ORIGINAL PAPER

DOI: 10.26794/2587-5671-2020-25-5-117-132
JEL G18, G28

Global Depository Receipts in India: Boon or Bane

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ABSTRACT

The Global Depository Receipt ("GDR" or "DR") is a structured financial instrument denominated in foreign currency and Indian companies issue equity shares/securities underlying the GDR to international investors. Many companies have used GDRs for manipulative and fraudulent practices and the Indian regulator, SEBI has penalised them. This paper **aims** to evaluate the legitimacy of the GDRs and malpractices associated with them and to find if there is any need for reform in the GDR Scheme, to see if the GDRs are beneficial to the economy or are inherently manipulative instruments and looks at the need to reform the laws governing GDR. The authors have employed the **methods,** literature review and empirical research. The authors have conducted empirical research of the participants in the Indian GDR industry in April and May of 2021 by way of an online Questionnaire and unstructured telephonic interviews. The study **results** in the author's conclusion that the GDRs are legitimate instruments but the participants abused the Scheme and led to malpractices. The authors failed to conclude about the need for reforms in the GDR laws. The paper **recommends** the suitable amendment of the DR scheme with an intention to plug its loopholes and allow it in foreign jurisdictions with the highest compliance requirements while keeping in mind the cost of such compliance.

Keywords: American Depository Receipt (ADR); Depository Receipt (DR); Global Depository Receipt (GDR); India; malpractices

For citation: **Khakase S.S., Ronald B.S., Rathi T.M. Global depository receipts in India: Boon or bane.** ***Finance: Theory and Practice.*** **2021;25(5):117-132. DOI: 10.26794/2587-5671-2021-25-5-117-132**

ОРИГИНАЛЬНАЯ СТАТЬЯ

Глобальные депозитарные расписки в Индии: благо или беда

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АННОТАЦИЯ

Глобальная депозитарная расписка («ГДР» или «ДР») — это структурированный финансовый инструмент, номинированный в иностранной валюте, на основе которого индийские компании выпускают акции/ценные бумаги для международных инвесторов. Многие компании использовали ГДР для манипуляций и мошенничества, в связи с чем индийский регулятор SEBI применил к ним штрафные санкции. **Цель** исследования — оценить легитимность ГДР и связанные с ними недобросовестные действия, выяснить, есть ли необходимость реформирования схемы ГДР, приносят ли они пользу экономике или являются по своей сути манипуляторными инструментами, а также рассмотреть необходимость реформирования законов, регулирующих ГДР. Автор использовал два **метода**: обзор литературы и эмпирическое исследование. Посредством онлайн-анкетирования и неструктурированных телефонных интервью в апреле и мае 2021 г. проведено эмпирическое исследование участников индийской индустрии ГДР. В результате автор пришел к **выводу**, что ГДР являются законными инструментами, но участники злоупотребляли этой схемой, что привело к недобросовестным действиям. Автору не удалось сделать вывод о необходимости реформ законов о ГДР. В статье **рекомендовано** внести соответствующие изменения в схему ГДР с намерением устранить лазейки и разрешить ее использование в иностранных юрисдикциях с соблюдением самых высоких требований к контролю, учитывая при этом его стоимость.

Ключевые слова: американская депозитарная расписка (АДР); депозитарная расписка (ДР); глобальная депозитарная расписка (ГДР); Индия; недобросовестные практики

Для цитирования: **Khakase S.S., Ronald B.S., Rathi T.M. Global Depository Receipts in India: Boon or Bane.** ***Finance: Theory and Practice.*** **2021;25(5):117-132. DOI: 10.26794/2587-5671-2021-25-5-117-132**

INTRODUCTION

Neo-liberalisation, by way of economic liberalisation in 1991, put an end to dirigisme and implemented economic policies in favour of a market driven Indian economy coupled with private and public investment. Financial industry, including capital markets were also influenced, policies were drafted to attract investments, domestic and international, Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 (the "1993 DR Scheme") was one of such measures.

The 1993 DR Scheme, with the aim of attracting foreign investment and facilitating international capital market access, has assisted many Indian companies to raise foreign funds through the GDRs.[1] With humble issuances in the early period, and the DR transactions surged during 2004–2011, around US$ 9 bn worth of GDRs were issued only in one financial year 2007–2008 [1, 2].

"Aquila Non Capit Muscam" means "a noble doesn't deal with insignificant issues", but the malpractices and fraudulent activities carried out in relation to the DR Scheme started affecting Indian Investors. It was no more insignificant, the regulator, the Securities and Exchange Board of India (the "SEBI") acted against such practices and restrained fraudsters from the Indian capital market. The 1993 DR Scheme, after observing irregularities and malpractices, went through several changes, stringent provisions were laid to reduce apprehension of the GDR abuse, but again, it was liberalised by the Ministry of Finance by the Depository Receipt Scheme, 2014 (the "2014 DR Scheme") [3] which further amended in 2019 and 2020 restricting GDR issuances only to listed companies, permissible jurisdictions, etc. The SEBI imposed penalties for dozens of the GDR transactions; even in 2021, several companies and participants have been penalised for decade-old GDR issuances.

The changes in regulatory policies and subsequent effects have zeroed down the new DR issuances in 2019–2020. These policy framework amendments raised several questions about the DR Schemes and policies, its effectiveness of accessing foreign funds and capital market, the quantum of malpractices and SEBI's action and market response to it. Further, the amendment of the 2020 in Companies Act, allowing direct overseas listing ("DOL"), has made participants believe the 'end of the DR era in India'.

Naturally, a question pops up, whether the GDR is good or bad: a boon or bane? That has been discussed on the basis of the methodology stated in the next section.

METHODS

In the last decade, the SEBI, Securities Appellate Tribunal (SAT) and the Supreme Court had penalised and restricted many companies for their manipulative practices related to the DR transactions [4]. These incidents split opinions, Sahoo Committee wanted to liberalise the GDR framework whereas SEBI restricted it, creating regulatory uncertainty about the instrument.

This paper is purported to understand the concept of GDR, indulgence into any manipulative or fraudulent practices related to GDR and evaluate if the DR scheme is a boon or a bane in India. Though this study attempts to address issues pertaining to the Indian legal system, it is of global significance as the DRs are commonly used financial instruments across the globe. This study may help to understand possible malpractices in all DR jurisdictions in the world and curative ways to curb them by framing a prudent GDR framework. Secondly, the DRs avail investors opportunities to exploit the international capital market and impart economic growth. The alterations in the Indian policy framework and its effect on the DR issuances will also be helpful to other economies in dealing with the malpractices by prudent policies.

The methodology was based on empirical analysis coupled with a logical literature review.

Traditional and semi-systematic approaches of the literature review were used wherein secondary data was reviewed from existing literature, legislations and other sources of data and information including various publications of the Government of India and others, published reports and newspapers. Based on the available literature, inductive and deductive reasoning approaches have been used to arrive at suggestive conclusions.

Primary research, exploratory and applied, was conducted with a structured questionnaire and unstructured telephonic discussions. Using purposive, convenience and stratified random sampling, primary data was collected from 40 stakeholders, excluding 1 outlier, ("Respondents" or "Participants") maintaining their anonymity.

The sample size has been stratified into five strata, namely GDR Issuer, Advisor to Issuer/Placement Agent and Legal Counsel were having 10 Respondents each. There were 5 Respondents from categories of the Lead Manager and Depository each. Hence, *Figure 1* presents

[1] See Section 2(44) of the Companies Act, 2013. Global Depository Receipt means any instrument in the form of a depository receipt, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts. Same definition is used throughout this paper. GDR includes all depository receipts including ADR issued in the USA and GDR issued in the rest of the world. The GDRs and the DRs are alternatively used; and plural forms are the GDRs and the DRs.

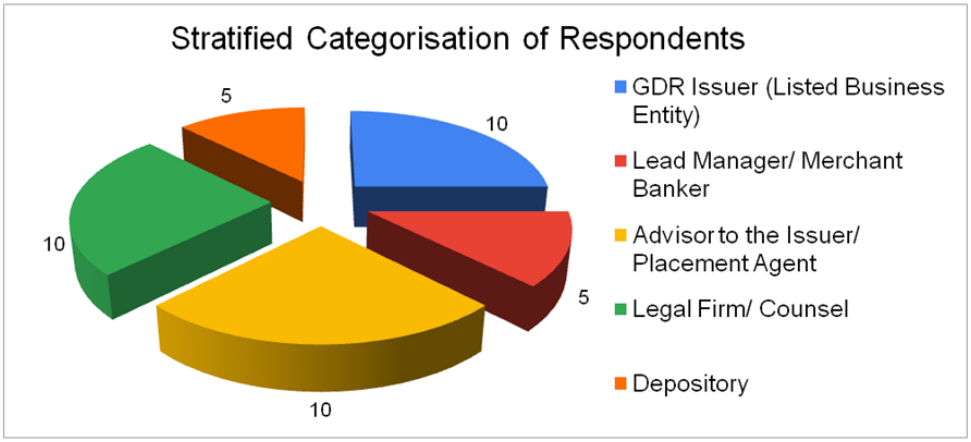

Fig. 1. **Stratified Sampling in the Empirical Study**
Source: compiled by the authors from the survey conducted by them.

the stratification of Respondents under this survey/data analysis.

