

## LEGALINK

### INVESTMENT AND BUSINESS START UP IN INDIA

#### (A) *Legal system*

##### **1. *What is the legal system (i.e. common law system, civil law system or both) in your country?***

The Indian legal system, as also all legislations in India, derive its source, contours and validity from the Constitution of India, which operates as the overarching *grund norm* and the fundamental law of the land. In essence, the Indian legal system combines a unique mix of common law tradition and civil law through the constitutionally entrenched mechanisms of independence of the Indian judiciary, balance of powers, judicial review, sanctity accorded to rule of law as also the power of the Supreme Court of India to be the final word on interpretation of laws for the entire country coupled with a sturdy precedent-based approach operating in an organic conjunction with laws enacted by the Indian legislatures.

While the Indian legislatures are competent to enact laws, it is in the domain of the judiciary to ascertain the proper meaning of the constitutional provisions and the laws enacted by the legislature. In view of the unique role of the judiciary in the context of the Indian Constitution, the Indian judiciary is constitutionally obligated to examine the functioning of the executive and the legislatures through the process of judicial review. This is a part of the delicate balancing of powers which runs through the Indian constitution.

The principal domain and function of the constitutional Courts in India is to interpret the law but, it is not infrequent to find during the course of such interpretation, the Indian Courts, in effect, legislate or, in the least, create and develop a rich pool of binding precedents. In the course of the interpretative process followed by the Indian Courts, this rich evolutionary precedent-based legal system (which India has inherited from its colonial past) is delicately weaved and enmeshed with the law enacted by the Indian legislatures thereby enabling the Indian courts to achieve a unique blend of inductive and deductive reasoning, procedural correctness and factual certainty together with consistency of law.

##### **2. *What are the major law courts in your country?***

The Supreme Court of India is the apex court of India with its seat at New Delhi. Following the Supreme Court in the judicial hierarchy, twenty one (21) High Courts have been established to exercise jurisdiction within the territories of the States and/or Union Territories of India.

Both, the Supreme Court of India and the High Courts, are set up under the Constitution of India and are courts of record. Notably, in addition to the normal trappings of original and appellate jurisdiction (coupled with powers of review and revision), these constitutional courts are also vested with extra-ordinary power to issue prerogative writs to any person or authority throughout the territories of India. The Supreme Court of India is also vested with the authority to adjudicate disputes between the Union and the States or between

any two (2) or more States. It is also empowered to render its opinion in connection with any references that may be made to it by the President of India.

Under this constitutional umbrella, district courts have been established within each district or local province and function within the supervisory jurisdiction of the High Court exercising jurisdiction over the territory within which the district court is so established. The district courts may be broadly divided on the basis of the nature of the jurisdiction they exercise, into civil courts and criminal courts. Jurisdiction of the judges of the civil and the criminal courts is determined with reference to subject matter, territory, monetary value of the claim/ pecuniary interest or cause involved, nature or severity of punishment involved, as the case may be.

The Indian Constitution also contemplates the establishment of a wide variety of tribunals for the purposes of trial and adjudication of different kinds of matters. Following this constitutional mandate, several courts, tribunals and forums have been established under various statutes of the Parliament and State Legislatures. Illustratively, the Consumer Forums and Commissions, Competition Commission *i.e.* the anti-trust commission (replacing, Monopolistic and Restrictive Trade Practices Commission), Board of Industrial and Financial Reconstruction (BIFR), Administrative Tribunals, Debt Recovery Tribunal (DRT), Foreign Exchange Tribunal and various Tax Tribunals have been established and are currently functioning in India. Appellate bodies to such tribunals, forums and commissions have also been established under the corresponding legislations.

**3. *What are the sources of laws (such as constitution, statute law and common law) in your country?***

The Constitution is the primary legal document and the principal fount and source of Indian laws. India has a unique blend of civil law and common law traditions and recognizes other sources of laws including laws enacted by the Parliament of India and the State Legislatures and judicial precedents. The Indian Constitutional document defines "law" to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

India also recognizes several international treaties, conventions, protocols and agreements to the extent that they have been executed, ratified and notified by the Union. Decisions of certain reciprocating nations/ territories are also recognized as valid and binding. Obiter of the Supreme Court and the High Courts, decisions of the Privy Council, opinion of eminent jurists, and precedents established in Commonwealth countries are regarded as having persuasive value.

**4. *What is/are the official language(s) in your country?***

Hindi has been adopted as the official language of the Union of India. Additionally, the Indian Constitution recognizes twenty one (21) other languages as being available to the Union/ State for being adopted as a language for official purposes.

The Indian Constitution mandates that all proceedings in the Supreme Court of India and in every High Court as also all authoritative texts of all Central and State Legislations, Ordinances, Bills or amendments thereto, all Orders, Rules, Regulations and Byelaws issued under the Constitution or under any Central or State law shall be in English. However, the Indian Parliament is competent to prescribe, by legislation, any other language for the said purposes. Some Indian States have in fact, prescribed, in addition to

English, Hindi or another regional/ vernacular language for being used in Court proceedings.

**(B) Foreign investment**

**5. Are there any restrictions faced by a foreign individual or company when they want to invest in your country? Is an approval or permit required if a foreign individual or company wants to enter a certain industry?**

Under the foreign exchange laws of India read with the foreign direct investment (“FDI”) policy of India as contained in the Consolidated FDI Policy (latest edition effective from April 1, 2012) issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (“FDI Policy”), FDI can be made through two routes – the Automatic Route and the Government Route. Under the Automatic Route, a person resident outside India or the Indian company does not require any approval from the Reserve Bank of India (“RBI”) or the Government of India for making FDI in India. There is, however, requirement to make filings with the RBI through the concerned authorized dealer by the Indian company pursuant to receipt of FDI. Under the Government Route, prior approval of the Government of India through the Foreign Investment Promotion Board, Ministry of Finance (“FIPB”) is required. Except in certain prescribed sectors, FDI in Indian companies is allowed up to 100% under Automatic Route. The FDI Policy also prescribes other conditions, such as pricing guidelines for issuance/ acquisition/ transfer of shares, which apply to investment/divestment involving a person resident in India and a person resident outside India.

There are certain other specified sectors where FDI up to prescribed sectoral caps is permitted under the Government Route such as banking - private sector (beyond 49% and up to 74%), print media – publishing of newspaper and periodicals dealing with news and current affairs (up to 26%), satellites – establishment and operation ( 74%), telecom services (beyond 49% and up to 74%) and defence (up to 26%).

There are also few sectors where FDI continues to be prohibited, such as gambling and betting including casinos, real estate business or construction of a farm houses, lottery business, atomic energy sector.

**6. Are there any exchange control or currency regulations in your country?**

India has a fairly liberal foreign exchange regime. The RBI plays a vital role in regulation and management of foreign exchange. Broadly all current account transactions are permitted. Capital account transactions are however subject to certain prescribed restrictions as they are not fully convertible. The Foreign Exchange Management Act, 1999 (“FEMA”) forms the statutory basis for foreign exchange management in India. FEMA contains only the basic legal framework and practical aspects are covered in policies and rules made by the Central Government and regulations made and circulars/ notifications issued by the RBI.

**7. What grants or incentives are available to a foreign individual or company to encourage investment in your country?**

Central and State Governments often provide incentives such as indirect and direct tax incentives for investment in industries under various schemes such as special economic zones, industrial parks schemes, etc. Incentives are in the nature of income -tax

exemptions for certain period of time (usually five to ten years) and indirect tax exemption such as exemptions from sales tax, excise duty, custom duty, etc. Some State Governments also offer land at concessional rates for setting up industries. There are also various sector and location specific schemes. These incentives are not nationality driven and are available to both domestic companies having only Indian investors and companies having FDI.

**(C) Business vehicles**

**8. What is the most common form of business vehicle used by foreign investors in your country?**

The most common form of business vehicle used by foreign companies is a limited liability company which can be public or private. A private company form is adopted/preferred where the company is proposed to be either a 100% owned subsidiary or closely held (by related/associated persons) whereas a public limited company form is most suited in situations where shares of such a company are to be held by larger number of shareholders. Foreign investors prefer to organise their investments/ventures in India as private companies as such companies also enjoy certain privileges/exemptions which are not available to public companies or a private company which is a subsidiary of a public company.

**Please provide details on:**

**i. Registration formalities;**

In terms of the relevant provisions of the Companies Act, 1956 ("**Companies Act**") the incorporation of a company in India involves two steps:

- a) Firstly, seeking of name availability for the proposed company; and
- b) thereafter, obtaining certificate of incorporation from the office of the concerned Registrar of Companies, ("**ROC**") by filing requisite documents.

Name availability

For seeking the availability of the proposed name for a company, an application is required to be made with the ROC in the prescribed e-Form 1A. The application for seeking name availability is also required to briefly state the main object(s) addressing the principal activities to be undertaken by the company, the initial authorized share capital of the company, particulars of the first directors and whether the proposed name(s) is/are based on a registered trade mark or is the subject matter of an application pending for registration under the [Indian] Trade Marks Act, 1999.

The name availability application is ordinarily processed by the ROC within 5-7 working days from the date of filing of the complete application.

Obtaining certificate of incorporation

Once the name has been made available by the ROC, the next step is the filing of inter alia the following documents with the ROC:

- Memorandum of Association ("**MoA**") signed by the initial subscribers;

- Articles of Association (“**AoA**”) signed by the initial subscribers;
- Intimation regarding the situation of the registered office of the company (e-Form 18);
- Particulars of appointment of first directors of the company having a Director Identification Number (“**DIN**”) (explained later) (e-Form 32); and
- Declaration regarding compliance with the provisions of the Companies Act in relation to the incorporation of the company (e-Form 1).

