Foreign Investment in India

A practical compliance reference

Evaluer Legal

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PREFACE

This guide is intended to provide foreign investors and their advisors a broad legal perspective on foreign investment in India. The guide is written in general terms and its application to specific situations will depend on the particular circumstances involved.

This guide summarizes all major foreign investment regulations and procedures that are currently in force in India. It has been prepared in order to facilitate multinational companies, start-ups and venture capital investors set-up business operations in India. With over 40 (forty) pages of drafting, this guide has included valuable regulations, forms and policies for ready reference of entrepreneurs and senior managers of foreign entities. It also includes a step-by-step guide to compliance and filings of forms in India.

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Entry options for foreign investors

CHAPTER

1

Evaluer on

doing business in India

In this chapter we will address the following:

- What are various entry options for foreign investors in India
- Brief understanding on how to set-up a branch, liaison or project office.
- Entry route via wholly owned subsidiary or a joint venture company.

ENTRY OPTIONS IN INDIA

1. INTRODUCTION

Ever since India embarked on the path of liberalisation and economic reform a couple of decades ago, the Government of India (the "**GOI**") has been keen to attract foreign capital and investment. To this end, the GOI has put in place a policy framework on foreign investment, which is transparent, predictable and easily comprehensible. Over the past several years, the policy and procedures regulating and governing the inflow of foreign investments into India have been progressively liberalized and simplified. The initiatives taken by the Government of India in this regard have resulted in significant inflows of foreign investment in almost all areas of the economy, except a select few, that continue to remain reserved for strategic reasons. Under the current Consolidated Foreign Direct Investment Policy[1] ("**FDI**" or "**FDI Policy**"), FDI is prohibited in the following areas or activities: (i) gambling and betting, including casinos, (ii) lottery business including government, private and online lotteries[2], (iii) business of chit funds, and (iv) activities and sectors not opened to private sector including atomic energy and railway transport (other than mass rapid transport systems).

1.1 ENTRY OPTIONS FOR FOREIGN INVESTORS

Foreign entities have the option to set-up their business operations in India either in the form of incorporated entities or unincorporated entities. A foreign company opting for the incorporation route for setting up its operations in India is required to incorporate a company in India through either joint venture collaboration ("**JV company"**), or wholly owned subsidiary[3] ("**WOS"**).

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[1] 'FDI' means investment by non-resident entity or a person resident outside India in the capital of an Indian company under Schedule I of Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000.

[2] Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

[3] For registration and incorporation of a WOS, one would first need to incorporate an Indian company and then file an application with Registrar of Companies ("**ROC**"). The WOS will be subject to Indian laws and regulations as applicable to other domestic Indian companies.

A foreign company not opting to be incorporated in India, either by way of a JV Company of WOS is permitted to conduct its business operations through any of the following offices:

- **i.** liaison office;
- **ii.** branch office; or
- **iii.** project office.

Such offices can only undertake activities permitted to them under the regulations framed by Foreign Exchange Management Act, 1999 ("**FEMA**") for such offices. These offices are further required to be in compliance with provisions of the Indian Companies Act, 1956 (the "**Companies Act**") as applicable to them. The approvals for these offices are accorded by the Reserve Bank of India ("**RBI**") on a case-to-case basis.

1.2 LIAISON OFFICE (ALSO KNOWN AS A REPRESENTATIVE OFFICE)[4]

A 'liaison office' means a place of business to act as a channel of communication between the principal place of business or head office and entities in India, but which do not undertake any commercial, trading or industrial activity, directly or indirectly, and maintains itself out of inward remittance received from abroad through normal banking channels. A liaison office is not permitted to undertake any business activity in India and cannot earn any income in India and therefore is required to maintain itself out of inward remittances received from abroad. The role of such office is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers. For liaison office, a profit making track record during the immediately preceding three years in the home county equivalent to not less than United States Dollar ("**USD**") 50,000 (fifty thousand) worth of net worth (total of paid-up capital and free reserves, less intangible assets as per latest audited balance sheet or account statement) is required. The application for establishing a liaison office in India is forwarded to the RBI, along with prescribed documents including: 1) the certificate of

[4] Application to RBI for opening liaison office shall be forwarded in form FCN 1.

incorporation / registration or memorandum and articles of association attested by Indian Embassy / notary public in the country of registration; and 2) latest audited balance sheet of the applicant company. Additionally, where principal business of the foreign entity falls under sectors where 100 (hundred) percent FDI is permissible under automatic route, approvals from the RBI will suffice, however where principal business of the foreign entity falls under the sectors where 100 (hundred) percent FDI is not permissible under automatic route, then along with RBI approval, the respective company will have to obtain permission from GOI. The liaison office thus established with RBI's approval will be allotted a Unique Identification Number ("**UIN**") for all official business correspondence purposes within India. If a foreign company has established a liaison office, it cannot acquire immovable property. In such cases liaison offices can take property by way of lease not exceeding five years.

1.2.1 PERMISSIBLE ACTIVITIES OF A LIAISON OFFICE

A liaison office can undertake only liaison activities, i.e. it can act as a channel of communication between head office abroad and parties in India. The role of such office is thus limited to collecting information about possible market opportunities and providing information about the company and its products to the perspective Indian customers. Permission for setting up such offices is granted initially for a period of three years and is extended from time to time. Liaison office can undertake the following activities in India:

- **i.** representing in India the parent company or group companies;
- **ii.** promoting export, import from or to India;
- **iii.** promoting technical or / and financial collaborations between parent and companies in India; and
- **iv.** acting as a communication channel between the parent company and Indian companies.

1.3 BRANCH OFFICE [5]

A 'branch office' means any establishment described as a branch by the company or any establishment carrying on either the same or substantially the same activities as

[5] Application to RBI for opening branch office shall be forwarded in form FCN 1.

that carried on by the head office of the company. For branch office, a profit making track record during the immediately preceding five years in the home county equivalent to not less than USD 100,000 (one hundred thousand) worth of net worth (total of paid-up capital and free reserves, less intangible assets as per latest audited balance sheet) is required. The application for establishing a branch office in India is to be forwarded to the RBI, along with prescribed documents including: 1) certificate of incorporation / registration or memorandum and articles of association attested by Indian Embassy / notary public in the country of registration; and 2) latest audited balance sheet of the applicant company. The branch office thus established with RBI's approval will be allotted a Unique Identification Number. Additionally, where principal business of the foreign entity falls under sectors where 100 (hundred) percent FDI is permissible under automatic route, approvals from the RBI will suffice, however where principal business of the foreign entity falls under the sectors where 100 (hundred) percent FDI is not permissible under automatic route, then along with RBI approvals, the respective company will have to obtain permission from GOI. Foreign companies who get permission to open an office in India are allowed to acquire immovable property in India, which is necessary or incidental to carrying on such activity.

