

Foreign Investment in Indian Real Estate: *Legal REAL(i)TY*



ADVOCATES, SOLICITORS, NOTARIES, PATENT & TRADEMARK ATTORNEYS

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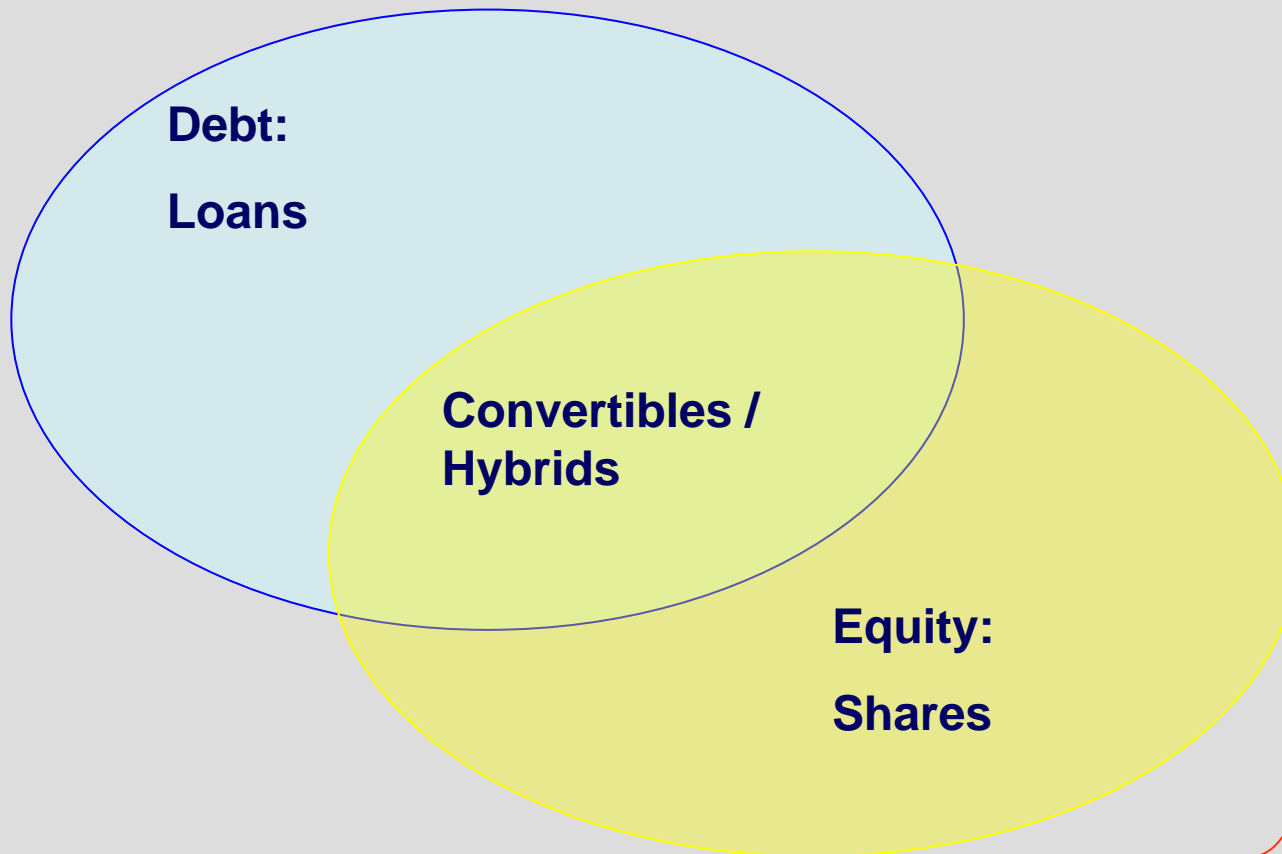
- Founded in 1911 by the Late Debi Prasad Khaitan, member, Constituent Assembly that framed the Constitution of India in 1950
- One of India's oldest & most recognised full service law firms.
- Strength
 - 160 fee earners
 - About 250 employees
- Offices in **Mumbai, Kolkata, Delhi, Bangalore**
- The only member of Meritas in India.
 - Meritas is a worldwide alliance of more than 200 independent law firms membership to which is purely by invitation.

