

DISTRIBUTION & AGENCY

India



Distribution & Agency

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Quick reference guide enabling side-by-side comparison of local insights, including into ownership structure and tax considerations for foreign suppliers in a direct distribution model; models involving local distributors, commercial agents and other representatives, including the general framework, rights of contract termination, and the transfer of rights of ownership; regulation of distribution relationships, including issues such as confidentiality, distribution of competing products, pricing, online sales and parallel imports; governing law and dispute resolution mechanisms; and recent trends.

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DIRECT DISTRIBUTION

Ownership structures

May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes, a foreign supplier can establish an entity in India for import and distribution, subject to compliance with the foreign exchange control regulations, namely the Foreign Exchange Management Act 1991 and accompanying regulations and the prevailing Foreign Direct Investment Policy (the FDI Policy).

The FDI Policy prescribes, among other things, the types of business entities that may be established by a foreign party, the cap on foreign investments and the minimum investments that should be made by foreign parties. Foreign suppliers can acquire up to a 100 per cent stake in an Indian entity engaged in a wholesale cash-and-carry business, single-brand retail trading (SBRT), or an e-commerce marketplace platform business. However, foreign parties can acquire up to a 51 per cent stake, with government approval, in an Indian entity engaged in multi-brand retail trading (MBRT). The FDI Policy also prescribes several other compliance obligations for Indian entities with foreign ownership engaged in SBRT, MBRT, wholesale cash-and-carry business and e-commerce market platform business. For example, entities engaged in MBRT should ensure that at least 30 per cent of the value of products purchased should be sourced from India. Similarly, minimum sourcing conditions apply to the entities that are engaged in SBRT and where foreign investment is more than 51 per cent.

Law stated - 13 December 2022

May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes, a foreign supplier can be a partial owner in an Indian entity along with one or more local Indian parties.

Law stated - 13 December 2022

What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Foreign parties can set up a public or private limited company under the Companies Act 2013 for import and distribution of products in India. A private limited company is most suitable if the intent is to have only a few shareholders in the Indian entity.

The Companies Act 2013 is the primary legislation that regulates companies in India. The Companies Act regulates, among other things, incorporation of companies; management and administration of companies; duties and responsibilities of directors; corporate governance framework; issuance and transfer of shares and debentures; maintenance of books of account; and dissolution and winding up of companies.

The incorporation of a company in India involves several steps, such as: preparing by-laws for the proposed company; seeking approval for the name of the proposed company; and filing the by-laws with the Ministry of Corporate Affairs, along with several declarations and affidavits from the shareholders and the directors of the proposed company regarding their interest in other companies, and their competency to act as directors of the proposed company.

Law stated - 13 December 2022

Restrictions

Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Under the prevailing Foreign Direct Investment Policy, 100 per cent foreign ownership is permitted in Indian entities engaged in wholesale cash-and-carry business, SBRT and e-commerce market platform business. In the case of entities engaged in MBRT, up to 51 per cent foreign investment is possible with prior approval of the government of India.

Law stated - 13 December 2022

Equity interests

May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes, a foreign supplier can hold an equity interest in the local distributing entity, subject to conditions that are prescribed in the FDI Policy. These conditions may relate to the maximum permitted foreign ownership in the local entity, the minimum value of foreign investments that should be made in the Indian entity, government approvals for making foreign investments, and other performance conditions that may be applicable to the local entity with foreign shareholding.

Law stated - 13 December 2022

Tax considerations

What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Various taxes may be applicable, including income tax (applicable on profits and income), goods and services tax (applicable on sale of goods and services provided) and customs duty (on import of products into India). Withholding tax may apply for payments made by an Indian entity to a foreign supplier.

Law stated - 13 December 2022

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

What alternative distribution relationships are available to a supplier?

The most common structure used by a foreign supplier is a simple distribution arrangement for the entire country or a region. Franchising is used for concepts or systems being licensed and is gaining popularity. Trademark licensing is mostly used when the intention is to produce goods in India for sale using the supplier's trademark only. Joint ventures are most commonly used when foreign and Indian parties combine to use the foreign partner's technology to manufacture goods in India, either for domestic sales or for exports.

