# ASIA

## A Legal Guide for Business Investment and Expansion

Fifth Edition

MERITAS®

LAW FIRMS WORLDWIDE

# ABOUT MERITAS

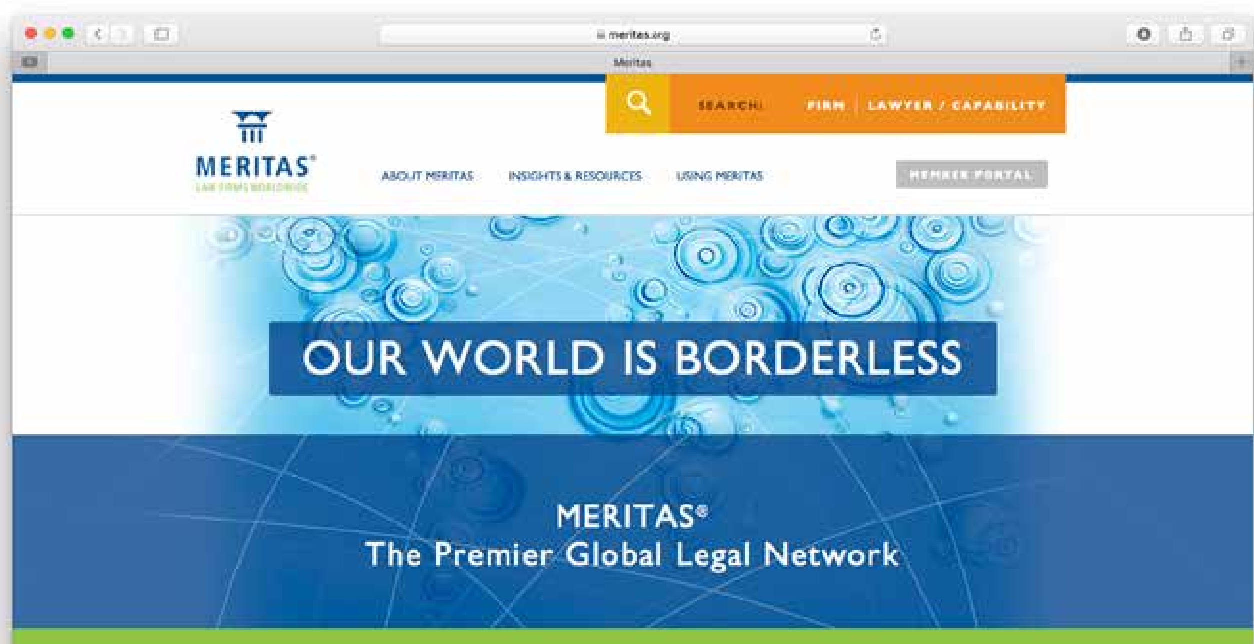
Founded in 1990, Meritas is the premiere global alliance of independent law firms working collaboratively to provide businesses with qualified legal expertise. Our market-leading member firms offer a full range of high-quality, specialized legal services, allowing you to confidently conduct business anywhere in the world.

As an invitation-only alliance, Meritas firms must adhere to our uncompromising service standards to retain membership status. Unlike any other network or law firm, Meritas collects peer-driven reviews for each referral, and has for more than 25 years.

| 7,500+ | 90+ | 180+ | 240+ |
|---|---|---|---|
| **EXPERIENCED LAWYERS** | **COUNTRIES** | **LAW FIRMS** | **GLOBAL MARKETS** |

Using this exclusive ongoing review process, Meritas ensures quality, consistency and client satisfaction.

With 182 top-ranking law firms spanning 89 countries, Meritas delivers exceptional legal knowledge, personal attention and proven value to clients worldwide.




For more information visit:

# INDIA

## FIRM PROFILE:

KHAITAN &CO
*Advocates since 1911*

Founded in 1911, Khaitan & Co is one of the oldest Indian law firms. The firm combines a rich heritage of over a hundred years with modern, cutting edge and solution-oriented legal practice and offers full service legal solutions to its domestic and international clients. The firm has a strength of 540+ fee earners, including 113 partners and directors across its offices in Bengaluru, Kolkata, Mumbai and New Delhi.

Main Areas of Practice:

- Banking and Finance
- Capital Markets
- Competition/Antitrust
- Dispute Resolution
- Energy, Infrastructure and Resources
- Environment Law
- Funds
- Hospitality
- Intellectual Property
- Labour and Employment
- Private Clients
- Real Estate
- Taxation
- Technology, Media and Telecom
- White collar crime

The firm's clients include business and financial enterprises, large business houses, banks, financial institutions, government bodies, educational and charitable trusts, cultural institutions, individuals, estates and trusts, based in India as well as abroad, served by its professionals across India.