The MoA contains inter alia the information in relation to the name of the company, State in which the registered office of the company is to be situated, the objects of the company, share capital of the company with which the company is to be registered, etc.

The AoA provides for the regulations for internal management of the company and is essentially an agreement between members/shareholders of the company and the company and also between the members/ shareholders inter se. The AoA ordinarily contains provisions relating to the share capital, names of the first directors, lien on shares, calls on shares, transfer of shares, transmission of shares, forfeiture of shares, alteration of capital, procedure for general meetings and board meetings, voting rights of members, directors, manager, secretary, dividends and reserves, accounts and capitalization of profits. Such provisions should be consistent with the provisions of the Companies Act.

Upon filing of the aforesaid documents, requisite registration fees and stamp duty is payable to the ROC.

Upon the ROC being satisfied that the statutory requirements regarding registration have been duly complied with, the ROC registers the MoA, AoA and other documents filed and issues the Certificate of Incorporation. The Certificate of Incorporation is conclusive evidence that all requirements under the Companies Act have been complied with in respect of registration of the company.

Obtaining of Certificate of Incorporation may take at least 7-10 working days from the date of filing of the incorporation documents with the ROC.

*(Please note that a private company may commence its business immediately on incorporation whereas a public company has to obtain a certificate of commencement of business by submission of requisite documents, including a statement in lieu of prospectus, with the ROC prior to commencing business activities.)*

#### Other requirements

(a) Director Identification Number (DIN):

As per the relevant provisions of the Companies Act, a person cannot be appointed as a director of a company unless he has obtained a valid DIN from the Ministry of Corporate Affairs (“**MCA**”). For obtaining the DIN, e-Form DIN-1 is required to be electronically filed with the MCA alongwith requisite enclosures (proof of identity, proof of residence, verification and photograph). DIN is immediately generated upon successful filing of e-Form DIN 1.

(b) Digital Signatures:

All the e-Forms filed with the ROC (including the name availability application, the aforesaid e-Forms 1, 18 and 32) under the relevant provisions of the Companies Act are filed on-line (*via electronic mode*) and for this purpose digital signatures of the person(s) filing the e-Forms is required to be obtained from the concerned agencies.

**ii. *Minimum (and maximum) share capital;***

A private company is required to have a minimum paid-up share capital of INR 100,000 (approx. USD 1,850) while a public company is required to have a minimum paid-up share capital of INR 500,000 (approx. USD 9,250). There is no maximum limit on share capital in either case. That said, the paid-up capital (beyond the said minimum prescribed) is guided by the funds requirement of the company and the nature of business in which it is going to be engaged in. Further, for certain sectors, there are minimum paid-up capital requirements e.g. in telecom sector.

**iii. *Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities)***

Subject to pricing guidelines prescribed by the RBI and other prescribed conditions equity shares can be issued by an Indian company to a foreign investor for consideration other than cash:

- (a) under the Automatic Route against (i) external commercial borrowings (ECB) (which Indian company may have availed from such foreign investor in compliance with, and subject to conditions as prescribed under, the applicable ECB guidelines); and (ii) amount payable towards lumpsum technical know-how fee, royalty; and
- (b) under the Government Route against (i) import of capital goods/ machinery/ equipment (excluding second hand machinery) provided an application is made for approval within one-hundred and eighty (180) days from the date of shipment of goods; and (ii) pre-operative/ pre-incorporation expenses that may be incurred by the foreign investor provided an application for approval is made within one-hundred and eighty (180) days from the date of incorporation of the company.

**iv. *Any restrictions on foreign shareholders***

Foreign shareholders are treated at par with the Indian shareholders and enjoy the same rights under the Indian company law. Under the Indian foreign exchange laws, there is an element of disparity when it comes to the pricing for the sale and purchase of shares by a person resident outside India to/ from a person resident in India. In case of acquisition of shares from a person residents in India consideration cannot be less than the share valuation arrived at as per RBI pricing guidelines and in case of transfer of shares to a person resident in Indian, it cannot exceed the share valuation arrived at as per RBI pricing guidelines.

**v. *Management structure and any restrictions on foreign managers***

Under the Companies Act, there is no residency/ local representation requirements for the directors of a private limited company and therefore all directors may be persons resident outside India. That said, from practical and procedural standpoint foreign companies normally appoint at least two resident Indian directors (either as proper directors or as alternate directors) to take care of routine matters requiring board meetings.

Further, a public limited company or a private company which is a subsidiary of a public limited company having a paid up capital of Rupees fifty million (approx. USD 9.1 million) or more is required to appoint a managing director/whole time director or a manager and such person shall be resident in India. In the case of a non resident approval from the Central Government is necessary for his appointment as managing director.

That said, in case of companies engaged in specified business activities and having foreign direct investment, the FDI Policy provides for conditions with respect to residency requirements. For instances in case of defence sector, the management should be in Indian hands with majority representation on the board of directors as well as the Chief Executives of the company being resident Indians and in case of telecom services, the majority of directors on the board of the company shall be Indian citizens.

***vi. Directors' liability***

The directors of a company are vicariously liable for offences committed by a company by virtue of holding office (vicarious liability). Directors are also liable for offences committed personally (direct liability). Vicarious liability can be criminal or civil and further, serious or non-serious. Vicarious liability (civil) is rare and doesn't often arise except where a statute specifically provides for the same e.g. under certain provisions of direct tax statutes - where under certain circumstances a director is personally liable to pay the taxes of a private limited company.

For a company's director in India, vicarious liability (criminal) is more common as most statutes that apply to a company, have penal provisions for offences committed by a company for which directors can also undergo punishment.

***vii. Parent company liability***

The liability of a member of a company limited by shares incorporated under the Companies Act is limited to the amount for the time being remaining unpaid on his/ its shares. Accordingly, in case of winding up of such a company no contribution is required from any member exceeding the amount, if any, unpaid on the shares in respect of which he/ it is liable as such member. A shareholder of a company limited by shares is not personally liable for the debts of the company.

Whilst Indian law recognizes that the subsidiary and the parent/holding company or a joint venture company and the corporate shareholders of such joint venture are distinct legal entities, the courts in India have in certain extreme and exceptional circumstances applied the doctrine of piercing the corporate veil, predominantly in the areas of fraud and taxation. Therefore under circumstances where the courts in India lift/pierce the corporate veil, the shareholders of the company can be proceeded against directly.

***viii. Reporting requirements (including filing of accounts)***

Under the Companies Act, every company is required to keep proper books of accounts which are to be prepared/ maintained having regard to the applicable accounting standards (as framed by the Institute of Chartered Accountants of India). Annually audit is required to be conducted by the statutory auditors of the company and they report and comment on the financial statements which comprise of the balance sheet and profit and loss account. The balance sheet and profit and loss account are to be prepared in the

prescribed format as provided under the Companies Act. Directors' report is also prepared for providing prescribed information and comments on the observations of the auditors, if any.

The audited financial statements are required to be approved and adopted by the members of the company at the annual general meeting of the company and thereafter the company is required to file the same in the prescribed forms (e-Form 23AC and e-Form ACA) with the concerned ROC within the period of 30 days from the date of the annual general meeting. Further, within 60 days from the date of the annual general meeting, the company is also required to file the annual return with the ROC providing certain information in relation to the share capital, indebtedness, directors and shareholders etc. of the company as on the date of annual general meeting.

A company having a paid up capital of INR 1 Million (approx. USD 1850) or more and less than INR 50 Million (approx. USD 0.91 million) is required to obtain a compliance certificate from a practicing company secretary certifying that the company has complied with all the provisions of the Companies Act and copy of such certificate is required to be attached to directors' report. Such compliance certificate is required to be filed with the ROC in the prescribed form (eForm-66) within 30 days from the date of annual general meeting.

In case of companies listed on a recognized stock exchange there are additional reporting requirements under various securities laws and listing agreement which include reporting of quarterly unaudited financial results with the recognized stock exchange, pledge of shares by promoters etc.

#### **(D) Employment**

##### **9. What are the main laws regulating employment relationships in your country?**

India has a large number of labour laws, both at the Central and State levels. Whilst the Central labour laws are applicable to the entire country (with state specific amendments), State labour laws are applicable only to a particular State.

Broadly, the Central labour laws can be classified as follows:

- Regulatory legislations to oversee the conditions of work at workplace, *e.g.* Factories Act, 1948, Contract Labour (Regulation and Abolition) Act, 1970;
- Legislations related to wages, *e.g.* Payment of Wages Act, 1936, Minimum Wages Act, 1948;
- Legislations related to social security, *e.g.* Employees' State Insurance Act, 1948, Employees Provident Funds and Miscellaneous Provisions Act, 1952 and Maternity Benefit Act, 1961;
- Legislations related to Industrial Relations, *e.g.* Industrial Disputes Act, 1947, Industrial Employments (Standing Orders) Act, 1946 and Trade Unions Act, 1926;
- Legislations related to service conditions, *e.g.* Sales Promotion Employees (Conditions of Service) Act, 1976;
- Miscellaneous legislations, *e.g.* Apprentices Act, 1961.



**10. Is a written contract of employment required in your country, and if so, must it contain any particular language? Are any agreements and/or implied terms likely to govern the employment relationship?**

A written contract of employment is not mandatory in all States in India and there is no prescription as to the language in which a contract of employment must be. There are a few States, however, which by virtue of the Shops & Establishments legislation applicable in that State or by virtue of the model standing orders (as described below), may require a written contract of employment for certain categories of employees. That said, it is always advisable and is a usual practice in India to issue appointment letters to all employees to avoid any issues at a later stage if the matters become contentious.