1.3.1 PERMISSIBLE ACTIVITIES OF A BRANCH OFFICE

Branch offices are permitted to represent the parent company and undertake the following activities in India:

- **i.** export / import of goods;
- **ii.** rendering professional or consultancy services;
- **iii.** carrying out research work, in areas in which the parent company is engaged;
- **iv.** promoting technical or financial collaborations between Indian companies and parent or overseas group company;
- **v.** representing the parent company in India and acting as buying / selling agent in India; and / or
- **vi.** rendering services in information technology and development of software in India.

Normally, the branch office should be engaged in the activity in which the parent company is engaged. Retail trading activities of any nature is not allowed for a branch office in India. A branch office is not allowed to carry out manufacturing or processing activities in India, directly or indirectly. Profits earned by the branch offices are freely remittable from India, subject to payment of applicable taxes.

1.4 CLOSING DOWN A BRANCH OR LIAISON OFFICE

A foreign entity may close down its branch or liaison office subject to certain procedural formalities. To begin with, the company will have to submit the following documents to the RBI:

- **i.** copy of RBI's permission / approval;
- **ii.** auditor's certificate – a) indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indication the manner of disposal of assets; b) confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc of the office have been either fully met or adequately provided for; and c) confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India;
- **iii.** no-objection / tax clearance certificate from income-tax authorities; and
- **iv.** confirmation from the applicant / parent company that no legal proceedings in any court in India are pending and there is no legal impediment to the remittance.

On winding up of the business, the sale proceeds of property, if purchased for office use can be repatriated with prior approval of the RBI

1.5 PROJECT OFFICE

The RBI has granted general permission to foreign companies to establish project offices in India, provided they have secured a contract from an Indian company to execute a project in India, and:

- **i.** the project is funded directly by inward remittance from abroad; or
- **ii.** the project is funded by a bilateral or multilateral international financing agency; or

iii. the project has been cleared by an appropriate authority in India; or

iv. a company or entity in India awarding the contract has been granted term loan by a public financial institution or a bank in India for the project.

If either of the above conditions is not met, the foreign entity has to approach the RBI for approval.

1.6 POINTS TO REMEMBER

i. Branch and project offices of a foreign entity are permitted to acquire immovable property by way of purchase for their own use and to carry out permitted / incidental activities.

ii. If a foreign company has established a liaison office, it cannot acquire immovable property. In such cases liaison offices can only take property by way of lease not exceeding five years.

iii. Transfer of assets of liaison or branch office to subsidiaries or other liaison and branch offices or any other entity is allowed with specific approval of the RBI.

iv. Branch offices are permitted to remit outside India profit of the branch net of applicable taxes in India.

Business regulations governing foreign investment

CHAPTER

2

Evaluer on

doing business in India

In this chapter we will address the following:

- What are various business regulations applicable to foreign investors?
- An understanding of procedural aspect of foreign direct investment in India.
- Regulations applicable to venture capital and private equity investments.

2. INDIAN COMPANIES ACT

Foreign investors can set up wholly owned subsidiary companies in India[6] in the form of private or public companies, subject to prescribed FDI guidelines. Further, foreign entities can set up a joint venture company with an Indian or foreign partner. In general, the following two types of companies are permitted to be set-up in India:

i. **Private Company:** A private company in India is a company with (i) a minimum paid up capital of Indian Rupees ("**Rs**" or "**INR**") 1,00,000 or higher; (ii) by its articles restricts the right to transfer its shares, (iii) limits the number of its members to fifty, (iii) prohibits invitation to the public to subscribe for any shares in or debentures of the company; and (iv) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

ii. **Public Company:** A public company on the other hand (listed or unlisted) is a company which is (i) not a private company; (ii) a company with a minimum paid up capital of Rs 5,00,000 or higher; and (iii) a private company, which is a subsidiary of a public company.

The Companies Act prescribes specific requirements for incorporation of a company depending on the type of entity established. Once incorporated, a company set up by the foreign entity is required to carry on business in India in accordance with Indian laws.

2.1 FOREIGN INVESTMENT: REGULATION AND PROCEDURE

The GOI is making all efforts to attract and facilitate foreign direct investment ("**FDI**") from abroad including investment from non-resident Indians ("**NRIs**") to compliment and supplement domestic investment. To make the investment attractive, returns on

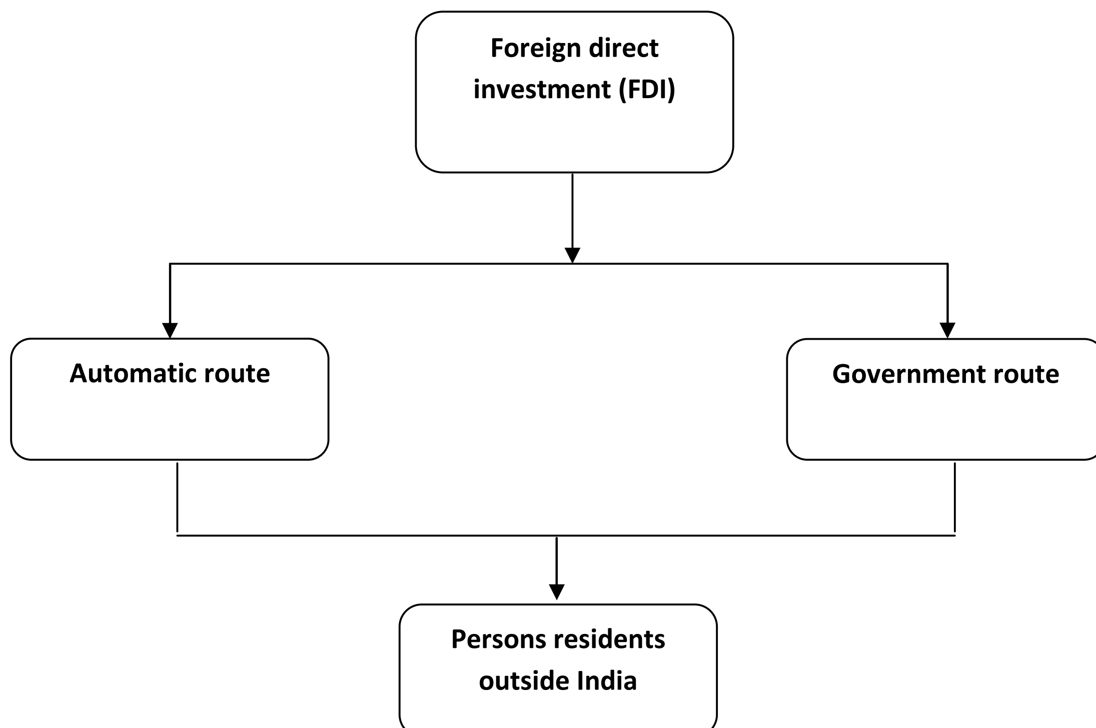
[6] Repatriation of funds: A subsidiary company does not require any approval for remittance of dividends declared subject to dividend distribution tax. Exit can be through sale of shares or winding up or liquidation winding up / liquidation can be a long drawn, complex process.

