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Third Edition

SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

PREPARED BY MERITAS LAWYERS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the third revised edition of Successful Strategies for Doing Business in Asia which was first published in 2006. Prepared by lawyers from 12 leading Asian Meritas firms, this book offers practical insights and targets foreign investors and business people who want to pursue opportunities throughout Asia. Each chapter contains general information and guidelines, not legal advice. Do not rely on these materials without first consulting with legal advisors who are familiar with your particular areas of interest.

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The following currency notations are used throughout this book.

RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Dông
MYR	Malaysian Ringgit		

Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

Five years have passed since the worst financial crisis in 70 years erupted. Today many countries and economic regions are still suffering, but there is one bright spot – Asia. Home to 3.8 billion people, Asia continues to take a leading role in driving the world economy back to healthier times. China rebounded quickly to high single-figure annual growth following the 2008-09 downturn, and in 2013-14 is expected to have a rise of 8% in GDP. India too is exhibiting signs of long-term growth potential, as are Singapore, Malaysia and others in Asia.

For 30 years I have worked closely with multinational companies as they explore investment and business opportunities throughout Asia. I have discovered that countries in the Asian region can at the same time appear similar yet be remarkably different. While specific legal systems and local government regulations will vary, there are universal issues in every country that foreign investors will face. This book was designed to provide practical and useful insights into the 12 most common questions that potential investors in Asia need to address:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business in a particular country without a local partner? If so, what corporate structure is most commonly used by foreign investors?
3. How do governments regulate commercial joint ventures between foreign investors and local companies?
4. What laws influence the relationship between local agents and distributors and foreign companies?
5. How does the government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the country's intellectual property laws? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution for foreign investors?
11. What advice can you offer for how best to negotiate and conduct business in your country?
12. What other practical lessons can you share with those who want to do business in your country?

Leading law firms within the Meritas alliance in Asia have contributed to this book. These firms are comprised of local lawyers who possess extensive experience in advising international clients on how best to conduct business in their respective countries. The law firms were presented with these "Twelve Questions" and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, the book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are patiently waiting for Asia to become more predictable before pursuing business or investment opportunities, do not wait too long. Most non-Asian multinationals are already there. Those who delay will find themselves missing out on the greatest economic expansion in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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1. What role does the government of India play in approving and regulating foreign direct investment?

Historically, India has been a regulated economy since its independence. The government of India (GOI) launched a new generation of economic growth on 24 July 1991 with the announcement of the New Industrial Policy Statement, which liberalized norms authorizing foreign direct investment and technology collaborations in specific sectors, subject to certain limitations. Since 1991, the foreign direct investment (FDI) policy has been further liberalized and made significantly investor-friendly.

The foreign exchange mechanism (inflow and outflow of foreign currencies) and the regime for investment and borrowing in foreign currencies in India are governed by the Foreign Exchange Management Act, 1999 (FEMA) and the rules, regulations and clarifications issued by the Reserve Bank of India (RBI) and the Central Bank of India. The GOI regulates FDI proposals through the Foreign Investment Promotion Board, Ministry of Finance (FIPB). FIPB acts as a single window to foreign investment in India. Any investment proposal that requires governmental approval must obtain FIPB certification. Applications to the FIPB are submitted both online in the prescribed form as well as by filing a hard copy.

In addition to the FIPB, other regulatory bodies are involved in the process of foreign investment in India. Since India is not yet fully convertible for capital account purposes, approval of the RBI, which is a regulator of exchange controls, may be required on certain exchange control and related issues. Further, approval of the Securities and Exchange Board of India (SEBI), which is the regulator of the Indian capital markets, is required for certain investments in listed public companies.

The Foreign Exchange Management (transfer or issue of security by a person resident outside India) Regulations, 2000 notified by the RBI and the Consolidated Foreign Direct Investment Policy dated 10 April 2012 (Consolidated FDI Policy) laid down by the DIPP provide the current framework for foreign investments in India (available at: http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf). The Consolidated FDI Policy is updated on an annual basis.