Except in the case of a few State legislations, there are no standard employment contract drafts/ templates prescribed by law. Certain state legislations dictate certain principles governing terms of employment and sometimes also prescribe that the employment letter should contain the following:

- the name of employer;
- the name, if any, and the postal address of the establishment;
- the name, father's name and the age of the employee;
- the hours of work;
- the rate of wages or salary;
- designation or nature of work for which employed;
- date of appointment.

It may also be noted that the Industrial Employment (Standing Orders) Act, 1946 ("**Standing Orders Act**"), which is applicable to certain prescribed industrial establishments (depending on the number of workmen employed on any day of the preceding twelve months), requires employers to define with sufficient precision, the conditions of employment of workmen employed by them and to make the said conditions known to such workmen. The Central Government has prescribed the model standing orders which contain the conditions of employment of such workmen which an employer may adopt.

The model standing orders framed by some States also prescribe the form of the appointment letters to be issued to workmen or stipulate that every workman at the time of his appointment should be given a written order specifying his appointment.

**11. Do foreign employees require work permits and/or residency permits if they work in your country? If so, how long does it take to obtain them and how much do they cost?**

A foreign national coming to India to undertake employment requires an employment visa (designated as 'E' Visa).

Listed below are some mandatory conditions that a foreign national is required to comply with to be granted an employment visa in India:

- The foreign national must be a highly skilled and/or qualified professional and the purpose of work applied for by the foreign national/ should not be such for which qualified Indians are readily available. Employment visas are not granted for routine, ordinary secretarial/clerical jobs and are in any event discretionary as the relevant consulate may be guided by various factors;

- The foreign national seeks to visit India for employment in a company/firm/organization registered in India or for employment in a foreign company/firm/organization engaged for execution of some project in India;
- The foreign national should draw a salary in India in excess of US\$ 25,000 per annum (which may be calculated taking into account salary and all other allowances paid to the foreign national in cash, perquisites like rent free accommodation which are included in 'salary' for purposes of calculating income tax). The only exceptions to this rule are - (a) ethnic cooks, (b) language teachers (other than English language teachers)/ translators and (c) staff working for the concerned Embassy/High Commission in India.

It is not possible to put a time frame for getting the employment visa as it varies from case to case and as mentioned above are discretionary. Also, consular fees are fixed on the basis of reciprocal arrangements or special agreements between governments, and therefore the fees for visas also differ based on the citizenship of the applicant.

Additionally, it may be noted that foreign nationals visiting India on a long term (more than one hundred eighty (180) days) visa or where the visa is so endorsed are required to register themselves with the concerned Foreigner Regional Registration Office ("FRRO") / District Superintendents of Police within fourteen (14) days of their first arrival, irrespective of the duration of their stay. On registration, the FRRO concerned may issue residential permit for the validity of the visa period. The FRRO registration is to be surrendered at the time of exit from India by the foreign national concerned.

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

Usually, in case of majority of the categories of employees, they are not entitled to management representation in relation to corporate transactions such as redundancies and disposals. That said industrial undertaking which have recognised trade unions or States where trade unions are very active, the management do consult and take them into confidence for redundancies, settlements, etc. However, when it comes to labour/workmen category Industrial Disputes Act, 1947 ("**ID Act**") does provide for the constitution of a works committee in certain industrial establishments (depending on the number of workmen employed). Workmen are elected to the works committees and in some States, trade unions may also nominate their nominees on a works committee. A works committee does not take part in the management of the industrial enterprise, it is required to promote amity and good relations between the employer and the workmen.

***13. Are there any employment protection laws (such as minimum wage law and/or maximum working hours law) in your country?***

In India, a number of legislations, both at the Central and State level, provide for various benefits to be provided by an employer to its employees and to govern and protect their conditions of employment. Brief details of some of the employment protection statutes are given below:

### The Minimum Wages Act, 1948

The Minimum Wages Act, 1948 (“**Minimum Wages Act**”) provides for fixing minimum rates of wages in certain employments notified in the schedule to the Minimum Wages Act and the employer is liable to pay to every employee engaged in a scheduled employment wages at rates not less than the minimum rate of wages fixed by the appropriate Government.

### Equal Remuneration Act, 1976

The Equal Remuneration Act, 1976 provides for the payment of equal remuneration to men and women workers and for prevention of discrimination against women in the matter of employment.

### Payment of Wages Act, 1936

The Payment of Wages Act, 1936 (“**Payment of Wages Act**”) provides that the wages of every person employed in a factory, industrial or other establishment in which less than one thousand (1,000) persons are employed are required to be paid before the expiry of the seventh (7<sup>th</sup>) day and in any other case before the expiry of the tenth (10<sup>th</sup>) day after the last day of the wage period in respect of which the wages are payable.

### Factories Act, 1948

The Factories Act, 1948 (“**Factories Act**”) aims at consolidating the law regulating the working conditions of blue collar workers in factories. The main objective of the Factories Act is to provide for protection of workers employed in factories against industrial and occupational hazards. The Factories Act also regulates the working hours, leave, holidays, overtime, employment of children, women and young persons, etc.

### Shops and Establishments Acts

As mentioned above, each State has a Shops and Establishments Act which is applicable to shops and (commercial) establishments other than factories covered under the Factories Act.

The Shops and Establishments Acts contain, *inter alia*, provisions relating to daily and weekly hours of work including overtime and the rates applicable for overtime work. The Shops and Establishments Acts also contain provisions relating to weekly holidays, annual leave with wages, sick leave etc. These provisions vary from State to State as per the law enacted in the respective State.

### Payment of Bonus Act, 1965

The Payment of Bonus Act, 1965 (“**Bonus Act**”) provides for payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith. The basic theme of the Bonus Act is to provide for a scheme of sharing of the enterprise’s profits with those who are instrumental in ensuring that the profits are realized, namely the workers, and also to ensure an increase in the earning capacity of the workers.

**14. Is there any pension system in your country? Is it on a mandatory or voluntary basis? If so, please give details.**

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**Provident Funds Act**") provides for the institution of a provident fund, family pension fund and deposit linked insurance fund for employees in factories and other establishments. It provides for a fund to which both the employer and the employee contribute a specified percentage of the employee's salary so as to provide the employee with a certain degree of financial security, at the time of retirement. The Provident Funds Act applies to most private sector organizations employing twenty (20) or more persons or any other establishment notified by the Central Government even if employing less than twenty (20) persons.

The Provident Funds Act imposes a statutory obligation on the employer of the establishment to make a monthly contribution calculated at the rate of 12%, which comprises of 8.33% towards pension fund and 3.67% towards provident fund, of the basic wages, dearness allowance and including cash value of any food concession and retaining allowance (if any) paid to the employees' for each month. The employer is further required to deduct an equal amount from the employees' pay as the employees' contribution under the Provident Funds Act. The amount of the employer's and the employee's contribution is required to be deposited by the employer with the fund/ regional provident fund organization within the prescribed time each month.

The Employees' Provident Fund Scheme, 1952 ("**Scheme**") framed pursuant to the Provident Funds Act provides that every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, is entitled and required to become a member of the fund. A member of the Employees' Provident Fund Scheme may withdraw the full amount standing to his credit in the fund on termination of his service in the case of mass or individual retrenchment. It may be pertinent to mention that even in cases where Provident Fund Act is not applicable, companies do create such funds for its employees as otherwise it may be difficult to hire people without this benefit as in India otherwise there are no social security schemes.

**15. How is the termination of individual employment contracts regulated in your country? Under what circumstances is the dismissal of an employee unlawful?**

Indian employment laws provide for the concept popularly known of 'protected employees', which is to say that employees who are considered "workmen" (blue collar workers) under the ID Act have statutory rights and whose services cannot be easily terminated and therefore the 'hire and fire' or termination-at-will rules cannot be enforced easily against them.

Employees who do not fall within the meaning of "workmen" can be governed by contracts providing "at-will" termination provisions and services of such employees can then be terminated in accordance their employment contracts. Practically however, in India termination is always a sensitive issue and has to be handled with care. To ease the process of termination, methods such as exploring the resignation route and offering voluntary retirement schemes or making ex-gratia payments over and above the employee's termination benefits, could be resorted to, wherever possible.

Also, please see the response to the query 16 below.

**16. Are redundancies and mass layoffs regulated in your country? If so, please give details.**

Depending on the nature of work being performed by the employee and his monthly salary, the termination of employment of an employee may be governed by the following:

- The Industrial Disputes Act, 1947 (ID Act);
- Standing Orders under the Industrial Employment (Standing Orders) Act, 1946
- The Shops & Establishments Act of the State where the establishment is located; and/or
- The employment contract.

Industrial Disputes Act, 1947

The obligations of an employer in respect of layoff, closure and retrenchment of workmen are regulated by the ID Act. It may be mentioned that retrenchment, as defined below, does not include termination of the employment by the employer as a punishment inflicted by way of disciplinary action.

The ID Act is applicable to every industrial establishment carrying on any business, trade, manufacture or distribution of goods and services, irrespective of the number of workmen employed therein. The ID Act defines a "workman" to mean any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward but does not include a person who is employed mainly in a managerial or administrative capacity or who, being employed in a supervisory capacity, draws wages exceeding INR 10,000 per mensem.

