e-iure.com

International Law Firm Alliance
COMPENDIUM 2013

"We shall make it together by walking"

INDCONLEGAL
ADVOCATE

India

We are a law firm based in New Delhi having offices in Mumbai and Bangalore. Our areas of practice includes corporate & commercial, intellectual property, litigation, international arbitration, banking, employment, power and infrastructure projects, environment, property and construction, aviation and Legal Process Outsourcing.

The firm's practice covers a wide range of services to big corporations, financial institutions, industries, public sector undertakings strongly emphasizing on providing high quality services with a cost effective approach. Our Attorneys are well versed with business issues and complex nature of cross border transactions and they work closely with clients to provide solutions to the challenges of modern business.

The firm has a vast and rich experience in advising Multi National Companies on registration, protection, use and enforcement of their intellectual property rights. The firm has a separate patents team supported by highly qualified technical staff, advising clients on different issues of the patent laws and patentability of inventions in India. The firm also advices on licensing and Technology transfer relating to the patented inventions. The Trade Mark and Copyright team of the Firm advices to the registration and protection of the intellectual property vested in trademarks and its enforcement.

The firm conducts arbitration (Domestic and International) and litigation in India and other countries. Our Attorneys have wide range of experience in appearing before forums like:-

- Hon'ble Supreme Court of India
- High Courts
- Consumer Courts and various tribunals

Lalit Mathur, *Partner*
lalitmath@indconlegal.com, Mobile : +91 9313353317

Corporate Law

Indian Companies Act also called Companies Act, 1956 was enacted in 1956 which enabled companies to be formed by registration, and set out the responsibilities of company on its Directors and Secretaries.

The 1956 Act received assent from President of India on 18 January 1956, and has come into force on 1 April 1956. This Act is administrated by Government of India through the Ministry of Corporate Affairs, and the Offices of Registrar of Companies, Official Liquidators, Public Trustee, Company Law Board, etc.

Since its commencement, it has been amendments many times, the Act amendment in 1990, 1996, 2000 and 2011. The 1956 Act exists there are a number of other statutes to be considered depending on the activity a company wishes to follow.

Nature and scope of this Act

Like most of Indian Act it is also extent to whole of India except State of Jammu and Kashmir. According to this Act Every Company, International and Indigenous will Work under the provision of this Act. This Act is containing 658 Section long. It contains provision about Companies, Directors and Secretaries Duties and liabilities, Memorandum and Article of Company, etc. This Act and other statues like Indian Contract Act, SEBI, FEMA, etc, states and discusses every single provisions need to govern a company.

Types of Business Structure

The first question to be considered by anyone wishing to establish a business operation in the INDIA is the type of business structure to be used. Although the corporate structure (setting up a company) is the one which is most widely used in the INDIA, there are a variety of other structures available to overseas entities seeking to establish a presence in the INDIA including setting up a branch or liaison office of an overseas company, a joint venture company or a limited liability partnership.

Establishment of Branch/Liaison/Project Offices in India by Foreign Entities

A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Liaison Office (LO) / Branch Office (BO) in India have to obtain permission from the Reserve Bank under provisions of Foreign Exchange Management Act (FEMA). The applications from such entities will be considered by Reserve Bank under two routes:

- Reserve Bank Route — Where principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.

- Government Route — Where principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and those from Non - Government Organisations / Non - Profit Organisations / Government Bodies / Departments are considered by the Reserve Bank in consultation with the Ministry of Finance, Government of India.

The following additional criteria are also considered by the Reserve Bank while sanctioning Liaison/Branch Offices of foreign entities:

- Track Record:

For Branch Office — a profit making track record during the immediately preceding five financial years in the home country.
For Liaison Office — a profit making track record during the immediately preceding three financial years in the home country.

- Net Worth [total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name].

For Branch Office — not less than USD 100,000 or its equivalent.
For Liaison Office — not less than USD 50,000 or its equivalent.

Permissible Activities for a Liaison Office

A Liaison Office (also known as Representative Office) can undertake only liaison activities, i.e. it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India. The role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers.

A Liaison Office can undertake the following activities in India:

- Representing in India the parent company / group companies.
- Promoting export / import from / to India.
- Promoting technical/financial collaborations between parent/group companies and companies in India.
- Acting as a communication channel between the parent company and Indian companies.

Permissible Activities of a Branch office

Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank. Such

Branch Offices are permitted to represent the parent / group companies and undertake the following activities in India:

- Export / Import of goods.1
- Rendering professional or consultancy services.
- Carrying out research work, in areas in which the parent company is engaged.
- Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- Representing the parent company in India and acting as buying / selling agent in India.
- Rendering services in information technology and development of software in India.
- Rendering technical support to the products supplied by parent/group companies.
- Foreign airline / shipping company.

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

Types of Companies

As mentioned above there are different types of corporate structure, which can be used under Indian law. The most common structure used is a private company limited by shares. Companies can be either public, which means that they can offer their shares or other securities for public subscription, or private, which means that they are not allowed to offer their shares or other securities to the public. A private company bears the suffix "Private Limited" or "Pvt. Ltd." and a public company bears the "Limited" or "Ltd".

PUBLIC LIMITED COMPANY: Public Company means which has a minimum paid-up capital of Rs.5,00,000 or such higher paid-up capital as may be prescribed. The minimum number of person to form a public company is 7(seven) and whereas the maximum number of person is not restricted.

A Public Limited Company may be :

- A listed Public company – This company means a public company which has any of its securities listed in any recognised stock exchange.
- An unlisted Public company – This company means whose securities are not listed in any recognised stock exchange.

PRIVATE COMPANY: A Private company means which has a minimum paid- up capital of Rs. 1, 00,000 or such higher paid – up capital as may be prescribe. The minimum numbers of person required are 2 and maximum is restricted to 50.

INCORPORATION OF COMPANY (REGISTRAR OF COMPANIES): Any Private or Public Company which with or without limited liability may be incorporated in India as under :

- First the name of the company has to be approved by the Registrar of Company (ROC)
- Once the name is approved Memorandum and Articles of Association of the Company duly signed by the subscribers and directors of the company will be filed with the ROC.
- After the satisfaction of the ROC based on the documents filed by the company, a certificate of Incorporation will given by the ROC which is a conclusive evidence that all the requirement of the companies Act have been complied with the registration .

Liability of Shareholders

Every company having a share capital, whether public or private, must have shareholders. There are no rules relating to the residency of shareholders. In the case of both private and public companies, the liability of the shareholders or members is limited to the amount unpaid on the shares held by them. The company and its shareholders are regarded for company law purposes as separate legal persons.

Rights of Shareholders

Shareholders have not any right to any item of property owned by company for he has no equitable interest therein. He is entitled to share in the profit while the company continued to carry on business and share in surplus assets when the company wound up.

Share Capital

AUTHORISED SHARE CAPITAL: company's authorised share capital is the total number of issued and unissued shares in the capital of the company. An increase in a company's authorised share capital requires shareholder approval by ordinary resolution (a simple majority).

ISSUED SHARE CAPITAL: The shares which are allotted and issued to shareholders will determine the company's issued share capital. In order to allot and issue shares, the company's directors must be authorised, by the articles of association or by shareholder resolution, to issue the relevant shares and also specifically authorised to issue shares where the directors wish to issue shares for cash otherwise than in proportion to existing shareholdings. A company incorporated under the Companies Act 1956 will first need to pass an ordinary resolution in order to give the directors the power to allot shares as set out above.

Shares must be issued for not less than their nominal value, although shares can be issued as partly paid and the directors can call up the unpaid amount at any time.

PAID- UP- CAPITAL: This is that part of the issued capital which has been paid up by the shareholders or which is credited as paid – up on the shares.

Meetings

Most powers needed to run the company are vested in the directors by the articles of association. However, the ultimate control of the actions of the board of Directors is vested in the shareholders of the company or member and from time to time they meet to ratify and plan for future of the company.

General Meeting or Statutory Meeting of the Shareholders

Every company limited by shares or having share capital has to conduct a meeting within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business. This meeting is called the 'Statutory meeting'. This is the first meeting of the shareholders of the company and is held once in a lifetime of the company. Annual General Meeting, every company shall in each year hold as its annual general meeting in addition to any other meeting. There shall not be interval of more that 15 months between two annual general meetings of the company. A company may hold its first annual general meeting with in period of 18 months from the date of Incorporation. The annual general meeting may be called by giving not less than 21 day's Notice in writing to the members.