In the broadest sense, FDI is permitted up to 100% of the total paid up share capital (Shareholding) of an Indian company in most sectors of the Indian economy without the requirement of any prior government regulatory approval (automatic route) such as in sectors like services, mining, manufacturing, information technology, power, cash and carry wholesale trading, etc. In some sectors, however, FDI is permitted only up to certain specified limits, which are usually 26%, 49%, 51% or 74% of the shareholding of an Indian company. For example, under the approval route, FDI in the insurance sector and defense production activities is permitted up to 26% and FDI by foreign airlines is permitted in scheduled and nonscheduled air transport services up to 49% subject to prescribed conditions. For investment by nonresident Indians, the limit in this transportation sector extends up to 100%, while FDI in telecommunications is permitted up to 49% under the automatic route and up to 74% subject to FIPB approval.

Foreign investment (whether direct or indirect) is prohibited in certain sectors, such as atomic energy, lottery business, gambling and betting (including casinos), real estate business (real estate business differs from the development of integrated townships in which 100% foreign investment, whether direct or indirect, is allowed subject to certain conditions) and construction of farm houses.

Foreign investors who desire to invest in sectors where investment is made only after governmental approval or where the proposed investment will exceed the permitted shareholding levels must obtain the prior approval of the FIPB.

Considering the complex nature of the regulatory framework, a foreign investor should always confirm the foreign investment approval levels and sectoral caps in the relevant sector before investing in India.

Further, in light of the liberalized trade policy, relaxed foreign investment norms and economic deregulation, the Parliament of India has enacted the Competition Act, 2002 (Competition Act), and which was brought into effect in May 2009. The provisions regulating market structure or their regulation of mergers and amalgamations in the Indian market were brought into effect from 1 June 2011. Foreign investors should be mindful if the acquisition of shares or acquisition of shares or voting rights or assets or control or mergers or amalgamations breach the prescribed thresholds and will need to be notified to the Competition Commission of India (CCI), or not.

2. Can foreign investors conduct business in India without a local partner? If so, what corporate structure is most commonly used by foreign investors?

Yes, foreign investors can conduct business in India without a local Indian partner. Foreign investors can conduct their business by way of wholly owned subsidiaries (WOS) in sectors permitting 100% foreign shareholding. Further, FIPB may also permit a foreign investor, on a case-by-case basis, to invest up to 100% in sectors that do not fall under the automatic route. Most of the investment sectors in India are now open to 100% foreign investment, save and except certain sectors which are under the approval route, such as insurance, defense, etc. Further, a WOS can be incorporated as a private limited company, which is less regulated compared to a public company in India.

In 2008, the GOI introduced a new form of business vehicle, the Limited Liability Partnership (LLPs) in India under the Limited Liability Partnership Act, 2008 (LLP) and rules issued thereunder (LLP Rules). An LLP is a hybrid between a partnership firm and a limited liability company.

Unlike a partnership firm, partners' liability in the case of an LLP is limited to the provision of their capital contribution and other contribution agreed upon in the LLP agreement. In India, an LLP can be incorporated only for a lawful business purpose with a view to making profit and they cannot be incorporated for any charitable/nonprofit purposes. An LLP offers a flexible compliance framework as compared with a limited liability company and is governed by the terms and conditions under the limited liability partnership agreement.

Foreign investors can invest in LLPs with the prior approval of the FIPB if the LLP operates in a sector where 100% foreign investment is permitted under the automatic route without any entry conditions. However, every LLP is required to have at least two designated partners who are individuals; at least one of them is required to be a resident in India. Designated partners are required to ensure compliance with the provisions of the LLP Act and LLP Rules on behalf of the LLP.

A foreign investor also has the option to establish a branch office or liaison office with the approval of the RBI without the necessity of having a local partner. The process of obtaining the RBI approval for establishing a branch or a liaison office in India is carried out through an authorized dealer bank in India. In cases where 100% FDI is permitted in the principal activity of the parent foreign entity under the automatic route, approval of the RBI is

required. However, where the principal activity of the parent foreign entity falls under the approval route, the application is considered by RBI in consultation with the Ministry of Finance.