Further, the ID Act defines "retrenchment" to mean the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include voluntary retirement or retirement of the workman on reaching the age of superannuation or termination of the service of the workman as a result of the non-renewal of the contract of employment or termination of the service of a workman on the ground of continued ill-health.

The term "industry" has been defined in the ID Act to mean *inter alia* any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply, or distribution of goods or services with a view to satisfy human wants or wishes.

In case of an industrial establishment employing less than one hundred (100) workmen, the ID Act provides that no workman employed, who has been in continuous service for not less than one (1) year under an employer, shall be retrenched by that employer until:

- (a) the workman has been given one (1) month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen (15) days' average pay for every completed year of continuous service or any part thereof in excess of six (6) months; and

- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

Similarly, in case of an industrial establishment (being a factory) employing not less than one hundred (100) workmen during the preceding twelve (12) months, the ID Act provides no workman who has been in continuous service for not less than one (1) year under an employer shall be retrenched by that employer until:

- (a) the workman has been given three (3) months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate government or such authority as may be specified by that government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

Where permission for retrenchment has been granted or where permission for retrenchment is deemed to be granted (after expiry of sixty (60) days), every workman who is employed in that establishment immediately before the date of application for permission shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen (15) days' average pay for every completed year of continuous service or any part thereof in excess of six (6) months.

#### Termination of employment pursuant to disciplinary proceedings as per the Standing Orders

As mentioned above, the Standing Orders Act requires employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to the workmen employed by them. The model standing orders prescribed by the Government (which an employer may adopt) contain the conditions of employment including termination pursuant to disciplinary action.

The model standing orders framed under the Standing Orders Act stipulate that in case of workmen guilty of misconduct the employer can initiate disciplinary proceedings against the workmen. If on the conclusion of the enquiry, the workman is found guilty of the charges framed against him then an order of dismissal can be passed by the employer.

#### *Shops & Establishments Acts*

The Shops and Establishments Acts of various states have different provisions for termination of employment and severance obligations for employees employed in the establishments covered by such acts.

By way of example, the Bombay Shops & Establishments Act, 1948 requires that an employer shall not dispense with the services of an employee who has been in continuous employment of the employer:

- (a) for not less than a year, without giving such employee at least thirty (30) days' notice in writing or wages in lieu thereof;
- (b) for less than a year but more than three (3) months, without giving such employee at least fourteen (14) days' notice in writing or wages in lieu thereof.

The above provisions, however, are not applicable where an employee is dismissed for misconduct.

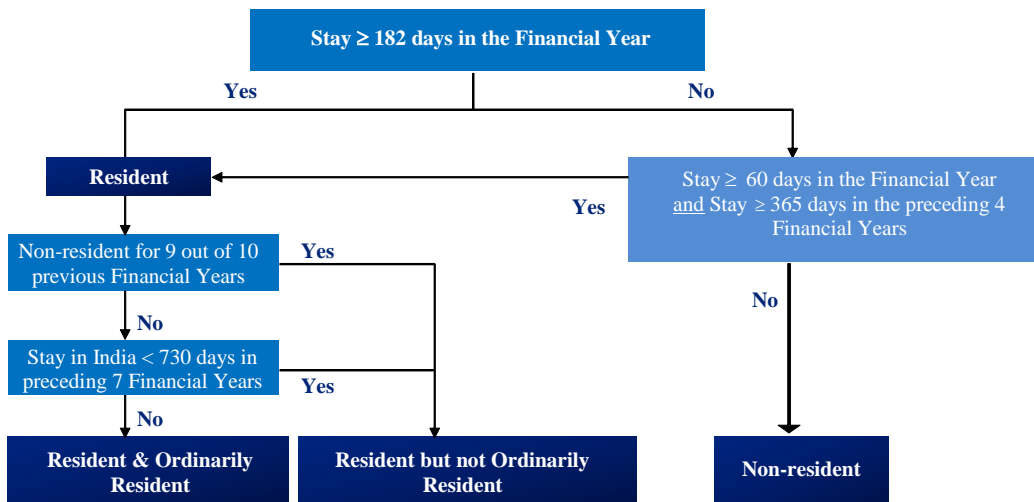
*Employment Contracts*

If the employee is not covered by either of the abovementioned statutes or is exempted, then the termination of his employment and severance obligations will be governed by the terms of his employment contract. Usually, employment contracts provide for written notice of durations ranging from one (1) to three (3) months or salary in lieu thereof for termination of employment without cause. However, though the legal technical position is as aforementioned, in practice due to the sympathetic considerations in Indian courts owing to the social welfare nature of the state, enforcing such provisions can lead to contentious issues and uncertain outcomes. Usually, settlements in the nature of 'hand-shakes' are advised in such matters. Termination of employment for gross misconduct may not require any notice.

**(E) Tax**

**17. In relation to employees, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?**

Taxability of individuals is determined based on their residential status in India during the relevant tax year. The tax year in India is the financial year which is a twelve (12) month period commencing from 1 April through 31 March. Under the Indian Income Tax Law, the residential status of an individual is determined as under:



However, it has been provided that where an individual, being a citizen of India, leaves India in any tax year as a member of the crew of an Indian ship or leaves India for the purposes of taking up employment outside India or an Indian citizen or person of Indian origin, being outside India, comes on a visit to India, then the sixty (60) days mentioned

above would be substituted by one hundred eighty two (182) days. This would be subject to the provisions under the relevant tax treaty if an individual is a tax resident of another country as well.

**18. Under what circumstances are employees subject to taxation in your country?**

An employee is taxable in India on the basis of its residential status in India. The brief overview of the scope of income which is taxable in the hands of the employee depending on his or her residential status is as under:

| Type of Income  | Resident | Resident but not ordinary resident | Non-resident |
|---|----------|------------------------------------|--------------|
| Income received or deemed to be received in India by or on behalf of the person   | ✓        | ✓                                  | ✓            |
| Income accruing or arising or is deemed to accrue or arise to the person in India   | ✓        | ✓                                  | ✓            |
| Income accrues or arises to the person outside India  | ✓        | X                                  | X            |
| Income accrues or arises to the person outside India and is not derived from business controlled in or a profession set up in India | ✓        | X                                  | X            |

**19. What income tax or social security contributions must be paid by:**

**i. Employees?**

Employees pay income-tax on the basis of their residential status as discussed above. The employees, both Indian citizens and otherwise, are liable to income-tax in India on their income (including salary after statutory deductions) for the tax year at the following rates:

| Status of individual                              | Slabs (INR) |                   |                     |                     |
|---|-------------|-------------------|---------------------|---------------------|
|   | 0%          | 10%               | 20%                 | 30%                 |
| Resident / non-resident                           | 200,000     | 200,001 – 500,000 | 500,001 – 1,000,000 | 1,000,001 and above |
| Resident – Senior Citizen (60 to 79 years)        | 250,000     | 250,001 – 500,000 | 500,001 – 1,000,000 | 1,000,001 and above |
| Resident – Very Senior Citizen (80 years or more) | 500,000     | –                 | 500,001 – 1,000,000 | 1,000,001 and above |

The income-tax so computed is required to be increased by the following:

**Surcharge:** Nil. Surcharge is proposed to be applied by the Finance Bill, 2013 for tax year 2013-14 at the rate of 10% on total income exceeding INR 10 Million.



Education Cess: Charged at the rate of 3% on the income-tax and surcharge computed above.

**ii. Employers, in relation to their employees?**

Every employer is required to withhold tax from the salary paid to an employee equal to the income-tax as computed in para 19.i. above and deposit the same with the Government. Further, every employer is required to file a quarterly withholding tax statement with the tax authorities and issue withholding tax certificate to the employees on annual basis.

**20. In relation to corporations, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?**

The Income Tax Act, 1961 levies tax on the basis of tax residency principle. The brief overview of the relevant provisions is as under:

| Type of Person                      | Basis of Taxation       | Method of determining tax residency   |
|-------------------------------------|-------------------------|---|
| Company                             | Tax residency principle | A company is said to be resident in India in any tax year, if:<br>(i) it is an Indian company; or<br>(ii) the control and management of its affairs is wholly situated in India during the tax year |
| Limited Liability Partnership (LLP) | Tax residency principle | LLP is said to be a resident in India in every case except where the control and management of its affairs is situated wholly outside India.  |

**21. Under what circumstances are incorporations subject to taxation in your country?**

Incorporations are taxed based on their residential status in India. A domestic company is taxed on its global income while a foreign company is taxable only in respect of the income which is received in India or deemed to be received in India or an income which accrues or arises or is deemed to accrue or arise in India. The taxability of the foreign company in India is subject to the provisions of the domestic tax law or the relevant tax treaty, whichever is more beneficial to the taxpayer.

**22. What are the main taxes that potentially applicable to a corporation and what are their tax rates?**

Direct Taxes

Incorporations in India are liable to pay following direct taxes:

Income Tax: The normal rate of tax payable on the total income during a tax year is as under:

| Particulars                   | Tax Rate         |                 |                               |
|-------------------------------|------------------|-----------------|-------------------------------|
|                               | Domestic Company | Foreign Company | Limited Liability Partnership |
| Income up to INR 10 Million   | 30%              | 40%             | 30%                           |
| Income exceeds INR 10 Million | 30%              | 40%             | 30%                           |

The income-tax so computed is required to be increased by the following:

*Surcharge:* Where total income exceeds INR 10 Million, 5% of income-tax in case of domestic companies and 2% in case of foreign companies. No surcharge applicable for Limited Liability Partnership.