Entry options: FDI & ECB

Debt

Equity

Debt & Equity combine



- Voting rights
- Management rights
- Information rights
- Economic Rights
- ECB / FDI
- Compliance

Entry options: FDI & ECB

Instruments for investment

Equity Shares

Compulsorily Convertible Preference Shares

Compulsorily Convertible Debentures

FDI

Non Convertible Preference Shares

Non Convertible Debentures

Non Convertible Debentures

Optionally Convertible Debentures

ECB

FDI in Real Estate

- **FDI ONLY!**
 - Only equity / instruments compulsorily convertible into equity
 - No Debt / ECB
- **Foreign investment in agricultural / plantation activity?**
 - **NO!**
- **Sectoral cap: 100%**
 - New Investment
 - Acquiring existing shares?

FDI in Real Estate: *reading Press Note 2*

- **Joint Venture**
 - **Minimum capitalisation – US\$ 5 Mn**
- **Wholly Owned Subsidiary**
 - **Minimum capitalisation – US\$ 10 Mn**
- **Within 6 months of commencement of business**
 - **Clarification**

FDI in Real Estate:

reading Press Note 2 contd.

Minimum area to be developed

- In case of development of serviced housing plots, a minimum land area of 10 hectares;**
- In case of development of serviced housing plots, a minimum land area of 10 hectares;**
- In case of a combination project, anyone of the above two conditions would suffice.**

FDI in Real Estate:

reading Press Note 2 contd.

- **Lock – In**
 - 3 years
 - Original Investment
 - FIPB approval

- **50% of the project must be developed within 5 years of obtaining all statutory clearances**
 - Investor not permitted to sell undeveloped plots

FDI in Real Estate:

reading Press Note 2 contd.

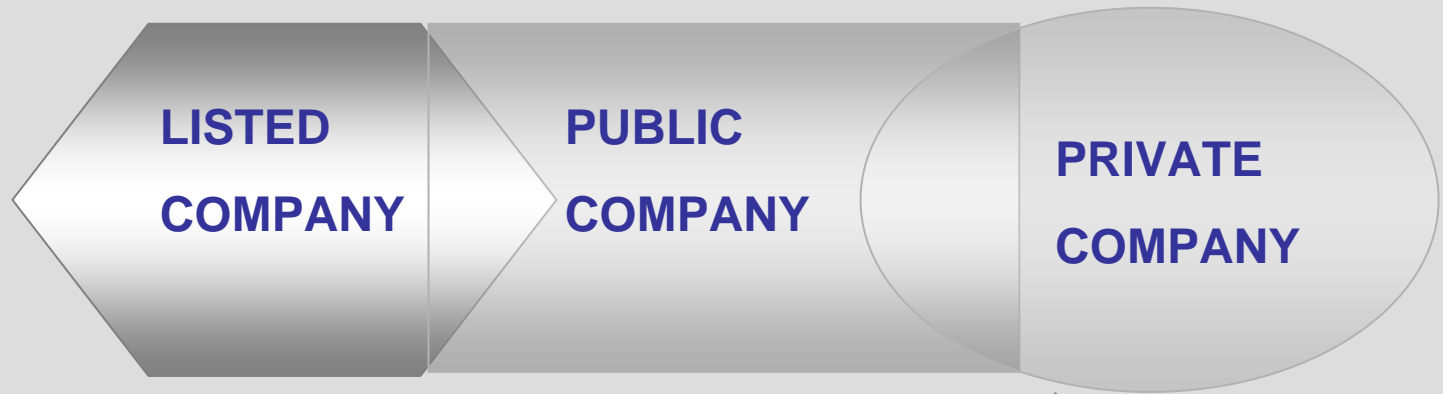
- **Project to conform to standards**
- ***Investor* responsible for obtaining all approvals**
- **State government / Municipal body concerned**

