Practical Law
GLOBAL GUIDE 2017
DOING BUSINESS IN...

Doing business in India
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OVERVIEW

1. What are the key recent developments affecting doing business in your jurisdiction?

Political changes
The parliamentary elections in 2014 led to significant political change. The Indian electorate voted for the Narendra Modi government, replacing the incumbent UPA government that had been in power since 2004. The new government promised stability and predictability, with a view to boost investor confidence and promote greater foreign direct investment (FDI). Further to its promise to maintain a business-friendly regulatory environment, the government in its initial round of policy changes, liberalised the FDI regime to allow FDI in railways and defence, followed by labour reforms, complete deregulation of diesel prices and a further easing of FDI rules in construction.

Economic and legal reforms
In addition to the political changes, other important steps taken to promote the ease of doing business in India were:

- Establishing an online investor website, providing primary support for all investment queries.
- Establishing E-Biz, a single-window online portal, where any investor looking to start a new business or establish a new industrial unit can access core services needed to obtain the necessary clearances, licences, complete mandatory tax registrations and regulatory filings required to operate the business or industrial unit.
- Introducing an online form (INC 32) by the Ministry of Corporate Affairs (MCA) that combines three processes, that is searching for name availability before incorporating a company, applying for director identification number and incorporating the company. A company can be registered within one or two working days from filing the INC 32 form.
- Allowing FDI in limited liability partnerships (LLP) subject to the condition that the LLP is engaged in sectors where 100% FDI is allowed under the automatic route and no FDI-linked performance conditions exist.
- Permitting a company with foreign investment to convert to LLP under the automatic route if the company is engaged in a sector where 100% FDI is allowed.
- Launching an online portal Shram Suvidha, which is expected to facilitate:
  - a single point of reporting for various labour laws;
  - the consolidation of all information in respect of labour inspections and their transparency and accountability;
  - the provision of labour identification numbers to companies, to enable simpler online registration and filing of returns; and
- the registration with the Employees’ State Insurance Corporation and Employees’ Provident Fund Organisation.
- The enactment of the Companies (Amendment) Act 2015 which removed the requirements of a minimum paid-up capital and common seal for companies and the need for a certificate of commencement of business for private companies.
- The enactment of the Insolvency and Bankruptcy Code, 2016 which facilitates the faster resolution of insolvency proceedings related to companies and individuals. It aims to complete the insolvency resolution process within 180 days from commencement. If the insolvency cannot be resolved within this time, the assets of the borrowers may be sold to repay creditors. The insolvency resolution processes will be conducted by licensed insolvency professionals who must be members of insolvency professional agencies (IPAs). An Insolvency and Bankruptcy Board of India has been set up to regulate the functioning of insolvency professionals, and IPAs.
- The announcement of the “Start-up India” initiative and action plan by the government providing various reforms including but not limited to:
  - legal support for, and fast-tracking of, patent examinations, and at lower costs. The patent application of start-ups will be fast-tracked for examination and disposal, so that they can realise the value of their intellectual property rights at the earliest possible stages. They will also be provided with an 80% rebate in relation to the filing of patents for other companies.
  - relaxing the norms of public procurement for start-ups. In order to promote start-ups, the government will exempt start-ups (in the manufacturing sector) from the criteria of “prior experience/turnover” without any relaxation in quality standards or technical parameters. The start-ups will however, have to demonstrate requisite capability to execute the project as per the requirements.
  - faster exit. In terms of the Insolvency and Bankruptcy Code 2016, start-ups with simple debt structures, or those meeting specific criteria, may be wound up within a period of 90 days from the making of an application for winding up, on a fast-track basis. In such instances, an insolvency professional must be appointed by the creditors, who will be in charge of the company (the promoters and management must no longer run the company) for liquidating its assets and repaying its creditors within six months of their appointment.
  - providing funding support through "a fund of funds" (FFS) with a value of US$1.5 billion (INR10,000 crores or INR100 billion). In order to provide funding support to start-ups, the government will set up a fund with an initial value of about US$375 million (INR2,500 crores or INR25 billion) and a total corpus of US$1.5 billion (INR10,000 crores or INR100 billion) over a period of four years. The corpus shall be released by 2025. The fund will be in the nature of "a fund of funds" (that is, it will not invest directly into start-ups, but will participate in the capital of venture funds registered with
the Securities and Exchange Board of India (SEBI), which in turn will invest in start-ups.

- a tax exemption to start-ups for three years. With a view to stimulate the development of start-ups in India and provide them a competitive platform, the profits of eligible start-up initiatives are exempted from income tax for a period of three consecutive tax years out of a block of seven, beginning from the year in which the eligible start-up is incorporated. "Eligible start-up" means a company or a limited liability partnership engaged in a business which involves innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property and is incorporated on or after 1 April 2016 (but before 1 April 2019) and its total turnover does not exceed US$3.75 million (INR25 crores (INR250 million)) in any of the previous years beginning on or after 1 April 2016 and ending on 31 March 2021. The exemption will be available subject to non-distribution of a dividend by the start-up.

- a tax exemption on capital gains. In order to provide suitable incentives to investors for investing in the start-up ecosystem, exemptions will be given to persons who have capital gains during the year, if they have invested such capital gains in the previously mentioned “fund of funds”.

- a tax exemption on investments above a fair market value. Under the Income Tax Act 1961, where a start-up receives any consideration for an issue of shares which exceeds the fair market value of such shares, such excess consideration is taxable in the hands of the start-up as income from other sources. Currently, investment by venture capital funds in start-ups is exempted from operations of this provision. This will also be extended to investments made by start-up incubators.

- amending the definition of the term “start-up” thereby widening the ambit of the term to cover entities incorporated seven years ago (ten years for a biotechnology start-up) as against the previous limit of five years.

- The abolition of the Foreign Investment Promotion Board. Since then, the processing of FDI applications and governmental approval under the FDI Policy will be handled by the concerned ministries/departments in consultation with the Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce. In the meantime, further liberalisation of the FDI policy is under consideration and necessary announcements can be expected in due course.

- The enactment of the Goods and Services Tax Act from 1 July 2017 which has replaced all indirect taxes levied on goods and services by the central government and state to reduce the number of indirect taxes to a single tax, uniform across the country.

- Starting in January 2016, the Reserve Bank of India (RBI) has started replacing the Master Circulars with Master Directions, on all regulatory matters. The Master Directions consolidate instructions on rules and regulations framed by the RBI under various statutes, including banking issues and foreign exchange transactions.

- Amendments to the double taxation avoidance agreement (DTAA) between India and Mauritius followed by the DTAA amendments with Cyprus and Singapore. The “Mauritius” route contributes to almost one third of India’s total FDI inflows owing to the exemption on capital gains tax in Mauritius. However, the amendment shifts to source-based taxation (from the residence-based regime), therefore permitting India to tax capital gains arising from alienation of shares by a Mauritius investor acquired on or after 1 April 2017 in a company resident in India with effect in the financial year 2017/18.

- Notification of provisions under the Companies Act 2013 with a view to simplify the overall process of acquisitions, mergers and restructuring, facilitate domestic and cross-border mergers and acquisitions, and thereby make Indian firms relatively more attractive to private equity investors. The government has issued the Companies (Compromises, Arrangements and Amalgamations) Rules 2016 to govern the proposed arrangements or reconstruction of any company. The Companies (Compromises, Arrangements and Amalgamations) Rules 2016 has been amended to provide for cross-border mergers between Indian and foreign companies. The RBI has also issued draft regulations relating to cross-border mergers (Foreign Exchange Management (Cross Border Merger) Draft Regulations 2017).

LEGAL SYSTEM

2. What is the legal system based on (for example, civil law, common law or a mixture of both)?

India follows the common law system and has a written Constitution that provides the framework for the separation of powers between the legislature, executive and the judiciary. The Constitution has both federal and unitary features. It provides for the distribution of legislative and executive powers between the centre and state while also providing for a unified judiciary. The legislative powers are divided between the central and state legislatures through:

- The Union List (which comprises 100 entries, which include subjects of national significance such as national defence, taxation, incorporation of companies and banking).
- The State List (which comprises 61 entries, which include subjects such as agriculture, land, trade and commerce with the state territories).
- The Concurrent List (which comprises 52 entries, which include subjects such as contracts, bankruptcy and insolvency, trust and trustees, on which both the central and state level legislatures may legislate; however, in case of a conflict, the central law prevails).

