if such steps are beneficial to the company in long term. In your jurisdiction, are there any measures that are commonly taken to

address this conflict (i.e., incentives for long term strategies)? Is, for example, by law or by agreement a part of the pay paid in mid- to long term options?

The salary of the management in listed companies is usually decided by a remuneration committee. The Act prescribes that, unless otherwise agreed to by the shareholders, the total managerial remuneration payable by a public company, to its directors and its manager in respect of a given financial year shall not exceed 11% of the net profits of the company, and shall be computed in the manner prescribed by the Act. Therefore the Act, resolutions passed by shareholders under the Act, the articles of association of the company and remuneration committees appointed determine the salary structure of the management in India. Companies may contractually agree to remunerate management through options, provided the thresholds prescribed are adhered to by the company.

4.3 Is the management and/or employees bound by a mandatory lock up period upon the IPO? In the event the lock up period is not mandatory, please explain the common standards in your jurisdiction towards implementing a lock up period.

Under Indian law, there is not specific lock-up period relating to the period of employment of the management and/or employees upon occurrence of the IPO. Retention policies as specified in our response to Query 1 above are usually adopted by companies.

5. Acquisition

5.1 The focus of the board of directors of a listed company may be set to a large extent on the share price performance. Usually, this should be in line with the corporate interest. However, in case a listed company is being approached by a potential bidder, the board of directors and the management of the potential target may face a conflict of interest: an acquisition that may be beneficial to the shareholders of the potential target, may at the same time require replacement or adjustment of the target's board of directors and management. In your jurisdiction, how is this conflict of interest addressed? For example, are there limits to the defense measures that the board of directors of the target may take?

As per Section 166 of the Act, the board of directors of a company are required to act in accordance with their fiduciary duties, which will include giving due consideration to any such bidder. While giving consideration to such a proposal, all such directors who are shareholder nominees are said to be conflicted in relation to such matters are required to abstain themselves from such discussions.

5.2 Which are the common alternatives in order to keep management / key employees focused and keen to continue in the company?

The incentive mechanisms, which have been stated in the response to query 1.1 of this Section, are the measures that companies typically adopt to keep management/key employees focused and keen to continue in the company.

5.3 In parallel, is it common to reinforce non-competition and confidentiality undertakings of the management / key employees upon acquisition? Is it common to regulate a non-solicitation by the Seller and that it is enforceable (for which period)?

Yes, non-competition and confidentiality agreements and undertakings are usually for the benefit of the acquirer on acquisition, or fresh non-compete and confidentiality agreements are executed in favour of the acquirer. Sellers and acquirers both typically contractually agree to non-solicitation. However, non-compete agreements and undertakings are generally not enforceable in India beyond the tenure of the employment or after the termination of the services or resignation of the management/key employees of the company.

D. Interest of advisors / lawyers

1. Startup

1.1 Which are the common difficulties you liaise with during this stage? How do you tend to structure your fees (for example, do you go below your standard rates and agree to have this difference compensated at a later stage when the company has become more successful)?

There are a multitude of issues that arise while advising startup companies. One issue that most startups face is the lack of government sponsored incubation facilities in India. As a result of this, startups do not have sufficient access to funds, infrastructure, etc. Therefore, as rightly pointed out, most startup companies do not

have the funds to pay for good quality legal advice. An entrepreneur usually requires a lot of hand-holding during this stage. There is usually a lack of knowledge regarding Indian laws, including tax laws. So a lot of time needs to be spent explaining the laws that will be applicable to the business of the entrepreneur. Unfortunately, in most cases, it is difficult to bill the startup for this time spent 'training' the entrepreneurs. Another issue is that the entrepreneur lacks the time to deal with the nitty-gritty of the incorporation process. There is a lot of paperwork that needs to be processed not just for setting-up the entity but also to obtain all the registrations needed subsequently for carrying on the business. We have seen in various cases that the entrepreneur lacks the time to review and process the paperwork needed to obtain these registrations as he also needs to concentrate on developing his business model. This could, at times, cause delays in process of obtaining all the licenses and registrations required.

The Bar Council of India lays down various duties of advocates towards clients. One such duty is to disclose any conflict of interest and not act further for the client if there is a conflict of interest. Therefore, we do not usually become a shareholder in startup companies of clients or become interested in the company in any other manner. We agree on a fee arrangement upfront with the client which could either be hourly fees, or a fixed fee arrangement, or a retainer arrangement, or a mixture of the above. We have seen that startups usually prefer fixed fee arrangements.