them are freely repatriable subject to certain legislative restrictions. A foreign entity may invest or participate in India in the following ways:

i. incorporate a WOS or a JV company;
ii. set-up a branch or liaison office;
iii. as a registered foreign venture capital investor ("**FVCI**") under the venture capital route;
iv. as a registered Foreign institutional investor ("**FII**") under the portfolio investment scheme;
v. as a holder of American Global Depository Receipts ("**ADR**") and Global Depository Receipts ("**GDR**"s) under the ADR / GDR Scheme;
vi. technology and trademark license agreements or the franchise route.

In addition to approval for bringing FDI in India, many other clearances and approvals, such as registration of company, environment and forest clearance, permission for import of plant and machinery, land acquisition etc are required for starting a business in India.

2.2 FOREIGN DIRECT INVESTMENT



FDI and its mechanisms (both substantive and procedural) governing inflow into India is regulated by the policies of the GoI and subjected to review on an ongoing basis. The GoI decided that a consolidated circular would be issued every year to update the FDI policy. The latest FDI policy reflects the current policy framework on FDI. Other than sectors where FDI is not permitted, like gambling, betting, lottery business etc, FDI is allowed in almost all sectors, subject to the prescribed limits. FDI can be made by subscribing to equity shares or fully and compulsorily convertible debentures or preference shares[7] of an Indian company, through the following two routes:

i. **Automatic approval route:**

   The GoI has placed a significant majority of sectors under the automatic route for FDI investment. Under this route, Indian companies are authorized to accept FDI without obtaining any prior approvals, provided the RBI is notified by the Indian company within 30 (thirty) days from receipt of such investment. Further, the equity or equity linked instruments should be issued within 180 (one hundred eighty) days from the date of receipt of the inward remittance.

ii. **Prior government of India approval route:**

   FDI in areas or activities, which do not fall within the automatic route or where proposed FDI exceeds the specific sectoral caps requires prior approval of the GoI through the Foreign Investment Promotion Board ("**FIPB**")[8]. Application for investment under the GOI approval route is submitted in Form FC/IL to the FIPB. Subject to any specific terms of the approval letter, upon securing the FIPB approval, the Indian company may then arrange to receive the investment and issue shares to the foreign investor without having to secure any further approvals from the RBI except filings pertaining to the issuance of shares in

[7] Under the FDI Policy, only preference shares and debentures which are fully, compulsorily & mandatorily convertible are treated as equity for the purposes of reckoning FDI.

[8] The FIPB is a government body that offers a single window clearance for proposals on Foreign Direct Investment in India that are not allowed access through the automatic route. FIPB comprises of Secretaries drawn from different ministries with Secretary, Department of Economic Affairs, and Ministry of Finance in the chair. This inter-ministerial body examines and discusses proposals for foreign investments in the country for sectors with caps, sources and instruments that require approval under the extant FDI Policy.

Form FC-GPR with the concerned regional office of the RBI within 30 (thirty) days from when the shares are issued to the foreign investor.

2.3 TYPES OF INSTRUMENTS

Indian companies can issues equity shares, fully and mandatorily convertible debentures and fully and mandatorily convertible preference shares subject to pricing guidelines / valuation norms and reporting requirements. If the preference shares are structured without a conversion option, they would fall outside the foreign direct equity cap and be considered as debt as external commercial borrowings ("**ECB**"). Only those debentures which are fully and mandatorily convertible into equity shares would be reckoned as part of equity under the FDI policy.

Rate of dividend on preference shares: interest rate will be based on swap equivalent of LIBOR *plus* spreads permissible for ECBs of corresponding maturity. This is applicable to partially convertible or non-convertible preference shares. In case of fully convertible preference shares, the rate of dividend on preference shares or convertible preference shares issue shall not exceed 300 (three hundred) basis points over the Prime Lending Rate of State Bank of India prevailing as on the date of the Board meeting of the company in which issue of such shares is recommended.

2.4 PRICING GUIDELINES

Price of fresh shares issued to persons resident outside India under the FDI scheme shall be: either i) on the basis of Securities and Exchange Board of India ("**SEBI**") guidelines in case of listed companies; or ii) not less than fair value of shares determined by a SEBI registered Merchant Banker or a Chartered Accountant as per the Discounted Cash Flow Method ("**DCF**") in case of unlisted companies. The above pricing guidelines are also applicable for issue of shares against payment of lump sum technical knowhow / royalty due for payment / repayment or conversion of external commercial borrowings ("**ECB**") into equity.