## CONTACT:

**RABINDRA JHUNJHUNWALA**
rabindra.jhunjhunwala@khaitanco.com

**CHAKRAPANI MISRA**
chakrapani.misra@khaitanco.com

+91 22 6636 5000
www.khaitanco.com

## I. What role will the government of India play in approving and regulating foreign direct investment?

The Reserve Bank of India (RBI) (the Central Bank of India and regulating exchange controls), the Department of Industrial Policy and Promotion in the Ministry of Commerce and industry (DIPP), along with the relevant sectoral regulators are the monitoring and regulating agencies for foreign exchange inflow and outflow.

The current regulatory framework for foreign investments in India is governed by the following:

- The Foreign Exchange Management Act, 1999 (FEMA), along with rules, regulations and clarifications issued by the RBI from time to time;
- The Consolidated Foreign Direct Investment Policy dated 28 August 2017 (FDI Policy) laid down by the DIPP, which is updated on an annual basis read along with the press notes released from time to time; and
- The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (FDI Regulations) which recently replaced the erstwhile Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000), notified by the RBI.

Until May 2017, the Foreign Investment Promotion Board (FIPB) was the regulatory agency for considering and approving foreign direct investment (FDI) proposals. The Government of India (GOI) now regulates and approves FDI proposals through competent authorities / ministries for specific sectors (Competent Authorities). For example, the Department of Pharmaceuticals (DOP) is the relevant authority for considering and approving FDI proposals in the pharmaceutical sector (FDI beyond 74% in brownfield pharmaceutical business needs approval from the DOP). The applications for FDI proposals must be submitted online to the Foreign Investment Facilitation Portal in the format as available on the portal.

In addition to the Competent Authorities, certain other regulatory bodies are also involved in the process of foreign investment in India. Since India is not yet fully convertible for capital account purposes, approval of the RBI may be required on certain exchange control and related issues. Also, approval of the Securities and Exchange Board of India (SEBI), which is the regulator of the Indian capital markets, is required for certain investments and mergers involving listed public companies. Foreign investors should be also mindful if the acquisition of shares, voting rights, assets, control, mergers or amalgamations breach the prescribed thresholds under the Competition Act, 2002 (Competition Act) and if a notification to the Competition Commission of India (CCI), the anti-trust regulator in India, will be required.

FDI in an Indian company can be either under the automatic route/ 100% FDI permitted (i.e. no approval from the Competent Authorities required) or the approval route (i.e. approval from the Competent Authorities required). In the broadest sense, FDI is permitted up to 100% of the total paid-up share capital (shareholding) of an Indian company in most sectors of the Indian economy such as services, mining, manufacturing, information technology, power, cash and carry wholesale trading, etc.

However, in some sectors, FDI is permitted only up to certain specified limits, which are usually 26%, 49%, 51% or 74% of the shareholding of an Indian company. Approval from the Competent Authorities is required for FDI beyond the prescribed sectoral limit in certain sectors. For example, FDI in the insurance sector, defense, telecom and by foreign airlines in scheduled and nonscheduled air transport services under the automatic route is permitted up to 49%, subject to prescribed conditions, and beyond the prescribed sectoral caps, with the prior approval of the relevant Competent Authority. Certain sectors also have prescribed conditions for receiving FDI, such as telecom, defence, construction and development, etc. It is important to also note that, if the FDI in an Indian company under the regulated sectors exceeds INR 5,000 crores (approximately USD 80 million), approval from the Cabinet Committee of Economic Affairs is required.

Apart from this, foreign investment (whether direct or indirect) is prohibited in certain sectors such as atomic energy, lottery business, gambling and betting (including casinos), etc.

Considering the regulatory framework for FDI in India, we recommend that a foreign investor should always confirm the foreign investment and other regulatory approval requirements, as well as sectoral caps in the relevant sector before investing in India.

## 2. Is it possible for foreign investors to conduct business in India without a local partner? What corporate structure is most commonly used and best for foreign investors?

Yes, foreign investors can conduct business in India without a local Indian partner in sectors permitting 100% foreign shareholding under the automatic route. There will be a requirement for a local Indian partner in sectors in which 100% FDI is not permitted. However, as explained under Question 1, the Competent Authorities may permit a foreign investor, on a case-by-case basis, to invest up to 100% in sectors that do not fall under the automatic route.

A foreign investor has several corporate structure options to set up a presence in India. These include a private or a public limited company, a limited liability partnership (LLP), a branch office, a liaison office, or a project office. A nonresident may also contribute to the capital of a partnership firm / a proprietorship concern / association of persons in India; however, these require prior approval of the RBI.

In sectors where 100% FDI is permitted, a foreign investor may set up a wholly owned subsidiary (WOS) in India, as a private limited company, which is less regulated compared to a public company in India. A foreign investor may also opt for a limited liability partnership (LLP), which is a hybrid between a partnership firm and a limited liability company.

A private limited company must have at least two shareholders and two directors. One of the directors should be a resident in India. The liability of the shareholders is limited to the extent of their capital contribution in the company. Similarly, in case of an LLP, unlike a partnership firm, partners' liability is limited to the provision of their capital contribution and other contribution agreed upon in the LLP agreement. Every LLP is required to have at least two designated partners, and at least one of them is required to be a resident individual and a in India. Designated partners are required to ensure legal and regulatory compliances on behalf of the LLP.