This research intends to examine whether the DR or the DR scheme is a boon or a bane in India? Other research questions framed are stated hereunder:

a) Do companies indulge into manipulative or fraudulent practices related to the GDRs or the DR Schemes in India?

b) Are the prevailing laws related to the GDR mechanism sufficient to restrict or curb malpractices:

c) Is there any need for reform in the DR Schemes?

To find answers, let's briefly understand the GDR and its structure.

GLOBAL DEPOSITORY RECEIPTS: DEFINITION & MEANING

The Global Depository Receipt that is the GDR[2] is stated in Cambridge dictionary as "an abbreviation for Global Depositary Receipt which is an official document that makes it possible for investors to buy shares of foreign companies". Cambridge dictionary defines the "depository receipt"[3] as "a document that represents a certain number of shares, bonds, etc. that have been bought from a stock market in another country and paid for in the currency of the buyer's country".

The first DR of the world was issued in 1927 when British companies, under British laws, were prohibited from registering their shares out of the country whereas ADRs were permitted to be subscribed by the investors of the United States [5] and thus depository receipts underlying equity shares came into existence. United Kingdom's Selfridges Provincial Stores Limited (now known as Selfridges PLC) was the first Issuer and JPMorgan was credited to have acted as the first Depository.[4]

In the Indian context, the GDR is a synonym for the DR: the Companies Act, 2013, under section 2(44) defines the GDR as "Global Depository Receipt means any instrument in the form of a depository receipt, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts."

The 2014 DR Scheme[5] has defined the 'depository receipt' as a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction, on the back of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian and that includes 'global depository receipt' as defined in section 2 (44) of the Companies Act, 2013.

Further, the meaning of 'Permitted Securities' is imported from the term 'securities' as defined in Section 2(h) of the Securities Contract (Regulation) Act, 1956 wherein the term 'securities' is broadly defined covering shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities include derivatives, Government securities, etc. and rights or interest in securities. If any of these securities are issued in dematerialised form and acquired by foreign residents under FEMA,[6] then they can be used as underlying security for issuing the DRs in foreign markets [6].

[2] CAMBRIDGE DICTIONARY (Online 2020). URL: https://dictionary.cambridge.org/dictionary/english/gdr (accessed on 28.03.2021).

[3] Id. URL: https://dictionary.cambridge.org/dictionary/english/depository-receipt (accessed on 28.03.2021).

[4] JPMorgan Chase & Co. Investor Relations: JPMorgan Chase celebrates 75th anniversary of the ADR. April 29, 2002. URL: https://jpmorganchaseco.gcs-web.com/news-releases/news-release-details/jpmorgan-chase-celebrates-75th-anniversary-adr (accessed on 28.03.2021).

[5] Ministry of Finance, Government of India. Notification. Gazette of India. Oct 24, 2014; New Delhi.

[6] Foreign Exchange Management Act, 1999.

Considering the above definitions, "the GDRs" or "the DRs" are synonyms in the Indian legal context and its meaning can be deduced as "any instrument created or issued by a depository in one country offered to investors in domestic currency whereas such instrument carries underlying (permitted) securities which are issued by a company in another country and in foreign currency."

Christopher J. Mailander [7] has cited several benefits of the ADRs, these are applicable to the DRs, *mutatis mutandis,* stated below:

1. The DR is an alternative instrument to equity shares when equity shares cannot be offered directly.
2. The DRs allow a company to have access to the foreign security market.
3. The DRs are offered in the local currency of investors, hence nullifying currency fluctuation risk.
4. Most countries including the USA, Europe, Singapore, etc., don't restrict purchasing of DRs underlying foreign securities.

Rishi Shroff [8] tried to point out the negative aspects of the DRs. Shroff stated that allowing foreign listing by way of the DRs is halfway of the capital market liberalisation and hence, it may not benefit Issuers completely in terms of true overseas pricing, valuation, visibility and others. In absence of direct listing, the DRs may be listed on secondary platforms of foreign exchange.

STRUCTURE OF THE GDR

The DR, being derivative instruments, its value is derived from the value of underlying securities, generally, shares but other securities are also permitted subject to the laws of the land.

Dr. P.R. Kousalya and Ms. S. Niranjana [9] along with other independent authors, Manoj Kumar [10] and N.M. Desai [11] have elaborated the mechanism or structural flow of the DRs from India. Inspired by those, a simplified structure is depicted in *Figure 2*.

In India, the GDR issuance is like any other public offering and is equally complex in terms of documentation, procedure and compliance. For ease of understanding, the process of GDR issuance has been divided into five broader steps:

1. Issue of Shares
2. Deposition of Shares with the Custodian
3. Receipt of Shares confirmation by Custodian to the Depository
4. Issue of the DRs by the Depository
5. Offering/ Sale of the DR

Generally, the Issuer issues shares that underlie the GDRs issued by the Depository. Issuance of shares is also a cumbersome process; many parties are involved like a Lead Manager who guides the DR transactions and determines the ratio of the DRs to the Share ("DR Ratio"), inter alia, other functions of coordination and the DR placement or book building.

The Issuer, pursuant to the Deposit Agreement, deposits the shares with the custodian which holds the shares on behalf of the Depository and will follow its instruction, abiding the agreements agreed by the parties.

The Depository, against the acknowledgment of the Custodian, issues the DRs. These DRs are negotiable instruments that guarantee the delivery of underlying shares, either on-demand, or at a predetermined time. These DRs, then, are offered to foreign investors for subscription and purchase price is paid to the Issuer or holders of underlying shares, as the case may be.

Like other countries, India has allowed two-way fungibility for the DRs, which means shares (or underlying securities) can be converted into the DRs and the DRs can be cancelled to the underlying securities [12].

TYPES OF THE DRS

The DRs have been differentiated on various grounds. *Figure 3* delineates different types of the DRs on the basis of three broad distinguishing grounds namely:

1. Location of the DR issuance
2. Consent of the Issuer
3. Laws or Targeted investors

1. Location of the DR issuance

On the basis of the Location of the DR issuance, the DRs can be divided into types:

1. ADRs, mean American Depositary Receipts, are the DRs issued and/ or listed only in the US markets [10].
2. GDR are generally issued and/ or listed in the European markets, but the term is used for any DR issued or listed across the globe except in the USA, including Singapore, Hong Kong, etc.
3. IDR[7] or BhDR[8] are similar to ADRs and GDRs wherein foreign companies are allowed to issue and lists their DRs in the Indian market[9] [13].

2. Consent of the Issuer

Unsponsored DRs: Unsponsored DRs imply that the DRs are issued without formal consent or approval of the Issuer. Hence, such DRs are issued against the existing

[7] IDR means Indian Depository Receipt as defined under Section 2(48) of the Companies Act 2013.

[8] Bharat Depository Receipt as recommended by Sahoo Committee.

[9] Ministry of Finance (Sahoo Committee III). Report of The Committee To Review The Framework Of Access To Domestic And Overseas Capital Markets (Phase II, Part II: Indian Depository Receipts). Feb, 2015; Government of India, New Delhi. URL: https://www.finmin.nic.in/sites/default/files/SahooCommittee_ecbReport_20150225.pdf (accessed on 28.03.2021).