Additionally, the constitution also provides for delegated legislation, allowing the executive to exercise legislative power in the form of ordinances, rules and regulations.

Further, the judiciary in India follows a hierarchical structure, with the Supreme Court at the apex and a High Court in each state as the highest appellate court. The decisions of the Supreme Court are binding on all the High Courts and other subordinate courts or tribunals.

FOREIGN INVESTMENT

3. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

India does not have full capital account convertibility. Consequently, the Indian rupee is not a fully convertible currency and there are regulations governing foreign investments into India. Non-residents investing in India are required to comply with foreign exchange regulations, specifically the regulations governing foreign direct investment (FDI). Most aspects of foreign currency transactions with India are governed under the Foreign Exchange Management Act 1999 (FEMA) and the delegated legislations thereunder.

FDI into India can be divided into two broad categories:

- Investments under the automatic route (see below, Investments that do not require prior governmental permission).
• Investments under the approval route (see below, Investments that require prior governmental approval).

**Investments that do not require prior governmental permission**

Investments under the automatic route do not require prior permission from the government of India, as long as such investments are within the sectoral caps set out under the policy governing FDI into India (FDI Policy).

The sectoral caps for the sectors included under the automatic route include:
- Agriculture at 100%.
- Metal and non-metal ore and coal and lignite mining at 100%.
- Manufacturing at 100%.
- Defence industry at 49%, with government approval required beyond 49%.
- Broadcasting carriage services (such as teleports, DTH, cable networks and mobile TV) at 100%, and broadcasting content services at 49%, with government permission needed beyond 49%.
- Airports, both greenfield and brownfield, at 100%.
- Construction development at 100%.
- Industrial parks at 100%.
- Private security agencies at 49%, with government approval required beyond 49% and up to 74%.
- Trading, including wholesale and business to business (B2B) e-commerce, at 100%.
- Marketplace model of e-commerce at 100%. Single Brand product retail trading at 49%, with government approval required beyond 49%.
- Duty free shops at 100%.
- Railway infrastructure at 100%.
- Telecom services at 49% and with government approval required beyond 49%.
- Private sector banking at 49%, with government approval required for investment between 49% and up to 74%.
- Asset reconstruction companies at 100%.
- Credit information companies at 100%. Other Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India at 100%.
- Private sector banking at 49%, with government approval required for investment between 49% and up to 74%.
- Greenfield pharmaceuticals at 100%.
- Brownfield pharmaceuticals at 74%, with government approval required beyond 74%.
- Petroleum and natural gas, including exploration activities of oil and natural gas fields, at 100%.
- Petroleum refining by public sector undertakings at 49%.
- Infrastructure companies in the securities market at 49%.
- White Label ATM Operations at 100%.
- Commodity exchanges at 49%.
- Insurance at 49%.
- Pensions at 49%.

• Power exchanges at 49%.
• Manufacturing of medical devices at 100%.

**Investments that require prior governmental approval**

Similarly, under the approval route, investments by foreign investors can be made only with the prior approval of the government of India. Proposals for foreign investment under government route, are considered by the respective administrative ministry/department. The sectoral caps for investments under the approval route include:
- Mining and mineral separation of titanium bearing minerals and ores at 100%.
- Retail trading (including e-commerce) in respect of food products manufactured and/or produced in India at 100%.
- Publishing/printing of scientific and technical magazines/specialty journals/periodicals at 100%.
- Print media, that is, publishing current affairs newspapers and periodicals and publishing Indian editions of foreign magazines dealing with news and current affairs, at 26%.
- Investment by foreign airlines in the capital of Indian companies operating scheduled and non-scheduled air transport services at 49%.
- The establishment and operation of satellites at 100%.
- Multi Brand retail trading at 51%.
- Public sector banking at 20%.
- Broadcasting content services, such as FM radio and the uplinking of news and current affairs TV channels, at 49%.

**Sectors prohibited from foreign investment**

While foreign investment is allowed in the vast majority of sectors in the economy, it is specifically prohibited in the following sectors:
- Real estate businesses (this prohibition, however, does not extend to the development of townships, the construction of residential or commercial premises, roads or bridges and real estate investment trusts (REITs) regulated under the Securities and Exchange Board of India (SEBI) (REITs) Regulations 2014).
- Chit funds (a form of a micro-finance organisation).
- A Nidhi/company (a form of a non-banking finance organisation).
- Gambling and betting including casinos.
- Lottery businesses.
- Trading in transferable development rights relating to land.
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.
- Construction of farm houses.
- Atomic energy.
- Railway operations.
- Additionally, the Government of India permitted FDI in LLPs under the Consolidated FDI Policy of 2016. FDI in LLPs is permitted under the automatic route in LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance conditions. Additionally, an Indian LLP, having foreign investment, is permitted to make downstream investment in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.
4. Are there any restrictions on doing business with certain countries or jurisdictions?

There are certain restrictions under the Foreign Exchange Management Act 1999 (FEMA), and the foreign trade policy of India in respect of the countries as outlined below:

- A citizen of Pakistan or an entity registered/incorporated therein cannot establish a place of business in India without the prior approval of the Reserve Bank of India (RBI). A citizen of Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau, or an entity registered/incorporated there, however, does not need prior approval of the Reserve Bank of India (RBI) except for opening a place of business in the cities/states of Jammu and Kashmir, North East region and Andaman and Nicobar Islands. A citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, China, Nepal, Bhutan, Hong Kong or Macau is not permitted to acquire or transfer immovable property in India without the prior approval of the RBI. Such citizens can, however, acquire or transfer property by way of lease which must not be for more than five years.

- A citizen of (or an entity registered in) Bangladesh and Pakistan can invest in India only under the government approval route. However, a citizen of or an entity registered in Pakistan cannot invest in defence, space and atomic energy sectors/activities.

- The import or export of arms and ammunition, to or from Iraq, is prohibited, except for such export to the Government of Iraq which can be made after securing a "No Objection Certificate" from the Department of Defence Production.

- The direct or indirect export or import of various items (as provided under the Foreign Trade Policy of 2015-2020), to or from the Democratic People's Republic of Korea (North Korea) is prohibited.

- The direct or indirect export or import of all items, materials, equipment, goods and technology that could contribute to Iran's reprocessing, water-related activities, or to the development of nuclear weapon delivery systems, to or from Iran, is prohibited.

- The direct or indirect import of charcoal from Somalia is prohibited, on account of the UN Security Council Resolution 2036 of 2012. Importers of charcoal are required to submit a declaration to customs authorities that the consignment has not originated in Somalia.

Further, in order to align with the objectives of the Financial Action Task Force (FATF), an Indian party is prohibited from making any direct investment in an overseas entity (set up or acquired abroad directly as a joint venture or wholly owned subsidiary or indirectly as step down subsidiary) located in the countries identified by the FATF as “non-cooperative countries and territories” as per the list available on the FATF website or as notified by the RBI from time to time.

5. Are there any exchange control or currency regulations?

The exchange control is regulated by the Reserve Bank of India (RBI) under the Foreign Exchange Management Act 1999 (FEMA). FEMA as it stands today encompasses provisions relating to all transactions that have an international financial implication. The general principle for transactions involving foreign exchange is that transactions which are in the nature of capital account transactions are restricted unless specifically permitted under the provisions of FEMA. However, the opposite is true for current account transactions. Capital account transactions are transactions which result in the alteration of the overseas assets or overseas liabilities (including contingent liabilities) of an Indian resident, or the alteration of Indian assets or liabilities of a person resident outside India (for example, foreign direct investment (FDI) or overseas direct investment or external commercial borrowings by an Indian entity). These transactions are not permitted unless they are specifically allowed and the prescribed conditions are satisfied.

Current account transactions are transactions which arise on account of foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business. The Indian currency is fully convertible (except for certain specified restrictions) for trade and for current account purposes (that is, one can freely purchase foreign currency in exchange for Indian currency for the purposes of settlement of trade and current account transactions).

FEMA envisages the RBI as having a controlling role in the management of foreign exchange. RBI maintains exchange control primarily by:

- Providing special or general permission for dealing in foreign exchange.
- Specifying conditions for payment in respect of capital account transactions.
- Regulating the transfer or issue of foreign securities to residents in India and Indian securities to non-residents.