The Non Press Note 2 Sectors

Sector*	Sectoral cap
Special Economic Zones FIPB Approval?	100%
Roads, Highways, Ports & Harbours	100%
Airports	Greenfield: 100% Existing: 74%
Mass Rapid Metro Transit System	100%
Industrial Parks, Model Towns & Growth Centres	100%
Health Care	100%
Hotels & Tourism	100%

* *Sub - sectors*

Investment Structures: *vehicles for investment*



- ENFORCEABILITY OF SHAREHOLDERS AGREEMENTS
- DIFFERENTIAL RIGHTS
- GENERAL FLEXIBILITY

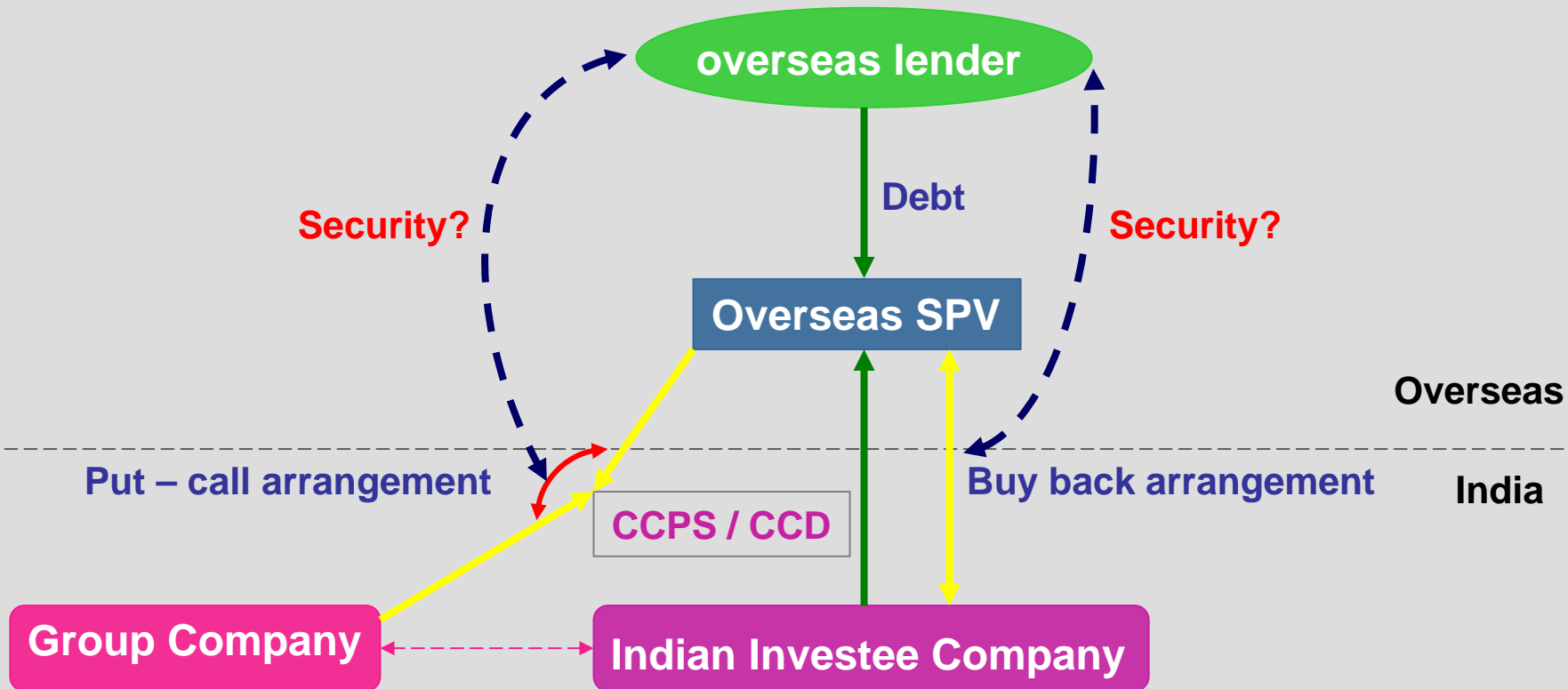
Joint Venture Issues



- **Shareholders' Agreement**
 - Charter documents & enforceability
- **Rights & responsibilities – clearly defined**
 - Reconcile Indian corporation/local laws & ForEx law
 - Obligations of Investor & local partners:
 - Acquire land
 - Approval for development
 - Permission to construct / develop
 - Non – compete & employment agreements with local partner
- **Different classes of equity shares**
- **Preferential rights to dividend / liquidation**
- **Press Notes 1 & 18**
- **Exits**

Investment Structures: *Hybrids / convertibles*

Why? & How?