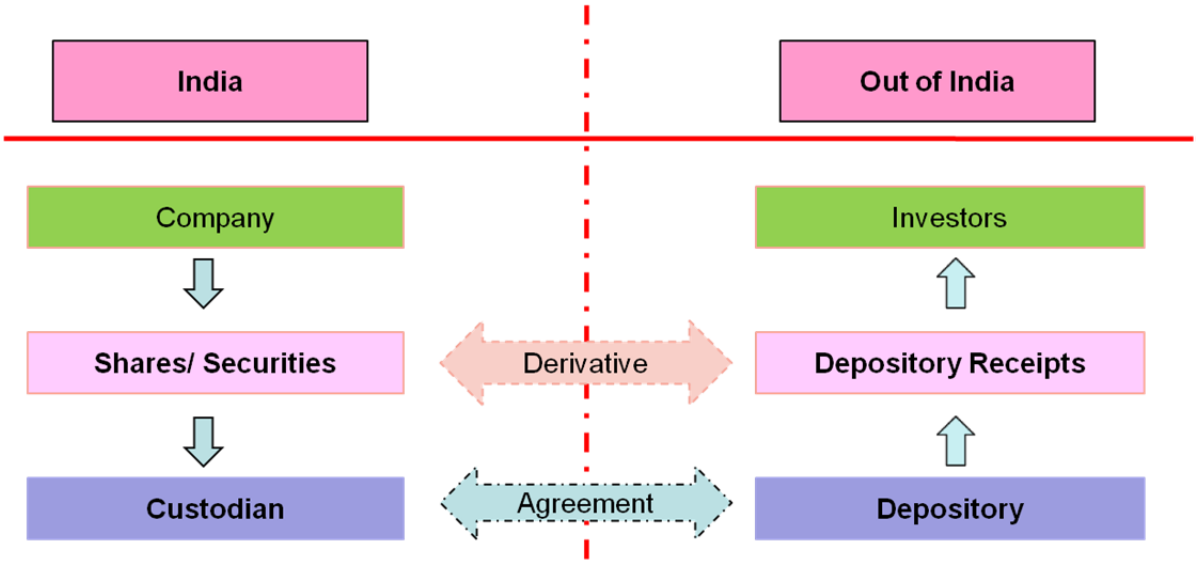

Fig. 2. **The GDR or DR issuance structure from India**

Source: compiled by the authors based on Dr. P.R. Kousalya and Ms.S. Niranjana [9] Manoj Kumar [10] and N.M. Desai [11].

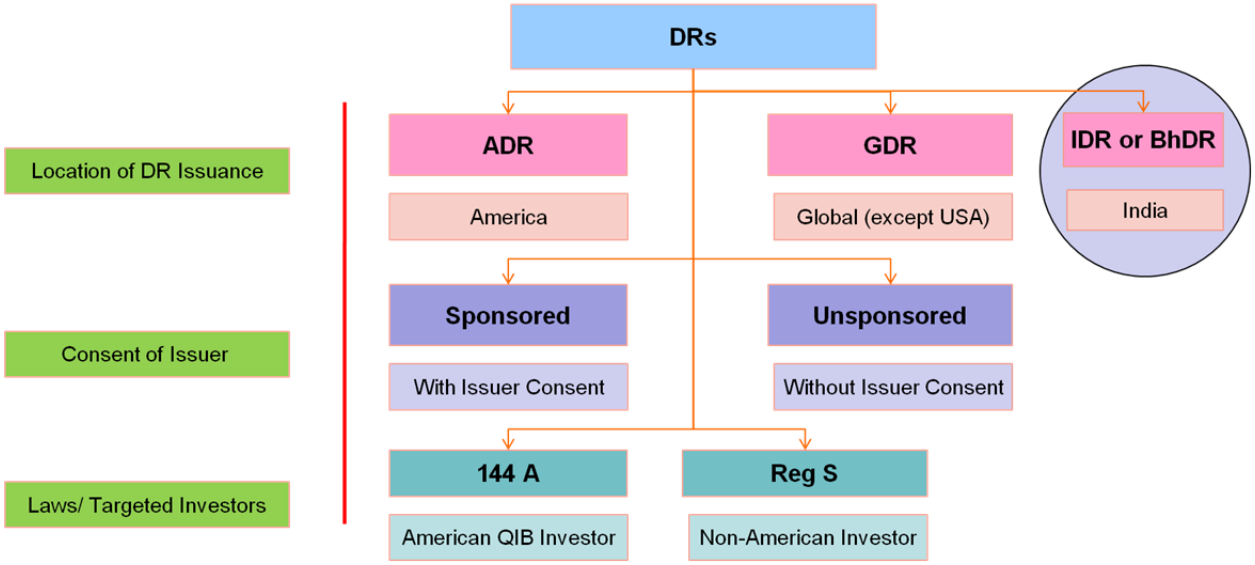

Fig. 3. **Types of the DRs**

Source: compiled by the authors based on Manoj Kumar [11], Amita Verma [13] and other literatures.

issued and subscribed shares held by any shareholder. These shareholders give custody of their shares to the Custodian and against such shares, the Depository issues the DRs. The DR buyer or the investor pays to the shareholders through the Depository.

In India, Unsponsored DRs were permitted by the 2014 DR Scheme[10] had overridden conflicting provisions under 2(44) of the Companies Act.[11] Sandeep Bhagat with co-authors [14] was unclear about the status of Unsponsored DRs. Restrictions imposed by the 2019 Circulars dated Oct 10 and Nov 28 of 2019 have practically made it impossible.[12,13]

Sponsored DRs:

India has permitted Sponsored DR wherein the Issuer is actively involved into the issuance of the DR. In fact, the DRs are issued at the behest and initiation of the Issuer.

[10] Supra Note 4. Ministry of Finance Notification in Gazette of India Dated Oct 24, 2014.

[11] Supra Note 1. The Companies Act, 2013. Section 2(44).

[12] SEBI. Circular SEBI/HO/MRD 2/DCAP/CIR/P/2019/146 dated Nov 28, 2019.

[13] SEBI. Circular SEBI/HO/MRD/DOP1/CIR/P/2019/106 Dated 10 Oct, 2019.

3. Laws/Target Investors

144A DRs: The Security Exchange Commission (the "SEC") has adopted Regulation D in 1982, and adopted Rule 144A in April 1990 which has allowed non-US to privately place their DRs/ADRs to the qualified institutional buyers ("QIBs") in the USA. Indeed, Rule 144A has availed an opportunity to foreign Issuers to offer their securities to QIBs which are defined under Rule 144A as an investor who owns and invests not less than US $ 100 million in securities on a discretionary basis. The Rule also allowed these QIBs to trade such securities among themselves privately [10].

Reg S DRs: The SEC has adopted Regulation S ("Reg S") in 1990, specifically to allow the Issuers or companies for offering their securities in the USA through a private offering to persons out of the USA. Reg S laid down the conditions or requirements to issue or to offer any security outside the USA which will be exempted from the SEC regulations or compliances.

MALPRACTICES RELATED TO THE GDR

The GDR transactions have been in vortex of malpractices for a decade. The Regulator, SEBI, has pointed out many malpractices in connection with the DR and barred many participants and Issuers from accessing Indian capital market[14,15,16] [1].

Interestingly, it to be noted that the SEBI/ SAT,[17] redefined the term 'fraud' as "if a person by his act either directly or indirectly causes the investors in the securities market in India to believe in something which is not true and thereby induces the investors in India to deal in securities, then that person is said to have committed fraud on the investors in India."

The Supreme Court also affirmed such malpractices in the GDR transactions.[18]

Also, the SEBI/SAT[19,20] tried to elaborate the way malpractices had been conducted in the GDR transaction that is pictorially outlined in *Figure 4*. These malpractices can be separated into following steps:

1. The Issuer issues the GDR.
2. The GDRs are subscribed by the Investor.
3. The Investor is funded by another financial institution or bank, by pledging the shares of Issuer or by providing other guarantee.
4. The Investor cancels the GDRs and converts them into equity shares.
5. The Investor sells the equity shares to financial institutions registered with the SEBI.
6. These financial institutions then sell the equity shares to the public and other investors.

In Re: Jindal Cotex Ltd. vs. Securities and Exchange Board of India, the SAT said that the modus operandi adopted in the above GDR issue structure has a basic element that vitiates the entire issue of the GDR. That element is "the Investor borrows from an international financial institution or Bank (Financier) to buy the GDRs issued by the Issuer wherein the Issuer itself pledges its shares to the Financier against the loan lent to the Investor". The tribunal upheld that the contention in this kind of the GDR structure is fraudulent.

POLICY CHANGES & THE EFFECT ON THE DRS

After replacing the 1993 DR Scheme, the 2014 Scheme has been liberalised, allowing unlisted, unsponsored DR issuances with underlying securities of equity, debt or other permissible/ marketable securities. On Oct 21, 2014, the Ministry of Finance (the Department of Economic Affairs) issued Notification which came into force from Dec 15, 2014, had listed out 34 permissible jurisdictions where the DRs can be issued [15].

SEBI's Circular dated Oct 10, 2019, has limited the issuance of the DRs only by listed companies in permissible jurisdictions.