The accounts of non-resident banks and rupee accounts of non-residents other than banks are also governed by the RBI.

6. What grants or incentives are available to investors?

The incentives and grants allowed to investors vary depending on the sector, geographic areas, and are commonly in the form of tax concessions. To encourage exports, the foreign trade policy of India enlists various schemes, such as export-oriented units, electronics hardware technology parks, software technology parks, bio-technology parks and special economic zones (SEZ), which provide for exemptions in respect of tax, import and export duties and restrictions on investments. The incentives also vary depending on whether they are granted at the central level or state level. The incentives from the central government are applicable across the country. State level incentives are limited to that particular state and generally relate to:

- Land being made available at concessional rates.
- The relaxation in stamp duty in respect of the sale or lease of land.
- Power tariff incentives.
- A concessional rate of interest on loans.
- Investment subsidies or tax incentives.
- Subsidies for areas of the state in need of development and state aid.
- Special incentive packages for mega projects.

The following central and state-level incentives are also available:

- In the IT sector, an increase in domestic transfer pricing has been provided, from US$750,000 (INR5 crores (INR50 million)) to US$3 million (INR120 crores (INR1200 million)), and a reduction in tax rate has been granted on royalties and fees from technical services from 25% to 10%.
- In the aviation sector, exemptions have been granted under the Income Tax Act 1961 (ITA) for infrastructure development. Similarly, in the construction sector, income tax exemptions are granted on income derived from the business of development of special economic zones in a block of ten years, under the ITA (if
the development of the special economic zone has started before 1 April 2017).

- In the electronics sector, incentives are granted for units in SEZ as specified in respective acts, or for the setting up of projects in special areas such as the Northeast, Jammu and Kashmir, Himachal Pradesh and Uttarakhand.

**BUSINESS VEHICLES**

7. **What are the most common forms of business vehicle used in your jurisdiction?**

Foreign investors can establish a presence in India through an incorporated or unincorporated entity. The decision regarding the choice of the type of entity must be based on the nature of the work to be undertaken. The common forms of business vehicles used in India are set out below.

**Liaison office**

A liaison office can be set up after securing the prior consent of an authorised dealer (a person authorised by the Reserve Bank of India (RBI) to deal in foreign exchange or foreign securities). A liaison office can be set up in a sector in which 100% foreign direct investment (FDI) is allowed under the automatic route. In other sectors, the foreign investor must seek the RBI’s approval. Such approval is granted by the RBI after consultation with the Ministry of Finance. In order to secure the RBI’s permission, the investor must have a:

- Profit-making track record during the immediately preceding three financial years in the home country.
- Net worth of not less than US$50,000 (INR33.5 lakhs (INR3.35 million)) or its equivalent.

A liaison office is a representative of the parent foreign company in India. However, it cannot undertake any commercial activities and must maintain itself only on the remittances received from its parent. This option is usually preferred by foreign companies that wish to explore business opportunities in India.

**Branch office**

This is similar to a liaison office, and can represent the parent foreign company as its buying or selling agent. In order to secure the RBI’s permission, the investor should also have a:

- Profit-making track record during the immediately preceding five financial years in the home country.
- Net worth of not less than US$100,000 (INR67 lakhs (INR 6.7 million)) or its equivalent.

However, a branch office cannot carry out any retail, manufacturing or processing activities. The branch office is permitted to remit surplus revenues to its foreign parent company subject to the payment of applicable taxes. This option is useful for undertaking research activities in India.

**Project office**

A foreign company can open project office(s) in India provided it has secured from an Indian company, a contract to execute a project in India, and one of the following:

- The project is funded directly by overseas inward remittance.
- The project is funded by a bilateral or multilateral international financing agency.
- The project has been cleared by an appropriate authority.
- A company or entity in India awarding the contract has been granted a term loan by a public financial institution or a bank in India for the project.

Foreign investors may also opt to incorporate an LLP, governed under the Limited Liability Partnership Act 2008, or a private limited company under the Companies Act 2013, which is the most common business vehicle in India owing to its separate legal character and limited liability.

8. **In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, what are the main registration and reporting requirements?**

**Registration and formation**

A private limited company incorporated under the Companies Act 2013 is one of the preferred business vehicles in India owing to its separate legal character and limited liability.

Incorporation of a private company can be done with the Registrar of Companies (ROC) of the relevant state where the foreign investor seeks to establish a presence. A permanent account number in relation to taxation, digital signatures of the directors and managerial personnel, and director identification numbers are the primary requirements to initiate the incorporation process. Thereafter, an application for approval of the name of the company must be submitted with the ROC. The ROC must be provided with one preferred name and a maximum of five alternate names, which should not be similar to that of any existing company.

Subsequent to this, the proposed shareholders of the company must prepare and adopt the memorandum of association (memorandum) and articles of association (articles) of the company suitable to the needs of the business activity to be undertaken by the company. The memorandum and articles must then be filed with the ROC.

Information in respect of the first directors and the registered address of the company is also required to be filed with the ROC. Post-incorporation, the company will be required to hold its first board meeting and appoint auditors within 30 days from the date of incorporation. The company must also register itself with statutory authorities such as indirect tax authorities and employment law authorities.

In order to facilitate doing business in India, the procedure for incorporation of a company in India requires a single form to be filed with one regulatory body. The incorporation is completed within a time frame of less than 48 hours after submission of the requisite documents.

At the time of incorporation, the investee company must file Form FC-GPR (in case of the issue of securities to non-residents) under the FDI Policy.

**Reporting requirements**

After registration and formation, there are various annual and event-based compliances which the company must comply with on a regular basis. The mandatory compliances include the filing of annual returns and annual accounts in prescribed formats. Examples of event-based reporting requirements include reporting in relation to:

- The creation of charges.
- The appointment and resignation/removal of directors.
- The appointment of auditors.
- The acceptance of deposits by the company.
- The transfer of shares and so on.

Other compliances include directors’ reports based on the audited financials of the company, and convening of the annual general meeting within six months from the end of the financial year to approve the directors’ report and audited financials.
Additionally, the company must also adhere to the relevant secretarial and accounting standards.

9. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, outline the management structure and key liability issues.

Management structure
It is mandatory for a private limited company to have a minimum of two directors and at least one resident Indian director (that is, an individual who has stayed in India for a period of at least 182 days in the previous calendar year).

Directors’ and officers’ liability
The duties and liabilities of a director are provided under the Companies Act 2013 which mandates him/her to act with due and reasonable care in accordance with the objects of the company and the best interests of the stakeholders. In the case of a contravention of the applicable laws and regulations, the directors of the company may also be held liable for violations based on the relevant law. For instance, in the case of certain violations of the Companies Act 2013, Foreign Exchange Management Act (FEMA), Income Tax Act (ITA) and so on, liability can extend to the directors who were in control of the decision-making process that led to the violation.

EMPLOYMENT
Laws, contracts and permits

10. What are the main laws regulating employment relationships?

The key employment-related laws in India are:

- **Industrial Disputes Act 1947.** This is the most important labour legislation in India, and provides for the mechanism of collective bargaining and dispute resolution between employers and employees. The statute also contains provisions with respect to unfair labour practices, strikes, lock-outs, lay-offs, retrenchment, and the transfer of undertakings and the closure of businesses.

- **Trade Unions Act 1926.** This provides for the registration of trade unions and sets out the law relating to registered trade unions.

- **Employees’ Provident Fund and Miscellaneous Provisions Act 1952 (EPF Act).** This provides for a contributory social security mechanism and applies to establishments that have at least 20 employees. An employee whose basic salary is less than Rs225 (INR15,000) per month, or who has an existing provident fund membership based on a previous employment arrangement, is eligible for benefits under the EPF Act.

- **Employees’ State Insurance Act 1948.** This statute is applicable to all factories, industrial and commercial establishments, hotels, restaurants, cinemas and shops. Employees drawing wages below Rs225 (INR15,000) per month are eligible for benefits under this statute. The statute provides for benefits in cases of sickness, maternity and employment-related injury and certain other related matters.

- **Factories Act 1948.** This statute prescribes, among other things, the necessary terms of health, safety, working hours, benefits, overtime and leave requirements in respect of factories in India.