Extraordinary General Meeting, any shareholders meeting other than General or Annual general meeting is called extraordinary general meeting. It is called for transaction some urgent or special business which cannot be postponed till the next annual general meeting.

The Ministry of Corporate Affairs has taken a "Green Initiative in the Corporate Governance" by allowing participation of directors in meetings of board / Committee of directors under the Companies Act, 1956 through electronic mode / video conference.

Minutes of Meeting

Every company shall keep a record of all proceedings of board meeting, annual general meeting or extraordinary general meetings. This is done by making within 30 days of the conclusion of every such meeting concerned. The record are known as minute and book in which records of proceeding of the minute is recorded is know as Minute book.

Shareholder meetings require a prior period of notice to shareholders of not less than 14 days save in respect of a private company's annual general meeting where 21 days notice is required. Where not less than 90% of the shareholders of a private company agree, however, these notice requirements can be dispensed with and the meeting (including the annual general meeting) may be held on short notice.

A public company must hold a general meeting of its shareholders, known as the annual general meeting, each year at which it is usual to present the accounts, appoint auditors, deal with dividends and elect any directors who have been appointed since the last annual general meeting.

Directors of the Company

The directors are the brain of the company. They occupy a pivotal position in the structure of the company. The directors are the body to whom the duties of managing the general affairs of the company are delegated.

On 2006 Company (Amendment) Act, 2006 its a obligatory for companies to ensure that directors have been allotted Director Identification Number (DIN) as required under amendment. According to newly amendment if the DIN is not allotted then that person cannot be appoint as a director of the company.

NUMBERS OF DIRECTORS: Minimum number of directors Every public company shall have at least 3 directors and every private company have at least 2 directors.

APPOINTMENT AND REMOVAL: The Article of Association of a company usually names the first director. The director of the company should be qualified according to provision of the Act. Directors must be appointed by the shareholders in general meeting. In the Public company only one-third of the total directors can be permanent directors and two-third directors shall be liable to retire by rotation, such directors are called "rotational directors". The director to retire by rotation at every annual general meeting and appointed a new director on same annual general meeting.

The directors may be removed by three ways:

- The shareholders may remove a director before the expiry of his period of office by passing an ordinary resolution..
- The Central Government may, in certain circumstance remove director of public company from office on the recommendation of the court or tribunal. The company may, with the approval from central government, appoint director in the office in the place of removed director.
- The company law tribunal may remove the director if they find any mismanagement in the company. The director cannot reappoint or hold any managerial capacity in the office for a period of 5 years from the date of order.

DIRECTORS' LIABILITY: Directors, as agent of the company, are not personally liable on contract entered into as agent on behalf of the company. But where a director enters into a contract, which is ultra vires to the company, the director is personally liable for breach of implied warranty of authority. When more than one director is alleged to have neglected his duties of care, all the directors are jointly and severally liable. It an action is brought by the company against only one of them, he is entitled to contribution from the other directors.

Annual Return

Every company has to file with Registrar an annual return containing certain particular during a year, which gives details of its share capital, profit and loss, shareholders, location of the statutory books, registered office, directors and secretary.

Registered Office

A company needs to file details of its registered office in India with the Registrar of Companies and any official notifications will be sent to that address. Subject to certain exceptions, the full name of the company must appear at its registered office and business premises.

Statutory Books

Every company must maintain a statutory register giving details of its shareholders, directors, secretary, any issues and transfers of shares as well as charge-holders. There should also be a minute book containing minutes of all meetings of directors and shareholders. A company can now keep its statutory books at an address other than its registered office.

Winding Up of Company

Winding up or Liquidation of company represents last stage in its life. It means the proceeding by which a company is dissolved. The assets of company are disposed of, the debts are paid of from the realised assets and surplus, if any, is then distributed among the members in proportion.

Compulsory/ Court wining up, in this court initiate the order of winding up of company. In the compulsory winding up various grounds in that court make an order. The liquidator as appointed in the compulsory winding for disposed of assets, to clear off debts and if any surplus then proportionally distributed among members/creditors. And the final report submitted to the Registrar of the Company for recording of the dissolution of the Company.

Voluntary Winding Up means winding up by the members or by the creditors of the company. Voluntary winding up may be two types.

- Member's Voluntary winding up- In this process the member / shareholders of company passed a resolution for winding up and make a declaration of solvency. The Declaration of solvency shall made by a majority of the directors at the meeting.
- Creditor's voluntary winding up- In which a Declaration of its solvency is not made, the company is deemed to be insolvent. Creditors arrange the meeting and decision correspondence to the members of the company. And appoint liquidator for dissolution of the company.

→ Foreign Investment

It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth. Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a lasting interest in an enterprise that is resident in an economy other than that of the investor.

In India, investment can be done in three ways by the Foreign company, Foreign Individuals or Non Resident Indians (NRIs) as

- FII (Foreign Institutional Investors)
- QFIs (Qualified Foreign Investors)
- FDI (Foreign Direct Investment)

FII (Foreign Institutional Investors)

The FIIs were allowed to invest in the Indian capital market from September 1992. The investments by them, however, were first made in January 1993. Until December 1998, the investments were related to equity only, as the Indian gilts market opened up for FII investment in April 1998. The FIIs' investment in debt started from January 1999. The FIIs continued to invest large funds in the Indian securities market.

The Reserve Bank of India (RBI) in consultation with the Government of India and the Securities and Exchange Board India (SEBI) are the bodies to make polices framework for FII investment.

On April 12, 2010, Government of India permitted FIIs to offer domestic government securities and foreign sovereign securities with AAA rating as collateral to the recognized stock exchanges in India, in addition to cash, for their transactions in the cash segment of the market.

QFIs (Qualified Foreign Investors)

A QFI is an individual, group or association resident in a foreign country that is compliant with Financial Action Task Force (FATF) standards and is a signatory to the International Organisation of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (MMoU). QFIs do not include FIIs (foreign institutional investors) or sub-accounts.

The individual and aggregate investment limits for QFIs are 5% and 10% respectively of the paid up capital of the Indian company. The investment limits are applicable to each class of equity shares having separate and distinct ISIN. QFIs can open only one dedicated demat account with a qualified Depository Participant ("DP") for investment in equity shares under the Scheme.

The government today allowed qualified foreign investors (QFIs) from six member-countries of the Gulf Cooperation Council (GCC) and 27 countries of the European Commission (EC) to invest in the Indian capital market to enhance foreign capital inflows, they are Saudi Arabia, Bahrain, the United Arab Emirates (UAE), Oman, Qatar and Kuwait are the six countries belongs to Gulf Cooperation Council (GCC) and 27 countries of the European Commission (EC).

FDI (Foreign Direct Investment)

PROCEDURE OF RECEIVING OF INVESTMENT IN INDIAN COMPANY: An Indian company may receive Foreign Direct Investment under the two routes as given under :

- *Automatic Route:* FDI up to 100 per cent is allowed under the automatic route in all activities/sectors except where the provisions of the consolidated FDI Policy. FDI in sectors /activities to the extent permitted under the automatic route does not require any prior approval either of the Government or the Reserve Bank of India

- *Government Route:* FDI in activities not covered under the automatic route requires prior approval of the Government which are considered by the Foreign Investment Promotion Board (FIPB), Department of Economic Affairs, Ministry of Finance. Indian companies having foreign investment approval through FIPB route do not require any further clearance from the Reserve Bank of India for receiving inward remittance and for the issue of shares to the non-resident investors.

REPATRIATION PROCEDURES AND RESTRICTIONS: All foreign investments are freely repatriable (net of applicable taxes) except in cases where:

- The foreign investment is in a sector like Construction and Development Projects and Defence wherein the foreign investment is subject to a lock-in-period; and
- NRIs choose to invest specifically under non-repatriable schemes.

Further, dividends (net of applicable taxes) declared on foreign investments can be remitted freely through an Authorised Dealer bank.

