

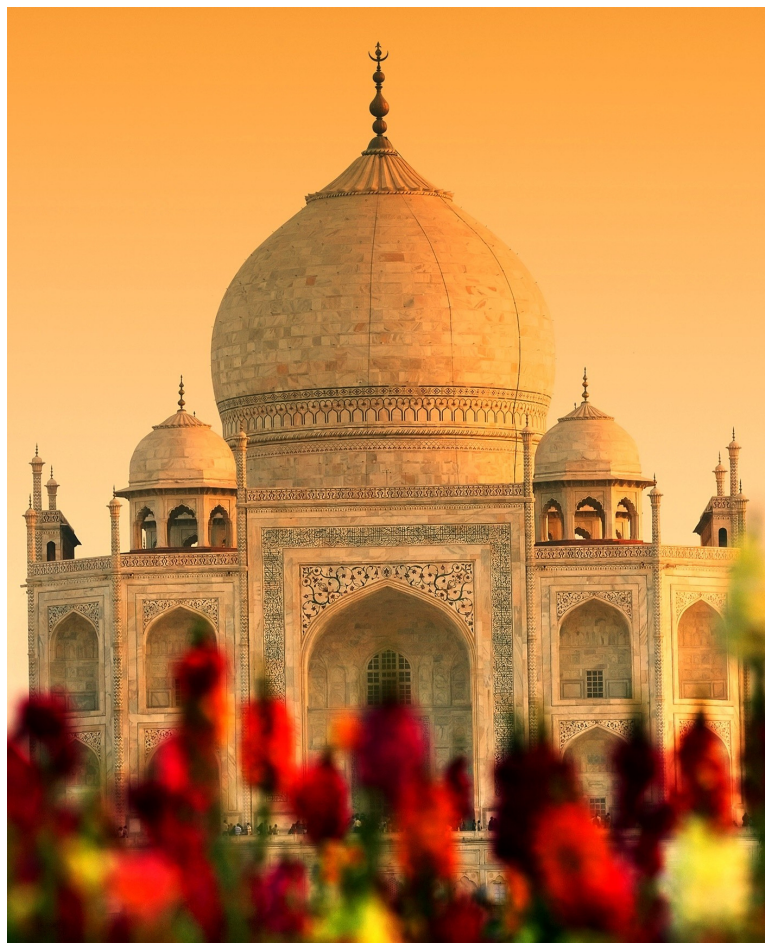


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DOING BUSINESS IN INDIA

An Overview

By **Parul Kashyap**



India is the seventh largest country in the world by landmass and second largest by population. India has the sixth largest economy in the world by nominal Gross Domestic Product and third largest by measure of purchasing power parity. Its large vibrant market, fair weather, stable democracy, independent judiciary, english speaking skilled workforce, liberal FDI regime, independent central bank, high interest rates, strong banking system and investment friendly policies has attracted global capital by way of investments across various sectors. However, Indian commercial, fiscal and legal regulations and market dynamics make it a complex region for business.

The Constitution of India provides for a division of powers between the Union (Centre) and states.

It divides all the subjects into three lists – Union List, State List, and Concurrent List. The Union List describe the subjects under the control Centre Government, the State List describes the subjects under the jurisdiction of states being the Concurrent List describes the subjects which are under the joint jurisdiction of the Centre of States. The subjects which do not fall in these lists i.e. residuary subjects have been given to the Centre.

This article provides an overview of key areas for consideration of companies planning on Doing Business in India.

Foreign Investment Policy

Setting up a business presence and investing into the Indian business market by non-residents requires strict compliance with the Foreign Direct Investment (FDI) policy issued by the Ministry of Commerce & Industry and foreign currency regulations governed by the Foreign Exchange Management Act, 1999 (FEMA). The FDI framework and its operation is governed by rules, regulations and circular issued by the Reserve bank of India (RBI), which is India's central banking institution.

Entry Options

A foreign investor has to choose from setting up an incorporated or unincorporated entity to initiate its operations in India.

Liaison Office: Foreign enterprises desirous of setting up liaison office in sectors which allow for 100% FDI under the automatic route require a specific approval from the Reserve Bank of India's (RBI) Foreign Exchange Department. Foreign banks can establish liaison offices only upon obtaining approval from the RBI. Foreign insurance companies can establish liaison offices in India only after obtaining an approval from the Insurance Regulatory and Development Authority (IRDA). However, for the remaining sectors where 100% FDI is not permitted under the automatic route, RBI's prior approval is required, which it provides upon consultation with the Ministry of Finance.

Branch Office: A Branch Office of a foreign company can be setup only upon receiving a prior consent from the Authorised Dealer bank (AD) for sectors where 100% FDI is allowed under the automatic route. An approval is granted after consultation with the Ministry of Finance for the purposes of other sectors. Though the branch offices are allowed to undertake trading activities, they are not allowed to carry out manufacturing activities on their own, but can sub- contract these to Indian manufacturers. Such offices are taken to be a part of the foreign company and are not considered as a separate legal entity.

Project Office: A foreign company may set up its project office in India only upon receiving an approval from the AD provided that it has an existing contract from an Indian company to execute a project in India where the project should be either funded by an international financing agency or cleared by an appropriate authority or funding of project should be done by inward remittance from abroad or the company or entity in India awarding the contract has been granted term loan by a public financial institution or a bank in India for the project.

Partnership: A foreign entity may enter into a partnership with an Indian partnership firm only upon receiving a prior approval of the RBI.

Trust: A foreign entity can act only as a beneficiary of a trust which is set up in the form of a venture capital fund only upon receiving a prior approval of the RBI.