On Oct 7, 2019, the Ministry of Finance (the Department of Economic Affairs) notified amendment in the 2014 DR Scheme in the Official Gazette of India allowing International Financial Services Centre in India (IFSC)[21] to be permissible jurisdiction for the DR Issuances [16]. In this regard, the SEBI, vide Circular dated Nov 28, 2019, has declared the list of permissible

[14] Securities Exchange Board of India (SEBI). Order WTM/SR/ISD/69/09/2014 dated Sep 19, 2014. In Re: Market Manipulation using GDR Issues. MANU/SB/0062/2014.

[15] Securities Exchange Board of India (SEBI). Order PM/AN/2020–21/10277 dated Feb 03, 2021. In the matter of GDR Issue (2008) of Beckons Industries Limited. MANU-SB-0289–2021.

[16] Jindal Cotex Ltd. vs. Securities and Exchange Board of India, Appeal No. 376 of 2019. Securities and Exchange Board of India / SEBI Appellate Tribunal Order dated Feb 05, 2020. MANU/SB/1310/2020.

[17] Securities Exchange Board of India (SEBI)/ SEBI Appellate Tribunal. Order Order/KS/VC/2020–21/7742–7743 dated May 26, 2020. In Re: GDR Issues of Asahi Infrastructure & Projects Ltd. MANU/SB/0347/2020.

[18] Securities and Exchange Board of India Vs. Pan Asia Advisors Ltd. and Another, Civil Appeal No. 10560 of 2013. Supreme Court of India judgment dated July 6, 2015. AIR 2015 SC 2782: III (2015) BC 513 (SC): [2015] 127 CLA 306 (SC): [2015] 191 CompCas 410 (SC): (2015) 3 CompLJ 241 (SC): 2015 (7) SCALE 694: (2015) 14 SCC 71: 2015 (8) SCJ 4.

[19] Supra Note 15. Jindal Cotex Ltd. vs. SEBI. MANU/SB/1310/2020.

[20] Supra Note 16. In Re: GDR Issues of Asahi Infrastructure & Projects Ltd. MANU/SB/0347/2020.

[21] Ministry of Corporate Affairs. GSR 111(E) dated Feb 13, 2020. Companies (Issue of Global Depository Receipts) Amendment Rules, 2020. MANU/DCAF/0022/2020. Government of India, New Delhi.

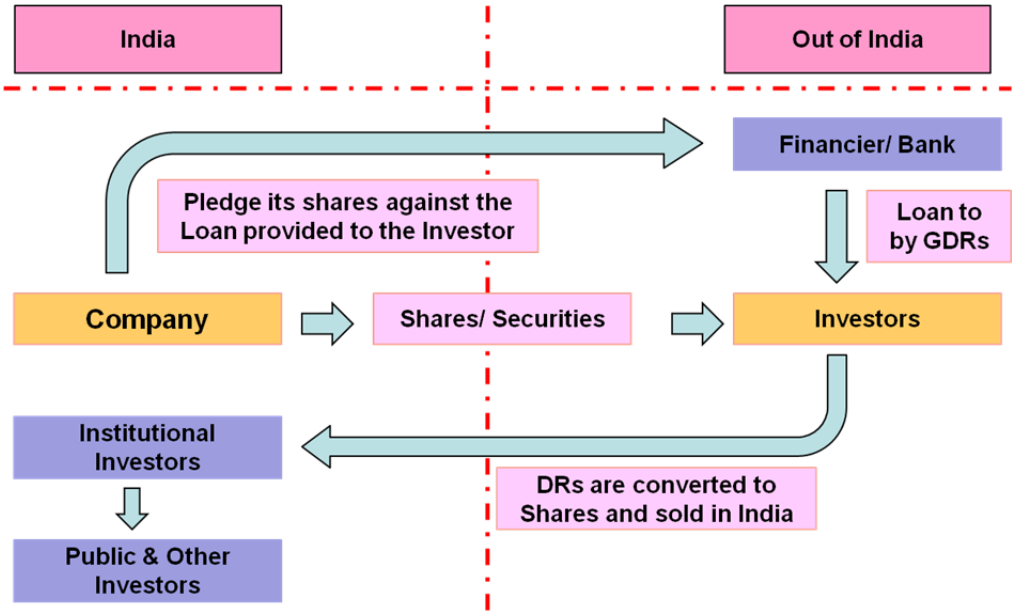

Fig. 4. **Scheme of malpractices in the DR transaction**

Source: compiled by the authors from Jindal Cotex Ltd vs. SEBI Judgment.

jurisdictions for the DR issuances wherein IFSC was included but the number of total jurisdictions were reduced to 7 (excluding IFSC) from 34.

Because of these limited 'permissible jurisdictions' like NASDAQ, New York Stock Exchange, Tokyo Stock Exchange, London Stock Exchange, etc. with strict compliance and high cost of listing of the DRs, Indian issuers had shied away from the new DR issuances from Jan 2019 to 2021. In the year 2018, Dish TV India Ltd and Tube Investments of India Limited have issued the DRs to the tune of US$ 1.8 bn [1] and then there were no new DR issuances in 2019 and afterward[22] [17].

The DR issuances are further affected by Companies (Amendment) Act, 2020 which has allowed Indian companies to list their securities directly on overseas stock exchanges. This is expected to wipe out the DR issuances from the Indian market.

RESULT

This survey, by means of a structured questionnaire in the form of 'Google Forms' and unstructured interviews, was conducted in the month of April and May of 2021 to understand the opinions of stakeholders about the GDRs or the DRs, laws and malpractices associated with it.

The survey also attempted to understand stakeholders' opinions about the need for any reform in the GDR Scheme or framework in India.

With this survey, the following things were observed:

1. All the 40 Respondents unanimously agreed that the GDRs or DRs issued in India are legitimate means of raising funds or capital that is portrayed in *Figure 5*.

2. *Figure 6* illustrates that all Respondents believed the Issuers prefer the DRs to gain international recognition and exposure, and over 80% felt that better valuation would be another reason. The Respondents were unclear about the other reasons such as regulatory flexibility, low cost of fundraising, avoidance of Takeover Code trigger, etc.

3. All Participants found it easy to answer that the DRs are means of attracting FDI in India that is sketched in *Figure 7*.

4. As represented in *Figure 8*, 77% of the Participants were of the opinion that the existing laws and regulations related to the GDRs or DRs are sufficient to attract FDI.

5. The Respondents, replying to available alternatives of the DRs, with over 90% majority believed that Qualified Institutional Placement (QIP), Direct Overseas Listing (DOL) and Private Equity (PE) are alternatives to the DRs. 25% and below Respondents thought that Foreign Currency Convertible Bonds (FCCBs) and External Commercial Borrowing (ECB) respectively are alternatives to the DRs. *Figure 9* details the responses of Respondents (in number) answering these alternatives.

6. As plotted in *Figure 10*, 75% of the Participants opined that the DRs or the DR Scheme has been used for manipulative or fraudulent practices.

[22] Citi Bank. Global DR Directory. Depository Receipt Services. July 7, 2021. URL: https://depositaryreceipts.citi.com/adr/guides/uig.aspx?pageId=8&subpageid=34 (accessed on 28.03.2021).

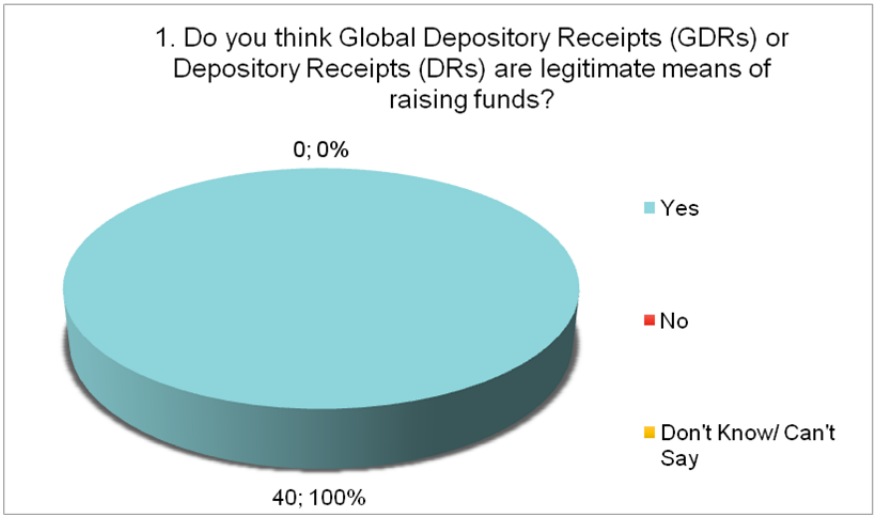

Fig. 5. **Legitimacy of the GDR issuance**

Source: compiled by the authors from the survey conducted by them.