SECTOR SPECIFIC CONDITION ON FDI:

Prohibited sectors

- Retail Trading (except single brand product retailing)
- Lottery Business including Government /private lottery, online lotteries, etc
- Gambling and Betting including casinos etc
- Chit funds
- Nidhi company
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of Farm Houses
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

- Activities / sectors not open to private sector investment e.g. Atomic Energy and Railway Transport (other than Mass Rapid Transport Systems)

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities.

Permitted sectors

S.NO.	SECTOR/ACTIVITY	%OF FDI CAP/ EQUITY	ENTRY ROUTE
1	Agriculture & Animal Husbandry	100%	Automatic
2	Tea Plantation	100%	Government
3	MINING	100%	Automatic
	Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation Act 1957)	100%	Government
4	PETROLEUM & NATURAL GAS	100%	Automatic
	Petroleum refining by the Public Sector Undertakings (PSU), without any disinvestment or dilution of domestic equity in the existing PSUs.	49%	Government
5	Defence Industry	26%	Government
6	Airports ■ Greenfield projects ■ Existing projects	 100% 100%	 Automatic Automatic up to 74% Government route beyond 74%
7	Courier services for carrying packages, parcels and other items which do not come within the ambit of the Indian Post Office Act, 1898 and excluding the activity relating to the distribution of letters	100%	Government

8	Construction Development: Townships, Housing, Built-up infrastructure*	100%	Automatic
9	Industrial Parks – new and existing	100%	Automatic
10	Satellites – Establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	74%	Government
11	Private Security Agencies	49%	Government
12	Telecom services	74%	Automatic up to 49% Government route beyond 49% and up to 74%
13	Banking –Private sector	74% including investment by FIIs	Automatic up to 49% Government route beyond 49% and up to 74%
14	Commodity Exchange	49% (FDI & FII) [Investment by Registered FII under Portfolio Investment Scheme (PIS) will be limited to 23% and Investment under FDI Scheme limited to 26%]	Government (For FDI)
15	Credit Information Companies	49% (FDI & FII)	Government
16	Insurance	26%	Automatic
17	Pharmaceuticals ■ Greenfield ■ Existing Companies	 100% 100%	 Automatic Government
18	Non-Banking Finance Companies (NBFC)	100%	Automatic
19	Infrastructure Company in the Securities Market	49% (FDI & FII) [FDI limit of 26% and an FII limit of 23% of the paid-up capital]	Government (For FDI)

20	TRADING Cash & Carry Wholesale Trading/ Wholesale Trading (including sourcing from MSEs)** E-commerce activities Single Brand product retail trading***	100% 100% 100%	Automatic Automatic Government
21	Print Media	26% (FDI and investment by NRIs/ PIOs/FII)	Government
22	BROADCASTING Terrestrial Broadcasting FM (FM Radio) Cable Network Headend-In-The-Sky (HITS) Broadcasting Service	26% 49% 74% (total direct and indirect foreign investment including portfolio and FDI)	Government Government Automatic up to 49% Government route beyond 49% and up tp 74%
	Asset Reconstruction Company (ARC) means a company registered with the Reserve Bank of India under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).	49% of paid-up capital of ARC	Government

** INVESTMENT WILL BE SUBJECT TO THE FOLLOWING CONDITIONS:*

- Minimum area to be developed under each project would be as under:

- In case of development of serviced housing plots, a minimum land area of 10 hectares
- In case of construction-development projects, a minimum built-up area of 50,000 sq.mts
- In case of a combination project, any one of the above two conditions would suffice

- Minimum capitalization of US$10 million for wholly owned subsidiaries and US$ 5 million for joint ventures with Indian partners. The funds would have to be brought in within six months of commencement of business of the Company.

- Original investment cannot be repatriated before a period of three years from completion of minimum capitalization. Original investment means the entire amount brought in as FDI. The lock-in period of three years will be applied from the date of receipt of each installment/tranche of FDI or from the date of completion of minimum capitalization, whichever is later. However, the investor may be permitted to exit earlier with prior approval of the Government through the FIPB.

■ At least 50% of each such project must be developed within a period of five years from the date of obtaining all statutory clearances. The investor/investee company would not be permitted to sell undeveloped plots. For the purpose of these guidelines, ―undeveloped plots‖ will mean where roads, water supply, street lighting, drainage, sewerage, and other conveniences, as applicable under prescribed regulations, have not been made available. It will be necessary that the investor provides this infrastructure and obtains the completion certificate from the concerned local body/service agency before he would be allowed to dispose of serviced housing plots.

■ The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/Municipal/Local Body concerned.

■ The investor/investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/ Municipal/Local Body concerned.

■ The State Government/ Municipal/ Local Body concerned, which approves the building / development plans, would monitor compliance of the above conditions by the developer.

Note: (i) The conditions at (1) to (4) above would not apply to Hotels & Tourism, Hospitals, Special Economic Zones (SEZs), Education Sector, Old age Homes and investment by NRIs. (ii) FDI is not allowed in Real Estate Business.

***GUIDELINES FOR CASH & CARRY WHOLESALE TRADING/WHOLESALE TRADING (WT):*

■ For undertaking WT, requisite licenses/registration/ permits, as specified under the relevant Acts/Regulations/Rules/Orders of the State Government/Government Body/Government Authority/Local Self-Government Body under that State Government should be obtained.

■ Except in case of sales to Government, sales made by the wholesaler would be considered as ‗cash & carry wholesale trading/wholesale trading' with valid business customers, only when WT are made to the following entities:
- Entities holding sales tax/ VAT registration/service tax/excise duty registration; or
-Entities holding trade licenses i.e. a license/registration certificate/membership certificate/registration under Shops and Establishment Act, issued by a Government Authority/ Government Body/ Local Self-Government Authority, reflecting that the entity/person holding the license/ registration certificate/ membership certificate, as the case may be, is itself/ himself/herself engaged in a business involving commercial activity; or

- Entities holding permits/license etc. for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies; or(IV) Institutions having certificate of incorporation or registration as a society or registration as public trust for their self consumption

- Full records indicating all the details of such sales like name of entity, kind of entity, registration/license/permit etc. number, amount of sale etc. should be maintained on a day to day basis.

- WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture

- WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations.

- A Wholesale/Cash & carry trader cannot open retail shops to sell to the consumer directly

****FDI IN SINGLE BRAND PRODUCT RETAIL TRADING WOULD BE SUBJECT TO THE FOLLOWING CONDITIONS:*

- Products to be sold should be of a ‗Single Brand' only.

- Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.

- Single Brand' product-retail trading would cover only products which are branded during manufacturing.

- The foreign investor should be the owner of the brand.

- In respect of proposals involving FDI beyond 51%, mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian ‗small industries/ village and cottage industries, artisans and craftsmen'. 'Small industries' would be defined as industries which have a total investment in plant & machinery not exceeding US $ 1.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose. The compliance of this condition will be ensured through self-certification by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts, which the company will be required to maintain.

- Application seeking permission of the Government for FDI in retail trade of ‗Single Brand' products would be made to the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion. The application would specifically indicate the product/ product categories which are proposed to be sold under a ‗Single Brand'. Any addition to the product/ product categories to be sold under ‗Single Brand' would require a fresh approval of the Government.

- Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the products proposed to be sold satisfy the notified guidelines, before being considered by the FIPB for Government approval.

Remittance and Repatriation

- Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

- Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

- Sale proceeds of shares and securities and their remittance are governed by The Foreign Exchange Management (Remittance of Assets) Regulations 2000 under FEMA.

- AD (Authorized Dealer) Category-I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC / tax clearance certificate from the Income Tax Department has been produced.

Consequences of Violation of Laws

FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the Foreign Exchange Management Act (FEMA). Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA.

PENALTIES: If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of

India/FIPB/Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

ADJUDICATION AND APPEALS:

- For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity will be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty.

- The Central Government may appoint as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, an Appellate Authority/ Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

Tax Law

The authority to levy a tax is derived from the Constitution of India which allocates the power to levy various taxes between the Centre and the State. An important restriction on this power is Article 265 of the Constitution of India which states that "No tax shall be levied or collected except by the authority of law". Therefore each tax levied or collected has to be backed by an accompanying law, passed either by the Parliament or the State Legislature. Taxes in India are levied by the Central Government and the State governments. Some minor taxes are also levied by the local authorities such the Municipality or the Local Council.