Limited Liability Partnership (LLP): For the purposes of a foreign entity, FDI in LLP is permitted under the automatic route only in sectors where 100% FDI is allowed.

Company under the Companies Act: A Foreign entity may establish a private limited or a public limited company under the Companies Act, 2013, by registering itself with the Registrar of Companies within 30 days of establishing its place of business in India. Rules and regulations regarding a private limited or public limited company shall be applicable as under the Companies Act, 2013.

Labour & Employment

India has established extensive labour laws to regulate its man-power. Most of these laws are formulated and governed by the Centre, there exist many state specific rules and regulations which a foreign entity must keep in mind before finalizing on a region to commence business operations in India. The major legislations regarding labour laws are the (i) Industrial Disputes Act, 1947 and the Factories Act, 1948

Anti-Trust Regulations

The Competition Act, 2002, is the law governing all the anti-trust issues and disputes in India related to (a) anti-competitive agreements, (b) abuse of dominant position and (c) combinations. The Competition Commission of India (CCI), a statutory body of the Government of India, is responsible for the enforcement of competition laws to prevent such activities which may have adverse effect on competition in the domestic market. There are several approvals which a foreign entity may require from the CCI before investing in India, specifically dealing with combinations, i.e. mergers, acquisitions and de-mergers.

Mergers & Acquisitions

The most commonly used modes of merger or acquisition by a foreign entity are (a) share acquisition and (b) asset purchase. There are several laws and regulations that govern such merger or acquisition in India under the (i) Companies Act, 2013, (ii) Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, (iii) SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, (iv) SEBI (Prohibition of Insider Trading Regulations) 2015, (v) Competition Act, 2002, (vi) FDI Regulations and (vii) Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004. There are several tax considerations involved in such transactions and a foreign entity needs to ensure strict compliance with the tax laws as well to conclude a successful merger or acquisition.

Capital Markets

Companies in India are allowed to raise capital and have access to the domestic financial markets through public issue of shares and other such instruments within the regulatory limits as specified by SEBI. India has two major stock exchanges, namely the National Stock Exchange of India (NSE) and the Bombay Stock Exchange (BSE). However, to facilitate capital raising by Small and Medium Enterprises (SME), SEBI has allowed SMEs to list their securities without the need for an IPO and has permitted for the trading of specified securities on Institutional Trading Platform (ITP) in the SME Exchange where the SEBI (Listing of Specified Securities on Institutional Trading Platform) Regulations, 2013, govern such listing of SMEs.

Environment Regulations

India has a resourceful geography and an abundance of naturally found minerals. However, with the advent of urbanization and industrialization, these resources are depleting at an unprecedented rate. To reduce such consumption and to ensure sustainability, the Government regulates the development of industrial activities/projects through environmental approvals and compliances. The approvals may be required from central agencies or there may be some requiring state approvals as well, depending on the region in India where the foreign entity finalizes on a region to commence business operations in India. There are several state and central legislations which a foreign entity may need to refer to, however, the major ones are (i) Environment (Protection) Act, 1986, (ii) Environment Impact Assessment (EIA) Notification, (iii) Coastal Regulation Zone (CRZ) Notification, (iv) Hazardous Substances and (v) Air & Water Act.

Intellectual Property Protection

India has successfully complied with all its obligations under the Agreement on Trade Related Intellectual Property Rights (TRIPS) by enacting and amending all such necessary statutes. It is a signatory to all major treaties related to IP protection, such as (i) Berne Convention, (ii) Paris Convention and (iv) Madrid Protocol. As far as domestic laws are concerned, the Patents Act, 1970, Copyright Act, 1957 and Trademarks Act, 1999

are the governing legislations of patents, copyright and trademarks respectively.

Insolvency and bankruptcy code 2016

Insolvency and Bankruptcy Code 2016 is one of the biggest economic reforms adopted by India. It is a glowing example of a much-needed law that witnessed prompt roll-out and speedy implementation. Insolvency and Bankruptcy Code, 2016 is the bankruptcy law that consolidates all the laws related to insolvency in India under a single law. The bill was passed by the Lok Sabha on 5th May 2016 and received the assent of the President of India on 28th May 2016. Before this law, the liquidation of companies was handled under various laws like Sick Industrial Companies Act, The Provincial Insolvency Act, Companies Act, and Recovery of debts due to banks and financial Institutions Act, The Provincial Insolvency Act etc.

This law being a one-stop solution that addresses cases of insolvencies in a time-bound and economically viable manner, has significantly helped India in achieving the historic 30 place jump in the ease of doing business rankings.

Dispute Resolution

The Constitution of India, Parliament, State Legislatures are the creators of law on various subjects, while the Supreme Court of India too, in the past decades, exercised its extraordinary constitutional powers to prescribe laws through judicial precedents on important topics.

India prescribes the common law system where it has a three-tier court system, i.e. the lower courts (district courts), the High Courts (state courts) and the Supreme Court (apex court). Apart from the courts there a number of tribunals, sector regulators and administrative bodies that also adjudicate on matters that fall under their jurisdiction. Arbitrations are a favoured method for resolving commercial disputes. There have been significant amendments in both the Arbitration and Conciliation Act as well as the Commercial Courts, Commercial Division and the Commercial Appellate Division in High Courts Act of 2015 with a view to provide a conducive, user-friendly and speedy dispute resolution framework to resolve commercial disputes.

Disclaimer

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For any queries on this subject please contact us at



Parul Kashyap

Partner

parul.kashyap@sunlegal.in

www.sunlegal.in