Law stated - 13 December 2022

Legislation and regulators

What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The relationship between a supplier and its distributor, agent or other representative is contractual in nature. The Indian Contract Act 1872 is the primary legislation on such contracts. The Sale of Goods Act 1930, which provides for certain implied conditions and warranties for sale and purchase of goods, may also apply. Additionally, the Competition Act 2002, the Income-tax Act 1961, the Foreign Exchange Management Act 1999 and the Trade Marks Act 1999 are other important pieces of legislation that regulate distribution and agency arrangements.

There are no government agencies that regulate the relationship between a supplier and its distributor or agent or other representative. Lastly, there are limited industry self-regulatory bodies that may impact the distribution or agency relationship.

Law stated - 13 December 2022

Contract termination

Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The relationship between a supplier and its distributor is contractual in nature. There is no other statutory restriction on a supplier to terminate a distribution contract without cause where such termination is permitted under the contract. Similarly, the renewal or non-renewal of a contract will also be governed by the contract between the parties.

Law stated - 13 December 2022

Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

There is no statutory requirement for a party terminating the contract, with or without cause, to pay any compensation or indemnify the non-terminating party, unless such termination itself is unlawful under the terms of the contract, resulting in a loss to the non-terminating party. If so, compensation or indemnity payable to the non-terminating party would depend on the contractual terms. In the absence of any understanding, courts are free to determine the quantum of compensation payable by the terminating party to the non-terminating party.

Law stated - 13 December 2022

Transfer of rights or ownership

Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Yes, such provisions are generally enforceable. However, a restriction on the transfer of ownership of the distributor or agent, or their respective businesses, to a third party may not be enforceable, where the courts are likely to arrive at a determination that such restrictive covenants operate in restraint of trade or are unreasonable.

Law stated - 13 December 2022

REGULATION OF THE DISTRIBUTION RELATIONSHIP

Confidentiality agreements

Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality provisions are generally enforceable, both during the term and post termination of the contract. Confidentiality covenants must be reasonable in time and scope, and should not be an artefact to restrict a distributor from dealing with its supplier's competitors on the ground that any such dealing by the distributor may result in a breach of confidentiality covenants.

Law stated - 13 December 2022

Competing products

Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

In accordance with the Competition Act 2002, restrictions on the distribution of competing products during the term of a contract may be enforceable, provided they do not cause any appreciable effect on the competition (AAEC) in India.

Although the Competition Act 2002 does not define an AAEC, it specifies the following factors that shall be considered by the Competition Commission of India (CCI) when determining the presence of an AAEC, namely:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods, or provision of services; and
- promotion of technical, scientific and economic development by means of production or distribution of goods, or provision of services.

Furthermore, such restrictions should not be imposed by a supplier as an abuse of its dominant position. Dominant position means a position of strength enjoyed by an enterprise, in the relevant market in India, that enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.

Law stated - 13 December 2022

Prices



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May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

In accordance with the Competition Act, any agreement for resale price maintenance among enterprises or persons at different stages or levels of the production chain in different markets shall be void if such resale price maintenance causes or is likely to cause an AAEC in India. Resale price maintenance involves the fixation of a minimum price of products, below which the products cannot be sold.

A supplier may control the prices at which its distribution partner resells its products, provided that such control in prices by the supplier does not have an AAEC in India.

Law stated - 13 December 2022

May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Although a supplier may influence resale prices, any arrangement or artefact by the supplier for resale price maintenance (ie, fixation of minimum price of products) shall be void if the resale price maintenance causes or is likely to cause an AAEC in India.

Law stated - 13 December 2022

May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes.

Law stated - 13 December 2022

Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

There are no statutory or legal restrictions on a seller preventing it from charging different prices to different customers based on location, type of customer, quantities purchased or any other parameters.

Law stated - 13 December 2022

Geographic and customer restrictions

May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

A supplier may restrict the geographic areas, territory or categories of customers to which its distribution partner resells, provided that the restriction does not cause an AAEC in India. The applicable law does not make any distinction

between active sales efforts or passive sales for determining market restrictions.

Law stated - 13 December 2022

If geographic and customer restrictions are prohibited, how is this enforced?

In accordance with the Competition Act, agreements that limit, restrict or allocate any area or market for the disposal or sale of the goods will be considered void if they cause or are likely to cause an AAEC in India. Similarly, an agreement restricting the customers to whom the distribution partner may resell the products is void if it causes or is likely to cause an AAEC in India.

Law stated - 13 December 2022

Online sales

May a supplier restrict or prohibit e-commerce sales by its distribution partners?