- **Shops and Commercial Establishments Acts.** These are state-specific statutes regulating the conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, places of public amusement/entertainment and other establishments located within the state. These statutes prescribe the minimum conditions of service and benefits for employees, including working hours, rest intervals, overtime, overtime wages, holidays, leave, termination of service, employment of children, young persons and women and other rights and obligations of an employer and employee.

- **Contract Labour (Regulation and Abolition) Act 1970.** This statute applies to:
  - all establishments employing 20 or more persons (or that have employed 20 or more persons) on any day of the preceding 12 months;
  - contractors employing (or who have employed) 20 or more workmen on any day of the preceding 12 months.

  This statute does not govern establishments where work of a casual or intermittent nature is carried out. It regulates the conditions of employment of contract labour, the duties of a contractor and principal employer and provides for the abolition of contract labour in certain circumstances.

- **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.** This statute aims to provide women with protection against sexual harassment in their workplace and prescribes detailed guidelines for employers and employees for the prevention and redress of complaints of sexual harassment.

- **Minimum Wages Act 1948.** This statute provides for the fixing and revision of minimum wages by the respective state governments.

- **Payment of Wages Act 1936.** This statute provides for the conditions of payment of wages, and is applicable to factories, railways, tramways, motor transport services, docks, wharves, jetties, inland vessels, mines, quarries and oil fields, workshops, establishments involved in construction work and other establishments as notified by the appropriate state governments. An amendment to the Act was passed in February 2017, amending the method of payment under the Act. The amendment removed the requirement to obtain written authorisation from the employee for the payment of wages by cheque or through a bank account.

- **Payment of Bonus Act 1965.** This statute applies to every factory and establishment in which 20 or more persons are employed on any day during an accounting year. It further provides for the payment of bonuses to employees whose salary or wage is up to Rs315 (INR21,000) per month.

- **Payment of Gratuity Act 1972.** This statute applies to every factory, mine, oil field, plantation, port, railway company, shop and commercial establishment where ten or more persons are employed or were employed on any day of the preceding 12 months. An employee is eligible to receive a gratuity only in cases where he has completed a continuous service of at least five years at the time of cessation of employment.

- **Child Labour (Prohibition and Regulation) Act 1986.** This statute prohibits the employment of children younger than 14 in certain occupations such as automobile workshops, bidi-making (a type of cigarette), carpet weaving, the handloom and powerloom industries, mines and domestic work. Further, in light of the Right of Children to Free and Compulsory Education Act 2009, the government has amended the statute to prohibit the employment of children under 14 in all occupations except where the child helps his family after school hours.

Simplification of the labour laws
Code on Wages 2017 has been introduced in Parliament. This law seeks to consolidate the:

- **Payment of Wages Act 1936.**
11. Is a written contract of employment required? If so, what main terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

The usual practice in India is for employees to be issued with an offer letter by the employer which outlines the terms and conditions of employment including their probationary period, remuneration and the documents required to be produced at the time of joining. However, it is advisable to execute an employment contract. The important clauses that should be included in an employment contract are:

- The terms of employment and termination of employment (including as a result of misconduct).
- The compensation structure (that is, remuneration and bonuses).
- The duties and responsibilities of the employee.
- The nature of the contract, terms and conditions and leave entitlements.
- The duty to avoid conflicts of interest.
- The duty to maintain confidentiality and non-disclosure of information.
- Terms concerning intellectual property and assignment.
- Non-compete and non-solicitation obligations.
- A dispute resolution clause.

12. Do foreign employees require work permits and/or residency permits?

Foreign employees are required to have an employment visa. Employment visas are granted subject to the fulfilment of the following conditions:

- The applicant is a highly skilled and/or qualified professional, who is being engaged or appointed by a company/organisation/industry undertaking in India on a contract of employment basis. However, the employment visa must not be granted for jobs for which qualified Indians are available or for routine, ordinary or secretarial/clerical jobs.
- The foreign national being sponsored for an employment visa in any sector, should draw a salary in excess of US$25,000 (INR17 lakhs (INR1.7 million)) per annum.
- The employment visa must be issued from the country of origin or from the country of domicile of the foreign employee, provided the period of permanent residence of the applicant in that particular country is more than two years.

Foreign investors can also apply for a business visa, subject to them submitting proof of their financial standing and documentation in support of the intended business visit to India. However, the foreign national will not be permitted to visit India for the business of lending or for running a small business or small trade (such as operating a food cart), or for full-time employment in India.

Further, it should be noted that foreign nationals, including their family members, intending to stay in India for more than 180 days, are required to register with the Foreign Regional Registration Office (FRRO) within 14 days of arriving into the country.

Additionally, the Government of India has launched the "Permanent Residency Scheme", under which a foreign investor can invest a minimum of US$1.5 million (INR10 crores (INR100 million)) to be brought into India within 18 months or US$4 million (INR27 crores (INR270 million)) to be brought into India within 36 months, and obtain residency for a period of ten years with multiple entries. Also, the foreign investment should result in the generation of employment for at least 20 resident Indians every financial year. There is no stipulation that the investor must stay in India, and these investors will be exempt from registration requirements with the FRRO.

Terminal and redundancy

13. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Generally, a right of representation at the management level is not granted to employees, and employees do not have a general right to participate or be consulted in the decision-making process in relation to corporate transactions. However, the lack of such consultative rights is compensated for by the concept of a retrenchment compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

14. How is the termination of individual employment contracts regulated?

Termination of an employee is governed under the retrenchment provisions of the Industrial Disputes Act. As per the Industrial Disputes Act, retrenchment means the termination by the employer of the service of a “worker” (“workers”, under the Industrial Disputes Act, are typically blue collar workmen engaged in manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire) for any reason whatsoever, other than as a means of disciplinary action, and does not include:

- Voluntary retirement.
- Retirement of the worker on reaching the age of superannuation.
- Termination as a result of the non-renewal of the contract of employment.
- Termination on the grounds of continued ill-health.

The Industrial Disputes Act does not apply to employees employed in a managerial and administrative capacity and termination of such employees is governed by the terms of their individual employment contracts.

Retrenchment (that is, termination of individual employment contracts) must be carried out in accordance with the provisions of the Industrial Disputes Act. According to the provisions of this statute, a worker employed in any industry, and who has been in the continuous service of an employer for at least one year, must be retrenched by that employer subject to the fulfilment of the following conditions:

- The worker has been given one month's notice in writing, indicating the reasons for such retrenchment and when the
period of notice will expire, or the worker has been paid in lieu of such notice, wages for the period of the notice.

- The worker has been paid, at the time of retrenchment, compensation which is the equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

- Notice in the prescribed manner is served on the appropriate government, or such authority as may be specified by the appropriate government, by notification in the Official Gazette.

Further, the employer must also comply with the notice and termination conditions under the various state-specific Shops and Establishments Acts.

Termination can also be made on disciplinary grounds. An employer must follow the principles of natural justice when conducting a disciplinary or grievance procedure. Certain federal laws relate to the handling of disciplinary and grievance procedures, such as the Industrial Employment (Standing Orders) Act 1946 and the Industrial Disputes Act. In all cases the employee must be provided with the opportunity to be heard and the process should be reasonable and fair. Further, if an establishment has 20 or more workers, a grievance committee or a similar mechanism must be established to handle employee grievances.

15. Are redundancies and mass layoffs regulated?

Mass layoffs and redundancies are not specifically regulated in India. However, the Industrial Disputes Act provides for layoffs in general, and for the closure of undertakings. According to the statute, every worker should be paid compensation of 50% of the total of their basic wages, and an allowance that would be due to the worker had they not been laid off, for all days during which he or she is laid off. Therefore, if a worker is laid off due to the closure of an undertaking, then as compensation he or she is entitled to 50% of their basic wages and an allowance which is calculated to include even the days on which he or she was actually laid off preceding the actual closure of the undertaking, which lead to the termination. This is applicable to undertakings or establishments that employ more than 50 workers. Also, the employer must provide a 60 days' notice to the government, providing reasons for such layoffs.

In the case of undertakings or establishments employing more than 100 workers, these workers can only be laid off with the prior permission of the government. Prior approval from the government must be obtained 90 days before the date of lay-offs.