Surcharge is proposed to be enhanced by the Finance Bill, 2013 for tax year 2013-14:

- (a) Where the total income exceeds INR 10 Million but does not exceed INR 100 Million – 5% of income-tax for domestic companies and 2% for foreign companies.
- (b) Where the total income exceeds INR 100 Million – 10% of income-tax for domestic companies and 5% for foreign companies.

Surcharge is proposed to be applied on Limited Liability Partnership by the Finance Bill, 2013 for tax year 2013-14 at the rate of 10% of income-tax if the total income exceeds INR 10 Million.

*Education Cess:* Charged at the rate of 3% on the income-tax and surcharge computed above.

*Minimum Alternate Tax (“MAT”):* MAT is payable where the total tax payable by a company under normal provisions of the domestic tax laws is less than 18.5% of book profits at the following rates:

| Particulars                      | Tax Rate         |                 |                               |
|----------------------------------|------------------|-----------------|-------------------------------|
|                                  | Domestic Company | Foreign Company | Limited Liability Partnership |
| Book profit up to INR 10 Million | 18.50%           | 18.50%          | 18.50%                        |
| Income exceeds INR 10 Million    | 18.50%           | 18.50%          | 18.50%                        |

*Surcharge:* Where total income exceeds INR 10 Million, 5% of income-tax in case of domestic companies and 2% in case of foreign companies. No surcharge applicable for Limited Liability Partnership.

Surcharge is proposed to be enhanced by the Finance Bill, 2013 for tax year 2013-14:

- (a) Where the total income exceeds INR 10 Million but does not exceed INR 100 Million – 5% of income-tax for domestic companies and 2% for foreign companies.

(b) Where the total income exceeds INR 100 Million –10% of income-tax for domestic companies and 5% for foreign companies.

Surcharge is proposed to be applied on Limited Liability Partnership by the Finance Bill, 2013 for tax year 2013-14 at the rate of 10% of income-tax if the total income exceeds INR 10 Million.

*Education Cess:* Charged at the rate of 3% on the income-tax and surcharge computed above.

*Dividend Distribution Tax (“DDT”):* DDT is payable on dividends declared, distributed or paid by the domestic companies at the rate of 16.2223%. No distribution tax is payable by the Limited Liability Partnership on distribution of profits to its partners.

DDT is proposed to be enhanced by the Finance Bill, 2013 for tax year 2013-14 at the rate of 16.995%.

*Wealth Tax:* Wealth tax is payable at the rate of 1% on the net wealth exceeding INR 3 Million.

#### Indirect Taxes

In addition to the aforementioned direct taxes, any company having operations in India needs to abide with below mentioned Central and State level indirect taxes:

*Central Excise:* Tax on manufacture or production of goods – base rate of 12.36%.

*Customs:* Tax on import and export of goods – base rate of 28.85%.

*Service Tax:* Tax on provision or receipt of services – rate of 12.36%.

*State Value Added Tax:* Tax on intra-state sale or purchase of goods – rate varies from State to State and product to product but normally ranges from 4% to 15%.

*Central Sales Tax:* Tax on inter-state sale or purchase of goods – 2% (concessional rate against Statutory Forms) or VAT rate of the originating State applies (if Statutory Forms are not available).

*State Entry Tax:* Tax on entry of goods in the State from outside – rate varies from State to State.

### **23. Please explain how each of the following is taxed in your country:**

#### ***i. Dividends paid to foreign corporate shareholders?***

Any domestic company which declares, distributes or pays any amount by way of dividend (whether interim or otherwise) will be required to pay dividend distribution tax at the rate of 16.223% (Proposed to be enhanced to 16.995% for tax year 2013-14 by the Finance Bill, 2013). Such dividend is tax free in the hands of the shareholders.

#### ***ii. Dividends received from foreign companies?***

Normally, dividend received by an Indian resident from a foreign company is taxable at the normal rates applicable to such person. However, presently, if an Indian company receives

during the tax year 2012-13 income by way of dividend declared, distributed or paid by a specified foreign company (*i.e.* a foreign company in which the Indian company holds 26% or more in nominal value of the equity share capital of the company), such dividend would be taxed at the peak rate of 16.2225% (Proposed to be enhanced to peak rate of 16.995% for tax year 2013-14 by the Finance Bill, 2013). This provision is applicable only for the tax year 2012-13 (Extended for one (1) more year, *i.e.* tax year 2013-14 by the Finance Bill, 2013) and its applicability for future years is subject to further extension.

***iii. Interest paid to foreign corporate shareholders?***

Generally interest paid to foreign corporate shareholders is subject to withholding tax at the peak rate of 21.012% subject to provisions of the tax treaty (Proposed to be enhanced to peak rate of 21.63% for tax year 2013-14 by the Finance Bill, 2013).

However, interest paid on External Commercial Borrowings or long-term infrastructure bonds obtained in foreign currency between 1 July 2012 to 30 June 2015 from a source outside India is subject to withholding tax at the peak rate of 5.253% (Proposed to be enhanced to peak rate of 5.4075% for tax year 2013-14 by the Finance Bill, 2013) for foreign corporate shareholders.

***iv. Intellectual property (IP) royalties paid to foreign corporate shareholders?***

Royalty payments in respect of intellectual property are subject to withholding tax at the peak rate of 10.506% of the gross amount under the domestic tax law, subject to the provisions of the relevant tax treaty (Proposed to be enhanced to peak rate of 27.0375% of the gross amount for tax year 2013-14 by the Finance Bill, 2013). In case, foreign corporate shareholder has a permanent establishment (“PE”) in India and such royalty payments are effectively connected with such PE, in that case such royalty payments would be taxed as business income liable to tax on net basis at the peak rate of 42.024% (Proposed to be enhanced to peak rate of 43.26% for tax year 2013-14 by the Finance Bill, 2013).

***24. Are there any thin capitalization rules (i.e. restrictions on loans from foreign affiliates) in your country? If so, please give details.***

Currently, there are no specific thin capitalization rules under the domestic tax law. However, General Anti-avoidance Rules (“GAAR”) are proposed to be applicable from 1 April 2015. In the proposed GAAR, there is a provision to treat equity as debt or vice versa.

Further, as per the extant external commercial borrowings (ECB) regulations, ECB (such as commercial loans from non-resident lenders) can be availed by eligible corporate borrowers from recognized lenders for permitted end use purposes. As per the external commercial borrowings regulations, in order for a “foreign equity holder” to be eligible as “recognized lender” under the automatic route for ECB of more than USD 5 million, minimum paid-up equity of 25 per cent is required to be held directly by the lender and ECB liability-equity ratio should not exceed 4:1. For calculating the ‘ECB liability’, not only the proposed borrowing but also the outstanding ECB from the same foreign equity holder lender shall be reckoned.

***25. Are there any controlled foreign company rules (i.e. the profits of a foreign subsidiary must be imputed to a local parent company) in your country? If so, please give details.***

Currently, India does not have any controlled foreign company rules under the domestic tax law. However, such rules form part of the proposed Direct Tax Code (DTC) which is proposed to replace the existing income-tax law. The implementation of the DTC is still under consideration.

**26. Are there any transfer pricing rules (i.e. restrictions on the pricing of transaction between a local entity and a foreign entity) in your country? If so, please give details.**

Income-tax law

Indian income-tax laws contain specific transfer pricing provisions which govern international transactions between two (2) or more associated enterprises. It provides that income or allowance for an expense or interest arising from specified international transaction between associated enterprises is to be computed having regard to the arm's length price.

These provisions also lay down various transfer pricing methods based on which arm's length price of a transaction between associated enterprises is to be computed. Also, there is a requirement to maintain annual transfer pricing documentation if the value of such international transaction exceeds INR 10 million. The law also requires a taxpayer having such transactions to file an annual accountant's report issued by an Indian Chartered Accountant with the tax authorities in respect of these transactions.

Customs Law

Further, in cases of imports from related parties, valuation of imported goods is specifically scrutinized by Special Valuation Branch ("SVB") of the Customs Department. During the scrutiny period by the SVB, all imported goods are assessed provisionally and 1% of value of goods is demanded as extra duty deposits ("EDD") from the importer. In case importer fails to provide the required documentation/information, EDD may be enhanced to 5%. Pursuant to conclusion of scrutiny, an order is passed by SVB authority, on the basis of which pending provisional assessments are finalized.

In case the importer is able to establish its price as the arm's length price of imported goods, it may claim refund of extra duty deposits. However, if an importer fails to substantiate the arm's length price, additional customs duty may also be demanded by the customs authorities on the grounds of enhanced value.

SVB order is valid for three (3) years, unless there are changes in valuation method. After three (3) years, the import value is again examined by the SVB.

**27. How are imports and exports taxed in your country?**

Import of both goods and services is subject to indirect taxes in India. However, exports are normally exempt (except for few specified goods) subject to receipt of payments in foreign exchange.

Taxes applicable on imports are as follows:

- (a) Import of goods is subject to customs duty normally at the rate of 28.85%. However, there are certain classification/purpose/origin specific exemptions/levies where rate of duty varies.
- (b) Import of services is subject to service tax applicable at the rate of 12.36%. Service tax in India is now applicable on all activities except for excluded or exempted activities. In addition, Research & Development (“R&D”) cess is applicable at the rate of 5% on import of technical know-how, designs, drawings etc. In case R&D cess is also payable on import of services, then importer can claim set-off of R&D cess paid against applicable service tax.

**28. Is there a wide network of double tax treaties in your country? If so, please give details.**

India has a wide tax treaty network with other countries. Currently, India has entered into double tax treaties with more than eighty (80) countries. In addition to this, India has also entered into Tax Information Exchange Agreement with more than eight (8) countries. The Government is continuously negotiating new treaties/agreements and renegotiating the existing treaties.