In India, an LLP can be incorporated only for a lawful business purpose with a view to make profits and they cannot be incorporated for any charitable/nonprofit purposes. However, a private limited company can be incorporated even for nonprofit purposes. An LLP offers a flexible compliance framework as compared with a limited liability company as there are lesser compliances applicable to an LLP and it is mostly governed by the terms and conditions under the LLP agreement.

Foreign investors can invest in LLPs without any approval from the GOI if the LLP operates in a sector where 100% FDI is permitted under the automatic route without any FDI linked conditions (i.e. any sector specific conditions for receiving foreign investment).

A foreign investor may in some cases establish a branch office or a liaison office without the necessity of having a local partner. Where the principal activity of the parent foreign entity falls under the automatic route, the application is considered by the Authorised Dealer Category I bank (AD Bank). Where the principal activity of the parent foreign entity falls under the approval route or the parent entity is a non-profit organisation, etc., the application is considered by RBI in consultation with the Ministry of Finance.

The primary difference between a branch office and a liaison office is the nature of the business activity that can be undertaken by them. A liaison office may undertake only liaison activities (and not generate revenues), i.e., represent the parent entity in India, act as a channel of communication between the parent entity and the parties in India, and promote technical/financial collaborations with the parent and Indian entities. On the other hand, a branch office can perform only those specified business activities as may be permitted.

A foreign company also may establish project office(s) in India without prior approval of the RBI. A project office means a place of business of a foreign company to carry out a project in India. It may operate only during the tenure of the project. RBI has granted general permission to foreign companies to set up project offices if it has secured a project contract from an Indian company.

Unlike a WOS or an LLP, branch offices, liaison offices (in certain facts and circumstances) and project offices are limited in what activities are permitted under the FEMA and the relevant FEMA regulations.

Branch offices, liaison offices, and project offices are regarded as foreign companies under Indian laws, which may result in a higher rate of corporate tax payable by them compared to domestic Indian companies (i.e. at the rate of 40%).

Given the flexibility of WOS structure and the tax advantages, the WOS is the most often used investment structure in India as compared to a branch / a liaison / a project office. Increasingly, foreign investors are also preferring LLPs over companies / branch / liaison / project offices owing to lesser statutory and regulatory compliances and operational ease, and favourable tax treatment (considering there is no dividend distribution tax and alternate minimum tax is payable only in limited circumstances in case of LLPs).

## 3. How does the Indian government regulate commercial joint ventures composed of foreign investors and local companies or individuals?

Please refer to the responses to Question 1 and 2 for more details.

As a general premise, the GOI or any of its regulatory bodies do not interfere in the commercial side of any Indian joint venture company. From a FDI Policy perspective, foreign investors in certain sectors are not permitted to hold entire shareholding of an Indian company. In these cases, foreign investors either identify a local partner in the real sense of a commercial joint venture or allow private equity investors to hold the remaining shareholding. No legal requirements exist mandating local partners in sectors in which foreign investors can invest up to 100% of the capital of the company.

## 4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?

The commercial relationship between local agents and foreign companies is governed contractually. The Indian Contract Act, 1872 (Contract Act) sets out the rights and obligations of the principal and the agent, along with the relevant provisions as interpreted by the Indian courts from time to time. Note that compliance with FEMA is mandatory for inward remittance of consideration by way of commission or otherwise to an agent.

There are certain factors that a foreign company should consider when appointing an Indian agent. First, where exclusive representation by the agent is contemplated, the parties must stipulate this in the agency agreement detailing the scope of such exclusivity. A contract for exclusive agency agreement should be drafted so that the language does not violate the provisions of Section 27 of the Contract Act, which prohibits agreements restraining exercise of lawful profession, trade or business of any kind.

Second, post-termination noncompete provisions under the Contract Act are unenforceable in India. Another noteworthy aspect of the law of agency is its departure from the law of contract in India (in which adequacy of consideration is required for entering into a valid and binding contract) in relation to consideration, i.e. no consideration is required to create an agency relationship. Note, noncompete provisions are enforceable only during the term of an agency provided they are reasonable to all the parties to such agreement and in legitimate interest of the business.

Distribution agreements differ from agency agreements. There is no specific law governing distribution agreements in India. Distribution agreements are governed by and interpreted in accordance with the Contract Act.

In addition to the provisions of the Contract Act, foreign entities should be wary of the provisions of the Competition Act for drafting and interpretation of distribution agreements. The Competition Act addresses anti-competitive agreements and the abuse of dominance. All agreements or practices of a company and any agreement or practice having an "appreciable adverse effect on competition in India" will fall under the scope and authority of the Competition Act and will need to be tested depending upon facts and circumstances of each case. Note that, any payments outside India pursuant to a distribution agreement will need to comply with the exchange control laws of India.

## 5. In what manner does the Indian government regulate proposed merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?

