

# Culmination of draftsmanship of Investment Agreements

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- ▶ Infusion of \$580 Million in 2016 in Hyderabad across different sectors.
- ▶ 19% of PE/VC investments/deals in India, from Hyderabad.

# Regulatory regime

- ▶ Domain specific laws;
- ▶ Companies Act, 2013 and Rules made thereunder;
- ▶ Indian Contract Act, 1872;
- ▶ Income Tax Act, 1961;
- ▶ Foreign Direct Investment (FDI) Policy;
- ▶ Foreign Exchange Management Act, 1999 and Regulations made thereunder;
- ▶ Competition Law;
- ▶ Other laws;
- ▶ Judicial precedents.

# The Process

- ▶ Signing a Non-Disclosure Agreement (NDA)/ Confidentiality Agreement;
- ▶ Financial Diligence;
- ▶ Preparation and signing of a Term Sheet;
- ▶ Due diligence & noting the Red flag issues;
- ▶ Negotiation & Execution of Definitive Agreements.

## Financial due diligence:

- ▶ Due diligence on the addressable market, trends, and customer behaviour patterns.
- ▶ Analysis of the revenue streams and future projections.
- ▶ Review of all major contracts and arriving at potential risk factors.
- ▶ Impact of risks and red flag issues from a financial perspective.
- ▶ Analysis of contingent liabilities and all other probable and potential liabilities.

- ▶ Contains a summary of the terms the proposal.
- ▶ Non-binding document.
- ▶ Sets out the broad parameters of the transaction.
- ▶ Parties should necessarily agree on potential Make/ Break matters.
- ▶ Contains other miscellaneous provisions on consideration, exclusivity, time-lines, confidentiality, costs and dispute resolution.

## Legal Due diligence:

- ▶ Understanding the objective behind the transaction.
- ▶ Look back period
- ▶ Collation of the documents/ information as per the Checklist – may include Minutes and annual reports, licenses and registrations, litigations (active and threatened), detailed operations' records, owned and leased property agreements, employment and labour matters, intellectual property documentation, detailed financial information.
- ▶ Providing all of this in a Data Room (electronic/ physical)
- ▶ Disclosure Schedule

# Definitive Agreements

- ▶ Share Subscription Agreement (SSA): For issuance of securities.
- ▶ Share Purchase Agreement (SPA)/ Share Transfer Agreement (STA): For purchase of securities.
- ▶ Shareholders' Agreement (SHA): For recording the understanding between the shareholders and the company.
- ▶ Joint Venture Agreement (JVA): For recording the terms of understanding between the JV Partners.



# Enforceability of an agreement

- ▶ Offer and Acceptance
- ▶ Consensus Ad-idem
- ▶ Contractual capacity
- ▶ Free Consent
- ▶ Consideration
- ▶ Lawful Purpose.

# Nature of an Agreement

- ▶ Central theme;
- ▶ Complete code and speaks for itself;
- ▶ Law between the Parties;
- ▶ Precise and careful about all the clauses.

# Sector Specific Knowledge

# Common clauses – Definitive Agreements

- ▶ Title - Names of Parties etc. – whom should we include.
- ▶ Recitals.
- ▶ Definitions and Interpretations.
- ▶ Description of the transaction and the Consideration.
- ▶ Conditions for closing (conditions precedent eg. Approvals from regulators, existing shareholders etc.)
- ▶ Conditions post-closing (including steps for corporate compliances for issue/ transfer of securities with the company).

# Common clauses: Definitive Agreements

- ▶ Representations and warranties.
- ▶ Breaches (material and non-material).
- ▶ Termination and Term.
- ▶ Miscellaneous clauses (non-compete, no partnership, severability, notices, etc.).
- ▶ Indemnity provisions
- ▶ Specific performance/ damages.
- ▶ Confidentiality.
- ▶ Dispute resolution and arbitration.

# SSAs/ SPAs - Contents

- ▶ Subscription/ Share Purchase Clause
- ▶ Conduct of Business (until Closing)
- ▶ Terms of CCPS/ CCDS
- ▶ Conditions precedent (CPs):
  - ▶ All authorisations, permissions and permits, are valid including insurance policies.
  - ▶ Valuation certificate.
  - ▶ Legal Opinion in an Agreed Form.
  - ▶ CP Fulfilment letter about completing all representations, warranties, obligations, covenants and execution of agreements.

# SSAs/ SPAs: Closing mechanism

- ▶ Payment in lieu of acquisition of shares (cash/ non-cash).
- ▶ Issue of original share certificates to the Investor/ demat transfer process
- ▶ Filing of forms with the Registrar of Companies, Reserve Bank of India and other relevant statutory/regulatory authorities, intimating about the allotment of Shares to be done.
- ▶ Passing of Board/ General Meeting Resolution.
- ▶ Deliveries and actions to take place on Closing for the Parties.

# SHAs - Contents

- ▶ Effective Date
- ▶ Valuation Adjustments;
- ▶ Post Closing obligations – filing of forms, etc.
- ▶ Implementation of Business Plan
- ▶ Other financial matters
- ▶ Financing of the Company
- ▶ Directors and Management
- ▶ Meetings
- ▶ Investor Affirmative Votes on certain key issues
- ▶ Future capital calls



- ▶ Transfer of shares.
- ▶ Restriction on transfer of shares and pre-emptive rights:
  - ▶ Right of First Refusal (ROFR) for Promoters – within specific period.
  - ▶ Drag Along Rights – After specific period – subject ROFO.
  - ▶ Right Of First Offer (ROFO)
  - ▶ Tag Along Rights.
- ▶ Investor Liquidity options – (IPO & Strategic sale)
- ▶ Event of Default – Buy out/ Sell out: +/- FMV

## Key Terms:

- ▶ Scope of Business of the Joint Venture Company(JVC) or Object of the JVC.
- ▶ Incorporation of JVC.
- ▶ Capital Structure of JVC.
- ▶ Contribution of each Party.
- ▶ Management of JVC.
- ▶ Deadlock mechanism

- ▶ Alignment of the Investee company with the new environment, new policies and new style.
- ▶ Alteration of Articles of Association to reflect the Definitive Agreements.
- ▶ Change in the reporting requirements.

## Q & A

**THANK YOU!**

# Lakshmikumaran & Sridharan

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