Direct Tax

A Direct tax is a kind of charge, which is imposed directly on the taxpayer and paid directly to the government by the persons (juristic or natural) on whom it is imposed. A direct tax is one that cannot be shifted by the taxpayer to someone else. Direct taxes are Income tax, Property tax, Corporation tax, Gift tax, etc.

Indirect Tax

An indirect tax is a tax collected by an intermediary (such as a retail store) from the person who bears the ultimate economic burden of the tax (such as the customer). An indirect tax is one that can be shifted by the taxpayer to someone else. An indirect tax may increase the price of a good so that consumers are actually paying the tax by paying more for the products. Some indirect taxes are Custom Duty, Central Excise Duty, Service tax, Sales tax, Value Added Tax (VAT), Securities Transaction Tax (STT) etc.

Personal Taxes (Income Tax)

Personal Tax, popularly known as Income tax in India is an annual tax on income of individuals. The Indian Income Tax Act 1961, provides that in respect of the total income of the Previous Year of every person, income tax shall be charged for the corresponding Assessment Year at the rates laid down by the Finance Act (Annual Budget) for that Assessment Year. The authority to levy and collect tax on incomes of individuals lies with the Central Government. Individuals are taxed on a progressive basis under three slabs. The slabs for individual taxpayers for the year 2011-12 is as below

SLAB OF INCOME (RS)	RATE OF TAX (%)
Upto 2,00,00	Nil
2,00,000 – 5,00,000	10
5,00,001-10,00,000	20
10,00,001 and above	30

For senior citizens, individual of the age of 60 years or above but below 80 years, the basic exemption limit is Rs 250,000. Individual of age of 80 years or above, the basic exemption limit is Rs 500,000

Determination of Income Tax

Taxation of individuals is determined on the basis of his/her residential status in India. For tax purposes, an individual may be resident, non resident or not ordinarily resident.

RESIDENT: An Individual is said to be resident in India in any Previous Year if:

- He is in India for at least 182 days in that year or
- Has been in India for at least 365 days during the 4 years preceding that year in which he is in India for a period of at least 60 days. However, the period of 60 days referred above is increased to 182 days in case of Indian citizens residing abroad or leaving India for employment abroad.

NON- RESIDENT: A person who does not meet the above resident criteria is a non resident. All income accruing, arising or deemed to have accrued or arisen or received in India is subjected to tax. This excludes foreign income.

RESIDENT BUT NOT ORDINARILY RESIDENT (RNOR): A resident, who was not present in India for 730 days during the preceding seven years or who was non-resident in nine out of ten preceding years, is treated as not ordinarily resident.

All Income, from Indian sources, accruing or arising or deemed to have accrued or arisen or received in India is subjected to tax. Moreover, all income earned outside India will also be included if the same is derived from a business or profession controlled or set up in India.

SPECIAL PROVISION FOR NON-RESIDENT INDIANS (NRIS)/EXPATS: NRIs are not required to file a tax return if their income consists of only interest and dividends, provided taxes due on such income are deducted at source. It is possible for non-resident Indians to avail of these special provisions even after becoming residents by following certain procedures laid down by the Income Tax Act.

An expatriate before leaving the territory of India is required to obtain a tax clearance certificate from a competent authority stating that he does not have any outstanding tax liability. Such a certificate is necessary in case the continuous presence in India exceeds 120 days.

Withholding Tax

Current rates for withholding tax for payment to non-residents are as follows:
- Interest: 20%
- Dividends (Domestic Companies: Nil
- Royalties: 20%
- Technical services: 10%
- Any other services: 30% of the income

Note: Applicable to Non-resident belonging to countries that are not party to Double Taxation Avoidance Agreement (DTAA) with India.

Corporate Tax

The corporate tax rate in India is at par with the tax rates of the other nations worldwide. The corporate tax rate in India depends entirely on the origin of a company. In India the corporate tax rates differ with regards to the nature of the ownership of the company and their income.

RESIDENT COMPANIES (COMPANIES REGISTERED UNDER INDIAN COMPANIES ACT): As per the corporate tax rates for the 2011-12 fiscal, domestic companies, with total income of more than 10 million rupees, need to pay a corporate tax of 32.445 percent. This includes a basic rate of 30% along with a surcharge of 5 percent and an education cess of 2%. In case their aggregate income is less than INR 10 million, the domestic companies are required to pay corporate taxes at a rate of 30.9 percent. This is inclusive of a direct tax of 30% and an education cess of 3 percent.

NON-RESIDENT COMPANIES(BRANCH OFFICES): According to the corporate tax rates for 2011-12 fiscal, international business organizations working in India and earning more than 10 million rupees need to pay a corporate tax rate of 42.024 percent. This includes a basic tax of 40%, an education cess of 3 percent and a surcharge of 2.5%.

If their aggregate income is less than INR 10 million they have to pay a corporate tax of 41.2 percent. This includes a basic tax of 40 percent along with an education cess of 3%.

Transfer Pricing

Transfer Pricing Regulations ("TPR") are applicable to the all enterprises that enter into an 'International Transaction' with an 'Associated Enterprise'. Therefore, generally it applies to all cross border transactions entered into between associated enterprises. It even applies to transactions involving a mere book entry having no apparent financial impact. The aim is to arrive at the comparable price as available to any unrelated party in open market conditions and is known as the Arm's Length Price ('ALP').

QUALIFIES TO BE INTERNATIONAL TRANSACTION: The definition of International transaction under the transfer pricing regulations is very wide and in its scope it includes transaction between two associated enterprises in the nature of:

- Purchase, sale or lease of tangible or intangible property or
- Provision of services or
- Lending or borrowing of money or
- Any other transaction having a bearing on the profits, income, losses or assets of such enterprises.

It would also include a mutual agreement or arrangement between two or more enterprises for allocation of cost/expenses incurred in connection with a benefit, service, facility provided or to be provided.

Tax Depreciation (Capital Allowances)

Tax allowances, called capital allowances, on certain purchases or investments can be claimed. This means a proportion of these costs can be deducted from taxable profits in order to reduce the tax charge. Capital allowances are available on plant and machinery, buildings (including converting space above commercial premises to flats for renting) and research and development.

Dividends Distribution Tax

In India, domestic companies that declare, distribute or pay dividends are subject to dividend distribution tax at 16.61% on the amount of such dividends. However, income distributed by a specified company or mutual fund is taxable at differential rates. Income distributed from the Money market/liquid funds is also taxable.

Tax Incentives

The Government offers many incentives to investors in India with a view to stimulating industrial growth and development. The incentives offered are normally in line with the government's economic philosophy, and are revised regularly to accommodate new areas of emphasis. The following are some of the important incentives offered, which significantly reduce the effective tax rates for the beneficiary companies:

- Five year tax holiday for:
  - Power projects.
  - Firms engaged in exports.
  - New industries in notified states and for new industrial units established, in electronic hardware/software parks.
  - Export Oriented Units and units in Free Trade Zones.
- Tax deductions of 100 per cent of export profits.
- Deduction of 30 per cent of net (total) income for 10 years for new industrial undertakings.
- Deduction of 50 per cent on foreign exchange earnings by construction companies, hotels and on royalty, commission etc. earned in foreign exchange.
- Deduction in respect of certain inter-corporate dividends to the extent of dividend declared.

Double Tax Treaties

INDIA has comprehensive Double Taxation Avoidance Agreements (DTAA) with 83 countries. This means that there are agreed rates of tax and jurisdiction on specified types of income arising in a country to a tax resident of another country. Under the Income Tax Act 1961 of India, there are two provisions, which provide specific relief to taxpayers to save them from double taxation.

- For taxpayers who have paid the tax to a country with which India has signed DTAA,
- Relief to tax payers who have paid tax to a country with which India has not signed a DTAA.

Thus, India gives relief to both kinds of taxpayers.

Mauritius as Tax Heaven

A large number of foreign institutional investors who trade on the Indian stock markets operate from Mauritius. According to the tax treaty between India and Mauritius, capital gains arising from the sale of shares are taxable in the country of residence of the shareholder and not in the country of residence of the company whose shares have been sold. Therefore, a company resident in Mauritius selling shares of an Indian company will not pay tax in India. Since there is no capital gains tax in Mauritius, the gain will escape tax altogether.