Additionally, when several workers are terminated or laid off by reason of redundancy, it must be based on the principle of "last-in-first-out". This means that the employer must retrench the worker who was the last person to be employed. In such cases, when re-employment is required, initial offers must first be made to these workers.

TAX Taxes on employment

16. In what circumstances is an employee taxed in your jurisdiction and what criteria are used?

A person's income tax is determined by their residential status. A person is considered a "resident" of India if he or she was in India either:

- For a minimum of 182 days during the tax year.
- For a minimum of 60 days during the tax year and for a minimum of 365 days during the previous four tax years.

In such cases, he or she will be liable to pay tax on his or her income.

Further, if a person has been a non-resident for nine out of ten tax years, or has been in India for a period of 729 days or less in the previous seven tax years, he is said to be "resident but not ordinarily resident" in India. In other scenarios, such a person is ordinarily resident in India.

The following sets out the taxable income under the Indian laws:

- Income received or deemed to be received in India whether earned in India or elsewhere: paid by resident and ordinary residents, "not ordinary" residents and non-residents.
- Income which accrues or arises is deemed to have accrued or arise in India, whether received in India or elsewhere: paid by resident and ordinary residents, "not ordinary" residents and non-residents.
- Income which accrues or arises outside India and is received outside India, from a business controlled from India: paid by resident and ordinary residents; "not ordinary" residents; not paid by non-residents.
- Income which accrues or arises outside India and is received outside India from any other source: paid by resident and ordinary residents, but not paid by "not ordinary" residents and non-residents.

The tax incidence on foreign individuals working in India will also be subject to the double taxation agreements between India and such foreign country.

17. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

Individuals are taxed on a progressive basis, with a maximum marginal rate of tax of around 34%, under the Income Tax Act. There are no special exemptions or deductions available to foreign nationals working in India and the rates of income tax are similar to those applicable to Indian nationals. India has also entered into more than 80 treaties for the avoidance of double taxation. A taxpayer may be taxed either under domestic law provisions or the tax treaty to the extent it is more beneficial. A non-resident claiming treaty relief would be required to file tax returns and furnish a tax residency certificate issued by the tax authority in its home country.

Employees are also subject to social security contributions such as those under the Employees Provident Fund and Miscellaneous Provisions Act (EPF Act). The present rate of contribution under the EPF Act is generally 12%. However, a 10% rate is applicable for:

- Any establishment in which less than 20 employees are employed.
- Any "sick industrial company" which has been declared as such by the Board for Industrial and Financial Reconstruction. A "sick industrial company" is a financially unviable business which is being restructured to allow it a chance at a financial revival. Technically, it is a stage where the company is trying to avoid being declared insolvent.
- Any establishment which has, at the end of any financial year, accumulated losses equal to or exceeding its entire net worth.

Employers are also required to make social security contributions under the EPF Act and the Payment of Gratuities Act 1972. Under the EPF Act, the employer is required to match the contribution made by the employee, that is, 12% of the basic salary.

Further, the employer is required to pay a "gratuity" (that is, an ex-gratia payment to recognise the employee's long association with
the employer) of 15 days' wages, at the rate of the salary last drawn, to every employee who has completed five years in continuous service, for every completed year of service. The “gratuity” becomes payable on termination of employment on account of:

- Superannuation.
- Retirement or resignation.
- Death or disability due to accident or disease. The completion of five years in continuous service is not mandatory in the case of death or disability.

**Business vehicles**

18. When is a business vehicle subject to tax in your jurisdiction?

**Tax resident business**

The Income Tax Act 1961 (and the rules framed under it) is the primary piece of legislation which deals with the levy and collection of income tax in India. A resident company is taxed on its worldwide income in India.

A business vehicle, incorporated as a company (public or private), is said to be resident in India if it is incorporated in India or has its “place of effective management” in India. The “place of effective management” means the place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance, made.

**Non-tax resident business**

A foreign company is subject to tax in India on income that is received or is deemed to be received, accrues or is deemed to accrue, arises or is deemed to arise, in India.

A foreign company is also liable to tax in India on income arising from the transfer of foreign securities that directly or indirectly derive its value substantially from assets situated in India. The securities of a foreign company are deemed to derive their value from assets (tangible or intangible) located in India, if the value of such Indian assets:

- Exceed US$1.5 million (INR10 crores (INR100 million)).
- Represent at least 50% of the value of all the assets owned by the non-resident company.

19. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction (including tax rates)?

The main taxes applicable to a business vehicle are as follows.

**Corporate income tax**

A resident company is taxed on its worldwide income in India at 30% (excluding a surcharge and education cess). However, a resident company with an annual turnover or gross receipts of less than US$750,000 (INR5 crores (INR50 million)) in the financial year of 2014/15 is subject to corporate tax at the rate of 29% (excluding the surcharge and education cess). The surcharge is levied on resident companies at 7% where the annual income exceeds US$150,000 (INR1 crores (INR10 million)) and 12% where the annual income exceeds US$1.5 million (INR10 crores (INR100 million)).

For resident companies categorised as start-ups, no income tax is payable for a period of three consecutive years out of the first five years since their incorporation or set up.

A company incorporated on or after 1 March 2016 and engaged solely in the business of manufacturing or production of any article is eligible to be taxed on its income at the rate of 25% (excluding the surcharge and education cess) and subject to compliance with prescribed conditions.

A foreign company is subject to tax at a rate of 40% (excluding the surcharge and education cess) on income that:

- Is received in India or is deemed to be received in India.
- Accrues in India or is deemed to accrue in India.
- Arises in India or is deemed to arise in India.

The surcharge is levied on resident companies at 2% where the annual income exceeds US$150,000 (INR1 crore (INR10 million)) and 5% where the annual income exceeds US$1.5 million (INR10 crores (INR100 million)).

All companies are liable to pay an education cess (including a higher and secondary education cess) of 3%.

**Minimum alternate tax (MAT)**

A company is liable to pay MAT on its book profits if its tax liability under the general provisions of the Income Tax Act is less than 18.5% (excluding the surcharge and education cess) of such book profits. A credit of the MAT paid is available in subsequent years (up to ten years) where tax is payable under the general provisions of the Income Tax Act. The Finance Act 2017 has increased the eligibility to carry forward and set off the minimum alternate tax credit from ten years to 15 years.

**Dividend distribution tax (DDT)**

Dividends distributed by Indian companies are subject to DDT at the rate of 15% (excluding the surcharge and education cess), on the aggregate dividend declared, distributed or paid.

**Capital gains**

Capital gains income is subject to tax depending on the period of holding of such an asset in the hands of the transferor. A capital asset held for a period of three years is considered to be a long-term capital asset, except in the case of:

- Listed shares, in which case the relevant period of holding is one year.
- Unlisted shares, in which case the relevant period of holding is two years.

Long-term capital gains income of a non-resident arising from the sale of listed shares is exempt from tax, provided securities transaction tax is paid on the transaction. Long-term capital gains for non-residents arising from unlisted securities are taxed at the rate of 10% (excluding the surcharge and education cess) where no inflation adjustment is claimed, and/ or 20% where the inflation adjustment is claimed.

A non-resident's short term capital gains income arising from the sale of:

- Listed shares is taxed at 15% (excluding the surcharge and education cess), and provided the securities transaction tax is paid on the transaction.
- Listed shares is taxed at 40% (excluding the surcharge and education cess) if the transaction is undertaken on the floor of the stock exchange and no securities transaction tax is paid on the transaction.
- Unlisted securities are taxed at the rate of 40% (excluding the surcharge and education cess).

The Finance Act 2017 has extended the benefit of tax exemptions to income arising from the conversion of preference shares to equity shares. The Finance Act 2017 has also exempted from tax any income arising to a non-resident from the transfer of rupee-denominated bonds, issued by an Indian company to another non-resident.
**Goods & Services tax (GST)**

GST is a comprehensive indirect tax levied on the manufacture, sale and consumption of goods and services. It has replaced all indirect taxes levied on goods and services by the state governments and the central government. India has adopted the dual GST model in which both the central and the state governments levy tax. Goods and services are classified in four groups and based on the classification they attract GST at the rate of 5%, 12%, 18% or 28%.

**Dividends, Interest and IP royalties**

20. How are the following taxed:
- Dividends paid to foreign corporate shareholders?
- Dividends received from foreign companies?
- Interest paid to foreign corporate shareholders?
- Intellectual property (IP) royalties paid to foreign corporate shareholders?