**(F) Competition**

**29. Is there any competition law in your country? If so, please give details.**

Yes. In India, competition/anti-trust issues are governed by the Competition Act, 2002 (“**Competition Act**”). Like other comprehensive competition law regimes, the Competition Act mainly deals with three (3) areas, viz. prohibition of anti-competitive agreements, prohibition of abuse of dominant position, and regulation of combinations. In addition, the Competition Act gives Competition Commission of India (“**CCI**”) the responsibility of enforcing the Competition Act, undertaking competition advocacy, creating awareness and imparting training about competition issues. Under the Competition Act, the CCI has been vested with substantial powers including power to impose hefty penalties for violation of the Competition Act. The Competition Act also provides for Competition Appellate Tribunal (“**the Tribunal**”) to hear and dispose of appeals against directions, decisions and orders passed by the CCI and to adjudicate on claims for compensation in certain cases. Further, the Competition Act provides for appeal against any decision or order of the Tribunal to the Supreme Court of India.

**30. Are restrictive agreements and practices regulated by competition law in your country?**

Section 3 of the Competition Act prohibits anti-competitive agreements that cause appreciable adverse effect on competition within India. The Competition Act applies to horizontal agreements and vertical commercial agreements. Broadly speaking anti-competitive agreements include, but are not limited to: agreements (including cartels) that determine prices, limit or control or share markets, or result in bid rigging, exclusive supply/distribution agreements, refusal to deal, resale price maintenance, tie-in arrangements, etc. That said, it may be noted that the Competition Act expressly recognizes that the provisions relating to anti-competitive agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be

conferred upon him under various intellectual property rights statutes mentioned under the Competition Act.

**31. Is unilateral (or single-firm) conduct regulated by competition law in your country?**

Section 4 of the Competition Act prohibits any conduct on the part of enterprise or group, which is an abuse of “dominant position”, in a relevant market in India. Importantly, the Competition Act does not prohibit a business from being dominant but prohibits a dominant enterprise from abusing its dominant position. In terms of section 4 of the Competition Act, there shall be abuse of dominant position if an enterprise or group directly or indirectly, imposes unfair or discriminatory condition in purchase or sale; or price in purchase or sale (including predatory price) of goods or services, limits or restricts production of goods or services or technical or scientific development relating to goods or services to the prejudice of consumers, indulges in practice resulting in denying of market access in any manner, makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts, or uses its dominant position in one (1) relevant market to enter into or protect other relevant market.

**32. Are mergers and acquisitions subject to merger control in your country?**

Only those mergers and acquisitions where total value of the assets or the turnover of combining parties exceeds the threshold limits prescribed under section 5 of the Competition Act are regulated by CCI. The thresholds appearing in Section 5 of the Competition Act are given in Table form below. Further, it is pertinent to note that the Notification issued by Government of India on March 04, 2011 (as subsequently clarified by a Notification dated Mat 27, 2011) grants a special target based exemption, and exempts an enterprise whose control, shares, voting rights or assets are being acquired and having an asset of value not more than INR 2.5 billion in India or turnover of not more than INR 7.5 billion in India from the provisions of section 5 of the Competition Act for a period of five (5) years (with effect from June 01, 2011).

Indian Clause

| Entity                      | Assets                                      |    | Turnover                                     |
|-----------------------------|---|----|--|
| Acquirer and Target         | INR 15 billion<br>(approx USD 272 million)  | or | INR 45 billion<br>(approx USD 818 million)   |
| Acquirer’s Group and Target | INR 60 billion<br>(approx USD 1.09 billion) | or | INR 180 billion<br>(approx USD 3.27 billion) |

\* @ USD 1 = INR 55

Worldwide Clause – providing Indian connection

| Entity              | Assets   |    | Turnover   |
|---------------------|--|----|--|
| Acquirer and Target | USD 750 million including<br>at least INR 7.5 billion<br>(approx. USD 136 million) | or | USD 2.25 billion<br>including INR 22.5<br>billion (approx. USD |

|                             |   |    |  |
|-----------------------------|---|----|--|
|                             | in India  |    | 409 million) in India  |
| Acquirer's Group and Target | USD 3 billion including at least INR 7.5 billion (approx. USD 136 million) in India | or | USD 9 billion including at least INR 22.5 billion (approx. USD 409 million) in India |

Having said that, there are also some general exemptions provided by the regulations framed under the Competition Act such as insignificant acquisitions, acquisitions in due course of business and acquisitions amongst "group" companies, to name a few. Unless exempted by the Competition Act under the general or special exemptions, the merger or acquisition transaction will have to be notified to CCI and the transaction can take effect only after two hundred ten (210) days of such notification or from the date CCI passes an order approving the proposed "combination", whichever is earlier. Aforesaid combinations are scrutinized by CCI and any combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India can be declared void by the CCI or it may pass the order directing that the parties to such combination to carry out necessary modifications to the proposed arrangement.

**(G) Intellectual property**

**33. Please outline the main intellectual property rights that are capable of protection in your country. In each case, please state:**

- i. What is the nature of the right?**
- ii. How is it protected?**
- iii. How is it enforced?**
- iv. How long is it protected?**

**Patent**

Nature of the right

Statutory right under The Patents Act, 1970 (39 of 1970).

To be patentable, an invention should be:

- A Product or a Process;
- Be new, *i.e.* not anticipated by publication/use anywhere in the world;
- Involve an inventive step<sup>1</sup>;
- Be capable of industrial application;
- Not be specifically excluded by statute.

The patent granted under The Patents Act, 1970 confers upon the patentee:

- *For product:* the exclusive right to prevent third parties from making, using, offering for sale, selling or importing for those purposes the product in India;
- *For process:* the exclusive right to prevent third parties, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

<sup>1</sup> Inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both, that makes the invention not obvious to a person skilled in the art.



▪

### Protection

An application for patent in the prescribed form, duly filled, accompanied with provisional/complete specification and other requisite documents, is required to be filed at the appropriate Patent Office.

### Enforcement

Suit for infringement of patents for grant of reliefs:

- Injunctive relief;
- Damages or account of profits;
- Seizure, forfeiture or destruction of goods which are found to be infringing as well as materials and implements which are predominantly used in the creation of infringing goods.

### Length of protection

Twenty (20) years from the date of filing/date of priority.

### **Trade Mark**

#### Nature of Right

Common law right and statutory protection under The Trade Marks Act, 1999 (47 of 1999). A trade mark means a mark:

- Capable of being represented graphically;
- Capable of distinguishing the goods and services of one (1) person from those of others and may include shape of goods, their packaging and combination of colours.

The rights, whether acquired or conferred, in relation to a trademark are monopolistic in nature. Such proprietary rights in respect of a trade mark in India can be acquired either by way of use or by registration.

The rights inured through use are termed as the common law rights and the statutory rights by registration. Under the regime of common law rights, the owner acquires both the proprietary right to exclusive use of a trade mark (in exclusion to all others) and also to restrain third parties in case of unauthorized use.

The registration of a trademark confers statutory rights in favour of the registered proprietor to the exclusive use of the trademark in relation to the goods or services, in respect of which the trademark is registered, and to restrain others from using identical or deceptively similar marks in respect of the same or similar goods or services.

### Protection

For statutory protection, the proprietor of a trademark needs to apply for registration in the manner prescribed under the Trade mark Act 1999 to the Trade Marks Office of appropriate jurisdiction.

## Enforcement

### *Civil remedy:*

In case of a registered trade mark, a suit for infringement and suit for passing off (available for unregistered trade mark, trade names and others) for relief of:

- Injunction;
- Damages/account of profits;
- Delivery up of infringing labels and marks for destruction or erasure.

Proceedings can be initiated by the proprietor or registered proprietor (registered trade mark) or the registered use.

## Length of Protection

The registration granted is valid for the period of ten (10) years, computed from the date of application and is required to be renewed after every ten (10) years.

## **Copyright**

### Nature of Right

Enjoys statutory protection under The Copyright Act of 1957 (Act 14 of 1957).

Copyright is a right given to creators of original literary, dramatic, musical and artistic works, cinematograph films and sound recordings. Copyright is an exclusive right entitling the holder/owner to a bundle of rights including:

- reproduction,
- communication to the public,
- adaptation
- Translation of the work.
- Sell or assign rights to others

### Protection Procedure

Copyright subsists in favour of the author or other person in whose favour the author assigns the copyright. Recordal of copyright can be sought by way of filing requisite application before the Registrar of Copyrights.

## Enforcement

Suit for the infringement of copyright may be instituted in a District Court/High Court having jurisdiction to try such suit. The proceedings can be initiated either by the owner of copyright (including exclusive licensee) or his legal representatives.

The remedies are:

- Injunction;

- Damages or account of profits and otherwise as are or may be conferred by law for the infringement of a right’.

In addition to the civil remedies the court may inflict imprisonment or fine or both in case of person who knowingly infringes or abets infringement. Such imprisonment or fine may be enhanced in case of subsequent infringement or abetment to the same.

### Length of Protection

The term of the protection varies in respect of different works.

| Work  | Term   |
|---|--|
| Literary, dramatic musical and artistic works   | Lifetime of the author until sixty (60) years from the beginning of calendar year next following the year in which the author dies.  |
| Anonymous and pseudonymous work (Literary, dramatic musical and artistic works)   | For sixty (60) years from the beginning of calendar year next following the year in which the work was published.<br>However if the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until sixty (60) years from the beginning of calendar year next following the year in which the author dies. |
| Posthumous work, Photographs, Cinematograph films, Government works, Works of public undertakings, Works of international organizations | For sixty (60) years from the beginning of calendar year next following the year in which the work or photograph or film or sound recording or record was published.   |

### **Designs**

#### Nature of right

Design protection is granted under The Designs Act, 2000 (16 of 2000). A design entails the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.