One important aspect for claiming DTAA, is that the Permanent Account Number (PAN) has been made mandatory to avail the benefit of lower withholding under DTAA. PAN is mandatory registration number which every individual or company must have as a tax asessee in India.

Value-Added Tax

India, particularly being a trading community, has always believed in accepting and adopting loopholes in any system administered by State or Centre. If a well-administered system comes in, it will not only close options for traders and businessmen to evade paying their taxes, but also make sure that they'll be compelled to keep proper records of sales and purchases.

Under the VAT system, no exemptions are given and a tax will be levied at every stage of manufacture of a product. At every stage of value-addition, the tax that is levied on the inputs can be claimed back from tax authorities.

ITEMS COVERED UNDER VAT:

- All business transactions that are carried on within a State by individuals/partnerships/ companies etc. will be covered under VAT.
- More than 550 items are covered under the new Indian VAT regime out of which 46 natural & unprocessed local products will be exempt from VAT
- Nearly 270 items including drugs and medicines, all industrial and agricultural inputs, capital goods as well as declared goods would attract 4 % VAT in India.
- The remaining items would attract 12.5 % VAT. Precious metals such as gold and bullion will be taxed at 1%.
- Petrol and diesel are kept out of the VAT regime in India.

All over the world, VAT is payable on the goods and services as they form a part of national GDP. More than130 countries worldwide have introduced VAT over the past 3 decades; India being amongst the last few to introduce it. Government is planning to merge service tax and sales tax in the form of Goods Service Tax (GST).

Custom Duty

Custom duty is type of Indirect tax charged on goods imported into India. When any goods imported from foreign country into India, one has to pay this Duty. This duty is often payable at the port of entry. This duty varied from good to goods. The system of calculating customs duty on the products imported is a complex one and based on products imported.

Service Tax

In India Service tax came into effect in 1994. Service tax was applicable on all type of service except the negative list of services. This tax is applicable on all service providers in India, except in the State of Jammu and Kashmir. Earlier Service tax rate was 10% on all type of service and charged on cash basis for each service provider. But from May 2012, service tax is charged at the rate of 12% on all service provider and it is charged on cash basis for individual and for Companies it is being charged on accrual basis.

SERVICE TAX RATE CALCULATION:

Current Service tax rate	= 12%
(+) Educational Cess @ 2%	= 0.24%
(+) Senior and Higher Education Cess@1%	= 0.12%
Effective Service Tax Rate	*= 12.36%*

Every service is now required to apply for Service Tax Registration if the value of service provided by him during the financial year is more that Rs. 10 Lakhs.

Securities Transaction Tax

Securities Transaction Tax or STT is a tax that is levied on all transactions done on the stock exchanges. That means if one purchase or sell equity shares, derivative instruments, equity oriented Mutual Funds, government securities or rights/interest in securities, one has to pay STT. Hence this tax is payable whether you buy or sell a share and it gets added to the price of the security during the transaction itself. Since this tax is automatically added to the transaction price, one can't avoid it or save it

SECURITIES TRANSACTION TAX RATE

MARKET TYPE	CURRENT RATE
Futures & Options	0.017%
Capital Market (Delivery)	0.125%
Capital Market (Intra-Day)	0.025%

STT AND CAPITAL GAINS TAX ON SECURITIES: With effect from 2010, the short term capital gain arising from the sale of shares or equity oriented mutual fund units, on which STT has been applied, would be taxed at a concessional tax rate of 15%(plus surcharge and education cess). Long term capital gains, of such similar transactions which have been subject to STT, is totally exempted from tax. For all transactions for which STT is not applied, the long term capital gains tax is at 10% without indexation and 20% with indexation is applicable.

Wealth Tax

Wealth tax is an annual tax like income tax. It is another type of direct tax by which tax is imposed on individuals coming within its purview. Wealth tax is charged for every assessment year in respect of net wealth of corresponding valuation date, inter alia, on every individual, Hindu Undivided Family (HUF) and company at the rate of one per cent (1%) of the amount by which net wealth exceeds Rs. 15 lakhs.

Scope of liability to wealth tax:

- HUF and company resident in India,Wealth tax is chargeable on net wealth comprising of
- All assets in India and outside India;
- All debts in India and outside India are deductible in computing the net wealth.
- An individual who is a citizen of India but non-resident in India or not ordinarily resident in India, HUF, non-resident or not ordinarily resident in India and a company non-resident in India and also including an individual who is not a citizen of India whether resident, non-resident or not ordinarily resident in India.
- All assets in India except loan and debts interest whereon is exempt from income-tax under section 10 of the Income-tax Act are chargeable to tax.
- All debts in India are deductible in computing the net wealth.
- All assets and debts outside India are out of the scope of Wealth Tax Act.

Capital Gains Tax

Capital gains arise from sale of capital investments. It can be a home, a farm, a business, shares, mutual fund, jewellery, paintings, bonds, other real estate, etc. It excludes items for personal use like apparel, motor vehicle, furniture. It also excludes stock-in-trade for business and agricultural land.

Capital Gains Tax can be classified as 'Long Term Capital Gains Tax' and 'Short Term Capital Gains Tax'. Long Term Capital Gains Tax arises when an asset is held for a 'long term' which is 3 years. In case of shares/equity or mutual funds which are traded on a listed exchange, long Term is defined as 1 year. Short Term Capital Tax arises when the asset is sold prior to minimum required period for it to be classified as 'long term'.

Professional Tax

In India, the professional tax is imposed at the state level. However, not all the states but major state impose this tax. Business owners, working individuals, merchants and people carrying out various occupations comes under the purview of this tax.

Labour Law

Legislative history of labour laws in India

The history of labour legislation in India is naturally interwoven with the history of British colonialism. Considerations of British political economy were naturally paramount in shaping some of these early laws. In the beginning it was difficult to get enough regular Indian workers to run British establishments and hence laws for indenturing workers became necessary. This was obviously labour legislation in order to protect the interests of British employers.

Then came the Factories Act. It is well known that Indian textile goods offered stiff competition to British textiles in the export market and hence in order to make India labour costlier the Factories Act was first introduced in 1883 because of the pressure brought on the British parliament by the textile magnates of Manchester and Lancashire. Thus we received the first stipulation of eight hours of work, the abolition of child labour, and the restriction of women in night employment, and the introduction of overtime wages for work beyond eight hours.

To date, India has ratified 39 International Labour Organisation (ILO) conventions of which 37 are in force. Of the ILO's eight fundamental conventions, India has ratified four - Forced Labour 1930, Abolition of Forced Labour 1957, Equal Remuneration 1951, and Discrimination (employment and occupation) 1958.

The organised and the unorganized sector

An important distinction that is popularly made nowadays in all discussions relating to labour legislation is between workers in the organised/formal sector and those in the informal/informal sector. Many who make this distinction do so with ulterior motives, yet we must reckon with it - especially because out of the total workforce in the country, 92 percent work in the informal sector while only eight percent work in the formal sector.

At the outset it must therefore be remembered that those who were unorganised yesterday are organised today and those who are unorganised today aspire to become the organised tomorrow. Moreover, many rights, benefits, and practices, which are popularly recognised today as legitimate rights of the workers, are those that have accrued as a result of the struggles carried out by the earlier generation of workers. The attempt, prevalent in some circles to pit one section of workers against the others, must therefore be carefully understood and deserves to be rejected outright.

Trade unionism and the Trade Union Act 1926

There are almost ten major central union organisations of workers based on different political ideologies. Almost every union is affiliated to one of these. These central organisations have state branches, committees, and councils from where its organisation works down to the local level.

The first central trade union organisation in India was the All India Trade Union Congress (AITUC) in 1920 - almost three decades before India won independence. At about the same time workers at the Buckingham and Carnatic Mills, Madras went on strike led by B P Wadia. The management brought a civil suit against the workers in the Madras High Court and not only obtained an injunction order against the strike but also succeeded in obtaining damages against the leader for 'inducing a breach of contract'. This was followed by widespread protests that finally yielded in the Trade Union Act 1926 giving immunity to the trade unions against certain forms of civil and criminal action. Apart from this aspect the Trade Union Act also facilitated registration, internal democracy, a role for outsiders and permission for raising a political fund subject to separate accounting requirements.

The Trade Union Act facilitates unionisation both in the organised and the unorganised sectors. It is through this law that the freedom of association that is a fundamental right under the Constitution of India is realised.