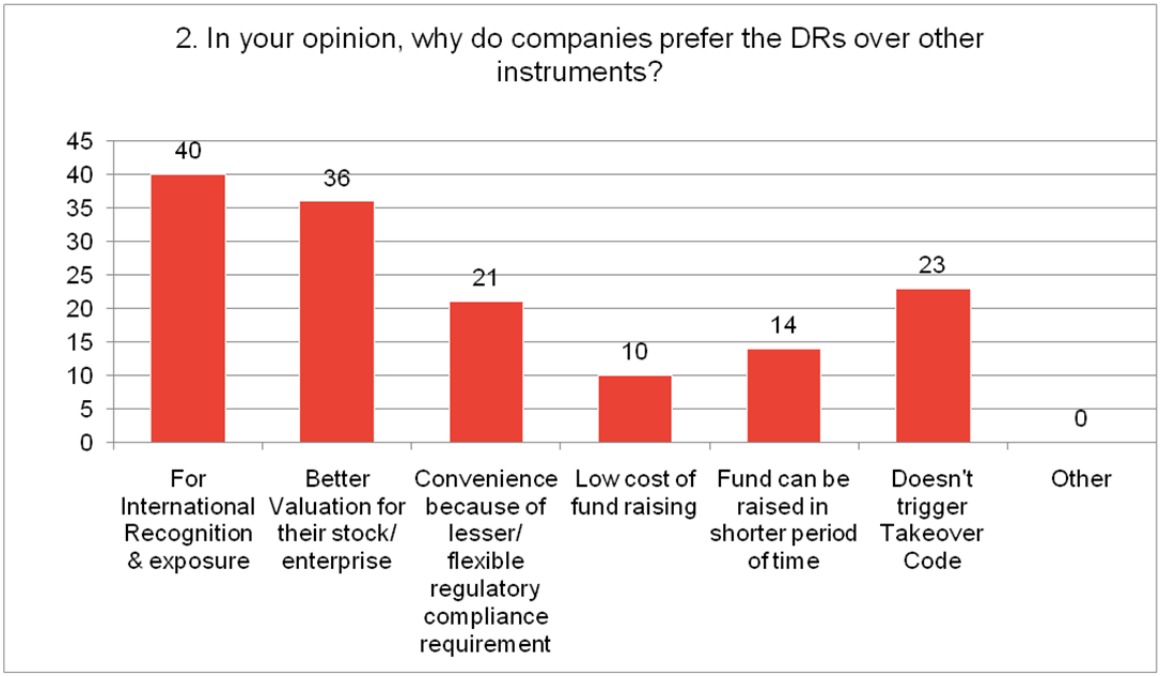

Fig. 6. **Reasons for preferring the DRs**

Source: compiled by the authors from the survey conducted by them.

Around 23% of the Respondents were not aware of malpractices and 2% believed that the DRs have not been used for manipulative or fraudulent practices.

7. *Figure 11* depicts the opinions of the Participants about the measures to be employed by the SEBI to curb malpractices. Around 80% of the Participants have opined that the Regulator/ the SEBI should employ three things to curb malpractices, namely:

a. Regulate the DR Scheme strictly and impose stringent compliance requirements,

b. Plug the loopholes which are being used for malpractices,

c. Impose Corporate Governance responsibility on both directors, executive & independent.

Out of the remaining 20%, 13% opted for "Don't know/can't Say" and 7% believed that the Regulator should plug the loopholes.

8. *Figure 12* portrays that around 80% of Respondents opined the companies might have indulged into manipulative or fraudulent practices because of the presence of loopholes or poor clarity of the DR Scheme.

Around 50% of Respondents believed that malpractices might be or have been conducted to avoid Takeover Code Trigger or to hold a majority of stake even

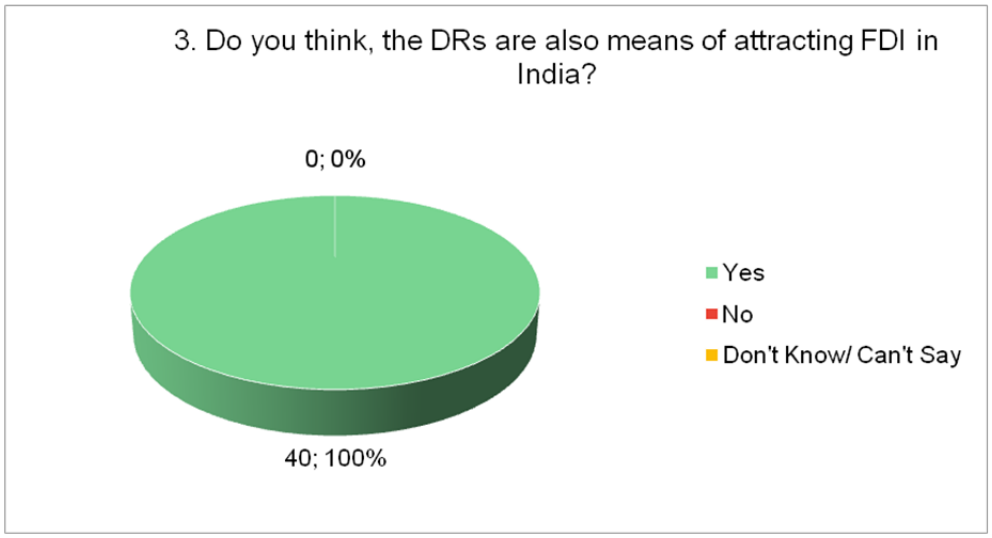

Fig. 7. **DRs as means of attracting FDI**
Source: compiled by the authors from the survey conducted by them.

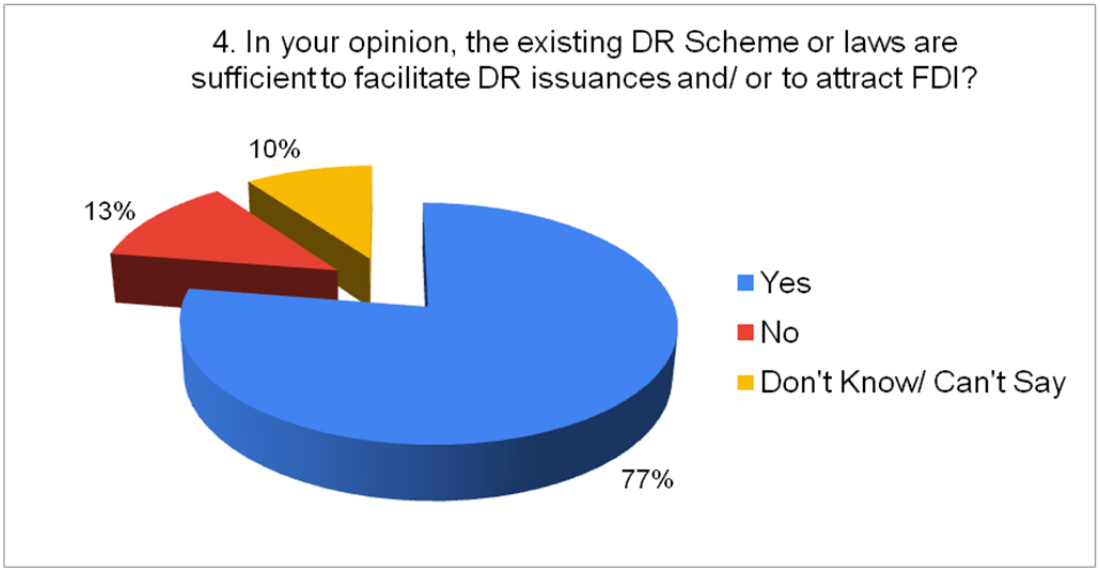

Fig. 8. **Perceived effectiveness of the laws to facilitate the DRs**
Source: compiled by the authors from the survey conducted by them.

after complying with 25% shareholding of the public in listed entities.

9. As presented in *Figure 13*, over 80% of Respondents believed that there are three reasons for the reduction in the DR issuances in the last few years which are namely:

(i) The DRs are not any more attractive investment avenues for the investors.

(ii) Unclear DR Scheme, policies and laws.

(iii) Lastly, strict compliance requirements.

Around 70% Respondents believed that the fear of being penalised by the SEBI or increment of the Takeover Code Limit to 25% may be other reasons for poor DR issuances.

10. *Figure 14* depicts interesting but non-decisive responses. 45% of the Respondents thought that the DR Scheme and existing laws related to the DR are sufficient to protect the interests of the stakeholders and curb malpractices. 15% of the Respondents thought the prevailing laws and the DR Scheme were not sufficient, whereas 40%, a substantial number chose not to say or were not aware of. Of not having a simple majority, it was observed that there was no clarity.