In accordance with the Competition Act, a supplier may restrict or prohibit e-commerce sales by its distribution partners, and levy an invasion fee for violation of such restrictive covenants, provided that such restriction or prohibition does not cause or is not likely to cause an AAEC in India.

Law stated - 13 December 2022

May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?

Yes, a distributor or agent and its supplier can agree in a contract that the supplier will not sell through e-commerce intermediaries into the distribution partner's territory, and an invasion fee for violation of such restrictive covenants can be levied.

Law stated - 13 December 2022

Refusal to deal

Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

There are no statutory restrictions on a supplier's ability to refuse to deal with customers. However, a contract between a supplier and its distributor placing restrictions on the distributor's ability to deal with particular customers will be void if the restrictions will cause or are likely to cause an AAEC in India.

Law stated - 13 December 2022

Competition concerns

Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Under the Competition Act, distribution or agency arrangements are not reportable transactions and do not require any clearance from the CCI or any other authority.

Law stated - 13 December 2022

Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

The Competition Act broadly stipulates that any agreement among enterprises or persons at different stages or levels of the production or supply chain in different markets that imposes any conditions that may cause an AAEC in India shall be void. Such agreements may include tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, arrangements for refusal to deal and arrangements for resale price maintenance. The restrictive covenants in agreements among enterprises or persons at different stages or levels of production or supply chain are not per se void unless they have or may have an AAEC in India.

Additionally, the Competition Act prohibits abuse of dominance by any business entity, including a supplier, that enjoys a position of strength or dominance in the relevant product or service market. Certain practices by a dominant entity, including predatory pricing and denial of market access, are prohibited.

In accordance with the Competition Act, the CCI, on its own motion or based on information received from any person, including the consumer or distributor, or on a reference made to it by the central or state government or any statutory authority, may initiate an inquiry into any alleged violation of the Competition Act. If a complaint is made against the activity of a supplier as being anticompetitive, the CCI will consider each case on its merits. An appeal can be made to the National Company Law Appellate Tribunal and thereafter to the Supreme Court of India in relation to any decision made by the CCI.

The Competition Act also provides that non-parties to a contract, including consumers can approach the CCI and obtain declaratory orders and injunctions. However, compensation claims must be brought before the National Company Law Appellate Tribunal.

In the case of a conviction under the Competition Act, the CCI is empowered to pass any or all of the following orders:

- direct the concerned undertakings to discontinue and not to re-enter the agreement or discontinue the abuse of the dominant position;
- impose a penalty, which may be up to 10 per cent of the average turnover for the three preceding financial years of the concerned undertakings;
- direct that the agreement shall stand modified to the extent and manner as may be specified by the CCI; and
- pass such other orders as it may deem fit.

The CCI is empowered to issue interim orders, temporarily restraining a party from carrying on an anticompetitive act, where it is satisfied that the anticompetitive act has been committed or is about to be committed.

Law stated - 13 December 2022

Parallel imports

Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

The Patents Act 1970 allows parallel imports in relation to patents and the Trade Marks Act 1999 provides for the principle of international exhaustion of rights, which suggests that parallel imports are allowed if the goods are genuine and have not been materially altered or impaired. However, there are certain exceptions to parallel imports, most notably in the case of parallel imports of products whose designs are protected under the Design Act 2000 and in the case of goods bearing a false trademark or a false trade description. The distributor or agent may cite these exceptions in a genuine case to prevent parallel imports of the supplier's products in its designated territory.

In general, the interpretation of parallel imports is ambiguous in India and is a subject that has been highly debated in various judicial forums without definite conclusions regarding its legality. Generally, no action can be taken to restrain the parallel import of products that are protected under the Patents Act or the Trademarks Act, unless it can be proved that the products are counterfeit or fake, or materially altered or impaired. With regard to articles whose design is protected under the Designs Act, parallel imports of even genuine goods are presently prohibited. However, to enforce this exception, the product design should have registration in India in accordance with the Designs Act.