The primary difference between a branch office and a liaison office is the nature of the business activity that can be undertaken by both. A liaison office can undertake only liaison activities, i.e., represent the parent company in India, act as a channel of communication between the parent entity and the parties in India, and promote technical/financial collaborations with the parent and Indian entities. On the other hand, a branch office can undertake only those specified business activities as may be permitted. Further, establishing a branch office or a liaison office is subject to the eligibility criteria as prescribed by the RBI.

A branch office can be established in one of many existing special economic zones (SEZ) in order to do manufacturing and service activities, without prior permission of RBI subject to fulfillment of certain conditions. Liaison offices by foreign insurance companies can be set up if they have obtained prior approval of the Insurance Regulatory Development Authority.

A foreign company also may establish project office(s) in India without prior approval of RBI. RBI has granted a general permission to foreign companies for the same, provided the foreign company has secured a contract from an Indian company that it has to carry on in India and subject to certain other conditions.

Unlike a WOS which can carry on all the activities provided for in its memorandum of association, branch offices, liaison offices (in certain facts and circumstances) and project offices are limited in what activities are permitted under the FEMA and the FEMA regulations. Further, branch offices, liaison offices, and project offices are regarded as foreign companies under Indian laws, which results in a higher rate of corporate tax than domestic Indian companies. Given the flexibility of WOS structure and the tax advantages, the WOS is the most often used investment structure in India.

3. How does the Indian government regulate commercial joint ventures between foreign investors and local firms?

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

4. What laws influence the relationship between local agents and distributors and foreign companies?

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

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

Second, post-termination noncompete provisions under the Contract Act are unenforceable in India. Another noteworthy aspect of the law of agency is its departure from the law of contract in India in relation to consideration. Noncompete provisions during term of an agency agreement can be enforceable provided they are reasonable to all the parties to such agreement and in legitimate interest of the business.

Distribution agreements differ from agency agreements. There is no specific law in India governing the structure of distribution agreements. Distribution agreements are interpreted in accordance with the Contract

Act. In addition to the provisions of the Contract Act, the foreign entities should also be now wary of the provisions of the Competition Act for construction and interpretation of distribution agreements. The Competition Act prohibits anticompetitive agreements and the abuse of dominance by an enterprise and regulates combinations (mergers) of enterprises which are likely to have an appreciable adverse effect on the competition in India. The Competition Act replaced the Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP). The Competition Act addresses anticompetitive agreements and the abuse of dominance. All agreements or practices of a company and any agreement or practice having an "appreciable adverse effect on competition in India" will fall under the scope and authority of the Competition Act and will need to be tested depending upon facts and circumstances of each case.

5. How does the Indian government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?

Mergers are covered under the heading of "amalgamations" in the Companies Act, 1956 (Companies Act). The term denotes the combination of two or more companies. The Companies Act envisages the amalgamation between two companies, one of which may be an unregistered company (which can either be a foreign company or an Indian branch of a foreign company). Although economics and business factors drive mergers and acquisitions, the processes underlying them are different. Unlike acquisitions, which are primarily negotiated deals formalized in a contract, mergers are subject to the approval of the high courts of the states in which the registered offices of the merging and/or merged companies are located. In addition to this, SEBI has now introduced revised requirements for scrutiny and approval of stock exchanges for merged/amalgamation schemes of arrangements involving listed companies.

Merger or amalgamation of a foreign transferor company into an Indian transferee company is possible under the Companies Act; however, merger of an Indian transferor company into a foreign transferee company is not possible under the present scheme of the Companies Act.

Further, the RBI through the FEMA regulations permits a transferee Indian company to issue shares to the shareholders of a foreign transferor company under a scheme of merger or amalgamation approved by an Indian court, provided that the sectoral caps mentioned are not exceeded. Further, specific approvals may have to be obtained from the RBI with respect to remittances depending on the circumstances. Takeover or acquisition of listed Indian companies is regulated by SEBI regulations. SEBI replaced the erstwhile takeover regulations with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (Takeover Regulations). The new Takeover Regulations require an acquirer who acquires more than 25% or more of shares or voting rights in a listed Indian company to make a public offer of at least 26% of the voting rights of the listed entity.

In addition to the compliance with the Takeover Regulations, acquisition of listed Indian companies by a foreign investor is subject to compliance with the SEBI regulations dealing with insider trading, and specific disclosure requirements under the listing agreement provisions established by the stock exchanges.