For a design to be registrable, it must:

- be applied to an article
- be new or original;
- not be disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date/priority date
- be significantly distinguishable from the known designs or a combination of known designs;
- not contain scandalous or obscene matter.

Registration of a design confers upon the registered proprietor the exclusive right to apply a design to any article in any class in which the design is registered.

#### Protection

By filing the application in prescribed form with photographic representations with the Comptroller of Design and obtaining a Design Registration Certificate.

#### Enforcement

In the event of piracy of design the registered proprietor has the right to initiate proceedings for every contravention and the offending party is liable to pay a sum not exceeding INR 25,000 recoverable as a contract debt. The total sum recoverable in respect of any one (1) design shall not exceed INR 50,000.

The registered proprietor also has the right to bring a suit for injunction and damages for any contravention

#### Length of protection

Protection lasts for ten (10) years from date of registration and can be extended by another term of five (5) years.

Besides the above, statutory protection is also available under:

- Geographic indications of goods (Registration and protection) Act 1999;
- The Protection of plant varieties and Farmers Rights Act 2001;
- The Semi Conductor Integrated Circuits layout Design Act, 2000;
- The Biological Diversity Act, 2002.

### **(H) Marketing agreements**

**34. Are marketing agreements regulated in your country? If so, please give brief details in respect of the following arrangements:**

- i. Agency;**
- ii. Distribution; and**
- iii. Franchising**

Marketing Agreements in India are regulated either by specific statute governing a particular relationship between parties or by the general principles of contract embodied in the law of contract, namely, the Indian Contract Act, 1872 ("**Contract Act**"). Sale of movable goods is also covered by a specific statute, namely, the Sale of Goods Act 1930.

#### Agency

The law governing agency relationships can be found in sections 182 to 238 of the Contract Act. The terms "agent" and principal" have been defined under section 182 of the Contract Act in the following manner:

*An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.*

Section 183 states that any person, who is of the age of majority according to the law to which he is subject and who is of sound mind, may employ an agent.

Section 184 states that as between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent.

Sections 185 and 186 provide that consideration is not necessary for purposes of creation of an agency and such agent's authority may be express or implied. Further, section 187 defines an express agency and an implied agency.

The extent of authority of an agent is described in section 188 of the Contract Act. An agent, having authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

Section 189 states that in an emergency, an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances.

Sections 190 to 193 deal with legal provisions governing sub-agents, *i.e.* persons employed by, and acting under the control of, the original agent in the business of agency, their liability and responsibilities.

Section 194 clarifies that where an agent, holding express or implied authority to name another person to act for the principal in the business of the agency, has named another person, accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him and section 195 provides for the duty of the agent in appointing such agent as under section 194 for the principal.

Sections 196 to 200 provide the law on ratification of acts done by an agent on behalf of his/her/its principal and the manner in which such ratification is effective.

Sections 201 to 210 deal with revocation of authority of agents and sub-agents and/or renunciation of such agency relationship by the agent and the consequences thereof.

While sections 211 to 214 deal with the duties of an agent towards his/her/its principal, sections 215 to 218 stipulate the rights of a principal in the event the agent acts on his/her/its own account without the principal's consent while conducting the business of agency.

Sections 219 to 221 provide for the agent's right to remuneration for acts done on behalf of the principal and his rights in case of non-payment of his/her/its fee by the principal.

Sections 222 to 225 state the respective duties of a principal towards its/his/her agent and the principal's obligation to indemnify its/her/his agent in certain cases.

Lastly, sections 226 to 238 provide, *inter alia*, for effects of an agency on contracts entered into with third parties, the liability of the principal and the agent and the legal consequence thereof.

## Distribution & Franchising

Contractual arrangements governing distribution and/or franchising in India are governed by the general principles of contract as per the Contract Act, as such arrangements are treated as pure commercial and contractual transactions between contracting parties. Matters relating to passing of title to the goods, rights of unpaid sellers, express and implied warranties etc. forming part of these arrangements, are governed by the Sale of Goods Act 1930 or widely accepted international norms (such as INCOTERMS) if specifically agreed under the contract by the contracting parties.

Such distribution and/or franchising arrangements may be in the nature of agency agreements or long term purchase and re-selling arrangements between a buyer and seller of goods or perhaps, a combination of both. The consideration to the distributor or the franchisee as the case may be, can take many shapes, in the form of commission on sales, a mark-up on a discounted purchase price, and in certain market segments like hospitality, a share of the turnover or profits. There is substantial flexibility in negotiating such arrangements within the overall ambit of the Contract Act and any special law that may be applicable to a particular provision of such contracts (like taxes, warranties and dispute resolution).

We presently do not have any specific law on franchising and such arrangements are guided by international models to the extent the provisions of the franchise arrangement are not otherwise in conflict with the Indian laws.

### **(I) E-commerce**

#### **35. Are there any laws regulating e-commerce (such as electronic signatures and distance selling) in your country? If so, please give brief details.**

In India, the Information Technology Act, 2000 (“**IT Act**”) provides for legal recognition of transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as ‘electronic commerce’ (“**e-commerce**”).

The IT Act recognizes authentication by means of digital signatures and in that regard provides that where any law provides that information or any other matter is to be authenticated by affixing the signature, or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement is deemed to have been satisfied, if such information or matter is authenticated by means of digital (electronic) signature affixed in the manner prescribed by the Central Government.

The IT Act also recognizes that where, in contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic records, such contract would not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

The provisions of the IT Act however do not apply to documents or transactions such as negotiable instruments (other than a cheque), power of attorneys, trusts, wills, contracts of sale or conveyance of immovable property or any interest in such property.

In India, as of now, there is no specific law on 'distance selling'; however the Consumer Protection Act, 1986 currently in force in India provides for protection of the interests of consumers such as the right to be protected against marketing of goods which are hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices; the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers.

It may be mentioned that on December 19, 2008 'The Distance Selling (Regulation) Bill, 2008' was introduced as a private member's bill in the Rajya Sabha (Upper House of Indian Parliament) however no further progress is there and the same has not been enacted till date as law. The said bill provides for regulation of selling of products and services by dialling a telephone number advertised for the purpose in television, internet network, newspapers, magazines, hoarding, banners, posters, etc. or placing orders on internet and for protection of rights of consumers against marketing of products and services through these methods and for matters connected therewith and incidental thereto.

In terms of the extant Foreign Direct Investment Policy of Government of India, foreign direct investment to the extent of 100% is permitted under the automatic route into those companies which provide for facility of buying and selling through the e-commerce platform. However, such companies are allowed to engage only in Business to Business (B2B) e-commerce and not in retail trading (neither single brand retail trading nor multi brand retail trading).

**(I) Data protection**

**36. Are there any data protection laws in your country? If so, please give brief details.**

The IT Act, originally passed to provide legal recognition for transactions carried out by means of electronic data interchange, did not cover other means of electronic communication by express provisions regarding data protection. To address this, the Information Technology (Amendment) Act, 2008 ("**Information Technology Amendment Act**") was passed and *inter alia* two new sections (Section 43A and Section 72A) were inserted into the IT Act providing remedies to persons who have suffered or are likely to suffer a loss on account of that person's personal data not having been adequately protected.

Section 43A of the IT Act *inter alia* provides that where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

In order to provide specific provisions with respect to protection of sensitive personal data or information and related matters, the Ministry of Communications and Technology, Government of India has in 2011 notified rules under the IT Act dealing *inter alia* with protection of sensitive personal data, security practices and procedures that must be followed by organisations dealing with sensitive personal data or information ("**Data**

**Privacy Rules”<sup>2</sup>**. The Ministry of Communications and Information Technology has also issued a Press Note (“**Press Note**”) *inter alia* clarifying that the Data Privacy Rules relate to sensitive personal data or information and are applicable to a body corporate or any person located within India.

The Data Privacy Rules define the term “personal information” to mean any information that relates to a natural person and is capable of identifying such person.

Further, the term “sensitive personal data or information” has been defined to mean such personal information which consists of information, *inter alia*, relating to passwords, financial information such as bank account or credit card or debit card or other payment instrument details. However, information that is freely available, accessible in the public domain, or furnished under the Right to Information Act 2005, is excluded from the ambit of the above definition.

As per the Data Privacy Rules, the following are some of the obligations of the body corporate collecting, receiving, possessing, storing, dealing or handling information/ sensitive personal data:

- (a) to provide a privacy policy for handling and dealing of such personal information including sensitive personal data or information;
- (b) not to collect sensitive personal data or information unless the information is collected for a lawful purpose and its collection is necessary for the purpose;
- (c) not to retain the information for longer period than is required for the purposes for which the information may be lawfully used or is otherwise required under any other law for the time being in force;
- (d) to procure prior permission (except in certain cases) from the provider of the information before disclosure of sensitive personal data or information to any third party; and
- (e) to implement reasonable security practices and standards and have a comprehensively documented information security program, and security policies that contains managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected and with the nature of business.