The right to register a trade union however does not mean that the employer must recognise the union – there is in fact no law which provides for recognition of trade unions and consequently no legal compulsion for employers, even in the organised sector, to enter into collective bargaining. Yet in reality because of the strength of particular trade unions there is fairly widespread collective bargaining, especially in the organised sector.

Wage determination in the unorganised sector

Wage determination in India has been achieved by various instruments. For the unorganised sector the most useful instrument is the Minimum Wages Act 1948. This law governs the methods to fix minimum wages in scheduled industries (which may vary from state to state) by using either a committee method or a notification method. A tripartite Advisory Committee with an independent Chairman advises the Government on the minimum wage. In practice unfortunately, the minimum wage is so low that in many industries there is erosion of real wage despite revision of the minimum wage occasionally. A feeble indexation system has now been introduced in a few states only.

Collective bargaining in the organised sector

An important factor that is not much recognised, but which still prevails in many organised sector units is fixing and revising wages through collective bargaining. The course of collective bargaining was influenced in 1948 by the recommendations of the Fair Wage Committee that reported that three levels of wages exist - minimum, fair, and living.

These three wage levels were defined and it was pointed out that all industries must pay the minimum wage and that the capacity to pay would apply only to the fair wage, which could be linked to productivity. In addition to this the fifteenth Indian Labour Conference, a tripartite body, met in 1954 and defined precisely what the needs-based minimum wage was and how it could be quantified using a balanced diet chart.

This gave a great boost to collective bargaining; many organised sector trade unions were able to achieve reasonably satisfactory indexation and a system of paying an annual bonus. It is now the law, that a thirteenth month of wage must be paid as a deferred wage to all those covered by the Payment of Bonus Act. The minimum bonus payable is 8.33 percent and the maximum is 20 percent of the annual wage.

Strikes and lockouts in the company

Workers have the right to strike, even without notice unless it involves a public utility service; employers have the right to lockout, subject to the same conditions as a strike. The parties may sort out their differences either bilaterally, or through a conciliation officer who can facilitate but not compel a settlement which is legally binding on the parties, even when a strike or a lockout is in progress. But if these methods do not resolve a dispute, the government may refer the dispute to compulsory adjudication and ban the strike or lockout.

Conciliation, arbitration, and adjudication

When parties engaging in collective bargaining are unable to arrive at a settlement, either party or the government may commence conciliation proceedings before a government appointed conciliation officer whose intervention may produce a settlement, which is then registered in the labour department and becomes binding on all parties. If conciliation fails it is open to the parties to invoke arbitration or for the appropriate government to refer the dispute to adjudication before a labour court or a tribunal whose decision may then be notified as an award of a binding nature on the parties. Disputes may be settled by collective bargaining, conciliation, or compulsory adjudication.

Colonial dispute settlement machinery

The Industrial Disputes Act 1947 (IDA) provides for the settlement machinery above. The framework of this legislation, which is the principle legislation dealing with core labour issues, is of colonial origin. This law originated firstly in the Trade Disputes Act 1929, introduced by the British, when there was a spate of strikes and huge loss of person days and secondly through Rule 81A of the Defence of India Rules 1942, when the British joined the war efforts and wanted to maintain wartime supplies to the allied forces. Interestingly the interim government on the eve of formal independence retained this framework by enacting the IDA, which still remains on the statute book.

Developments after independence

Even though the IDA was primarily meant for industry in the organised sector, its present application has now extended well into the unorganised sector, through judge-made law. Its pro-worker protection clauses and safeguards against arbitrary job losses have evolved over a period of time both through the process of sustained legislative amendments and through the process of judicial activism spread over more than five decades.

The original colonial legislation underwent substantial modification in the post-colonial era because independent India called for a clear partnership between labour and capital. The content of this partnership was unanimously approved in a tripartite conference in December 1947 in which it was agreed that labour would be given a fair wage and fair working conditions and in return capital would receive the fullest co-operation of labour for uninterrupted production and higher productivity as part of the strategy for national economic development and that all concerned would observe a truce period of three years free from strikes and lockouts.

Protection of service conditions

A feature of the Industrial Disputes Act (IDA) is the stipulation that existing service conditions cannot be unilaterally altered without giving a notice of 21 days to the workers and the union. Similarly if an industrial dispute is pending before an authority under the IDA, then the previous service conditions in respect of that dispute cannot be altered to the disadvantage of the workers without prior permission of the authority concerned. This has been identified as a form of rigidity that hampers competition in the era of the World Trade Organisation.

Removal from service

A permanent worker can be removed from service only for proven misconduct or for habitual absence - due to ill health, alcoholism and the like, or on attaining retirement age. In other words the doctrine of 'hire and fire' is not approved within the existing legal framework. In cases of misconduct the worker is entitled to the protection of Standing Orders to be framed by a certifying officer of the labour department after hearing management and labour, through the trade union.

Employers must follow principles of 'natural justice', which again is an area that is governed by judge-made law. An order of dismissal can be challenged in the labour court and if it is found to be flawed, the court has the power to order reinstatement with continuity of service, back wages, and consequential benefits. This again is identified as an area where greater flexibility is considered desirable for being competitive.

Almost all pro-worker developments that accrued since independence are now identified as areas of rigidity and in the name of flexibility there is pressure on the government of India to repeal or amend all such laws. Interestingly, if such a proposal is fully implemented, labour law, especially for the organised sector, will go back to the colonial framework where state intervention was meant primarily to discipline labour, not to give it protection.

Globalisation and Changing Business Environment

The most distinctly visible change from globalisation is the increased tendency for offloading or subcontracting. Generally this is done through the use of cheaper forms of contract labour, where there is no unionisation, no welfare benefits, and quite often not even statutorily fixed minimum wages. Occasionally the tendency to bring contract labour to the mother plant itself is seen. This is very often preceded by downsizing, and since there is statutory regulation of job losses, the system of voluntary retirement with the 'golden handshake' is widely prevalent, both in public and private sectors.

Regulation of contract labour

The Contract Labour (Prohibition and Regulation) Act 1970 provides a mechanism for registration of contractors (if more than twenty workers are engaged) and for the appointment of a Tripartite Advisory Board that investigates particular forms of contract labour, which if found to be engaged in areas requiring perennial work connected with the production process, then the Board could recommend its abolition. A tricky legal question has arisen as to whether the contract workers should be automatically absorbed or not after the contract labour system is abolished. Recently a Constitutional Bench of the Supreme Court held that there need not be such automatic absorption - in effect this 'abolishes' the contract labourer and has given rise to a serious anomaly.

Phase between organised and unorganized

We are already witnessing a reduction in the organised labour force and an increase in the ranks of the unorganised. The above law is a kind of inter-phase in the process of regulating the transition from regular employment to irregular employment. If contract labour is seen as introducing a form of flexibility, a strict enforcement of this Act could have had a salutary effect on the transition process. Instead the enforceability of the Act is now diluted and consequently even the minimum protection envisaged under this law to contract labourers is in jeopardy. Dominant thinking in relation to globalisation is having its effect on the judicial process also, ignoring Directive Principles of State Policy contained in the Constitution of India.

Employment injury, health, and maternity benefit

The Workman's Compensation Act 1923 is one of the earliest pieces of labour legislation. It covers all cases of 'accident arising out of and in the course of employment' and the rate of compensation to be paid in a lump sum, is determined by a schedule proportionate to the extent of injury and the loss of earning capacity. The younger the worker and the higher the wage, the greater is the compensation subject to a limit. The injured person, or in case of death the dependent, can claim the compensation. This law applies to the unorganised sectors and to those in the organised sectors who are not covered by the Employees State Insurance Scheme, which is conceptually considered to be superior to the Workman's Compensation Act.

The Employees State Insurance Act provides a scheme under which the employer and the employee must contribute a certain percentage of the monthly wage to the Insurance Corporation that runs dispensaries and hospitals in working class localities. It facilitates both outpatient and in-patient care and freely dispenses medicines and covers hospitalisation needs and costs. Leave certificates for health reasons are forwarded to the employer who is obliged to honour them. Employment injury, including occupational disease is compensated according to a schedule of rates proportionate to the extent of injury and loss of earning capacity. Payment, unlike in the Workmen's Compensation Act, is monthly. Despite the existence of tripartite bodies to supervise the running of the scheme, the entire project has fallen into disrepute due to corruption and inefficiency. Workers in need of genuine medical attention rarely approach this facility though they use it quite liberally to obtain medical leave. There are interesting cases where workers have gone to court seeking exemption from the scheme in order to avail of better facilities available through collective bargaining.