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

Courts orders for mergers/amalgamations/demergers may incur stamp duty depending upon the concerned states involved. Therefore, depending upon the concerned states, stamp duty may need to be paid to the state governments on the order passed by the high court.

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

As regards sector-specific guidelines regulating mergers, in April 2008 the Department of Telecommunications prescribed the new guidelines replacing the erstwhile guidelines of 2004 for merger of licenses in the same service area. Such mergers are regulated by the Department of Telecommunications and need to be in compliance with the specific requirements under the prescribed guidelines.

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

Broadly, there are no restrictions and compliance requirements under applicable Indian laws for hiring employees, and entities can freely employ personnel. The terms and conditions of the employment contract govern the relationship between the employer and the employee. Employment contracts usually contain certain clauses which stipulate the probation period, leave entitlements, maternity benefits, etc., though these may vary from contract to contract. India has promulgated various enactments that ensure the protection of social and economic interests of employees. Note that India is a signatory to the International Labour Organization and has ratified its legislation accordingly.

Expatriate workers are required to obtain separate work visas, which permit them to work in India. The expatriates must comply with all procedural formalities. To obtain a work visa, foreign employees should have an employment contract outlining the details of terms and conditions of employment and salary along with the employer's undertaking. This undertaking is usually in the form of a letter of invitation from the employer in India. Those who stay for more than 180 days, after reaching India, should obtain a resident permit from the Foreigners Regional Registration Offices (FRRO) that are located in all the major cities or, in the case of smaller cities, from the District Superintendent of Police within 14 days from the date of arrival in India. The grant of the employment visa is subject to compliance with the regulations of the Bureau of Immigration in India, under the Ministry of Home Affairs and may also be subject to the terms and conditions, if any, laid down by the Indian consulate in the respective foreign country.

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

7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

As mentioned earlier, India is not yet fully convertible on capital account and is subject to regulation by the RBI. All international financial transactions, such as the conversion of these currencies into rupees, repatriation of funds, issuance of letters of credit and creation of security interest over immovable property in India, are governed by FEMA and its regulations. FEMA sets out comprehensive law relating to treatment of international financial transactions and any person involved in any current or capital account transaction with India should examine related foreign control law issues in India. In addition to the enactment of FEMA in 2000, the Indian Parliament also enacted the Prevention of Money Laundering Act, 2002 which imposes obligation on banking companies, financial institutions and intermediaries to verify the identity of its clients, maintain records and furnish information in order to prevent money laundering transactions.

In terms of FEMA, except with the general or specific permission of the RBI, no person can deal in or transfer any foreign exchange or foreign security to any person, make any payment to or for the credit of any person resident outside India and receive any payment by order or on behalf of any person resident outside India in any manner. Also, the RBI has the power to specify any class or classes of capital account transactions that are permissible and the limits thereof.

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

Income tax on domestic companies is applied at the rate of 30% plus applicable surcharge and education assessment of 3%. Domestic companies are liable to pay surcharge at the rate of 5% where income exceeds INR10 million). The Finance Bill 2013 (Finance Bill) proposes to levy a higher surcharge of 10% in case of domestic companies whose income exceeds INR100 million. Foreign companies having a permanent establishment in India are subject to higher taxation at the rate of 40% plus applicable surcharge and education assessment of 3%. Foreign companies are liable to pay surcharge at the rate of 2% where income exceeds INR10 million. The Finance Bill proposes to levy a higher surcharge of 5% in the

case of foreign companies whose income exceeds INR100 million. In addition to business income, a foreign company would be subject to tax in India on the following categories of income even in the absence of a permanent establishment in the country: interest, royalty, fees for technical services, capital gains, professional fees, income from property, shipping income and other income.

India taxes its residents, whether companies, individuals or other forms of business entities, on their worldwide income whereas nonresidents are taxed on income which has its source in India, whether actual or deemed. There are elaborate provisions with respect to determining residency for individuals. A company is resident in India if it is incorporated in India or its management and control are wholly situated in India. A partnership firm is resident in India if any part of its management and control is situated in India.