2.5 CALCULATION OF TOTAL FOREIGN DIRECT INVESTMENT, DIRECT AND INDIRECT

i. **Direct foreign investment**: all investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.

ii. **Indirect foreign investment:** if the investing company is owned and controlled by 'non-residents entities', the entire investment by the investing company into the subject Indian company would be considered as indirect foreign investment. If however the investing company is not owned and controlled by non-resident entities then its investment into the subject Indian company would not be considered as indirect foreign investment. For example, if indirect investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

   a. Where Company Y has foreign investment less than 50 (fifty) percent, Company X would not be having any foreign investment through Company Y;

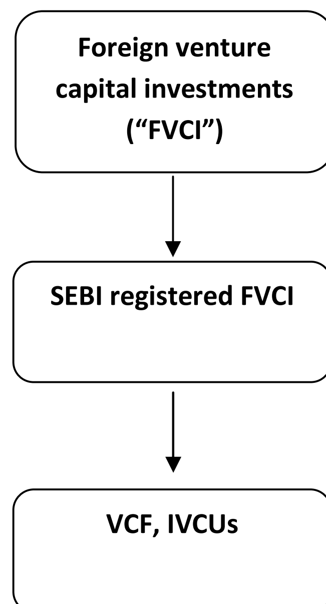
   b. Where Company Y has investment of more than 50 (fifty) percent, invests 26 (twenty six) percent in Company X, the entire 26 (twenty six) percent would be considered as foreign investment in Company X.

The total foreign investment would be the sum total of direct and indirect foreign investment.

2.6 MODE OF PAYMENT

An Indian company issuing shares / convertible debentures under the FDI Policy to a person or entity outside India shall receive the amount of consideration required to be paid for such shares / convertible debentures by inward remittance through normal banking channels; or ii) debit to non-interest bearing Escrow account in Indian rupees in India which is maintained with an authorized bank on behalf of residents and non-residents towards payment of share purchase consideration.

2.7 FOREIGN VENTURE CAPITAL INVESTMENT



A Securities and Exchange Board of India ("**SEBI**") registered foreign venture capital investor ("**FVCI**")[9] with specific approvals of the RBI can invest in Indian venture capital undertaking ("**IVCU**")[10] or venture capital fund ("**VCF**")[11] or in a scheme floated by such VCFs subject to the condition that the domestic VCF is registered with SEBI. These investments by SEBI registered FVCI, would be subject to the respective sector specific caps of FDI. Application fee for an IVCU of Rs 1,00,000 (one lakh) and registration charges of Rs 5,00,00 (five lakh) would apply at the time of registration of a venture capital fund with SEBI. Additionally, for a FVCI application fee USD 1,000 (one thousand) and registration charges of USD 5,000 (five thousand) would apply at the time of registration with SEBI. Registration of a FVCI is not necessary. There are only certain advantages to registration, like i) no prior approval required from the FIPB for making investments into Indian Venture Capital Undertakings and ii) a FVCI can purchase, sell securities at a price that is mutually acceptable to the parties and there is no ceiling or floor restriction applicable to

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[9] 'FVCI' means an investor incorporated outside India, which proposes to make investments in venture capital funds or venture capital investors in India. The foreign investor should be registered with SEBI as per SEBI (Foreign Venture Capital Investor) Regulations, 2000.

[10] An IVCU is defined as a company incorporated in India whose shares are not listed on a recognized stock exchange in India.

[11] A VCF is defined as a fund established in the form of a trust, a company including a body corporate and registered with SEBI under SEBI (Venture Capital Fund) Regulations, 1996 having a dedicated pool of capital raised in a manner specified under the said regulations, and which invests in venture capital undertakings in accordance with the said regulations.

them. FVCIs can purchase equity linked instruments and debt instruments including debentures of an IVCU or of a VCF through initial public offer or private placement or by way of private arrangement or purchase from third party. Further, FVCIs would also be allowed to invest in securities on a recognized stock exchange subject to the provisions of the SEBI (FVCI) Regulations, 2000 that states that not more than 66.67 (sixty six *decimal* six seven) percent of the investable funds shall be invested in unlisted equity shares and not more than 33.33 (thirty three *decimal* three three) percent in listed companies.

2.8 REPORTING OF FDI

i. Issue of shares and reporting of inflows

An Indian company receiving investment from outside India for issuance of shares / convertible debentures / preference shares under the FDI Policy, should report the details of the amount of consideration to the regional office concerned of the RBI not later that 30 (thirty) days from the date of receipt of inward remittance in the Form FC-GPR. The equity instruments should be issued within 180 (one hundred eighty) days from the date of receipt of the inward remittance. Non-compliance with the above provision would be reckoned as a contravention under the Foreign Exchange Management Act, 1999 ("**FEMA**") and could attract penal provisions.

ii. Transfer of shares and reporting of inflows

Reporting of transfer of shares between residents and non-residents and vice-versa is to be made in Form FC-TRS. The Form FC-TRS should be submitted within 60 (sixty) days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor / transferee, resident in India.

2.9 PURCHASE OF SECURITIES AND INVESTMENT BY NRIs

As far as FDI is concerned, there is not much difference in respect of NRI and other foreign investors, except a few alterations, for example NRIs are permitted to hold investment to the tune of 100 (hundred) percent in civil aviation as compared to foreign investment for which equity holding of 49 (forty nine) percent only is permitted. However, NRIs can purchase without any limit, on non-repatriation basis,

shares or convertible debentures of an Indian company, except in companies engaged in real estate business or / and agriculture, plantation activities or construction of farm houses, whether by public issue or private placement or right issue. The amount invested in shares or convertible debentures on non - repatriation basis and the capital appreciation thereon shall not be repatriated abroad, except only dividend from time to time declared by the Indian company. NRIs can however purchase without any limit on repatriation basis, i) Government dated securities; ii) treasury bills or units of domestic mutual funds; and iii) bonds issue by public sector undertakings in India. Remittance of maturity proceeds is permissible subject to payment of taxes.

2.10 INVESTMENT IN PARTNERSHIP FIRM / PROPRIETARY CONCERN

A NRI or a person of Indian origin ("**PIO"**) resident outside India can invest by way of contribution to the capital of a firm or a proprietary concern in India on non-repatriation basis provided; i) the amount is invested by inward remittance; ii) the firm or proprietary concern is not engaged in any agricultural / plantation or real estate business (i.e. dealing in land and immovable property with a view to earning profit or earning income there from) or print media sector; and iii) amount invested shall not be eligible for repatriation outside India. A person resident outside India other than NRIs or PIOs may make an application and seek prior approval of RBI, for making investment by way of contribution to the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the GOI. Additionally, no person resident outside India shall make any investment by way of contribution to the capital of a firm or a proprietary concern or an association of persons in India, provided the RBI may grant permission in exceptional cases. It's important to note that only NRIs or / and PIOs are permitted to set up partnerships or proprietorship concerns in India. No foreigners are allowed to do so. Even for NRIs or / and PIOs, investment is allowed only on non-repatriation basis.