Mergers of Indian companies with substantial foreign shareholding is permitted subject to compliance with conditions under the Companies Act 2013 (2013 Act). The conditions are same for Indian-owned companies as well. Such mergers should be compliant with the extant foreign exchange laws with respect to any sector specific restrictions. The 2013 Act also permits merger of foreign companies with Indian companies (which was allowed under the previously existing Companies Act 1956 also) and vice versa (which has now been permitted under the 2013 Act), subject to the prior approval of the RBI. RBI has framed draft guidelines for such mergers and the same are awaiting notification.

Mergers are subject to the approval of the relevant jurisdictional bench of the National Company Law Tribunal (NCLT) in which the registered offices of the merging and/or merged companies are located. In addition to this, SEBI has laid down norms for scrutiny and approval of the stock exchanges for merger / amalgamation schemes involving listed companies.

As discussed, the CCI now plays an increasingly important role in regulating combinations. Therefore, any proposed merger and amalgamation must now be tested against the cornerstone of prescribed thresholds (unless exempted) to determine if a notification requirement with the CCI will be incurred or not.

NCLT orders for mergers/amalgamations/demergers may incur stamp duty depending upon the concerned states involved. As a result, depending upon which states are involved, stamp duty may need to be paid to the state governments on the order passed by the NCLT.

Under the Income Tax Act, 1961 (IT Act), mergers/demergers/amalgamations are tax neutral subject to compliance with prescribed terms and conditions, which ideally should be considered early on from a tax structuring standpoint.

There are certain sector-specific guidelines regulating mergers, for example, in telecom sector in India.

Acquisitions of Indian companies by foreign companies are governed by the FDI Policy as explained more fully in the responses to Questions 1 and 2. Takeovers or acquisitions of listed Indian companies are regulated by SEBI under the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations). The Takeover Regulations require an acquirer who holds more than 25% of shares or voting rights or control in a listed Indian company to make a public offer of at least 26% of the voting rights of the listed entity.

In addition to compliance with the Takeover Regulations, acquisition of listed Indian companies by a foreign investor is subject to compliance with the SEBI regulations which deals with insider trading and specific disclosure requirements under SEBI (Listing Obligations and Disclosure Requirements), 2015 and listing agreement provisions established by the stock exchanges.

## 6. How do local labor statutes regulate the treatment of employees and expatriate workers?

The employment law regime in India emanates from federal and state legislative framework. Over 40 labour and employment laws were enacted at the Central and State levels resulting in a mix of laws dealing with, amongst others, laws to regulate issues such as industrial relations, wages, social security, and employment and training. Labour laws in India have also developed through case laws laid down by the Supreme Court on various issues such as wages, employment, termination and reinstatement, domestic enquiries and the conduct of employees. To understand the legal framework governing labour laws, it is important to understand the broad classification of "employees" under the Indian law.

Employees, for the purposes of the Indian labour law legislation, are broadly classified into two categories. The first category consists of persons employed in an industry to carry out manual, unskilled, technical, operational, clerical, or supervisory work (subject to certain statutory exceptions). These are commonly referred to as "workmen". The second category consists of persons employed in mainly managerial, administrative or supervisory capacity but earning more than a specified amount (presently the amount specified under the Industrial Disputes Act, 1947 is INR 10,000, approximately USD160 per month). The second category of persons is often referred to as "white-collar workers", who typically have an employment contract with their employer.

The conditions and procedures for the employment of persons that are not workmen will depend on the contract of employment. Contracts of employment include the period of employment, salary, other benefits (such as provident fund, gratuity, leave travel assistance and medical reimbursement), exclusivity, non-compete and non-solicitation obligations, termination events and confidentiality requirements.

Expatriate workers must obtain separate employment visas permitting them to work in India. An employment visa may be granted to foreign nationals who intend to enter India for employment, provided certain requirements are fulfilled, such as:

(i) the applicant should be a highly skilled and/or qualified professional being engaged or appointed by an Indian entity on contract or an employment basis. An employment visa will not be granted for routine, ordinary or secretarial/ clerical jobs, or for jobs for which qualified Indians are available; and
(ii) the employee's salary must be in excess of USD 25,000 per annum.

The duration of an employment visa depends on the type of employment as well on the nationality of the employee. A foreign national may be granted an employment visa valid up to 2 years, or the term of the assignment, whichever is less, with multi-entry facility. Where an employment visa is issued for more than 180 days, it carries an endorsement that the employment visa holder must register with the Foreigners Regional Registration Officers (FRRO/FRO) concerned within 14 days of arrival. On registration, the FRRO/FRO concerned may issue a Residential Permit for the validity of the visa period. If there is any change in the residential address, the concerned foreign national must immediately report such change, in writing, to the FRRO/FRO concerned.

An employer who offers an employment opportunity must assist in the visa application by either providing an invitation letter or executing the employment agreement. The applicant (i.e., the expatriate) should apply to the Indian Embassy/High Commission in his/her country of residence for the visa.