11. Like *Figure 14*, *Figure 15* also failed to provide majority opinion about the need for any reform in the DR laws. *Figure 15* depicts that Respondents were divided in three sects, 35% believed there is a need for

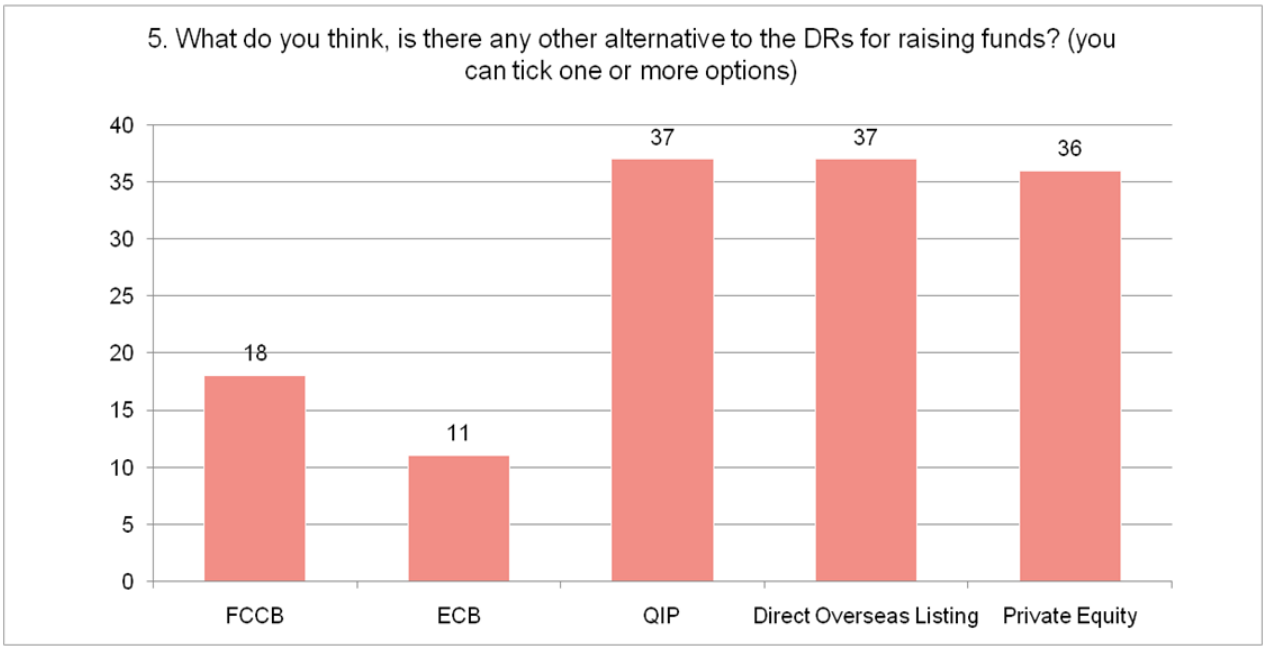

Fig. 9. **Alternatives to the DRs**

Source: compiled by the authors from the survey conducted by them.

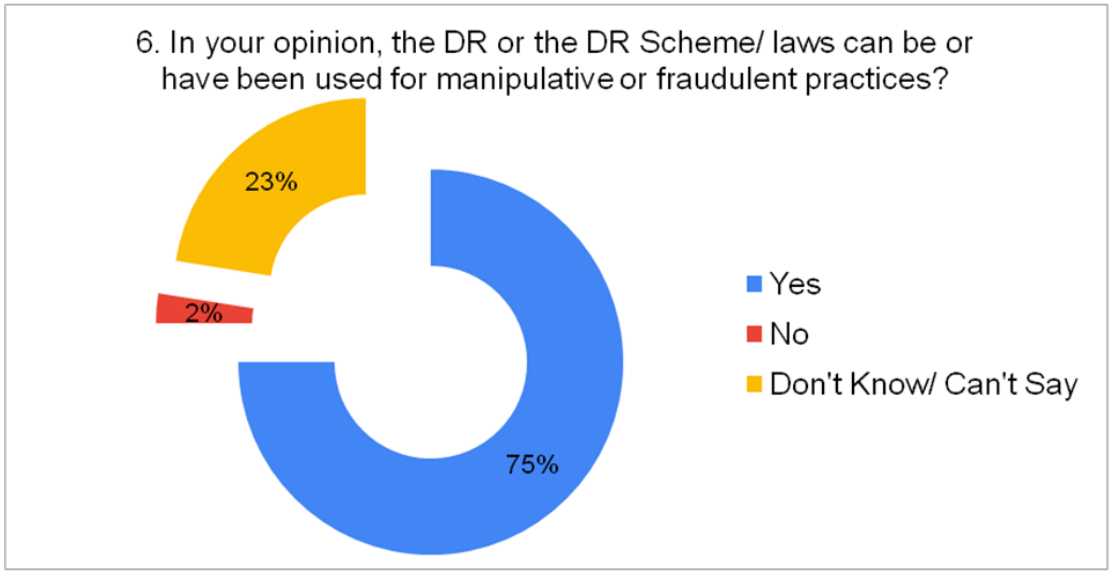

Fig. 10. **Manipulation in the DR issuances**

Source: compiled by the authors from the survey conducted by them.

reform, 40% believed there is no need and 25% were either not aware of or opted not to say on the matter.

12. Suggestions:

There were several suggestions, most were about how to make the GDR a more effective tool to attract FDI without compromising the interests of the investors. It had been suggested that the Regulator should adopt a trade-off between FDI and compliance stringency, without affecting the interests of investors. Another suggestion was to emphasise more on corporate governance practices and hold the promoters responsible for malpractices.

DISCUSSION

1. This study concluded that GDRs or DRs, being issued in India as per the DR Schemes, are legitimate means of raising funds or capital. Rajeevan [18], Datta [19] and Manoj Kumar [10] also found the same.

2. In this study, it found that Issuers generally prefer the DRs for international recognition and exposure and better valuation which was also mentioned by Pratik Datta [20]. Datta [20] further stated the three benefits of the DRS, namely:

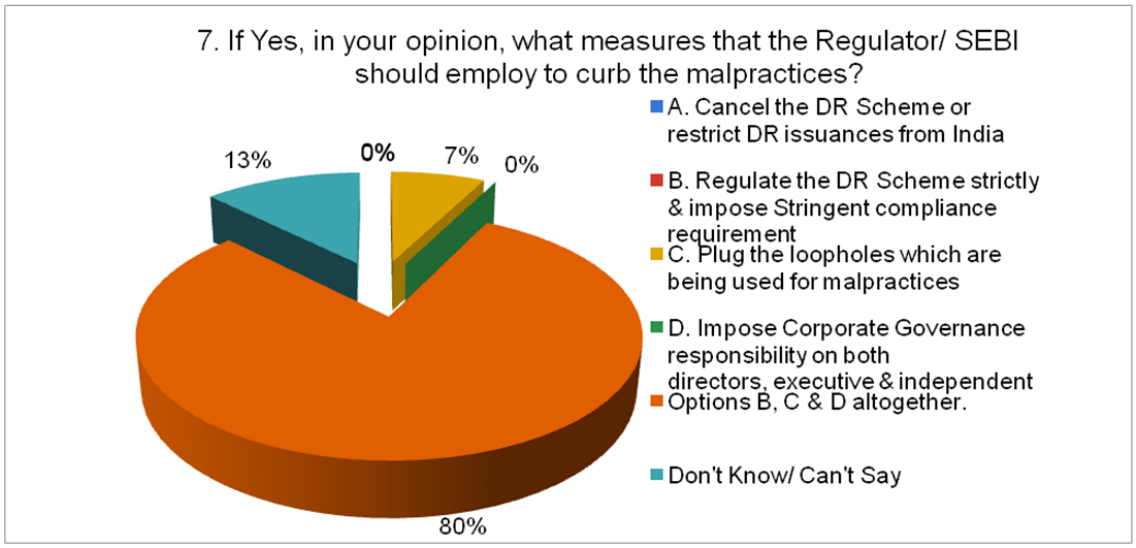

Fig. 11. **Possible measures to be taken by SEBI to curb malpractices**

Source: compiled by the authors from the survey conducted by them.