Dividends are nontaxable in the hands of shareholders, whether resident or nonresident, though an Indian company issuing dividends (whether interim or otherwise) must pay a dividend distribution tax of 15% plus applicable surcharge of 5% and education assessment of 3%. The Finance Bill proposes to levy a higher surcharge of 10%.

Capital gains from assets in India, including shares of Indian companies or units of Indian mutual funds, are treated as Indian source income and hence, are taxed in India whether they are realized by a resident or nonresident, unless they are exempt under the provisions of a double taxation avoidance agreement between India and the country of the nonresident. Therefore, any gains arising on transfer of shares held by a nonresident in an Indian company are taxable in India. Likewise, any indirect transfer of Indian assets by way of transfer of shares of a foreign company whose substantial value is derived from assets located in India would also be taxable in India, subject to the provisions of the relevant double taxation avoidance agreement.

Short term capital gains tax, which arises upon sale of short term capital assets (i.e., 12 months or less for shares, mutual fund units or zero coupon bonds and 36 months or less for other capital assets, from the date of its acquisition) is ordinarily taxed as part of the total taxable income of the assessee, except at a lower rate of 15% (plus applicable surcharge and education assessment of 3%) where it arises from sale of shares of a company listed on a stock exchange and is subject to a securities transaction tax (SST) of 0.125% (proposed to be reduced to 0.1% *vide* Finance Bill) on the value of the transaction.

Long term capital gains tax is charged at the rate of 20% with indexation and 10% without indexation, plus applicable surcharge and educational assessment in either case; however, no capital gains tax is payable upon sale of shares of a listed Indian company or an unlisted company under an initial public offer held for more than 12 months and on which STT has been paid. In the case of a sale of unlisted shares of public companies by nonresidents, the applicable long term capital gains tax rate would be 10% plus applicable surcharge and education assessment of 3%.

The IT Act provides for a Minimum Alternate Tax (MAT) to be paid by companies on the basis of profits disclosed in their financial statements subject to certain adjustments. MAT is payable at the rate of 18.5% plus applicable surcharge and education assessment.

The Finance Bill proposes to introduce an additional tax in relation to amounts distributed by an Indian unlisted company upon buy-back of its shares. Accordingly, an Indian unlisted company would be liable to pay an additional tax at the rate of 20% (plus applicable surcharge and education cess) on the amount distributed to its shareholders in excess of the amount received by the company towards issue of such shares. There will be no further taxation in the hands of the shareholders on such amount.

The Finance Bill also proposes to introduce Commodities Transaction Tax payable by the seller at the rate of 0.01% on transactions involving sale of commodity derivatives in respect of commodities (other than agricultural commodities) traded in a recognized association.

Aside from the taxes described above, certain Indian states have implemented their own version a of value-added tax usually at the rate of 4%-5% and 12.5%-14%. Other Indian states continue to be governed by the Central Sales Tax. Finally, other taxes such as customs duty, excise duty and service taxes may be assessed depending on the activities of the tax payer.

India is in the process of revamping the indirect tax system by introducing the Goods and Service Tax (GST) regime. Most of the taxes levied on goods and services like central value-added tax, value-added tax, service tax, entertainment tax will be subsumes in the GST. It is expected that the GST will be implemented across India sometime during 2013 or 2014.

9. How comprehensive are the intellectual property laws of India? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

Intellectual property rights (IPRs) are comprehensive and enforceable in India. Ever since India signed the TRIPS and the WTO Agreements, the laws relating to IPRs in India, especially patent and trademark laws, have undergone a series of amendments so as to make IPRs in India compliant with the TRIPS and WTO Agreements. Besides these, India is also signatory to the Patent Cooperation Treaty, Budapest Treaty, Berne Convention and the Universal Copyright Convention.

As of today, India has enacted laws protecting patents (the Patents Act, 1970), trademarks/service marks (the Trade Marks Act, 1999), designs (the Designs Act, 2000), copyright (the Copyright Act, 1957), geographical indications (The Geographical Indications of Goods [Registration and Protection] Act, 1999) and plant varieties (Protection of Plant Varieties and Farmers' Rights Act, 2001) and the Semiconductors Integrated Circuits Layout Designs Act, 2000. India is on the verge of acceding to the Madrid Protocol and in order to bring the trademark law in conformity with the provisions of the Madrid Protocol, India is in the process of amending the Trade Marks Act, 1999. Legal provisions for protection of databases are currently under consideration. Indian courts and tribunals enforce the laws objectively, irrespective of the nationality of the parties, assuming the relevant intellectual property has been properly registered in India and if the IP owners are nationals of countries who are members of the same international IP conventions as India.