It is also pertinent to note that presence of expatriate workers / employees of a foreign company in India are often viewed as an extension of the foreign company in India and hence, this may expose the foreign company to being considered as having a taxable presence in India. It becomes important to carefully structure cross-border secondment and service arrangements to mitigate adverse tax consequences for the foreign company in India.

## 7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

As mentioned earlier, India is not yet fully convertible on capital account and is subject to regulations by the RBI. All international financial transactions in India, such as the conversion of these currencies into rupees, repatriation of funds, issuance of letters of credit and creation of security interest over immovable property, are governed by FEMA and its regulations. FEMA sets out comprehensive laws relating to treatment of international financial transactions, and any person involved in any current or capital account transaction with India should examine related exchange control law issues in India. In addition to the enactment of FEMA in 1999, the Indian Parliament also enacted the Prevention of Money Laundering Act, 2002, which imposes obligation on banking companies,

financial institutions, and intermediaries to verify the identity of their clients, maintain records and furnish information to prevent money laundering transactions.

Under FEMA, except with the general or specific permission of the RBI, no person can deal in or transfer any foreign exchange or foreign security to any person, make any payment to or for the credit of any person resident outside India, and receive any payment by order or on behalf of any person resident outside India in any manner. All foreign exchange remittances into India and from India can take place only through the AD Banks. These AD Banks are essentially banks authorized to deal in foreign currency and are regulated by the provisions of FEMA and various regulations/directions issued by the RBI from time to time pursuant to the powers vested in the RBI.

Please note that the RBI has the power to specify any class or classes of capital account transactions that are permissible and the limits thereof.

## 8. What types of taxes, duties, and levies should a foreign investor expect to encounter in negotiating an inbound investment in India?

The Income Tax Act, 1961 (IT Act) governs the income tax liability in India. Income tax is levied by the Central Government at the national level. Each year the Finance Act revises the applicable rates of taxation and / or other provisions of the IT Act. The Indian fiscal year runs from 1 April to 31 March.

While residents are subject to income tax on their worldwide income, non-residents are subject to tax in India only on income that is sourced in India, i.e. income which (i) is received or is deemed to be received in India; or which (ii) accrues or arises or is deemed to accrue or arise in India.

A company is said to be "resident" for tax purposes in India in a financial year if (i) it is an Indian company (i.e. incorporated in India) or (ii) its 'place of effective management' is in India. The phrase 'place of effective management' has been explained to mean *'a 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.'* The Central Board of Direct Taxes (CBDT), the administrative body responsible for implementation of the IT Act, has issued guidelines for the determination of POEM of a company. If a foreign company's POEM is considered to be in India, its global income shall be chargeable to tax in India at the rate of 40%.

Income tax on domestic companies is applied at the rate of 30%. Certain domestic companies can choose to avail of a concessional tax rate of 25%, subject to fulfillment of some conditions.

Under the IT Act, firms, including LLPs qualify as a separate taxpayer category, and are required to pay taxes on their income. General partnerships and LLPs are taxed at the rate of 30%.

Foreign companies having a permanent establishment (PE) in India are subject to higher taxation at the rate of 40%.

The tax rates as described above are required to be increased by applicable surcharge and education cess.

If the income-tax payable by a domestic company is less than 18.5% of its adjusted book-profits, then such company would be required to pay a minimum amount of tax, known as 'Minimum Alternate Tax' (MAT) at the rate of 18.5%. A foreign company shall not be subject to MAT if such company does not have a PE in India in terms of the applicable tax treaty.

Indian companies declaring dividend are liable to pay a dividend distribution tax (DDT) at an effective rate of 20.36% (inclusive of applicable surcharge and education cess) of the dividends declared. Such dividends are tax exempt in the hands of all resident corporate and non-resident shareholders of the company. For general partnerships and LLPs, at the time of distribution of profits, there is no additional tax that is required to be paid. Further, share of profits received by partners of a general partnership or an LLP are tax exempt in their hands.

The sale of equity and debt instruments by a non-resident investor entails capital gains tax in India, which could vary from 'nil' to 40%, (depending on the nature of the instrument and the period of holding), subject to relief under the applicable tax treaty. Any indirect transfer of Indian assets by way of transfer of shares of a foreign company whose 'substantial value', directly or indirectly, is derived from assets located in India would also be taxable in India, subject to the provisions of the relevant tax treaty of the seller. Shares (or interest) in a foreign company (or entity registered outside India) are said to derive their value substantially from assets located in India where the value of the Indian assets exceeds INR 100 million (approx. USD 1.5 million), and represents at least 50% of the value of the foreign company.

On undertaking a scheme of buy-back of shares, an Indian unlisted company would be liable to pay an additional tax at the rate of 20% on the amount distributed to its shareholders in excess of the amount received by the company toward issue of such shares. There will be no further taxation in the hands of the shareholders on such amount.

Note that, where the payee is a non-resident, there is a legal obligation on the payer (whether resident or non-resident) to deduct tax at source when making any remittance to the former, if such payment constitutes income which is chargeable to tax under the IT Act read with the applicable tax treaty. Payments of a certain nature made to a resident also attract deduction of tax at source, whether the payer is a resident or a non-resident.