2.11 IMPORT OF GOODS AND SERVICES

Except for goods included in the negative list which require license under the Foreign Trade Policy in force, AD category banks in India are permitted to remit money for import. Remittance for import of goods and services is permitted without any ceiling, provided the importer adheres to certain procedural requirements.

Remittance of money to-and-from India

CHAPTER

3

Evaluer on

doing business in India

In this chapter we will address the following:

- What are various RBI regulations applicable to remittance of money to-and-from India.
- Brief understanding on procedural aspect of remittance of salary proceeds.
- Legal understanding of capital and current account transactions

3 REMITTANCE OF MONEY

As a general rule, all current account transactions are freely permitted, unless categorically prohibited, while all capital account transactions are subject to restrictions unless categorically allowed. However, some restriction on current account transactions have been prescribed in order to ensure that capital is not remitted in garb of capital account payments.

3.1.1 The following are included in current account transactions

- **i.** payment due in connection with foreign trade, other current business, services and short term banking in ordinary course of business;
- **ii.** payment due as interest on loans and as net income from investments (dividend after deduction of tax);
- **iii.** remittance for living expenses of parents, spouse, children residing abroad;
- **iv.** current income like rent, dividend, interest etc;
- **v.** expense in connection with foreign travel, education and medical care of parents, spouse and children, subject to certain restrictions;
- **vi.** salary to foreign nationals / foreign directors, subject to appropriate provisions of the Indian Companies Act, 1956; and
- **vii.** all other transactions which are not capital account transactions, even if they are not covered above, including branch office abroad or in India.

3.1.2 The following include capital account transactions

- **i.** investment in India in: a) security issued by a body corporate or an entity in India and investment made therein by a person resident outside India;
- **ii.** import and export of currency to and from India by a person resident outside India;
- **iii.** acquisition and transfer of immovable property in India, other than lease for a period not exceeding five years, by a person resident outside India;
- **iv.** giving of guarantee by a person resident outside India in favor of, or on behalf of a person resident in India;

v. remittance outside India of capital assets of a person resident in India; and
vi. any borrowing or lending in foreign exchange in whatever form or by whatever name called.

3.2 BUSINESS AND COMMERCIAL REMITTANCE ABROAD

Since remittance of dividend on investment and interest in borrowings / debentures are current account transactions, these are permitted without restrictions. Remittance of sale proceeds of shares and securities (net of applicable taxes) to the seller of shares resident outside India is permitted, provided: a) the security was held by the seller on repatriation basis; and b) RBI's approval has been obtained for the sale of security and remittance of money.

3.3 REMITTANCE OF SALE PROCEEDS OF SECURITY

Remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India is permitted, subject to following:

i. the security was held by the seller on repatriation basis;
ii. a no-objection certificate / tax clearance certificate from the Income tax department has been obtained; and
iii. RBI approval has been obtained.

Additionally, dividends are freely repatriable without any restrictions (after tax deduction or Dividend Distribution Tax, is any as the case may be). Similarly, interest on fully, mandatorily and compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes).

3.4 FOREIGN TECHNOLOGY COLLABORATION

Foreign technology agreements are permitted in any industry in India. Payment can be made as lump sum payment or royalty bases on sales. Remittance of royalty or payment or lump sum fee under technical collaboration is permitted, without restriction, if the agreement is registered within India (automatic approval route). Payment can also be made by issuing equity shares, subject to FDI guidelines. The payment however is permitted in three stages viz. first 33 (thirty three) percent on

approval of agreement, 33 (thirty three) percent on delivery of know how documentation and balance on commencement of commercial production, subject to payment of taxes as applicable. If however, payment is made by issue of shares, then the investment must be as per FDI guidelines. Payment for foreign technology collaboration by Indian companies is allowed under the automatic route subject to the following:

i. the royalty limits are net of taxes and are calculated according to standards;

ii. the royalty payments will be calculated on the basis of the net ex-factory sale price of the products, exclusive of excise duties, *minus* the cost of standard bought-out components and the landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties, etc;

iii. proposals, which do not satisfy the parameters prescribed for automatic route of RBI, require clearance from Department of Industrial Policy and Promotion ("**DIPP**"), Government of India.

3.5 EMPLOYEE OF A FOREIGN COMPANY ON DEPUTATION IN INDIA

A foreign company may send a person on deputation in India. Such person may be either, (a) be citizen of a foreign state resident in India being an employee of a foreign company, or (b) a citizen of India employed by a foreign company outside India. Salary, remuneration to foreign nations / foreign directors is freely repatriable subject to tax deduction at source and compliance under the Indian Companies Act.

3.6 FOREIGN PERSON EMPLOYED BY COMPANY INCORPORATED IN INDIA

A citizen of foreign state resident in India, being in employment with the company incorporated in India, can open a foreign currency account outside India. His whole salary received in Indian rupees can be remitted outside India to his account after payment of income tax on entire salary accrued in India.

3.7 REMITTANCE FACILITY FOR NRIs, PIOs AND FOREIGN NATIONALS

Remittance outside India of current income like rent, dividend[12], pension, interest on debentures[13] etc in India of NRI / PIO is freely allowed even if they do not maintain NRO account subject to payment of taxes as applicable.

i. Repatriation of sales proceeds of property purchased by NRIs / PIOs should not exceed the amount paid for the property. Capital gains, if any, may be may be repatriated up to USD one million per financial year (April-March), subject to tax compliance. The amount also includes sale proceeds of assets acquired by way of inheritance or settlement.

ii. Foreign nationals who come to India on employment and who are eligible to open / hold a resident saving banking account, are permitted to re-designate their resident savings bank account maintained in India as NRO account on leaving the country after their employment to enable them to receive their legitimate dues, subject to the following conditions:

- **a.** the funds credited to the NRO account should be repatriated abroad immediately, subject to payment of taxes and other legitimate dues, if any in India;
- **b.** the amount repatriated abroad should not exceed USD one million per financial year; and
- **c.** the account should be closed immediately after all dues have been received and repatriated.

iii. A foreign national of non-Indian origin who has retired from employment in India may remit an amount not exceeding USD one million, per financial year (April - March).

iv. A NRI or PIO may remit an amount up to USD one million per financial year out of sale proceeds of assets (including assets acquired by way of inheritance or settlement), for all bonafide purposes, subject to payment of taxes and other legitimate dues.