The Maternity Benefit Act is applicable to notified establishments. Its coverage can therefore extend to the unorganised sector also, though in practice it is rare. A woman employee is entitled to 90 days of paid leave on delivery or on miscarriage. Similar benefits, including hospitalisation facilities are available under the law described in the paragraph above.

Retirement benefit

There are two types of retirement benefit generally available to workers. One is under the Payment of Gratuity Act and the other is under the Provident Fund Act. In the first case a worker who has put in not less than five years of work is entitled to a lump sum payment equal to 15 days' wages for every completed year of service. Every month the employer is expected to contribute the required money into a separate fund to enable this payment on retirement or termination of employment. In the latter scheme both the employee and the employer make an equal contribution into a national fund. The current rate of contribution is 12 percent of the wage including a small percentage towards family pension. This contribution also attracts an interest, currently 9.5 percent per annum, and the accumulated amount is paid on retirement to the employee along with the interest that has accrued. Unfortunately the employee is allowed to draw many types of loan from the fund such as for house construction, marriage of children, and education etc. As a result very little is available at the time of retirement. This is also a benefit, which is steadily being extended to sections of the unorganised sector, especially where the employer is clearly identifiable.

Women labour and the related Labour laws

Women constitute a significant part of the workforce in India but they lag behind men in terms of work participation and quality of employment. According to Government sources, out of 407 million total workforce, 90 million are women workers, largely employed (about 87 percent) in the agricultural sector as labourers and cultivators. In urban areas, the employment of women in the organised sector in March 2000 constituted 17.6 percent of the total organised sector.

Apart from the Maternity Benefit Act, almost all the major central labour laws are applicable to women workers. The Equal Remuneration Act was passed in 1976, providing for the payment of equal remuneration to men and women workers for same or similar nature of work. Under this law, no discrimination is permissible in recruitment and service conditions except where employment of women is prohibited or restricted by the law. The situation regarding enforcement of the provisions of this law is regularly monitored by the Central Ministry of Labour and the Central Advisory Committee. In respect of an occupational hazard concerning the safety of women at workplaces, in 1997 the Supreme Court of India announced that sexual harassment of working women amounts to violation of rights of gender equality. As a logical consequence it also amounts to violation of the right to practice any profession, occupation, and trade. The judgment also laid down the definition of sexual harassment, the preventive steps, the complaint mechanism, and the need for creating awareness of the rights of women workers. Implementation of these guidelines has already begun by employers by amending the rules under the Industrial Employment Standing Orders Act 1946.

Implementation of labour laws

The Ministry of Labour has the responsibility to protect and safeguard the interests of workers in general and those constituting the deprived and the marginal classes of society in particular with regard to the creation of a healthy work environment for higher production and productivity. The Ministry seeks to achieve this objective through enacting and implementing labour laws regulating the terms and conditions of service and employment of workers. In 1966, the Ministry appointed the First National Labour Commission (NLC) to review the changes in the conditions of labour since independence and also to review and assess the working of the existing legal provisions. The NLC submitted its report in 1969. The important recommendations of NLC have been implemented through amendments of various labour laws. In the areas of wage policy, minimum wages, employment service, vocational training, and worker's education, the recommendations made by the NLC have been largely taken into account in modifying policies, processes, and programmes of the government. In order to ensure consistency between labour laws and changes in economic policy, and to provide greater welfare for the working class, the Second NLC was constituted in 1999.

All labour laws provide for an inspectorate to supervise implementation and also have penalties ranging from imprisonment to fines. Cases of non-implementation need to be specifically identified and complaints filed before magistrates after obtaining permission to file the complaint from one authority or the other. Very few cases are filed, very rarely is any violator found guilty, and almost never will an employer be sent to prison. Consequently these powers are used by corrupt officials only for collecting money from employers.

This does not however mean that no labour laws are implemented. On the contrary experience has proved that the implementation of such laws is directly proportional to the extent of unionisation. This generalisation is particularly true of the informal sector.

The unorganised sector

Many of the laws mentioned above apply to the unorganised sector also. In some cases a separate notification may be necessary to extend the application of a particular law to a new sector. It is useful to notice that some pieces of legislation are more general in character and apply across the board to all sectors. The Trade Union Act 1926, The Minimum Wages Act 1948, The Contract Labour (Regulation and Abolition) Act 1970, The Workman's Compensation Act 1923, and The Payment of Wages Act 1936 are examples of this type. In certain cases, even the IDA 1947 would be included.

In addition to the above there are special sectoral laws applicable to particular sectors of the unorganised. Under this category are laws like the Building and Construction Workers Act 1996, the Bonded Labour System (Abolition) Act 1976, The Interstate Migrant Workers Act 1979, The Dock Workers Act 1986, The Plantation Labour Act 1951, The Transport Workers Act, The Beedi and Cigar Workers Act 1966, The Child Labour (Prohibition and Regulation) Act 1986, and The Mine Act 1952.

Broadly speaking these sectoral laws either abolish or prohibit an abominable practice like bonded labour or they seek to regulate exploitative conditions by regulating working hours and conditions of service.

A recent trend has been to seek the creation of a welfare fund through the collection of a levy from which medical benefits or pension provisions are made. Workers and management may contribute and attempt to set up tripartite boards for implementation of welfare benefits.

Another contemporary effort is to provide an umbrella statute to take care of employment conditions and social welfare benefits for all unorganised sections. Common central legislation for all agricultural workers is also on the anvil. Many powers are vested in quasi-judicial authorities, labour courts, and magistrates' courts. The power of review is in the High Courts and finally in the Supreme Court.

The general experience, with the occasional exception, is unbearable delay. Even where statutes prescribe reasonable time limits, they are not adhered to. Frustration with labour-related justice is heightened by these unlimited delays. A case of dismissal takes almost ten years for the labour court to decide and if the parties decide to seek judicial review in the higher courts there can be unlimited delay.

For the unorganised sector a renewed attempt to focus on the core labour standard identified by the ILO in its Declaration on Fundamental Rights at Work would still be worthwhile, especially if we take steps to ensure the implementation of the first of those core labour standards namely the freedom of association and the right to collective bargaining. It is only through the organisation of potential beneficiaries that we can hope for some benefits at least to percolate down into the hands of the needy.

Real Estate Law

Real estate or immovable property is a legal term that encompasses land along with anything permanently affixed to the land, such as buildings. Real estate is often considered synonymous with real property. The term real estate and real property are used primarily in common law, while civil law jurisdiction refers instead to immovable property. In law, the word real means relating to a thing as distinguished from a person.

In INDIA Real estate can divide into three categories: These are

- Commercial
- Residential
- Agricultural

Types of Ownership Interests: Real property (immovable property) can refer to the real estate itself or to various types of ownership interests in real estate, including:

- Freehold: Provides the owner the right to use the real estate for any lawful purpose and sell when and to whom the owner wishes.
- Life estate: An interest in real estate which is granted to a life tenant until that person dies. The interest terminates upon the death of the life tenant.
- Estate for years: Similar to life estate but term are a specified number of years.
- Leasehold: The right to posses and use real estate pursuant to the terms of a use.
- Reversion: The right to posses the free interest in real estate after the expiration of a life estate, estate for years or leasehold.

Land Registry

In INDIA Land Registry governed by Registration Act 1908, the purpose of this Act is the conservation of evidence, assurances, title, and publication of documents and prevention of fraud. The register is maintained by a number of district land registries located throughout the country. Instruments which it is mandatory to register include:

- Instruments of gift of immovable property;
- other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immovable property;
- non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of instruments in (2) above.
- leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

Sales, mortgages (other than by way of deposit of title deeds) and exchanges of immovable property are required to be registered by virtue of the Transfer of Property Act. Evidently, therefore, all the above documents have to be in writing. An unregistered document will not affect the property comprised in it, nor be received as evidence of any transaction affecting such property, unless it has been registered.