The IT Act also provides for certain valuation requirements, non-compliance of which can lead to adverse tax consequences for both the seller as well as the acquirer. For instance, in determination of capital gains taxation on the transferor of unquoted shares, the fair market value of the shares (as computed under the prescribed rules) shall be deemed to be the minimum sale consideration. Receipt of property (including shares and securities) by an investor at a discount to fair value, can lead to the discount being taxed as ordinary income in the hands of the investor.

From 1 July 2017, India has implemented Goods and Services Tax (GST) which replaced the earlier multi-layered indirect tax regime with a uniform and comprehensive tax system. GST has subsumed most of the indirect taxes like sales tax, service tax, excise duty, entertainment tax (unless levied by local bodies), entry tax, additional customs duty (countervailing duty), special additional duty of customs, surcharges and cesses. With the implementation of GST regime, foreign investors could potentially look at incidence of Integrated GST or Central GST or State GST on various transactions depending on the place of supply.

## 9. Do comprehensive intellectual property laws exist in India and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?

Intellectual property rights (IPRs) are comprehensive and enforceable in India. Ever since India signed the TRIPS and WTO Agreements, the laws relating to IPRs in India have undergone a series of amendments to make IPRs in India compliant with the TRIPS and WTO Agreements. Besides these, India is also signatory to the Patent Cooperation Treaty, Budapest Treaty, Berne Convention, Universal Copyright Convention, Geneva Convention for the Protection of Rights of Producers of Phonograms and the Madrid Protocol, all of which clearly reflect the country's intention to partake in achieving a state of uniformity with other developed jurisdictions.

As of today, India provides statutory protection to most IPRs which include patents, trademarks/service marks, designs, copyrights, geographical indications plant varieties and Semiconductors Integrated Circuits Layout. Further, confidential information and trade secrets are at present protected by contract law.

From an enforcement perspective, civil remedies and criminal actions are available to IP owners in India.

However, in respect of patents and designs, the statutes only provide for a civil suit. In addition to civil remedies and criminal actions, border protection measures are available to the IP owners to prevent import of counterfeit products into India. With reference to confidential information and trade secrets, relief can be obtained by way of claim for breach of contract.

## 10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?

The slow speed of litigation in India is compounded by complex procedures, large amounts of documentation, and time constraints faced by the judiciary. As a consequence, commercial disputes unfortunately remain pending before courts for several years and are unable to reach early conclusion. Arbitrations are therefore considered to be a viable and effective alternate of dispute resolution especially in cases of commercial disputes. Nowadays, most commercial documents contain arbitration clauses. If parties have agreed to have disputes between themselves resolved by arbitration, the jurisdiction to approach the courts, except in so far as to seek such interim reliefs which otherwise cannot be granted by the arbitral tribunal, is barred. The Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015, (Amendment), Act 2015 (Act) is the legislation which provides for alternate dispute resolution mechanism and proceedings. This Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, and UNCITRAL Conciliation Rules, 1980, making it one of the most comprehensive pieces of legislation regarding arbitration.

An arbitral award is enforceable as a decree of the court and is final and binding on the parties. India is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral awards, 1958, and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927. As such, foreign awards passed in a notified country which is a signatory to one of these conventions is enforceable in India as a domestic award, and vice versa. However, for enforcement of a foreign arbitral award in India, certain conditions must be met, inter alia and principally, the arbitral award should not be against the public policy of India.

In the case of *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Service, Inc.*, the Supreme Court of India held that Part I of the previous Arbitration and Conciliation Act, 1996 (1996 Act) does not apply to foreign seated arbitrations where the agreements were entered into after 6 September 2012. By doing so, the Court has limited the extent of judicial intervention by courts in India for foreign seated arbitrations.

Keeping pace with the judicial developments, the 1996 Act was amended and the Act was promulgated on 23 October 2015. The primary changes brought by this amendment are:

(i) The Act reforms the powers of the Indian courts to grant interim measures as provided in the Act;
(ii) The Act has introduced timelines for completion of arbitral proceedings;
(iii) The Act also empowers the courts to impose a penalty on the arbitrator(s), if the court is of the view that the delay has been caused due to reasons attributable to the tribunal;
(iv) "Public policy" is no longer a ground to resist enforcement in India of an international commercial arbitration award or a foreign award. The scope of public policy is limited to circumstances where there has been contravention of "*the fundamental policy of Indian law*". The courts in such cases will not review the merits of the dispute when considering a defense on the ground of public policy.

It is pertinent to mention that the recent amendments on arbitration reflect a pragmatic shift of the judiciary in having a hands-off approach to interfere with an arbitral award. With the amendments in place and the judiciary recognizing the importance and effectiveness of arbitration, it appears that arbitration will serve as an effective alternative and be the preferred mode of resolving commercial disputes.

The other alternate dispute resolution mechanisms such as conciliation, mediation and negotiation are also available in India.