[12] Dividends are freely repatriable without any restrictions (net after taxes at source or Dividend Distribution Tax, is any, as the case may be). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

[13] Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without restrictions (net of applicable taxes). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

3.8 PURCHASE AND SALE OF SHARES / CONVERTIBLE DEBENTURES ON NON-REPATRIATION BASIS

A NRI may without any limit, purchase on non-repatriation basis, shares or convertible debentures of an Indian company provided the investment is not in a prohibited sector as outlined by the GOI from time to time. The amount invested under in shares or convertible debentures under this scheme and the capital appreciation thereon shall not be allowed to be repatriated abroad.

Any person resident outside India may open and maintain a Non Resident Ordinary Rupee Account ("**NRO Account**") with an authorized bank for the purpose of putting through bona fide transactions denominated in India Rupees.

Permissible credits in NRO account

- **i.** Legitimate dues in India of the account holder. This includes current income like rent, dividend, pension etc.
- **ii.** Sale proceeds of assets including immovable property acquired out of rupee / foreign currency funds or by way of legacy or inheritance.
- **iii.** Residents' individuals may make rupee gift to a NRI / PIO who is a close relative of the resident individual. The gift amount would be within the overall limit of USD 200,000 (two hundred thousand) per financial year.

Permissible debits in NRO account

- **i.** Remittance outside India of current income like rent, dividend, pension, interest in India of the account holder.
- **ii.** Remittance up-to USD one million, per financial year (April-March), for all bona fide purposes, to the satisfaction of the Authorized Dealer bank.
- **iii.** Transfer to NRE account within the overall ceiling of USD one million per financial year subject to payment of tax.

Labour and employment law

CHAPTER

4

Evaluer on

doing business in India

In this chapter we will address the following:

- What is the essential difference between an employee and a workman?
- Brief understanding about various legislations applicable to international workers.
- Procedure for salary remittance by foreign nationals.

LABOUR AND EMPLOYMENT LAWS IN INDIA

4. CONCEPT OF EMPLOYEES AND WORKMEN IN INDIA:

In India, the employment laws applicable to employees are based on the category into which the employee falls. Such employees can be broadly divided into two categories:

i. **Managerial personnel and employees**

Persons performing predominantly managerial, administrative and supervisory duties are defined as employees. Typically, managerial personnel are governed by the terms and conditions of their contracts of employment, service rules and agreements negotiated with the employer, if any, and do not enjoy any additional protection of law or security of service. They have to approach a civil court of appropriate jurisdiction in case of breach of contract of employment

ii. **Workmen**

On the other hand, persons performing non-supervisory work including any manual, unskilled, skilled, technical operation or clerical work for hire or reward are classified as workmen. Workmen enjoy several protections, (majority of which deal with social security measures) benefits and amenities including terminal benefits. They can approach the Industrial Tribunal for any breach of their service terms.

4.1. IMPORTANT EMPLOYMENT LEGISLATIONS

Some of the relevant statues applicable to employees in India (particularly workmen) are discussed under the following heads:

4.1.1 Maternity

The Maternity Benefits Act, 1961 provides for maternity benefits to women working in any establishment for a period of six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

4.1.2 Work time regulations

The Shops and Commercial Establishment Act, promulgated by various states and the Factories Act, 1948 regulates the working time and conditions of employment of workers in commercial establishments or shops and factories in India.

4.1.3 Minimum Wage

The Minimum Wages Act, 1948 provides for minimum statutory wages and the basis for fixing them. These minimum wages are fixed in order to curb exploitation.

4.1.4 Trade Unions

Indian law recognizes the existence of trade unions. The Trade Unions Act, 1926 provides for the registration of trade unions and the rights and obligations of the trade unions and their officers. It is applicable to unions of workers.

4.1.5 Equal Remuneration

The Equal Remuneration Act, 1976 provides for equal remuneration to men and women and prevents discrimination against women on the ground of sex, in matters of employment.

4.1.6 Payment of Gratuity

The Payment of Gratuity Act, 1972 provides for payment of gratuity to an employee who has rendered continuous service for five years or more and is linked to the number of years in service. A statutory right of gratuity has also been given to all employees whose services are terminated on account of superannuation, retirement, resignation, death, or disablement.

4.1.7 Payment of Bonus

The Payment of Bonus Act, 1965 provides that every employee shall be entitled to be paid bonus by his employer in an accounting year, provided the employee earns less than the stipulated amount per month as mentioned in the Act.

4.1.8 Regulation of Contract Labour

The Contract Labour (Regulation and Abolition) Act, 1970 applies to every establishment in which 20 (twenty) or more workmen are employed on any day in the preceding 12 (twelve) months, as contract labour. Its aim is to place contract labourers at par with labourers employed directly, with respect to the working conditions and other benefits under labour law.

4.1.9 Employees Provident Fund

India has specific legislation dealing with the pensions for employees'. Under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (the "**PF Act**"), an employer employing more than 20 (twenty) employees earning less than a stipulated wage has to set up a compulsory contributory fund, which has to be paid to the employee following his retirement, or is paid to his dependents in the case of employee's premature death.

4.1.10 Insurance

The Employees State Insurance Act, 1948 (the "**ESI Act**") deals with insurance of employees in India. The main objective of the ESI Act is to provide workers whose monthly wages do not exceed a stipulated amount, medical and sickness benefits, maternity benefits to workers and well as their respective dependents and compensation to them for fatal and other work related injuries.

4.2 INTERNATIONAL WORKERS

Indian companies are permitted to engage the services of a foreign national (including NRIs or PIOs) on both short and long term assignments. Indian companies may engage services of such persons on short term assignments without prior approval of the RBI subject to compliance with certain procedural requirements. Indian companies can engage the services of foreign nationals on a long- term basis after acquiring prior RBI approval.

4.2.1 Remittance of salary

A citizen of a foreign state resident in India, being an employee of a foreign company and on deputation to the office, branch, subsidiary, or joint venture in India of such foreign company or being an employee of a company incorporated in India, may open, hold and maintain a foreign currency account with a bank outside India and receive/ remit the whole salary payable to him for the services rendered, by credit to such account, provided that income tax chargeable under the Income Tax Act, 1961 is paid on the entire salary as accrued in India.