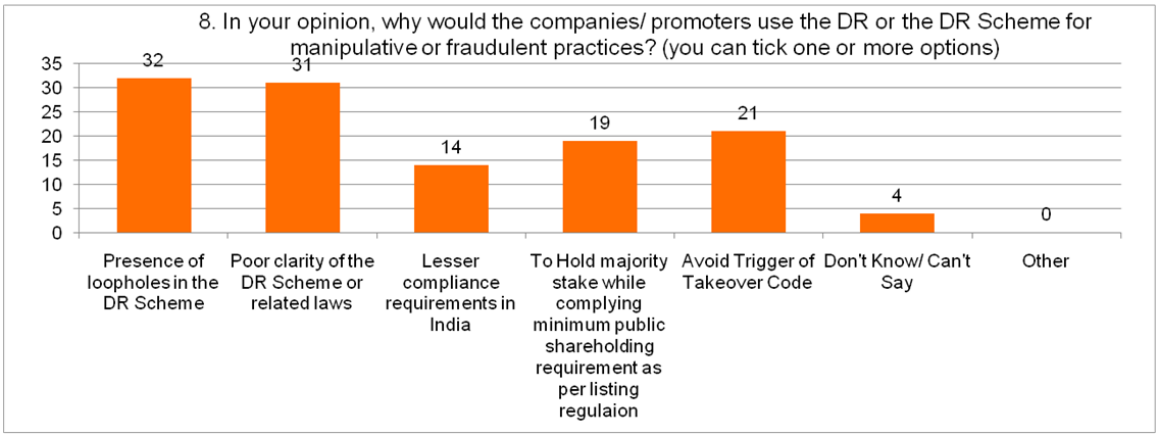

Fig. 12. **Reasons for indulging into manipulative practices**

Source: compiled by the authors from the survey conducted by them.

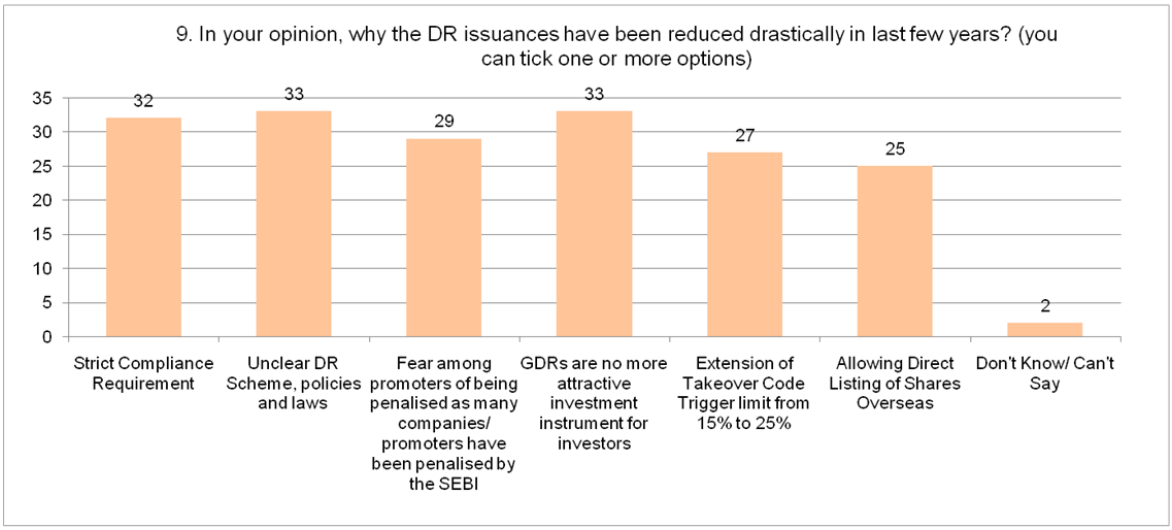

Fig. 13. **Reasons for reductions in the DR issuances**

Source: compiled by the authors from the survey conducted by them.

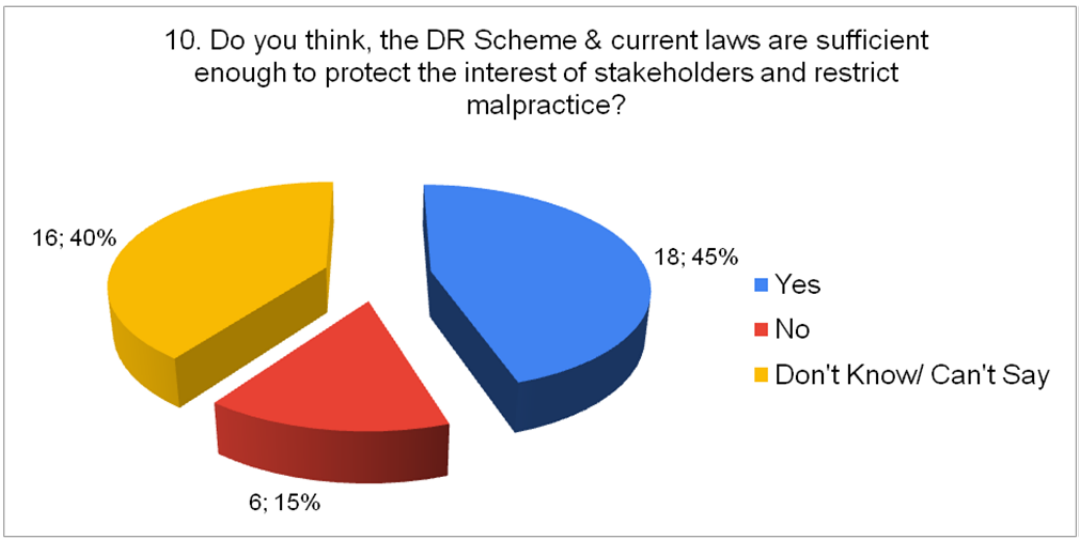

Fig. 14. **Sufficiency of prevailing laws to protect investor's interest**
Source: compiled by the authors from the survey conducted by them.

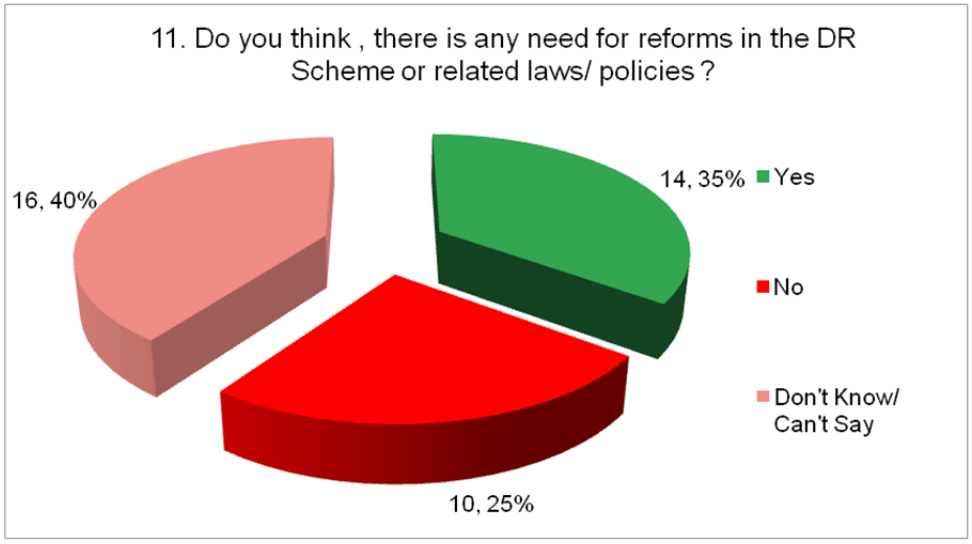

Fig. 15. **Need of Reform in the DR Scheme**
Source: compiled by the authors from the survey conducted by them.

a. The DRs, being traded in foreign markets in its own currency, help to overcome the currency and local security related home bias problem.

b. The DRs provide potential to improve the valuation of Indian companies, importantly in innovative and technology-driven sectors.

c. The DRs offer several commercial advantages to Indian companies including gaining the trust of customers and government and also building brand value.

3. Madhavan and Ray [1] wrote that the GDR activities had declined in the last few years mainly because of SEBI's stringent action against companies involved in the GDR manipulation; and, secondly, QIP arose as an alternative way to raise capital which is cheaper and convenient. Further, the SEBI, vide 2020 amendment of the Companies Act, allowed DOL which is likely to reduce the DR transactions. This study also found that QIP along with DOL and PE are alternatives to the DRs. Bhumesh Verma [4] mentioned that DOL is a positive move in the capital market whereas the GDRs are passé and lack clarity.

4. In this survey, it has been observed that the DRs or the DR Scheme have been used for manipulative or fraudulent practices. This outcome has been demonstrated by Madhavan & Ray [1] and several orders of the SEBI like Securities and Exchange Board of India Vs. Pan Asia Advisors Ltd. and Another,[23] In

[23] Supra Note 17. SEBI Vs. Pan Asia Advisors Ltd. AIR 2015 SC 2782.