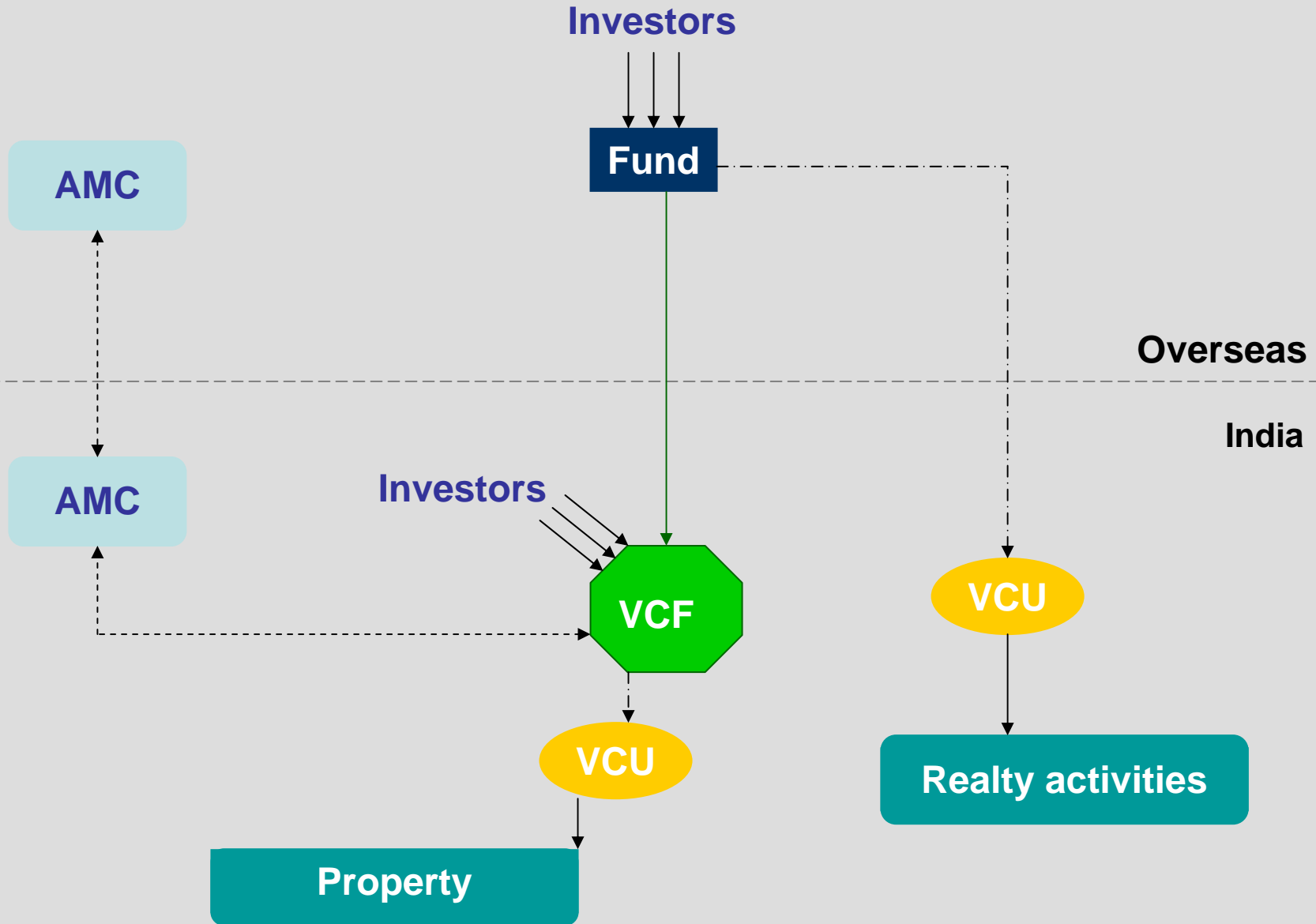
Entry options: *FII, FVCI, VCF*



- **REITS** - as understood in international context – non existent in India
- **FII**: foreign institutional investor registered with the Securities & Exchange Board of India*
- **FVCI & VCF** window opened in 2004
- **Advantage FVCI:**
 - Free entry / exit pricing
 - Exemption under Takeover Code
 - QIBs
 - Exemption from pre-IPO holding lock-in requirements
 - Not generally treated as ‘promoter’ in spite of management participation
- **Domestic VCF**: usually structured as a Trust under Indian law

* The Capital Markets regulator in India

REF (VC): *typical structure*



LAND: *ground issues*

- **Agricultural vs. Non Agricultural land**
 - **Prohibition on acquisition of land OR agricultural activity?**
 - **Move with caution!**
- **Process of Land Acquisition**
 - **Private Acquisition**
 - **By the Government**
 - **Land Acquisition statutes**
 - **Recent SEZ controversy**
 - **Court / Tribunal auction**

LAND: private acquisition

- **Agreement for purchase to be in writing –
Transfer of Property Act**
 - Departure from general principles of Indian contract law
- **Agreement for purchase to be registered -
Transfer of Property Act**
- **It is usual to sign agreement for sale &
purchase as a first step**

LAND: private acquisition *contd.*



- **After signing the agreement for sale & purchase:**
 - Title Search / Due Diligence
 - Land registration records, tax dues, local corporations, courts for litigation, RoC for companies, public administration etc.
 - Execute ‘conveyance’ witnessing transfer of title
- **Other issues:**
 - Sick companies / BIFR