## 11. What recommendations can you offer for how best to negotiate and conduct business in India?

A foreign investor intending to do business in India may consider the following:

- Foreign investment in India is permitted depending upon the sector in which the foreign investor intends to invest. Therefore, a foreign investor should check specific sectoral caps, requirement of an approval from Competent Authorities, adherence to any specific terms and conditions, etc., before investing in India.
- A foreign investor should consider an appropriate form of business entity for its entry in India.
- Investment can be made by a foreign investor in an Indian company through a variety of instruments, such as equity shares and convertible instruments. Each instrument may have different tax implications and returns. Appropriate advice on tax is therefore crucial when structuring investments in India. There are pricing and reporting requirements to be complied with at time of entry as well as exit from India under the exchange control laws of India.
- Non-resident investors intending to set up business in India, either by way of franchise or distribution arrangements, or by acquiring an existing Indian company, must now be aware of the competition law regime in India which could have far-reaching repercussions on the investors' ability to do business in India. Such contracts should also be reviewed for compliance with the Contract Act and exchange control laws of India.
- India has a plethora of central and state specific laws. Appropriate legal advice should be sought on specific licenses/approvals and compliances under such laws for conducting business in India.
- While a WOS can acquire or lease immovable property in India, there are certain restrictions on branch/liaison offices from acquiring immovable property in India. An instrument for lease or conveyance of immovable property in India is required to be stamped as per the applicable stamp duty in the relevant state and is required to be registered with the sub-registrar having the jurisdiction.
- Foreign investors should consider registering their intellectual property in India to avoid any potential infringement or passing-off.
- Adequate contractual protection (in the form of specific indemnities or tax insurance cover) should be sought for any tax risks which may devolve on the acquirer.
- Parties should consider having appropriate dispute resolution mechanism in their contractual arrangements.

## 12. What practical advice can you share with investors who decide to do business in India?

In addition to our response in Questions 8 and 11, foreign investors may keep the following in mind from a practical standpoint:

- Litigation and enforcement processes are relatively slow in India. Therefore, alternate dispute mechanisms, such as mediation, conciliation and arbitration, are the preferred choice of parties for resolving commercial disputes.
- The Competition Act provides for a mandatory and pre-notification regime in case of certain combinations, which should be assessed beforehand.
- India, being a largely agricultural society, has strict policies on user restrictions. While acquiring land, one should be mindful that title/ownership aspects are thoroughly investigated as property is held by multiple owners. The time for such investigations should also be factored in while considering a live opportunity.
- As the entire indirect tax landscape has changed with introduction of GST, investors should be mindful of revised tax rates, registration requirements and new concepts such as invoice matching and anti-profiteering.

## 13. Does India currently have any data privacy laws or regulations? how do they affect business activitles?

Presently, apart from the Constitution of India, privacy rights are indirectly recognized in various sector-agnostic statutes such as the Indian Penal Code 1860, the Information Technology Act 2000 (IT Act) etc. There are certain sensitive sectors such as banking, insurance, telecom, etc. that have their specific regulations to address aspects of data privacy.

The concepts of 'data privacy' and 'data protection' were given focused attention primarily through Sections 43A and 72A of the IT Act. Failure to implement and maintain reasonable security practices and procedures in relation to 'sensitive personal data or information', as prescribed under Section 43A of the IT Act, attracts civil liability. On the other hand, Section 72A of the IT Act prescribes criminal liability for disclosure of 'personal information' in breach of lawful contract or without the information provider's consent.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (SPDI Rules) formulated under Section 43A of the IT Act stipulates regulations in relation to 'sensitive personal data or information'. In terms of the SPDI Rules passwords, financial information, physical, health condition etc. are classified as 'sensitive personal data or information' (SPDI).

Broadly, an entity that collects SPDI is required to obtain prior written consent from the information provider. SPDI can be transferred to third parties only with prior consent from the information provider and subject to the transferee (whether situated within or outside India) providing as much protection to the SPDI as prescribed under the SPDI Rules. An entity that collects SPDI is required to have a privacy policy and is also required to implement reasonable security practices and procedures in relation to SPDI.

Recently, in the *Justice KS Puttaswamy v Union of India* case (Privacy Case), the Supreme Court of India declared privacy as a fundamental right that is protected under the Constitution of India. This, however, is enforceable against the State and State-actors alone. The Privacy Case has also highlighted the need to have a dedicated data privacy regime to regulate the collection and processing of an individual's information by both State and non-State actors.

The Government of India has recently constituted an expert committee (Committee) under the Chairmanship of retired Supreme Court judge Justice B N Srikrishna, in order to study various issues relating to data protection in India and to suggest the contours of a new data protection legislation.

## 14. Are there any recently passed laws or regulations in India that are expected to affect the activities of foreign investors in the future?