Law stated - 13 December 2022

Advertising

What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

There is no uniform law or statutory body regulating the advertising industry. Therefore, a supplier or distributor must comply with industry-specific laws, which may restrict or prescribe the manner in which an advertisement should be published. These include the Consumer Protection Act 2019, which prohibits false or misleading advertisements that are prejudicial to the interest of any consumer or are in contravention of consumer rights. The Food Safety and Standards Act 2006 prescribes that an advertisement relating to the standard, quality, quantity or usefulness of any food product should not be misleading or deceiving. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003 prohibits any direct and indirect advertisement of tobacco products. There are other industry-specific laws and an examination of these laws is important to determine whether there is any restriction on the supplier's or distributor's ability to advertise and market the products it sells. Apart from this, the Advertising Standards Council of India (ASCI), a non-statutory and self-regulatory body, has issued a Code for Self Regulation in Advertising (the ASCI Code), which applies to persons involved in the commissioning, creation, placement or publishing of advertisements. The ASCI Code does not have any statutory force and is merely considered good practice, but has been adopted by various advertising industry bodies.

A supplier may pass on any or all costs incurred by it in advertising the contract products to its distributor. In a similar vein, the supplier may also share the costs incurred by its distributor in advertising the concerned products.

Law stated - 13 December 2022

Intellectual property

How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

The rights of an intellectual property holder are protected under common law in India in cases where there is no registration of intellectual property; however, it is advisable that suppliers register their intellectual property to seek protection under statutory laws. Registration of intellectual property in India acts as prima facie proof of ownership in favour of the registered proprietor. Furthermore, to avoid misuse of intellectual property, a supplier should incorporate clear provisions in the agreement regarding the scope of intellectual property rights that are to be granted or licensed to its distributors. Periodic checks and monitoring of the physical and online market should be undertaken to identify potential infringements of rights so that timely action can be taken against the infringer.

India does not have any specific laws in respect of trade secrets and know-how, and the protection of trade secrets and know-how is purely contractual.

Law stated - 13 December 2022

Consumer protection

What consumer protection laws are relevant to a supplier or distributor?

In general, the following consumer protection laws and their accompanying rules and regulations may be relevant to a supplier or distributor: the Consumer Protection Act 2019; the Legal Metrology Act 2009 ; the Food Safety and Standards Act 2006; and the Competition Act 2002.

Law stated - 13 December 2022

Product recalls

Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

The laws relating to the recall of distributed products vary depending on the nature of the products. For example, the Consumer Protection Act 2019, which in general deals with the sale of products and services to individuals who are end consumers, provides that the Central Consumer Protection Authority may order the recall of goods that are dangerous, hazardous or unsafe for consumers. The Food Safety and Standards Act 2006 requires food business operators (which includes manufacturers, packagers and distributors) to recall a food product at any stage of the supply chain that the food operator considers or has reason to believe has not been processed, manufactured or distributed in compliance with the applicable law, or where the product may pose a threat to the public health. The food operator recalling the product is also required to inform the competent authority about the recall and provide reasons for product withdrawal. Similarly, the Drugs and Cosmetics Act 1940 and Rules framed thereunder provide elaborate provisions for a recall and rapid alert system for drugs.

Generally, the parties are free to mutually agree and delineate their responsibilities and liabilities, if any, in the distribution agreement with respect to the recall of products.

Law stated - 13 December 2022

Warranties

To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Under the Sales of Goods Act 1930 (SGA), where there is a contract for the sale of goods by description, there is an

implied condition that the goods shall correspond with the description. In the case of a contract for sale by sample there is an implied condition that the bulk shall correspond with the sample in quality and the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

There is an implied warranty or condition regarding the fitness and quality of goods for the following:

- where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose;
- where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality; and
- an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Unless there is a contract to the contrary, the buyer has the right to initiate a product liability claim under the circumstances described above. Therefore, the supplier may contractually agree with its distribution partner to vary or extinguish the implied warranties and conditions provided under the SGA. Similarly, the supplier and its distribution partner may include suitable disclaimers in the contract with its downstream customers for varying or excluding the implied warranties and conditions.

Law stated - 13 December 2022

Data transfers

Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules) impose conditions on the collection, storage, processing, transfer and disclosure of 'sensitive personal data or information' of natural persons using computer resources. The IT Rules prescribe the manner in which sensitive personal data or information may be collected, transferred or disclosed by a business entity. These conditions include obtaining prior consent of the provider of information for disclosure and transfer of sensitive personal data or information. A body corporate handling sensitive personal data or information is obligated to implement and maintain certain reasonable security practices and procedures prescribed under the IT Rules, and no transfer of sensitive personal data or information should be made to an entity that does not ensure the same level of data protection that is adhered to by the transferee.

The IT Rules do not expressly clarify the ownership of sensitive personal data or information; however, the presumption is that the data is owned by the provider of the information.