**Dividends paid**

Dividends paid to foreign corporate shareholders and distributed by Indian companies are subject to dividend distribution tax (DDT) at the rate of 15% (excluding the surcharge and cess) on the dividends declared, distributed or paid. The foreign corporate shareholder receiving dividends from an Indian company is exempt from tax on such income in India.

**Dividends received**

Dividends received by an Indian company from a foreign company are subject to tax as corporate income. However, dividends received by an Indian company from a foreign company in which such Indian company holds at least 26% equity shares is subject to tax at a reduced rate of 15% (excluding the surcharge and education cess).

**Interest paid**

Interest paid to foreign corporate shareholders is taxed in India (subject to any reductions under any applicable tax treaty) in the following manner:
- Interest on foreign currency borrowing: 20% (excluding surcharge and education cess).
- Interest on rupee-denominated bonds issued by an Indian company: 5% (excluding the surcharge and education cess).
- Interest from notified infrastructure debt funds: 5% (excluding the surcharge and education cess).

**IP royalties paid**

IP royalties paid to foreign corporate shareholders by an Indian resident are taxed in India at the rate of 10% (excluding the surcharge and cess) on the gross amount, unless reduced under any applicable tax treaty.

22. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

India does not have any controlled foreign company rules.

23. Are there any transfer pricing rules?

The Indian transfer pricing rules prescribe that income arising from international transactions or specified domestic transactions between associated enterprises should be computed by having regard to the arm’s-length price. The arm’s length price is determined using multiple year data. The law mandates Indian companies to maintain comprehensive documentation relating to their international transactions. The documentation requirements have been updated recently to include country-by-country reporting.

**Customs duties**

24. How are imports and exports taxed?

The Customs Act 1962 is the legislation governing the levy and collection of duty on imports and exports from India, related procedures, prohibitions, penalties and offences. Customs duty comprises basic duty, additional customs duty (imposed in lieu of excise duty), special additional duty (imposed in lieu of sales tax) and the related cess.

**Double tax treaties**

25. Is there a wide network of double tax treaties?

India has entered into 96 treaties for the avoidance of double taxation and the exchange of information with various nations, including the US, the UK, Mauritius, Singapore, Australia and The Netherlands.

The Income Tax Act (ITA) allows a taxpayer to choose to be taxed under the domestic law (ITA) or the tax treaty, whichever is more beneficial to it. A non-resident claiming treaty relief would be required to file tax returns in India and furnish a tax residency certificate issued by the tax authority in its home country. The tax treaties also provide avenues for exchange of information and incorporate measures to curb fiscal evasion.

**COMPETITION**

26. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single-firm) conduct regulated by competition law?

**Competition authority**

The Government of India enacted the Competition Act 2002, to replace the Monopolies and Restrictive Trade Practices Act 1969, which governs restrictive agreements and practices. Unlike its predecessor that aimed at curbing monopolies, the Competition Act aims at promoting competition. It contains specific provisions on anti-competitive agreements, the abuse of dominant positions and mergers, amalgamations and takeovers. The Competition Commission of India (CCI) has been established to monitor, regulate, control and adjudicate on anti-competitive agreements, abuse of dominant position and combinations.
Restrictive agreements and practices

There is a general prohibition on entering into any kind of agreement for the production, supply, distribution, storage, acquisition or control of goods or provision of services that causes, or is likely to cause, an appreciable adverse effect on competition in India. Any agreement (such as tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusals to deal, and resale price maintenance) is said to create an appreciable adverse effect if:

- Directly or indirectly determines purchase or sale prices.
- Limits or controls production, supply, markets, technical development, investment or provision of services.
- Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.
- Directly or indirectly results in bid rigging or collusive bidding.

Unilateral conduct

Unilateral conduct by companies is governed by the provisions for the abuse of dominant positions. A company which enjoys a position of strength in the relevant market which enables it to operate independently of competitive forces prevailing in the relevant market, or affect its competitors or consumers or the relevant market in its favour will be abusing its dominant position if it:

- Directly or indirectly imposes unfair or discriminatory conditions in the purchase or sale of goods or services, or in the price of the purchase or sale (including predatory price) of goods or service.
- Limits or restricts the production of goods or the provision of services in the market, or the technical or scientific developments relating to goods or services to the prejudice of consumers.
- Indulges in a practice or practices resulting in the denial of market access in any manner.
- Makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Uses its dominant position in one relevant market to enter into, or protect, other relevant markets.

India, or turnover of more than US$3 billion (INR20,000 crores (INR200 billion)), including at least US$450 million (INR3,000 crores (INR30 billion)) in India.

- The group, to whom the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired would belong to after the acquisition, jointly has or would jointly have:
  - either in India, assets of more than US$1.2 billion (INR8,000 crores (INR80 billion)) or a turnover of more than US$3.5 billion (INR24,000 crores (INR240 billion)); or
  - in India or outside India, in aggregate, assets of more than US$4 billion (INR27,000 crores (INR270 billion)), including at least US$150 million (INR1000 crores (INR10 billion)) in India, or turnover of more than US$12 billion (INR80,000 crores (INR800 billion)), including at least US$450 million (INR3,000 crores (INR30 billion)) in India.

However, certain combinations involving relatively smaller enterprises benefit from exemptions from the mandatory notification regime. By virtue of a specified exception, the following are exempted from the mandatory notification provisions under the Competition Act for a period of five years (effective 4 March 2016):

- A group exercising less than 50% of voting rights in another enterprise.
- An enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than US$52 million (INR350 crores (INR3.5 billion)) in India or turnover of not more than US$150 million (INR1,000 crores (INR10 billion)) in India.

For the purpose of the Competition Act, “group” means two or more enterprises which, directly or indirectly, are in a position to:

- Exercise 26% or more of the voting rights in the other enterprise.
- Appoint more than 50% of the members of the board of directors in the other enterprise.
- Control the management or affairs of the other enterprise.

INTELLECTUAL PROPERTY

28. Outline the main IP rights in your jurisdiction.

Patents

Definition and legal requirements. Patents are governed under the Indian Patent Act 1970 (Patent Act). A patent is a statutory right to exclude others from making, using, selling, and importing a patented product or process without the consent of the patentee, for a limited period of time. Such rights are granted in exchange of full disclosure of an inventor’s invention.

If the invention fulfills the requirements of novelty, non-obviousness (an inventive step), and industrial application then it would be considered a patentable invention.

Registration. India grants patent rights on a “first-to-file” basis. The application can be made by either the inventor or the assignee or legal representative of the inventor.

Once a patent is granted, it gives the inventor the exclusive right to exclude third parties from making, using, selling, and importing a patented product or process without the consent of the patentee.

Enforcement and remedies. In the event someone uses a patented invention without the permission or consent of the patent owner, then it would amount to patent infringement and the owner of the patent can approach a court of law for obtaining remedies including but not limited to injunctions and damages. However, only civil remedies are available in cases of patent infringement.
Length of protection. The Patent Act incorporates the "Bolar" provision and provision for parallel imports. The Bolar provision allows manufacturers to begin the research and development process in time to ensure that affordable equivalent generic medicines can be brought to the market immediately after the patent expires, and without the threat of a patent infringement action brought by the patentee. The term of every patent in India is 20 years from the date of filing of the patent application, irrespective of whether it is filed with a provisional or complete specification.

**Trade marks**

**Definition and legal requirements.** The Trade Marks Act 1999, along with its supplementary rules, governs the law of trade marks in India. The term "mark" is defined to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or, combination of colours, or any combination of these. Therefore, the list of what are defined as "marks" is inclusive and not exhaustive.

**Protection.** A proprietor can get a trade mark registered in respect of any mark capable of being "graphically represented" and indicative of a trade connection with the proprietor.

**Enforcement and remedies.** The owner of a registered trade mark and a user of the registered trade mark can file a suit before the jurisdictional district court for infringement of trade marks, seeking an injunction on the non-permitted use of such trade marks by third parties. However, the owner of an unregistered trade mark has no remedies under the Trade Marks Act 1999 to prohibit the use of such unregistered trade marks by third parties, except to bring a claim for the tort of passing off.