India has become an attractive investment destination for global investors. The current-BJP led Government has implemented several legal and regulatory reforms for encouraging ease of doing business in India, including Make-in-India campaign, Start-up India-Stand-up India, promoting cashless digitalized economy, easing and liberalizing FDI laws, corporate governance reforms, new corporate insolvency norms, etc. Some of the recently enacted laws which might affect foreign investment in India are:

- **FDI Laws:** Some of the key changes in the FDI regime are:
  - Liberalization of certain key sectors: The GOI has eased FDI restrictions in key sectors of the economy, such as defence, pharmaceutical, etc. Recently, the DIPP has further liberalized the FDI laws, including permitting 100% FDI under the automatic route in the single brand retail trading sector with relaxed conditions, clarified that 100% FDI under the automatic route is permitted in real estate brokerage business, FDI in investing companies registered as non-banking financial companies with the RBI being overall regulated would be under 100% automatic route, etc.
  - Deferred Consideration: RBI has permitted deferred purchase consideration in case of share transfers between resident and non-resident parties up to 25% of the total consideration and to be paid within 18 months of the transfer agreement. Prior to this change, any deferred purchase consideration required prior approval from the RBI.

- Put Options: Historically, RBI has disallowed assured returns to foreign investors. Exit clauses including put options were often challenged by Indian promoters as well as RBI as violation of public policy of India so as to avoid honouring contractual obligations. Recently, Indian courts in two important decisions (*Tata- Docomo and Cruz City v. Unitech*) upheld foreign arbitral awards enforcing breach of put option clause as valid contractual obligations to be honoured and did not accept the public policy defense. This has provided a much needed relief to foreign investors when enforcing contractual arrangements in India and will deter Indian parties from taking this defense for avoiding contractual obligations.

• **Tax Laws**

- Amendments to India's tax treaties with Mauritius, Singapore and Cyprus: Tax treaties with Mauritius, Singapore, and Cyprus have been revised, in terms of which, capital gains arising to tax residents of such jurisdictions from sale of shares of Indian companies which are acquired on or after 1 April 2017 shall be taxable in India. The amendments do not impact the beneficial capital gains tax treatment in relation to investment in instruments other than shares (regardless of the time of investment) and in relation to shares acquired prior to 1 April 2017 (regardless of when the exit occurs).
- General Anti-Avoidance Rules (GAAR): GAAR has come into effect on 1 April 2017. GAAR may be invoked where the main purpose of an arrangement is to obtain a 'tax benefit'. GAAR provisions empower the tax authorities to investigate any such arrangement as an "impermissible avoidance arrangement" and consequently disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal situs of assets involved, treat debt as equity and vice versa, and the like. By doing so, the tax authorities may even deny tax benefits conferred under a tax treaty. Accordingly, it must be ensured that there is justifiable commercial substance in any investment structure, which proposes to avail of any 'tax benefit'.
- Thin capitalization: Thin capitalization norms were introduced in India's extant transfer pricing regime with effect from 1 April 2017, whereby if an Indian company borrows money from its non-resident associated enterprise, then such Indian borrower would not be permitted a deduction of interest exceeding 30% of the earnings before interest, taxes, depreciation and amortization if the total amount of such interest exceeds INR 10 million (approx. USD 0.15 million/150,000) per year.
- GST: India embarked into GST regime by promulgating Central, State and Union Territory Goods and Services Tax Acts coupled with corresponding Rules, with effect from 1 July 2017.

• **Insolvency and Bankruptcy Code, 2016 (Code):** The Government of India has enacted the Insolvency and Bankruptcy Code, 2016 aimed at acting as an umbrella legislation for providing quick and efficacious remedy to creditors or investors in case the debtor company (Corporate Debtor) commits a default. Under the scheme of the Code, if a Corporate Debtor commits a default of INR 100,000 (approx. USD 1600) or more, then a Corporate Insolvency Resolution Process can be initiated by any creditor, and any creditor who has a claim against the Corporate Debtor can participate in the CIRP process depending upon what category of creditors it belongs to.

**Bangalore**
Simal
2nd Floor
7/1 Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
F: +91 80 2559 7452
E: bengaluru@khaitanco.com

**Kolkata**
Emerald House
1B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
F: +91 33 2248 7656
E: kolkata@khaitanco.com

**Mumbai**
One Indiabulls Centre
13th Floor, Tower 1
841 Senapati Bapat Marg
Mumbai 400 013, India

T:+91 22 6636 5000
F: +91 22 6636 5050
E: mumbai@khaitanco.com

**New Delhi**
Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001 India

T: +91 11 4151 5454
F: +91 11 4151 5318
E: delhi@khaitanco.com

**Prepared by Meritas Law Firms**

Meritas is an established alliance of 180 full-service law firms serving over 234 markets – all rigorously qualified, independent and collaborative. Connect with a Meritas law firm and benefit from local insight, local rates and world-class service.

**www.meritas.org** enables direct access to Meritas law firms through a searchable database of lawyer skills and experience.

MERITAS®

LAW FIRMS WORLDWIDE

**www.meritas.org**

800 Hennepin Avenue, Suite 600
Minneapolis, Minnesota 55403 USA
+1.612.339.8680