1.2 In case you accept warrants / rights to shares as compensation for professional services rendered: how do you set the amount or the value of such warrants and rights? Do you rely on valuations of the company? If so, whose valuations? Is it common for an advisor in this situation to request that the company has previously successfully completed a minimum viable product ("MVP") stage which reduces the risk of failure (i.e., as part of the lean startup methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

As mentioned in the above response, we do not accept warrants / rights to shares as compensation for professional services rendered.

2. Growth

2.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up phase)?

As mentioned in the previous section, our fees could either be hourly fees, or a fixed fee arrangement, or a retainer arrangement, or a mixture of the above. Again,

clients here prefer fixed fee arrangements but they are able to pay more than they could during the startup phase.

2.2 Is it common for advisors (in particular, lawyers) to take board positions during this phase? If so, how is such board member compensated? In cash? Or with exclusivity for providing legal services to the company?

As mentioned in the previous section, to avoid any conflict of interest, we do not take board positions.

2.3 As the lawyer you may be asked by the entrepreneur to render advice on the division of equity (in particular to FFF)? What is the basis for your advice regarding the division of equity?

We have seen in most cases that the entrepreneur wants to divide the equity based on the value addition by the FFF. This could be value addition that has already been provided in the past (and the entrepreneur now wants to repay the FFF for the value added) or value addition that FFF is presently providing or value that FFF could provide in the future. So the entrepreneur usually wants to divide the equity based on the value addition by FFF.

2.4 In certain jurisdictions corporate law is rigid and does not allow to regulate certain rights of the shareholders in the by-laws of the company (such as, preferential preemptive rights, drag along or tag along rights). Please explain (succinctly) which is corporate legal scheme that applies in your jurisdiction. Is the shareholders agreement enforceable against third parties in your jurisdiction or is only binding between the relevant shareholders?

Under the Act, a public company is by definition, one which imposes no restrictions on the transferability of its shares. The Act expressly provides that shares of a public company are to be freely transferrable. Courts in India have held, in a plethora of cases that transfer restrictions, which may take the form of right of first offer/refusal, pre-emptive rights, negative covenants and other similar contractual arrangements, would be destructive to free transferability and would not be enforceable against a public company. The mere execution by shareholders of a binding agreement or the inclusion thereof in the articles of association would not be sufficient to restrict the transferability of the shares held by them in a public company.

Private companies however, are accorded greater freedom to regulate and restrict shareholders' rights. However, in order to be enforceable against the company, Indian law requires such restrictions to be incorporated in the articles of association

of such company. A private company has been defined to be one which, by its articles, restricts the rights to transfer its shares. Courts have held that restrictions contained only in shareholders agreements, and not in the articles of a company, would not bind the company. However, where a shareholder of a private company has contractually agreed to restrictions on the transfer of his shares, such restrictions may be enforced under laws relating to contracts and specific relief against such shareholder, even though the same may not be enforceable against the company.

3. Maturity

3.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up or growth phase)?

Our fee arrangements vary from client to client and could either be hourly fees, a fixed fee or a retainer arrangement. We have seen that hourly fees and fixed fees are the common arrangements during this stage.

3.2 Are you able to become member of the board of directors of the companies? Do you tend to render more unique advice to companies (while the corporate counsel provides the typical ongoing corporate advice)?

As mentioned above, to avoid any conflict of interest, we do not take board positions.

3.3 From a lawyers' perspective, how is the conflict of interest of the management liaised with (are there any mandatory provisions that apply in your jurisdiction)?

One way is to minimize the impact of a conflict of interest is to report to a team of employees / management in the company where there are different people at different levels and across different departments involved in the decision making process.

3.4 Does the anti-money laundering provisions in your jurisdiction have changed the form your render advice?

The Advocates Act, 1961 and the Bar Council of India rules do not require advocates to conduct a diligence on the source of funds coming into India in a transaction and have not laid down any KYC/AML standards for advocates to follow.

4. IPO/ Listed phase

4.1 How do you structure your fees for an IPO?

Our fee for an IPO depends on our role in the IPO. In the event we are the issuer's counsel to the IPO, then our fees are higher than it would be if we were the underwriters counsel or an investor's counsel in the company going public

4.2 From a lawyers' perspective, which are the main regulatory aspects of offering equity to the public? Is it common that companies reach this stage (in certain jurisdictions becoming a listed company is less rigid)?