Re: GDR Issues of Asahi Infrastructure & Projects Ltd.[24] and Jindal Cotex Ltd. vs. Securities and Exchange Board of India.[25]

5. Siddharth Rajeevan [18], Yash J. Ashar [21] and Minal Shah [22] studied the 2019 SEBI Circular issued on Oct 10, 2019 with the previous provisions of the 2014 DR Scheme. They found that the DR scope has been curtailed. In this study, major problems of limiting the GDR issuances, have been pointed out as:

a. The DR or GDR issuances may drop, affecting the FDI inflow to India.

b. If the DR Scheme is relaxed, there will always be a fear of malpractices, subject to compliance requirements in the DR (foreign) jurisdiction.

c. The SEBI, vide 2020 amendment of the Companies Act, allowed DOL. This overseas direct listing, like the DR listing, may attract malpractices.

BOON OR BANE?

The DR Schemes and the GDR issuances had been studied with perspectives of the Regulator, companies, investors and the Indian economy. The pros and cons which were determinants of the DR Schemes, are tabulated hereunder to find the answer for 'Whether the GDR is Boon or Bane?' (see *Table*).

This research could not find an answer with a majority whether the prevailing laws are sufficient to restrict or curb malpractices or if there is any need for the reforms. With an indecisive outcome, "Whether the GDR is Boon or Bane?" is believed to be more complex and subjective, and needs further deductive and quantitative research. At this juncture, it cannot be wrong to say that the DRs are neither a boon nor a bane; the future will depend upon the legal framework and compliance requirements and prudential conduct of the participants.

CONCLUSION

The 2014 DR Scheme, replacing the 1993 DR Scheme, has liberalised the DR mechanism and further amendments in 2019, it is made more rigid and prohibitive to Indian companies of using the DR route for accessing foreign capital markets. By the amendment of the Companies Act in Sep 2020, direct overseas listing (DOL) allowed to Indian companies, is likely to diminish new DR issuances.

De facto, the DR mechanism is a means to attract FDI and to assist in the economic development of the country. It will keep availing access to foreign capital to Indian companies and may provide a better valuation. In view of globalisation, foreign investors can invest in the Indian equity market in their local currencies using the DR scheme. These GDR benefits imply that the DR Scheme, prevailing or former, is or has been a boon.

The 2014 DR Scheme and former, were neither inherently fraudulent nor availed participants any opportunity for fraudulent activities or malpractices. Having said that, there have been many companies, directors and participants who have been penalised for indulging into fraudulent activities or malpractices in connection with the GDR programs. One of the reasons: loopholes available in the scheme can be corrected by:

1. Imposition of corporate governance rules related to the GDR issue, subscription and receipt disclosures.

2. Prohibiting, expressly, Indian companies to enter into any agreement with the GDR subscribers or investors or participants securing their investment by pledging shares or other means.

3. Inducting provisions, expressly, related to vicarious liability and lifting of corporate veil in matters of the GDR Scheme abuse.

The above suggestion can also be used in designing a framework for DOL which is again aimed to attract FDI and avail international capital market access. There are a few things that still favour the GDRs, first, the shares of the Issuer will be in India, secondly, DOL may face the same issues and malpractices and thirdly, offering a second option to access the international capital market can't be that bad.

'Omnia Mutantur, Nihil Interit', agree nothing is permanent; but changing the DR policies to address the problem of foreign jurisdiction without fruitful results, will it prove Latin maxim true, *'Coelum Non Animum Mutant Qui Trans Mare Currunt'* that means 'those who are in hurry to cross the sea, change the sky'. Expecting, the DR Scheme will be altered suitably to attract investments, generate business opportunities for participants within the laws and without affecting the interest of the Indian investors detrimentally, conclude.

SUGGESTIONS

The 2014 DR Scheme, based on the recommendation of the Sahoo Committee was liberal in two senses, first availing more liberty to Indian companies to issue the DRs, even unsponsored and unlisted were permitted, for not only equity but also debt securities. Secondly, the 2014 DR Scheme, was more focused on the protection of interests of Indian investors and hence, activities under foreign jurisdiction which were neglected if it not detrimentally affecting Indian investors. By redefining the term "fraud" by the SEBI or SAT, even misinforming

[24] Supra Note 16. In Re: GDR Issues of Asahi Infrastructure & Projects Ltd. MANU/SB/0347/2020.

[25] Supra Note 15. Jindal Cotex Ltd. vs. Securities and Exchange Board of India, Appeal No. 376 of 2019. Securities and Exchange Board of India / SEBI Appellate Tribunal Order dated Feb 5, 2020. MANU/SB/1310/2020.

Table

The DRs: Boon or bane

Perspectives of	Boon Factors	Bane Factors
Regulator (the SEBI)	The Regulator has, inter alia, an objective to expand capital market participation and the GDRs facilitate foreign entities to participate in the Indian capital market	The SEBI has identified malpractices and fraudulent activities in connection with the GDR issuances
	Secondly, the GDRs attract foreign investment in the Indian market and foster it	The GDR is issued in foreign markets and the SEBI could not control or regulate the GDR issuances and hence it has to rely on the prudence of the foreign GDR jurisdiction
Companies (the DR Issuers)	Foremost reason for issuing the GDRs, it provides international capital market access to Indian companies*	After detecting malpractices about the GDRs, the SEBI has imposed strict regulations and compliance related to the GDR issuances. The regulator is also distrustful about the DR Schemes & mode of fund raising, deterring the GDR issuances
	Secondly, the USA and Europe, being mature capital markets, are having high investible funds. It makes Indian companies expect higher valuations in these markets	Most of the GDRs, though listed, are not traded overseas regularly. Being illiquid, they are unlikely to attract better valuation.
Investors	The DR Scheme facilitates foreign investors to participate in the Indian capital market which, being an emerging market, is generating significant returns	In most of the GDR investments, the investors have lost their funds. 85% of investors have incurred losses in their investments made via the GDRs (excluding ADRs) in 2010 [4]
	Secondly, the GDRs are bought in their own currency, mitigating the risk of currency fluctuation	The Investor or the issuer has to pay depositories for cancelling the GDRs or dividend distribution or split or bonus of underlying shares, etc
Economy	The Indian economy is looking for economic growth, FDI is perceived as a vehicle and expects the GDR to attract FDI and contribute to the economy	Malpractices related to the GDR evidenced that there were no actual inflows in the economy through these issuances

Source: compiled by the authors.

* Ministry of Finance (Sahoo Committee II). Report of The Committee To Review The Framework Of Access To Domestic And Overseas Capital Markets (Phase II, Part I: Indian Depository Receipts). June 2014. Government of India, New Delhi.

Indian investors to induce them into security trading, leads to 'fraud'.

Hence, suggestive reforms deduced from this study, are mentioned hereunder:

The 2014 DR Scheme should be balanced, liberal enough to attract foreign investors, as recommended by the Sahoo Committee and strict enough to curb malpractices and sufficient to protect Indian investor's interests.

1. The 2014 DR Scheme should protect Indian investors from malpractices and misinformation. Hence, only sponsored GDRs should be allowed and the issuer or company must be held responsible for the actual inflow of funds into the account.

2. The Company must adhere to the "Use of Proceeds" mentioned in the GDR prospectus with slight allowance, and the Company and its management should be held responsible, severally and jointly, for any deviation of funds or misinforming Indian investors.

3. Malpractices related to the GDRs like 'round tripping' can be restrained by inserting specific clause related "Parking of Proceeds" regulating the flow of funds.

4. The DR issuing companies must be expressly restricted from entering into any agreement with investors or financers of investors which provides security for their investment by way of the DR or underlying shares of the DRs.

5. Permissible Jurisdiction for issuing the DRs, must be identified on the basis of strict compliance requirements and cost feasibility for Indian Issuer to list there.

6. Corporate governance practices should be followed in the GDR transaction. The GDR issuing companies must inform Indian Investors about funds received through the GDR and utilisation of these funds, and any contractual arrangement or agreement made by the Issuers or companies with the intermediaries or investors, helping Indian investors to take "Informed Decision" in relation to investment.

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The article was submitted on 13.06.2021; revised on 11.07.2021 and accepted for publication on 20.07.2021.
The authors read and approved the final version of the manuscript.
Статья поступила в редакцию 13.06.2021; после рецензирования 11.07.2021; принята к публикации 20.07.2021.
Авторы прочитали и одобрили окончательный вариант рукописи.