**(K) Product liability**

**37. Are there any laws regulating product liability and product safety in your country? If so, please give brief details.**

Product liability in India can broadly be categorized into civil product liability and criminal product liability. Whilst civil product liability in India is essentially governed by (i) the law of Torts (though we do not have any codified Tort law but torts/ tortious liability are now guided by various Indian courts pronouncements); (ii) the Sale of Goods Act, 1930; and (iii)

---

<sup>2</sup> Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 issued vide notification no. G.S.R. 313(E), dated 11 April 2011, Gazette of India, Extraordinary, Part II, Section 3(i).



the Consumer Protection Act, 1986, the provisions for criminal product liability are found in several enactments including the (i) the Bureau of Indian Standards Act, 1986; (ii) the Food Safety and Standards Act, 2006 (which replaced the Foods Adulteration Act, 1954); (iii) the Drug & Cosmetics Act, 1940; (iv) the Indian Penal Code, 1860; (v) the Agricultural Produce (Grading and Marking) Act, 1937; and (vi) Legal Metrology Act, 2009.

### Civil Product Liability

Tortious remedies are important where an injured consumer of goods is a subsequent user and cannot claim damages under the law of contract in case he is not the buyer of the goods. Such a user might be an employee or member of the primary buyer's family, or someone else inadvertently coming in contact with the goods, such as a passer-by or a donee. In such cases, where no privity of contract exists between the parties, tort remedies may be available against the manufacturer, supplier, importer, distributor or retailer who owes a tortious liability to such ultimate consumers.

Torts may be classified as follows:

- (a) Intentional torts – which are deliberate actions which may cause injury;
- (b) Tort of negligence - which involves injuries following a failure to use 'reasonable care';
- (c) Strict liability torts impose legal responsibility for injury even though the party liable had not caused the injury intentionally or negligently.

### *Sale of Goods Act, 1930*

Where a buyer is injured by a product transferred to him under a contract of sale, he may rely on implied conditions and warranties as well as express undertakings of the seller. Implied conditions as to fitness for purpose and merchantable quality are postulated in section 16 of the Sale of Goods Act, 1930. Merchantable quality implies, (i) genuineness as to name, kind and description; (ii) saleability in the market; (iii) fitness for ordinary use; and (iv) free from defects interfering with sale or ordinary use.

Thus, the seller will be liable if the goods do not meet the standard required by law even if he has taken all possible care. In this light, the doctrine of *caveat emptor* has now been replaced by the doctrine of *caveat venditor*.

### *Consumer Protection Act, 1986*

The main object of the Consumer Protection Act, 1986, Consumer Protection Rules, 1987, and the Consumer Protection Regulations, 2005 is the promotion of the basic rights of consumers, namely the right to safety, the right to be informed of quality, potency and purity of products and services, etc.

The Consumer Protection Act, 1986 also prohibits unfair trade practices.

The provisions of Consumer Protection Act, 1986 do not debar a consumer from going to a civil court to seek compensation for loss or damage caused to him by a defect in the goods purchased by him but merely provides a separate adjudication machinery and redressal forum. The Consumer Protection Act, 1986 has established a hierarchy of special courts

known as 'Consumer Redressal Fora' for redressing consumer disputes at district, state and national level.

These Consumer Dispute Redressal fora provide relief to consumers who suffer losses due to defective products.

The Consumer Dispute Redressal fora, at the various levels, are duty bound to promote and protect the rights of the consumers such as to be protected against the marketing of goods and services hazardous to life and property, and to be informed about the quality, quantity, potency, purity, standard and price of goods or services.

### Criminal Product Liability

#### *Bureau of Indian Standards Act, 1986*

The Bureau of Indian Standards Act, 1986 replaced the earlier Indian Standards Institution (Certification Marks) Act, 1952. Contemporaneously with this replacement, the Indian Standards Institution ("ISI") was renamed as the Bureau of Indian Standards ("BIS"), which is a national standards body in India. However, the symbol of 'ISI' continues to be used on products till date to certify the product's safety and quality.

The BIS has a product certification scheme which aims at providing third party guarantee of quality, safety and reliability of products to the ultimate consumer. The presence of the ISI certification mark on a product is an assurance of conformity to the specifications. The conformity is ensured by regular surveillance of the licensees' performance by surprise inspections and testing of samples drawn both from the market as well as the factory. Through its surveillance operations, the BIS maintains a close vigil on the quality of certified goods.

Products under the mandatory certification list include milk powder, condensed milk and infant milk food, food colours and additives, cement, LPG cylinders, oil pressure stoves, vegetable cooking oils, dry cell batteries, electrical appliances and accessories, pumps, irons, immersion heaters, stoves, minors' safety boots and shoes, steel tubes, etc. Other products like bags and briefcases, slippers, bicycles, paints, inks, typewriter ribbons, cotton vests, razor blades, soaps and handloom cloths, biscuits, common salt, chewing gum, etc. are covered under the voluntary certification scheme.

#### *Food Safety and Standards Act, 2006*

Under the Food Safety and Standards Act, 2006 ("**Food Safety Act**"), an article of food cannot contain any food additive or processing aid unless it is approved by the Government. Further, no food in India can contain any naturally occurring toxic substances, toxins, hormones, or heavy metals that are in excess of the stipulations of the Food Safety Act. No insecticides can be used directly on food except when the fumigant is registered and approved by the Insecticides Act, 1968. The Food Safety Act also stipulates that no article of food can contain insecticides or pesticides residues, veterinary drug residues, antibiotic residues, or solvent residues in amounts that are greater than the specified regulations and which vary from product to product.

The Food Safety Act is a complete code which deals with the responsibilities of a food business operator, liability of the manufacturers, packers, wholesalers, distributors and sellers. It also mandates a food business operator to immediately initiate procedures to

withdraw food from the market and consumers if it is not found to be compliant with the Food Safety Act.

The Food Safety Act prohibits an individual from manufacturing, distributing, or selling to any agent any packaged food that is not marked and labelled in the prescribed manner. The labels cannot contain statements that are false or misleading in any way concerning the food that is in the package. This might apply to misleading the customer about the quantity of food or the nutritional value of the food in packaged form, or the therapeutic claims as to the place of origin. The manufacturers of the product also must ensure that the label itself does not mislead consumers in its shape or appearance.

Stringent punishments are prescribed under sections 48-67 of the Food Safety Act for different types of offences. Whilst sections 48 and 49 deal with the general provisions applicable to offences and penalties, the remaining provisions deal with specific penalties and punishments.

#### *Drugs and Cosmetics Act, 1940*

The objective of the Drugs and Cosmetics Act, 1940 ("**Drugs Act**") is to regulate the import, manufacture, distribution and sale of drugs and cosmetics. The Drugs Act sets standards to be complied with for drugs and cosmetics manufactured, sold or distributed in India and standards of quality for imported drugs and cosmetics.

Provisions of the Drugs Act prohibit a person to manufacture, sell, stock or exhibit or offer for sale or distribute (i) any sub-standard, misbranded, adulterated or spurious drug or cosmetic; (ii) any patent or proprietary medicine; (iii) any drug claiming magical effect; and (iv) any unsafe or hazardous cosmetics. Drugs must mandatorily comply with the standards set out in the Second Schedule of the Drugs Act, and cosmetics must comply with the standards prescribed by the Government. Failure to comply with the standards set out in the Drugs Act, such as through the manufacturing, sale or distribution of sub-standard, adulterated and spurious drugs and cosmetics, and the manufacture, sale or distribution of drugs and cosmetics without a license, are punishable with imprisonment ranging from a minimum of one (1) year to a maximum of a life term, in addition to fine.

#### *Indian Penal Code, 1860*

The Indian Penal Code deals with offences affecting public health by making the sale of adulterated / noxious food or drink an offence punishable with up imprisonment, or fine, or both. Similarly, the offence of adulteration of drugs intended for sale, the sale of adulterated drugs, and the sale of a drug as a different drug or preparation is also punishable. The provisions of Indian Penal Code in respect of product liability are also attracted when the element of cheating and fraud can be attributed to such defects and when the weights and measures and property marks are falsified.

#### *Agricultural Produce (Marking and Grading) Act, 1937*

Agricultural Produce (Marking and Grading) Act, 1937 is the pioneer legislation in the field of quality control and standardization of agricultural commodities in India. It empowers the Central Government to make rules for fixing grade designations to indicate the quality of any scheduled article, defining the quality indicated by every grade designation, specifying grade designation marks to represent particular grade designations, prescribing the manner in which articles could be packed, sealed and marked and providing for the

confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions.

Standardization is carried out by the Directorate of Marking and Inspection. The quality mark under the Act is known as 'AGMARK', an acronym for Agricultural Marketing. The grade standards are based on physical as well as internal attributes of the commodity, such as weight, colour and the commodity's material contents. Consumers are directly benefited by the AGMARK scheme since the mark is considered a symbol of purity and quality, making it easier for the consumer to select a product bearing the mark for consumption.

The articles covered under the Agricultural Produce (Marking and Grading) Act, 1937 include fruits, eggs, dairy produce and poultry products, food grains, oilseeds, oils and cakes, spices condiments, forest produce, edible nuts, tobacco, tea, honey, wheat flour, etc.

*The Legal Metrology Act, 2009*

The Legal Metrology Act, 2009 was enacted to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number. The provisions of the Legal Metrology Act, 2009 govern, *inter alia*, the regulation of weights or measures, approval of model of weights or measures, verification of prescribed weights or measures, exempting regulation of weights or measures or other goods meant for export and levy of fee for various services.

**Note: In the interests of brevity and conciseness the questions have been addressed in a broad and general manner and therefore fall short of being considered as legal advice or opinion. Readers are therefore requested to take specific legal advice at the time of taking decisions.**

***DUA ASSOCIATES  
MARCH 22, 2013***