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

The time-related issues involved with the Indian court process make arbitration an extremely common alternate dispute resolution mechanism in India. The Arbitration and Conciliation Act, 1996 (Act) is the legislation which provides for alternate dispute resolution mechanism and proceedings. This Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, and UNCITRAL Conciliation Rules, 1980, making it one of the most modern pieces of legislation.

For arbitration, the Act provides for separate provisions for domestic arbitral awards and foreign arbitral awards. In transactions involving a foreign investor, the arbitration agreement may also provide for arbitration in an offshore territory in view of India being a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards, 1958 (New York Convention) and the Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). In terms of the Act, an arbitral award made in an offshore territory under an arbitration agreement to which the New York Convention applies would be enforceable in India as long as such offshore territory has been notified by the government of India. However, for enforcement of a foreign arbitral award in India, certain conditions must be met, *inter alia*, the arbitral award should not be against the public policy of India and should not be contrary to the fundamental policies of Indian law. In a recent case of Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., the Supreme Court of India held that the provisions governing domestic arbitral awards shall not govern foreign arbitral awards, granting more sanctity to international commercial arbitrations.

The other alternate dispute resolution mechanisms such as conciliation, mediation and negotiation are also available in India. They are becoming more widely adopted by a variety of businesses seeking to resolve their disputes without resorting to arbitration or litigation in courts.

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

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

- Foreign investment in India is permitted depending upon the sector in which the foreign investor intends to invest. Therefore, a foreign investor should check specific sectoral caps, requirement of an approval from the FIPB, if any, adherence to any specific terms and conditions, etc., before investing in India.
- Foreign investment can be made by a foreign investor in an Indian company through a variety of instruments, such as equity shares and convertible instruments. Each instrument may have different tax implications and returns. Appropriate advice on tax is therefore crucial when structuring investments in India.
- Nonresident investors intending to set up business in India, either by way of franchise or distribution arrangements, or by acquiring an existing Indian company, must now be aware of the newly formulated competition law regime in India, which could have far-reaching repercussions on the investors' ability to do business in India.
- India has a plethora of central and state specific laws. Appropriate legal advice should be sought on specific licenses/approvals and compliances under such laws for conducting business in India.
- While a WOS can acquire or lease immovable property in India, there are certain restrictions on branch/liaison offices from acquiring immovable property in India. Further, an instrument for lease or conveyance of immovable property in India is required to be stamped as per the applicable stamp duty in the relevant state, and is required to be registered with the sub-registrar having the jurisdiction.
- Foreign investors should consider registering their intellectual property in India to avoid any potential infringement or passing-off.

12. What other practical lessons can you share with those who want to do business in India?

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

- Litigation and enforcement processes are relatively slow in India; therefore, alternate dispute mechanisms, such as mediation, conciliation and arbitration, are the preferred choice of parties for resolving commercial disputes. However, the courts have shown promptness in enforcement and protection of intellectual property rights in India. This is comforting for investing companies which largely rely upon providing technology as a business module.
- India is set to welcome a major policy change on the direct as well as indirect tax front. A Direct Taxes Code Bill 2010 has been introduced in the Parliament. Another important change is the introduction of Goods and Service Tax.
- The GOI has brought into force merger-control provisions under the Competition Act, which provide for a mandatory and prenotification regime. The regulation and its enforcement are in the nascent stage which inevitably throws up challenges. The CCI has been very active recently and has been *suo moto* initiating inquiries. The antitrust regulations and their implementation on this count are being watched very carefully.
- India, being a largely agricultural society, has strict policies on user restrictions. While acquiring land, one should be mindful that title/ownership aspects are thoroughly investigated as property is held by multiple owners. The time for such investigations should also be factored in while considering a live opportunity.

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