Law stated - 13 December 2022

What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

The IT Rules require that a body corporate collecting, storing, processing or handling sensitive personal data or

information of natural persons using computer resources should implement security practices and standards that have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected. The international standard ISO/IEC 27001 'Information Technology – Security Techniques – Information Security Management System – Requirements' is an example of a security practice and standard.

Law stated - 13 December 2022

Employment issues

May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Since there are no statutory or legal restrictions to the contrary, a supplier may do so, provided the distribution contract confers a right upon the supplier to take such action. However, such rights are rarely used by suppliers.

Law stated - 13 December 2022

Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

It is unlikely that a distributor or agent or its employees would be treated as an employee of the supplier. However, it is always advisable to clarify this aspect in the contract between the supplier and its distributor or agent, especially where the supplier or the agent is an individual.

Law stated - 13 December 2022

Commission payments

Is the payment of commission to a commercial agent regulated?

Payment of commission to a commercial agent is not regulated under Indian law, except in defence and government procurement deals. In accordance with the Indian Contract Act 1872, no consideration is necessary to create an agency. Provisions relating to the commission payable to an agent are agreed upon mutually by the parties to a contract.

Law stated - 13 December 2022

Good faith and fair dealing

What good faith and fair dealing requirements apply to distribution relationships?

The Indian Contract Act 1872 does not expressly incorporate the doctrine of good faith. However, several courts have opined that every contract inherently includes the principle of good faith.

Law stated - 13 December 2022

Registration of agreements

Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

Distribution agreements or intellectual property licence agreements are not required to be approved by any government agency. Furthermore, registration of such agreements is not mandatory.

Law stated - 13 December 2022

Anti-corruption rules

To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The Prevention of Corruption Act 1988 (PCA) is the primary anti-corruption legislation in India. The PCA criminalises the offering of undue advantage to induce or reward any public servant for the improper performance of his or her public duty. Currently, there is no law to regulate private commercial bribery.

In accordance with the PCA, a commercial organisation can be punished with a fine, if any 'person associated' with the commercial organisation gives or promises to give any undue advantage to a public servant to obtain any advantage for the conduct of business or to retain business for the commercial organisation. A commercial organisation will be able to avoid prosecution only if it is able to prove that it had in place adequate procedures that comply with the guidelines prescribed under the PCA to prevent persons associated from undertaking such conduct. The government is yet to frame guidelines for commercial organisations regarding the control or supervision they should exercise over the associated persons to prevent them from offering any undue advantage to a public servant on behalf of the organisation.

A person is said to be associated with the commercial organisation if he or she performs services for or on behalf of the commercial organisation irrespective of any promise to give any undue advantage to a public servant. Whether a person can be classified as a 'person associated' with a commercial organisation will be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between the person and the commercial organisation.

A supplier may be liable under the PCA if a distributor offers any bribe to a public servant to secure any business for the products of the supplier, unless the supplier is able to prove that sufficient control was put in place to prevent the distributor from offering any bribe to a public servant.

Law stated - 13 December 2022

Prohibited and mandatory contractual provisions

Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

The Indian Contract Act 1872 recognises the freedom of parties to contract freely and does not prescribe any mandatory provisions to be included in the distribution contract. However, there are certain provisions that will not be enforceable even if they are included in a contract. For example, any provision where a party is absolutely restricted from instituting legal proceedings to enforce its legal rights is void. A contract will also be void if:

- it is uncertain;
- both parties to the contract have misunderstood a matter of fact essential to the contract; and
- the consideration or object of the contract is of such a nature that, if permitted, it would defeat the provisions of any local law or is fraudulent, or involves or implies injury to the person or property of another, or is contrary to public policy.

Furthermore, a contract where consent of a party was obtained through coercion, undue influence, fraud or misrepresentation is voidable at the option of the party that gave consent.

Law stated - 13 December 2022

GOVERNING LAW AND CHOICE OF FORUM

Choice of law

Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Although Indian law does not expressly prohibit a foreign party from agreeing to foreign governing law in a contract with an Indian party, Indian courts are not comfortable adjudicating disputes under such contracts due to their lack of familiarity with foreign law.

A foreign party may opt for foreign governing law should it decide to resolve disputes through arbitration seated in India or in a foreign country.