4.3 VISA REQUIREMENTS

4.3.1 Employment visa

An employment visa is granted to foreigners desiring to come to India for the purpose of employment subject to the fulfilment of certain conditions, including the applicant is a highly skilled and/or qualified professional, who is being engaged or appointed by a company, organization, industry or undertaking in India on contract or employment basis.

4.3.2 Business visa

A business visa may be granted to a foreigner for the following purposes:

- **i.** foreign nationals who wish to visit India to establish industrial / business venture or to explore possibilities to set up industrial or business venture in India;
- **ii.** foreign nationals coming to India to purchase and / or sell industrial products or commercial products or consumer durables;
- **iii.** foreign nationals coming to India for technical meetings / discussions, attending board meetings or general meetings for providing business services support; and / or
- **iv.** foreign nationals who are partners in the business and/or functioning as directors of the company.

Intellectual Property Rights

CHAPTER

5

Evaluer on

doing business in India

In this chapter we will address the following:

- Understanding copyright issues with respect to copyright laws in India.
- Understanding patent and trademark protection in Indian.
- Understanding the basic difference between Indian and US patent laws.

INTELLECTUAL PROPERTY RIGHTS

5. INTRODUCTION

Intellectual properties in India include, inter alia, patents, trademarks, copyrights, geographical indication. India and its intellectual property ("**IP**") laws have come a long way of evolution since the British Raj era. The current laws in India are concurrent to its international obligations as a signee to TRIPS and a member of WIPO. The prevailing laws concerning Intellectual Property Rights in India are:

- **i.** Copyright Act, 1957 Amended in 2012 by the Copyright Act (Amendment) Act, 2011];
- **ii.** Trade Marks Act, 1999;
- **iii.** Patents Act, 1970 [Last Amended in 2005 by the Patents (Amendment) Act, 2005];
- **iv.** Geographical Indications of Goods (Registration & Protection) Act, 1999;
- **v.** Designs Act, 2000; and
- **vi.** Plant Varieties & Farmers Rights Act, 2001.

5.1. COPYRIGHT

It is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings, viz. rights of reproduction, communication to the public, adaptation and translation of the work. It is protection for the expression not the idea. It comes into existence as soon as any creative work is created but the registration of Copyright is sure to give you a better leverage while enforcing the same. E-filing for copyrights can be done in India on the website of the GOI, Copyright office.

5.2. PATENT

It is a negative right given to on an Inventor for excluding others from capitalising on the invention. Besides the usual criteria of novelty, non-obviousness, industrial applicability, patents in India have further criteria to fulfil through section 3 of the Indian Patents Act. It also contains the controversial section 3(d) made infamous

worldwide through Novartis`s Glivec case in the Supreme Court of India. Furthermore, there are four types of applications which an applicant can file for:

- **i.** ordinary application;
- **ii.** patent of addition application;
- **iii.** convention application;
- **iv.** patent co-operation treaty (“**PCT**”) application.

International applicants can file patents in India through the Convention or the PCT route. Average time taken by the Indian Patent Office for deciding on a patent application is four to five years from the date of filing.

5.3. TRADEMARK

Trademark is a sign, insignia, combination of colours, words, numerals that represents the goods or services of an enterprise or a person. It represents your business entity, your products and your quality. Generally word, numeral, graphic, device, shape, colour combination are recognised as a trademark in India. It is supposed to distinguish the make or manufacturer of goods or, provider of services from others. Therefore the distinctiveness of your mark is crucial for its register-ablility. The legislation pertaining to trademarks in India is the Trademarks Act, 1999 which is a comprehensive act dealing with all aspects of trademarks viz. registration, renewal, infringements. Indian trademarks law also recognises ‘well know’ trademarks and their maintainability in India even if not registered in India. International applicants can also claim a priority date through a Convention application for registering their trademarks in India within six months of filing in their respective convention country.

5.4. SOME DIFFERENCES BETWEEN THE INDIAN AND US PATENT LAWS

Even though both the countries, India and US, are signatories to the TRIPS agreement, still there are considerable differences in their patent regimes. In simple terms, the bar for granting patents in India is much higher than in United States. The criteria for considering innovative step is quite stringent in India.

Unlike the US, neither plant nor design patent is given in India they are given protection under separate acts. Business methods are patentable in US while in India they are not. While the various guidelines and court judgments in the US have made

it clear that software is patentable, however, in India computer programmes *per se* are not patentable. There is no provision for pre grant opposition whereas in India both pre grant and post grant opposition is allowed.

Environment and consumer legislations

CHAPTER

6

Evaluer on

doing business in India

In this chapter we will address the following:

- Brief introduction to environmental legislations in India like the Environmental Protection Act and other pollution control legislations.
- An understanding on consumer redressal procedure.

6. ENVIRONMENT AND CONSUMER LEGISLATIONS

6.1. Environment Clearances

Entrepreneurs are required to obtain statutory clearances relating to pollution control and environment for setting up an industrial project. The Government of India has listed about 30 (thirty) projects in respect of which environmental clearance need to be obtained from the Ministry of Environment, Government of India. This list includes industries like petrochemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilisers, dyes and paper. Additionally, setting up industries in certain locations considered ecologically fragile like Aravalli Range, coastal areas and Doon valley, among others are guided by stringent guidelines for setting-up an industrial unit. There are various enactments that govern environmental and pollution control matters including, the Environment (Protection) Act, 1986 (the "**Environment Act**"); the Water (Prevention and Control of Pollution) Act, 1974 (the "**Water Act**"), the Air (Prevention and Control of Pollution) Act, 1981 (the "**Air Act**"), Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 and the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. These are administered by either the Government of India or the various state governments. Consequences of non-compliance with relevant provisions of these statutes and rules framed there under are provided in the respective statutes include monetary fines and (or) imprisonment of the persons responsible. In some extreme cases, licenses and consents are liable to be cancelled. In addition to the above, there are various other laws that may be relevant in respect of the proposed commercial venture under consideration. Some of these include, the Indian Forest Act, 1927 (the "**Forest Act**"); the Forest (Conservation) Act, 1980 (the **Forest Conservation Act**"); the National Environment Tribunal Act, 1995; and the Public Liability Insurance Act, 1991 ("**PLIA**"). PLIA and the rules framed there under require the owners or controller of hazardous substances to take public liability insurance for the purpose of providing immediate relief to persons affected by

accidents occurring while handling any hazardous substances and for matters connected therewith. The right to claim relief as outlined above is in addition to any other rights available to a person to claim compensation under any other law, and in the event a person claims such right, the amount of such compensation shall be reduced by the amount of relief paid under the PLIA. The Environment Relief Fund Scheme, 2008 provides that the Government of India shall establish Environment Relief Fund. This fund shall administer and manage the payments required to be made under the public liability insurance.