All registered land has its own "bearing number" and plan which identifies the land in question. The entries which appear on the register against a particular title number are guaranteed by the state as accurate.

The net effect has been that a large number of property transactions have been accomplished without proper registration. Further other instruments such as Agreement to Sell, General Power of Attorney and Will have been indiscriminately used to effect change of ownership.

Transfer

According to Transfer of Property Act 1882, land can only be transferred by a registered deed. A deed is a document usually it shows the ownership of land, which is signed and witnessed and brought into effect in a particular way. This process does not require a notary. In order for a transfer of registered land to be effective, it must be completed by registration at the Land Registry office and governed by Indian Registration Act 1908. This cannot be done unless the relevant tax has been paid on the documents. The relevant tax is Stamp Duty Land Tax which is explained below.

According to Indian law i.e. Transfer of Property Act, 1882, a property can be transferred by Mortgage of property, Sale of property, Lease of Property, Gift of property, Charge of Property, Exchange of property, etc. But to become absolute owner of the property the only way is the sale of property method wherein the sale of property is done through a sale deed after paying the requisite stamp duty and registration of the sale deed with the jurisdictional registrar' office. In all other case mentioned above the transferee gets only the right to use the property but not become the absolute owner of the property.

Mortgages

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Type of mortgage in India:

- *Simple mortgage*- Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold

- *Mortgage by conditional sale*- Where, the mortgagor ostensibly sells the mortgaged property- on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void

- *Usufructuary mortgage*- Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money.

- *English mortgage*- Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee.

Charge

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the later person is said to have a charge on the property and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Charge not apply on trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration.

Acquisition of property by people residing outside India (Indian origin) including foreigners

A PERSON OF INDIAN ORIGIN RESIDENT OUTSIDE INDIA MAY:

- Acquire any immovable property other than agricultural land/farm house/ plantation property in India by purchase, from out of
  - Funds received in India by way of inward remittance from any place outside India or
  - Funds held in any non-resident account maintained in accordance with the provisions of the Foreign Exchange Management Act(Act) and the regulations made by the Reserve Bank of India under the Act.

- Acquire any immovable property in India other than agricultural land / farm house /plantation property by way of gift from a person resident in India

- Acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India

A PERSON RESIDENT OUTSIDE INDIA (MAINLY FOR FOREIGN COMPANIES) WHO HAS ESTABLISHED IN INDIA IN ACCORDANCE WITH THE FOREIGN EXCHANGE MANAGEMENT ACT, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may:

- Acquire any immovable property in India, which is necessary for or incidental to carrying on such activity; Provided that all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and

- The person files with the Reserve Bank a declaration not later than ninety days from the date of such acquisition.

- Transfer by way of mortgage to an authorised dealer as a security for any borrowing, the immovable property acquired.

RESTRICTION ON FOREIGNERS IN ACQUIRING IMMOVABLE PROPERTY IN INDIA: A foreign national of non-Indian origin, resident outside India cannot purchase any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India. However, he / she can acquire or transfer immovable property in India, on lease, not exceeding five years. In such cases, there is no requirement of taking any permission of /or reporting to the Reserve Bank.

Repatriation of sale proceed

Repatriation outside India means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency.

In the event of sale of immovable property other than agricultural land / farm house / plantation property in India by a Non Resident Indian (NRI) / Person of Indian Origin (PIO), the Authorised Dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

- The immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- The amount to be repatriated does not exceed:

- the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels, or
- the amount paid out of funds held in Foreign Currency Non-Resident Account, or
- The foreign currency equivalent (as on the date of payment) of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property.

NRI/PIO are also allowed by the Authorised Dealers to repatriate an amount up to USD 1 million per financial year. This is subject to production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter, and a tax clearance / no objection certificate from the Income Tax Authority for the remittance.

Legal Protection for Buyers and Sellers

In India, the law gives no special protection to buyers or sellers of property. Those involved in property transactions will invariably use a solicitor to represent their interests. It is the job of the buyer's solicitor to ensure that the property being bought is free from undisclosed restrictions or obligations and that it is validly transferred at the correct price and proper stamp duty is paid to the government on the transaction and the sale deed is registered before the registrar's office.

Leases

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee.

A lease is the most common way of holding commercial and residential property in the INDIA. The length of leases will vary depending upon the circumstances and requirements of the parties.

The lease will impose obligations and restrictions on the tenant. The obligation which is most significant from a financial point of view is the obligation to repair, decorate and if necessary re-build or pay towards the cost of rebuilding. Tenant will also be responsible through the service charge to contribute towards the cost of repairing and maintaining the building of which his offices form part including all services to the building (e.g. lifts air-conditioning and heating plant and systems and so on). It is often the case that these expenses are not capped and if the building and its services are old, the tenant can face very significant extra costs through the service charge.

Some of the other important provisions in a typical commercial lease are as follows:

- restrictions on use
- restrictions on alterations to the property
- restrictions on disposing of the property
- Service Tax is payable on the rent of commercial property
- Any lease granted for more than 1 year must be registered at the Land Registry.

Stamp Duty Tax

There is a direct link between Registration Act and Stamp Act. Stamp duty needs to be paid on all documents which are registered and the rate varies from one Indian State to another Indian State. Stamp Duty is a tax payable to the State government on land transactions. The tax is payable by the buyer or the tenant.

Property Tax

Property tax is a levy charged by the municipal authorities for the upkeep of basic civic services in the city. In India it is the owners of property who are liable for the payment of municipal taxes.. Whenever the property value will change it will change in value of the property tax.

Service Tax

April 2010, an additional amount in the form of service tax is being collected from buyers, on under construction properties. The Finance Minister introduced a service tax of 10.3% (at present 12.36%) on all under construction property purchases from a builder or developer. The government has stipulated that construction of a house by a builder. This service tax is to be paid by property buyers, to the builders, who would in turn deposit the amount to the tax authorities.

Service Tax, therefore, would be on 25% of the value of the property and not on the entire cost. Tax would be applicable only on the cost of labour or services of the builder or developer. All costs of land and construction material of the property would not fall under the purview of service tax.

Foreign Direct Investment in Real Estate

FDI provides for 100% foreign participation in housing and real estate development sector through government approved Automatic route. In Townships, housing, built-up infrastructure and construction development projects. Investment will be subject to the following conditions:

- Minimum area to be developed under each project would be as under:
- In case of development of serviced housing plots, a minimum land area of 10 hectares.
- In case of construction-development projects, a minimum built-up area of 50,000 sq.mts.
- In case of a combination project, any one of the above two conditions would suffice

- Minimum capitalization of US$10 million for wholly owned subsidiaries and US$ 5 million for joint ventures with Indian partners. The funds would have to be brought in within six months of commencement of business of the Company.

- Original investment cannot be repatriated before a period of three years from completion of minimum capitalization. Original investment means the entire amount brought in as FDI. The lock-in period of three years will be applied from the date of receipt of each installment/tranche of FDI or from the date of completion of minimum capitalization, whichever is later. However, the investor may be permitted to exit earlier with prior approval of the Government through the FIPB.

- At least 50% of each such project must be developed within a period of five years from the date of obtaining all statutory clearances. The investor/investee company would not be permitted to sell undeveloped plots. For the purpose of these guidelines, —undeveloped plots will mean where roads, water supply, street lighting, drainage, sewerage, and other conveniences, as applicable under prescribed regulations, have not been made available. It will be necessary that the investor provides this infrastructure and obtains the completion certificate from the concerned local body/service agency before he would be allowed to dispose of serviced housing plots.

- The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/Municipal/Local Body concerned.

- The investor/investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/ Municipal/Local Body concerned.

- The State Government/ Municipal/ Local Body concerned, which approves the building / development plans, would monitor compliance of the above conditions by the developer.

Note: The conditions at (1) to (4) above would not apply to Hotels & Tourism, Hospitals, Special Economic Zones (SEZs), Education Sector, Old age Homes and investment by NRIs. FDI is not allowed in Real Estate Business.

CREDAI

Confederation of Real Estate Developer's Associations of India (CREDAI) is the apex body of the organized real estate developers/builders across India. 20 State/city level associations, spread over across 18 States of India are members of CREDAI with over 3,500 individual members' and developers encompassing over 60% of the organised private state/cities in the country.