Law stated - 13 December 2022

Choice of forum

Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

While there are no restrictions on the parties' contractual choice of courts (whether in India or a foreign country) or choice of arbitration tribunals to resolve disputes, this choice must be made carefully, based on the manner of enforcement of judgments of foreign courts by local courts and the enforcement of foreign arbitration awards in India.

In accordance with the Code of Civil Procedure 1908, a conclusive foreign judgment passed by a foreign 'superior court' situated in 'reciprocating territory' can be enforced in India. A 'reciprocating territory' means a foreign country that is notified as a reciprocating territory by the central government of India for the purpose of enforcement of foreign judgments. The term 'superior courts' means courts situated in a reciprocating territory and notified by the central government of India as superior courts.

The parties to an international distribution agreement may opt to arbitrate either in or outside India. In accordance with the Arbitration and Conciliation Act 1996, foreign arbitration awards can be enforced in India if they are passed in a country that is notified by the government of India and is also a signatory to either the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) or the Geneva Convention on the Execution of Foreign Arbitral Awards (commonly known as the Geneva Convention).

Law stated - 13 December 2022

Litigation

What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Indian law does not prescribe a separate set of procedures for the resolution of disputes involving distributors and suppliers. If a distributor or supplier decides to resolve their dispute in an Indian court, all such disputes will be resolved according to the Code of Civil Procedure 1908, which applies to all contractual and other civil cases.

India has a unified judicial system, with the Supreme Court at the top of the hierarchy followed by the high courts of each state. The district court is positioned below the state's high court and is followed by various subordinate courts. In addition to the regular civil courts, various tribunals (including appellate tribunals) have been set up for specialised matters, such as income taxes, debt recovery, intellectual property and company law. Appeals from the orders of these tribunals lie with the designated appellate tribunals, the state's high court or the Supreme Court, as the case may be.

With the exception of the Supreme Court, each court in India has a defined territorial limit over which it can exercise its jurisdiction. Furthermore, a pecuniary limit has been prescribed for all district and subordinate courts, and a court cannot exercise jurisdiction over a matter whose value exceeds the pecuniary limit set for that court. Generally, subject to the applicable pecuniary limit, a suit should be filed in the court that has jurisdiction over the place where the cause of the action arose, or where the defendant resides or carries on its business. Appeals from subordinate courts lie with the state's district court. Similarly, an appeal from a district court can be filed with the state's high court and then with the Supreme Court.

Indian procedural law treats a foreign party fairly and equally to an Indian party. No additional benefits or advantages are conferred to a foreign party over an Indian party desiring to resolve disputes through Indian courts. However, resolution of disputes in Indian courts is likely to result in protracted litigation owing to a huge backlog of cases and slow disposal rates.

Law stated - 13 December 2022

Alternative dispute resolution

Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

The Arbitration and Conciliation Act 1996 (the Arbitration Act) governs domestic arbitration, international commercial arbitration and the enforcement of foreign arbitral awards. The Arbitration Act defines an international commercial arbitration as an arbitration involving commercial disputes arising from a legal or contractual relationship between two or more parties, wherein one of the parties is a foreigner.

The parties to an international distribution agreement may opt to arbitrate either in India or outside India in any country that is notified by the government of India and is also a signatory to either the New York Convention or the Geneva Convention.

The Arbitration Act requires that the arbitration agreement by the parties to submit to arbitration all or certain disputes

between them in respect of a defined legal relationship should be made in writing. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement is deemed to be in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, that provide a record of the agreement.

No additional benefits or advantages are conferred to a foreign party over an Indian party desiring to resolve disputes through arbitration. However, arbitration of disputes, as opposed to litigation in court, provides a speedy remedy.

Law stated - 13 December 2022

UPDATE AND TRENDS


Key developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

Currently, there are no proposals for new regulations or amendments of existing regulations concerning the distribution of products. However, there is a proposal to amend the existing data protection laws. When this is implemented, it may impact suppliers and distributors.

Law stated - 13 December 2022

Jurisdictions

	Austria	DORDA
	Belgium	Lydian
	Brazil	Vaz e Dias Advogados & Associados
	Canada	Lapointe Rosenstein Marchand Melançon LLP
	China	Ribeiro Hui
	Finland	ADVOCARE Law Office
	Germany	Taylor Wessing
	India	G&W Legal
	Netherlands	Buren NV
	Switzerland	MLL Meyerlustenberger Lachenal Froriep Ltd
	USA	Plave Koch Plc