6.2. CONSUMER LAWS

In India, consumer justice is part of social and economic justice. There are several laws that, in one way or the other, bring out the spirit of consumer protection in the country. There are diverse pieces of legislation relating to, standardization, grading, packaging and branding, prevention of food adulteration, weights and measures and hoarding and profiteering. While these do not specifically mention the concept of consumer interest they nevertheless contain provisions to defend consumers. The central consumer legislation is the Consumer Protection Act, 1986 (the "**CPA**"). The CPA is a comprehensive piece of consumer legislation enacted for the better protection of the interests of consumers by providing for the establishment of consumer councils and other forums for the settlement of consumer disputes. Under the provisions of the CPA, "Consumer" means, any person who buys goods or hires or avails of any services for a consideration. Upon the detection of any defect in the goods or of any deficiency in the services availed by a consumer, there is a right available to such consumer to file a complaint with the appropriate dispute redressal forum. There is a three-tiered structure of forums established under the CPA: the District Consumer Disputes Redressal Forums ("**District Forums**"), the State Consumer Disputes Redressal Commissions ("**State Commissions**") and the National Consumer Disputes Redressal Commission ("**National Commission**"). The jurisdiction of these forums to entertain a complaint depends on the value of the goods and services and the compensation claimed. In cases where the value does not exceed two million the jurisdiction is that of the District Forums. Where the value exceeds two million but does not exceed ten million, the complaint lies with the State

Commission and in cases where the value exceeds ten million the complaint is filed with the National Commission. If the consumer is not satisfied by order passed by a consumer rederessal forum, the consumer may file an appeal against the said order with the higher forum. Appeals against orders of the National Commission are filed with the Supreme Court. In addition to the consumer dispute redressal agencies, there are consumer protection councils, namely, the Central Consumer Protection Council and State Consumer Protection Councils. The objectives of these councils are the promotion and protection of consumer rights.

Enforcement of contracts

CHAPTER

7

Evaluer on

doing business in India

In this chapter we will address the following:

- Brief introduction to contractual legislations in India.
- An understanding of enforcement of contracts.
- An understanding of court procedures in India.

7 INTRODUCTION

India has a highly developed and codified legal system, extensively re-worked per the Constitution and substantively well-structured. There are detailed codified statutes governing commercial relations between parties including the Contract Act, 1872, the Sale of Goods Act, 1930 and the Specific Relief Act, 1963. The Indian judicial system is administered by a three-tiered judicial structure. The Supreme Court of India ("**Supreme Court**") is the apex federal court under which the respective High Courts that head state level judicial administration function. Each state is further divided into judicial districts presided over by a District and Sessions Judge, who is the highest judicial authority in a district. The judicial districts comprise of trial courts of both civil and criminal jurisdiction.

7.1 SUPREME COURT

The Supreme Court exercises original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to all disputes between the Government of India and one or more States or between two or more States. The Constitution grants an extensive original jurisdiction to the Supreme Court to enforce fundamental rights. The appellate jurisdiction of the Supreme Court can be invoked by a certificate of the High Court concerned or by special leave granted by the Supreme Court in respect of any judgment, decree or final order of a High Court in civil and criminal cases, involving substantial questions of law or as to the interpretation of the constitution. Under its advisory jurisdiction, the President of India is entitled to consult the Supreme Court on any question of fact or law of public importance. The Supreme Court has been responsible for the introduction of several concepts of critical importance including the concept of Public Interest Litigation ("**PIL**") which stands for litigation in the interest of the public in general. Through the PIL, the Supreme Court has imparted easier access to the law and introduced a broader public interest perspective to litigation addressing important issues including human rights, consumer welfare and protection of the environment.

7.2 HIGH COURTS

There are 21 (twenty one) high courts in India at present. High courts have powers of superintendence over all courts within their jurisdiction. High courts have original jurisdiction with regard to certain matters, in addition to appellate jurisdiction.

7.3 ARBITRATION AND ENFORCEMENT OF CONTRACTS

The concept of "Alternative Dispute Resolution" on the lines of internationally accepted standards was comprehensively re-modelled in India with the advent of the economic liberalization. The objective was to facilitate structured economic development, which required quick and cost effective resolution of domestic and trans-national business, and commercial disputes. The law pertaining to arbitration in India is contained in the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"). The Arbitration Act is based on the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law of International Commercial Arbitration (the "**ICC**"). It encompasses both domestic and international commercial arbitrations and gives freedom to the arbitrating parties in case of transborder contracts to choose the venue as well as the rules governing their arbitration. It further accords due recognition to mediation and conciliation. The Arbitration Act contains elaborate provisions on the composition and jurisdiction of arbitral tribunals and the conduct of arbitral proceedings. Further, the Arbitration Act incorporates the principle of finality of arbitral awards as in UNCITRAL and ICC and accords arbitral awards final and binding status between the parties. Under the Arbitration Act, interference of the courts in matters connected with matters such as the conduct of arbitration, decision of the arbitrator and challenges to awards have been minimized. However, courts are empowered, to order interim measures of protection including securing the amount in dispute, detention, preservation or inspection of property, injunction and the appointment of receivers. The Arbitration Act contains elaborate provisions in respect of "Conciliation" based on the UNCITRAL Conciliation Rules. Conciliation can be resorted to in relation to disputes arising out of a legal relationship, whether contractual or not. There are elaborate provisions regarding the role of the conciliator, disclosure of information, settlement agreements,

confidentiality and admissibility of evidence in such proceedings. Settlement agreements are final and binding on the parties and hold the same status and effect as an arbitral award. Settlement agreements can be enforced as a decree of court. Enforcement of a foreign award made by countries to which the New York Convention or the Geneva Convention applies and having a reciprocal arrangement with India is enforceable in India. Such enforceability is subject to compliance with certain conditions prescribed under Part II the Arbitration Act.

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