**Length of protection and renewability.** The term of registration of a trade mark is ten years, which can be renewed for a further period of ten years on the payment of a prescribed renewal fee. The non-use of a registered trade mark for a continuous period of five years is a ground for cancellation of the registration of the trade mark at the request of any aggrieved party.

**Registered designs**

Definition. Industrial designs in India are protected under the Designs Act 2000 which incorporates the minimum standards for the protection of industrial designs, in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights. It also provides for the introduction of an international system of classification, as per the Locarno Classification. The Locarno Classification was established by the Locarno Agreement in 1968. This is an international classification used for the purposes of the registration of industrial designs.

Under the statute, "design" means the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any "article", whether in two dimensional or three dimensional, or in both, forms, by any industrial process or means, whether manual mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.

**Registration.** A proprietor can get a new or an original design which is not previously published in any country, and which is not contrary to public order or morality, registered with the Controller-General of Patents, Designs and Trade Marks.

The application for registration of design can be made in Form 1 (available on the website) along with the prescribed fee.

**Enforcement and remedies.** The Designs Act 2000 provides for civil remedies in cases of infringement of copyright in a design, but does not provide for criminal actions against the infringing party. The civil remedies available in such cases are injunctions, damages, compensation, or delivery up of the infringing articles.

**Length of protection and renewability.** Registered designs are valid for a period of ten years from the date of registration and can be extended for a further period of five years.

**Unregistered designs**

**Definition and legal requirements.** A design which is not registered under the Designs Act 2000 is termed as an unregistered design.

**Enforcement and remedies.** If a design is not registered under the Designs Act 2000, the proprietor of such a design cannot take any action against the infringer under the provisions of the Designs Act 2000. However, a proprietor of an unregistered design may have remedies available under common law.

**Length of protection.** The Designs Act 2000 does not provide any protection for unregistered designs.

**Copyright**

**Definition and legal requirements.** The Copyright Act 1957, supported by the Copyright Rules 2013, is the law governing copyright protection in India. The Copyright Act provides that copyright exists in an original literary, dramatic, musical or artistic work, in cinematography and films, and sound recordings. The rights granted under the Copyright Act to a creator include the right to stop or authorise any third party from reproducing the work, using the work for a public performance, make copies or recordings of the work, broadcast it in various forms and translate the work into other languages.

An author is also granted "special rights", which exist independently of the author's copyright, and subsist even after the assignment (whole or partial) of the copyright. The author has the right to claim authorship of the work, and restrain or claim damages with respect to any distortion, mutilation, modification, or other act in relation to the work if such distortion, mutilation, modification, or other act, would be prejudicial to his or her honour or reputation. These special rights can also be exercised by the legal representatives of the author.

A copyright is infringed if a person without an appropriate consent does anything that the owner of the copyright has an exclusive right to do. However, there are certain exceptions, such as fair dealing, or copying for the purpose of research or study or to undertake criticism or a review of the work (for example, quoting a few lines from a John Lennon song in a music review would not amount to copyright infringement).

**Enforcement and remedies.** The Copyright Act provides for both civil and criminal remedies for copyright infringement. In the event of infringement, the copyright owner is entitled to remedies by way of injunction, damages, and order for seizure and destruction of the infringing articles.

**Length of protection and renewability.** The term of copyright in India is, in most cases, the lifetime of the creator plus 60 years thereafter.

**MARKETING AGREEMENTS**

29. Are marketing agreements regulated?

Marketing agreements are generally governed under the Indian Contract Act 1872 and the Competition Act. Any agreement will be required to comply with basic principles of the contract laws such as offer and acceptance, consideration, valid legal object and consent. Similarly, it has to be ensured that the agreement in respect of marketing does not create any appreciable adverse effect on competition and that the clauses in the agreement are not abusive of the dominant position of a party if it has a dominant position under the terms of the Competition Act.
**E-COMMERCE**

30. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)?

There are no specific laws that exclusively apply to the e-commerce sector. However, an e-commerce business will be governed under the general body of Indian laws such as the Indian Contract Act 1872, Sale of Goods Act 1930 and Competition Act, which equally apply to other relevant sectors of the economy.

Additionally, the Department of Industrial Policy and Promotion has issued guidelines in relation to the e-commerce market in India. E-commerce entities must only engage in business to business (B2B) e-commerce and not in business to consumer (B2C) e-commerce and are also subject to the following conditions:

- Marketplace e-commerce entities are permitted to enter into transactions with sellers registered on their platforms on a B2B basis.
- E-commerce entities providing a marketplace cannot directly or indirectly, in any manner, influence the sale price of the goods or services and must maintain level playing field.
- The e-commerce entity providing a marketplace may also provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centres, payment collection and other services.
- The e-commerce entity providing a marketplace must not exercise ownership over the inventory (that is, the goods purported to be sold). Such ownership over the inventory will be considered as an inventory model of e-commerce.
- An e-commerce entity must not allow more than 25% of the sales effected through its market-place to be from one vendor or their group companies.
- In the marketplace model, goods/services made available for sale electronically on the website should clearly provide the name, address and other contact details of the seller. Subsequent to the sale, delivery of goods to the customers and customer satisfaction will be the responsibility of the seller only.
- In the marketplace model, the e-commerce entity may facilitate payments, in conformity with the guidelines of the Reserve Bank of India (RBI).
- In the marketplace model, any warranty/guarantee of goods and services sold must be borne by the seller.
- Digital and electronic networks must include a network of computers, television channels and any other internet applications used in an automated manner, such as web pages, extranets and mobiles and so on.

**DATA PROTECTION**

32. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

India does not have any specific data protection legislation. At present, the Information Technology Act 2000 (IT Act), read with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (Privacy Rules), recognises the concept of personal information and sensitive personal data and to that limited extent governs data protection and privacy in India. Article 21 of the Constitution of India which provides for the right to life and liberty, sets out the overarching principle of the right to privacy in India.

The IT Act and the Privacy Rules create a duty upon any corporate entity to provide a privacy policy for dealing with personal information and sensitive data. Such a corporate entity is also required to comply with reasonable security measures and procedures to protect any sensitive information provided by any person (the data subject). The corporate entity is liable for any wrongful loss caused to the data subject, or any wrongful gain caused to any other person, on account of negligence in maintaining reasonable security practices and procedures in relation to sensitive information provided by the data subject.

The data subject can provide sensitive information to any organisation or corporate entity under a lawful contract or under any applicable laws. Under the Privacy Rules, an organisation or any person acting on its behalf must, prior to the collection of sensitive information, obtain consent in writing from the data subject, regarding the nature of how the information will be used. Additionally, disclosure of sensitive personal data or information by an organisation to any third party requires prior permission from the data subject.

Further, the transfer of personal data by an Indian entity to another entity outside India is permissible when:

- The entity in the other country ensures and maintains the same level of data protection as the Indian entity which is transferring the data.

**ADVERTISING**

31. Outline the regulation of advertising in your jurisdiction.

At present, there is no central statutory agency or statute providing for the regulation of advertising in India.

The Advertising Standards Council of India (ASCI), established in 1985, with the support of all industry participants connected with advertising, such as advertisers, advertising agencies, media (including broadcasters and the press) and others like public relations agencies, market research companies and so on, seeks to ensure self-regulation in advertising and the protection of the interests of the consumers.

The ASCI has formulated a code for self-regulation in advertising (ASCI Code), applicable to all individuals and entities engaged in the activity of advertising. The ASCI Code applies to advertisements read, heard, or viewed in India, or directed to consumers in India, or which are exposed to a significant number of consumers in India, even if they originate or are published abroad.

Though non-statutory, the ASCI Code is recognised under various Indian laws in addition to being adopted by advertising-industry bodies. Notably, the ASCI Code provides that it is not in competition with any law, its rules, or the machinery through which they are enforced, and is designed only to complement legal controls under such laws and not to usurp or replace them.

In accordance with the ASCI Code, any advertisement must:

- Be truthful and honest to consumers and competitors.
- Be within the bounds of generally accepted standards of public decency and propriety.
- Not be used indiscriminately for the promotion of hazardous or harmful to society or to individuals, particularly minors, to a degree unacceptable to society at large.
- Observe fairness in competition so that the consumer needs to be informed of choices in the marketplace and that generally accepted competitive behaviour in business is observed.