 - Creditors’ claims
 - Family issues
 - Succession & Wills
 - complexities with various personal laws & sub-classifications

Land acquisition: peculiarities



- **Land ceiling for agricultural land**
- **Urban land ceiling**
 - Repealed in most states
- **Stamp Duty**
 - 5% - 12%
 - Varies from state to state
 - At the time of agreement – set off at time of conveyance
- **Registration charges**



Land acquisition: peculiarities *contd.*



- **Grants by government**
 - transfer restrictions
 - Require consent
- **Land could be acquired on lease from the Government & its agencies**
- **Conversion of user**
 - Residential
 - Commercial
 - Industrial

Project Development & Construction



- **Require clearances**
 - Intimation of Disapproval
 - Commencement Certificate
 - No Objection of
 - Civil Aviation, Fire & Health Departments
 - Urban Land Ceiling Authorities

- **Prior Environmental clearance**
 - Environment impact assessment (EIA) report
 - Sometimes, this may involve public consultation

- **Other clearances for sanction of plan / construction**

Project Development & Construction

- **Need for robust construction contracts and project management contracts**
- **Sale and lease agreements of developed areas**
- **Formation of Company / Society / Condominium for Management / Maintenance**



Conclusion

- **Local Partner**
 - Complexities & dependence
- **Socio-economic-political issues**
 - Varying with states
- **Dispute Resolution in India**
 - The costs of litigation
 - Alternate dispute resolution mechanisms
 - Conflict of laws
 - Procedures

Thank you



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