The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**") govern the process of an initial public offering ("**IPO**") by an Indian company. An unlisted company may list its equity shares and any convertible securities if it satisfies certain minimum eligibility requirements including, prescribed minimum (i) net tangible assets; (ii) average pre-tax operating profit; (iii) net worth; (iv) issue size; and (v) public shareholding. Additionally, the unlisted company cannot undertake an IPO if the company has less than 1,000 prospective allottees and there are outstanding convertible securities or any other right which would entitle any person any option to receive equity shares after the initial public offer, amongst other such conditions. The ICDR Regulations also require the promoters of the issuer company to contribute not less than 20 % of the post-IPO share capital of an issuer company.
The issuer company has to file a draft red herring prospectus with the SEBI and stock exchanges (where securities are proposed to be listed) prior to the filing of the prospectus with RoC and also obtain in-principle approval from all the stock exchanges on which the issuer company intends to list the securities through the prospectus. Thereafter, the issuer company has to carry out changes or comply with observations made by SEBI in the draft red herring prospectus before filing the prospectus with the ROC.

In addition to the key pre-issue obligations discussed herein, issuer companies have to comply with a comprehensive list of post-issue obligations as well.

There are many companies that reach this stage once they satisfy the eligibility criteria.

4.3 Is there any specific secondary market in your jurisdiction that allows early startup companies to become listed with the aim of obtaining more equity (given the complexity of becoming a public company in certain jurisdictions

a startup company can become listed in a specific market which is less rigid and allow it to obtain other sources of financing, among others)?

We have the SME Exchange. An SME Exchange is a stock exchange dedicated for trading the shares / securities of SMEs who otherwise find it difficult to get listed on the Main Board. The concept originated from the difficulties faced by SMEs in gaining visibility and attracting sufficient trading volumes when listed along with other stocks on the Main Board of stock exchanges.

4.4 Does the fact of becoming a listed company imply that the lawyers and/or advisors adjust rates their rates accordingly?

This varies from company to company. Some listed companies pay our fees on an hourly basis while there are other companies that still require a fixed fee. But the fees are higher since there are more compliances that a listed company needs to adhere to.

5. Acquisition

5.1 Which is most frequent scheme of implementing an acquisition (asset deal vs share purchase deal)?

This depends on whether the buyer wants to acquire only the assets of the company or is fine with purchasing the entire company (along with its liabilities) by purchasing the shares of the company. Therefore, once a due diligence is conducted on the company, the buyer decides how to proceed with the acquisition.

5.2 From a lawyers' perspective, which are the main differences within the process of acquiring a stake in listed companies versus private companies?

Listed companies have to additionally follow the process prescribed under the Takeover Code. Private companies do not have to follow this process for acquisition.

Once the equity shares of a company are listed on a stock exchange in India, the provisions of the Takeover Regulations will apply to any acquisition of the company’s shares/voting rights/control. Acquisitions up to a certain threshold prescribed under the Takeover Regulations mandate specific disclosure requirements, while acquisitions crossing particular thresholds may result in the acquirer having to make an open offer of the shares of the target company. The Takeover Regulations also provide for the possibility of indirect acquisitions, imposing specific obligations on the acquirer in case of such indirect acquisition.

5.3 From a lawyers' perspective, which are the main steps in your jurisdiction in order that a public entity becomes a private entity as a consequence of an acquisition?

There are two separate processes. The provisions of the Takeover Regulations need to be followed for acquisition of shares of a listed company. A listed company can become an unlisted company and delist its shares by following the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 ("**Regulations**") which regulates delisting in India. The Regulations provide that no company shall apply for and no recognised stock exchange shall permit delisting of equity shares of a company: (a) pursuant to a buyback of equity shares by the company; or (b) pursuant to a preferential allotment made by the company; or (c) unless a period of three years has elapsed since the listing of that class of equity shares on any recognised stock exchange; or (d) if any instruments issued by the company, which are convertible into the same class of equity shares that are sought to be delisted, are outstanding.

There are broadly two types of delisting, namely compulsory delisting and voluntary delisting. As per the Regulations voluntary delisting can further be sub classified into (a) voluntary delisting from all the stock exchanges; (b) voluntary delisting from few stock exchanges subject to listing on at least one stock exchange having nationwide trading terminals and (c) voluntary delisting for small companies.
Any company desirous of delisting its equity shares will have to first obtain the prior approval of the board of directors of the company and subsequently obtain the prior approval of the shareholders of the company after disclosure of all material facts (votes cast by public shareholders in favour of the proposal should amount to at least two times the number of votes cast by public shareholders against it). Thereafter the company is required to make an application to the concerned recognised stock exchange for in-principle approval of the proposed delisting in the form specified by the recognised stock exchange and within one year of passing the special resolution, make the final application to the concerned recognised stock exchange in the form specified by the recognised stock exchange

5.4 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to other phases)?

Clients are usually willing to pay our hourly fees at this stage. The fee is higher than it is during the other stages of growth as there are many more compliance requirements for a listed company.