Advertisements are banned for various products and services, including (but not limited to) tobacco and tobacco products, alcohol, legal services, physicians, firearms, weapons and ammunitions.
• The transfer of the data is necessary for the performance of a lawful contract between the Indian entity and the data subject.
• The data subject has consented to the transfer.

Companies, as a general practice, enter into several contractual agreements with other companies, clients, agencies or partners to secure their information. Such agreements usually contain confidentiality and privacy clauses and also arbitration clauses for the purpose of resolving any dispute which may arise. Such contractual obligations regarding data protection are governed by the provisions of the Indian Contract Act 1872 which provide for remedies for contractual damages by way of compensation for violation of the terms of the contract or non-performance of the obligations. Further, any corporate entity is liable to pay damages by way of compensation to the data subject, for negligence in implementing and maintaining reasonable security practices and procedures. Additionally, any disclosure of sensitive information in breach of a lawful contract is punishable with imprisonment for three years or with fine which can extend up to US$7,500, or both.

PRODUCT LIABILITY

33. How is product liability and product safety regulated?

Product liability in India is primarily governed by:
• The Consumer Protection Act 1986.
• The Sales of Goods Act 1930.

Any person who trades in goods (manufacturers, importers, distributors, wholesalers, and so on) or services may be held liable for defective products.

The Consumer Protection Act defines "defect" as any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by any law in force, under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods or services. Typically when a consumer finds a product or service defective, he or she is entitled to sue the person from whom he or she has bought the goods, or from whom he or she is receiving such services. However, if the defect is a manufacturing defect, then the consumer can sue the manufacturer along with the seller, particularly under the law of tort.

Similarly, as per the Sale of Goods Act, there is an implied warranty or condition in respect of the quality or fitness of the goods sold in the following circumstances:
• Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether or not he is the manufacturer or producer or not), there is an implied condition that the goods will be reasonably fit for such a purpose. However, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.
• Where goods are bought by description from a seller who deals in goods of that description (whether or not he is the manufacturer or producer or not), there is an implied condition that the goods will be of merchantable quality. However, if the buyer has examined the goods, there will be no implied condition as regards defects which such examination ought to have revealed.
• An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
MAIN BUSINESS ORGANISATIONS

Reserve Bank of India (RBI)
W www.rbi.org.in

Main activities. The RBI regulates the inward and outward remittance of currency from India. It regulates transactions involving the issue of shares to a non-resident and the transfer of shares between a resident and a non-resident.

Ministry of Commerce and Industry (Department of Industrial Policy and Promotion (DIPP))
W www.dipp.nic.in

Main activities. The DIPP formulates FDI policy and prescribes the sectoral caps on foreign investment into an Indian company. It also operates an online portal (www.ebiz.gov.in) to facilitate, among other things, the following government to business services:

- Reporting of foreign remittances.
- Applications for environmental clearance.
- Reporting in relation to foreign investment into India.

Foreign Investment Promotion Board (FIPB)
W http://fipb.gov.in

Main activities. The FIPB processes FDI applications in relation to foreign investment in sectors that are under the approval route. However, the government has proposed to abolish the FIPB in 2017 or 2018.

Ministry of Corporate Affairs (MCA)
W www.mca.gov.in

Main activities. The MCA is responsible for administering, among other things, the Companies Act 2013 and the Limited Liability Partnership Act 2008. The online portal of MCA facilitates the compliance filings to be made by a company and an LLP including incorporation-related form filings, annual returns and so on.

Securities and Exchange Board of India (SEBI)
W www.sebi.gov.in

Main activities. SEBI is the regulator for the securities market of India. Activities such as the public issuance of shares and the trading of shares by listed public companies are governed by SEBI.
ONLINE RESOURCES

Reserve Bank of India and Ministry of Commerce & Industry websites
W www.rbi.org.in and http://dipp.nic.in
Description. The official website of RBI contains up-to-date statutes, notifications, circulars and guidelines released by RBI. The official website of DIPP contains the notifications released by DIPP and the FDI policy released each year.

Ministry of Corporate Affairs website
W www.mca.gov.in
Description. The official website of MCA contains the up-to-date Companies Act 2013 and the updated rules, circulars and notifications under the Companies Act 2013.

Ministry of Labour & Employment website
W www.labour.nic.in
Description. The official website of the Ministry of Labour & Employment contains up-to-date employment-related legislation enacted by the government.

Income Tax Department website
W www.incometaxindia.gov.in
Description. The official website of the Income Tax Department contains up-to-date direct tax-related acts, rules, circulars and notifications.

Central Board of Excise and Customs website
W www.cbic.gov.in/
Description. The official website of the Central Board of Excise and Customs contains up-to-date legislation relating to customs duty, excise duty, service tax and goods and service tax.

Office of the Controller General of Patents, Designs & Trade Marks website
W www.ipindia.nic.in
Description. The official website of the Office of the Controller General of Patents, Designs and Trade marks, DIPP contains up-to-date intellectual property-related legislation, including forms and manuals.

Competition Commission of India website
W www.cci.gov.in
Description. The official website of the Competition Commission of India contains up-to-date competition law related legislations.

India Code Information System website
W http://indiacode.nic.in/
Description. A website managed by the Ministry of Law and Justice, Legislative Department and it contains all up-to-date Acts of Parliament.
### Contributor profiles

#### Rajiv Luthra, Founder, Managing Partner

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**Professional qualifications.** Alumni, BA (Hons), Delhi University; Alumni, LLB, Delhi University; Alumni, Harvard Law School

**Areas of practice.** Banking and finance; capital markets; corporate, commercial and M&A; project finance.

**Recent transactions.** Involved in major transactions including the US$4 billion Sun Pharma Ranbaxy merger, and Mylan Inc’s acquisition of Agila Specialties Division from Strides Arcolab.

**Languages.** English, Hindi

**Professional associations/memberships**

- Fellow, British Commerce Society and the Royal Geographical Society.
- Member of:
  - Supreme Court Bar Association, India;
  - India International Bar Association;
  - American Bar Association;
  - Inter-Pacific Bar Association;
  - International Union des Avocats;
  - Round Table on Legal Education (a Department of Higher Education, Ministry of Human Resource Development, a Government of India initiative);
  - Board of Governors of the National Law School of India University, Bangalore;
  - Advisory Board of the National Law University, Jodhpur;
  - City of London Advisory Council for India;
  - National Executive Committee of the Federation of Indian Chambers of Commerce and Industry (FICCI);
  - National Executive Committee of the Confederation of Indian Industry (CII).
- On the Boards of:
  - Network18 Media & Investments Limited as an Independent Director;
  - Singapore International Arbitration Centre (SIAC);
  - Symphony International Holdings Limited, a London Stock Exchange listed company;
  - The DLF Group;
  - Corporate Governance & Audit Committee of the Hong Kong & Shanghai Banking Corporation (India) (HSBC) (former member).

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**Professional qualifications.** BA, LLB, National Law School of India University, Bangalore, 2004; Stanford Law School, 2004; The University of Law (formerly, The College of Law), London, 2005; BPP University, London, 2007; Member of the Delhi Bar Council; Solicitor of the Senior Courts of England and Wales (currently non-practising)

**Areas of practice.** M&A; joint ventures; corporate and commercial advisory; private equity and venture capital investments; corporate governance; capital markets; dispute resolution; litigation and arbitration; management, labour and employment.

**Recent transactions**

- Advised Global Infrastructure Partners on its exit from East India Petroleum.
- Advised Nutanix Inc. on its global acquisition of Calm.io and PernixData.
- Advised China’s Anhui Conch on its bid for Lafarge’s cement business in India.
- Advised on the merger of HDFC Life and Max Life to create the largest private life insurance company in India.
- Advised Everstone on its US$52 million acquisition of Aon Hewitt’s payroll processing business through a combination of share and asset purchases in India, China, Singapore and Philippines.
- Advised a large French railway equipment manufacturer to resolve the disputes with its existing business partner and exit the business venture.
- Advised a large French cement manufacturer on its shareholder dispute with its joint venture partner.
- Advised a major German railway systems manufacturer on the reorganisation of its business in India.

**Languages.** English, Hindi, Malayalam

**Professional associations/memberships.** Member of the Jersey Advisory Group involved in assisting and advising the Jersey Government in negotiating international tax and investment protection agreements with India.

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global.practicallaw.com/dbi-guide