

Distribution & Agency

Contributing editor
Andre R Jaglom



2019

GETTING THE
DEAL THROUGH

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Tannenbaum Helpert Syracuse & Hirschtritt LLP

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Preface

Distribution & Agency 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Distribution & Agency*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andre R Jaglom of Tannenbaum Helpert Syracuse & Hirschtritt LLP, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
February 2019

India

Rahul Chadha, Neeraj Prakash and Rupali Srivastava

Chadha & Co

Direct distribution

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

A foreign supplier can establish its own entity in India in order to import and distribute its products by incorporating a private limited company, a public limited company or a limited liability partnership (LLP) as may be appropriate.

Where a foreign company wants to have complete control over all aspects of the business in India and intends to be in India for the long term, a wholly owned subsidiary is recommended. However, the extent of foreign equity participation and control depends upon the exact nature of business in India, and is governed by the foreign direct investment (FDI) Policy of the government.

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

A foreign supplier can be a partial owner or equity shareholder in an Indian company with a local partner. Accordingly, a foreign company may form a joint venture in India with any local company, subject to compliance with the FDI Policy. Typically, a foreign supplier chooses to enter into the Indian market by way of forming a joint venture with a local company in order to use the local market expertise and network of the Indian partner.

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

Generally, a private limited company is formed as per the procedure laid down under the (Indian) Companies Act 2013 and the rules made thereunder. The corporate affairs of the company are governed and managed as per the provisions of the Companies Act 2013. Further, a company is subject to tax laws in India, and product specific laws are also applicable for importing and distributing products in India.

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

Foreign investment in India is regulated and governed by the FDI Policy, which is issued from time to time. Generally, foreign investment in most business sectors is allowed up to 100 per cent under the automatic route; that is, without any prior permission from the government of India or the Reserve Bank of India. However, for certain businesses, the FDI Policy prescribes limits for foreign investment and certain business-related conditions that have to be met by the Indian company that has such foreign investment. For example, a 100 per cent foreign investment or ownership in an Indian company carrying out wholesale trading business in India is allowed under the automatic route. However, for a company engaged in retail activities, different conditions are prescribed for different levels of foreign investment.

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

As explained under questions 1, 2 and 4, a foreign supplier can own equity interest in the local entity in India that distributes its products.

The limit of investment depends upon the actual activities to be carried out by the Indian entity.

6 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?

The major tax considerations for foreign suppliers in India are corporate income tax, and the treatment of tax incidence under the Double Taxation Avoidance Agreement (if applicable in relation to the supply) entered into between India and the country of the supplier. Several other taxes must also be considered, such as the Goods and Services Tax (GST) (which would be applicable on the sale of goods and services), and customs duty (for import of the supplied products) among others. In relation to owning interests or shareholding in the local business in India, dividend distribution tax (payable at the time of payment of dividend by the Indian company), and capital gains tax (payable by the foreign investor at the time of selling its shares held in the Indian company) become applicable.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Multiple structures are available to a foreign supplier for distribution of products in India and the same can be chosen based on the commercial objectives and the nature of products of the foreign supplier.

Distributors

Foreign suppliers generally appoint a distributor for the whole of India, or for a certain defined territory, by way of entering into a detailed distribution agreement. Sometimes, the foreign supplier establishes its own entity to act as importer and master distributor in India, and the master distributor further appoints distributors for different territories in India. The suitability of the distributor model depends upon the level of control the foreign supplier wishes to have on the distribution and sales activities in India. Competition law-related issues are important considerations for deciding the distribution structure, such as the fixing of resale price, exclusivity, territorial restrictions, among others.

Agency

The supplier can appoint agents, wherein the supplier is the principal and would retain control over the product sale and price. The agent only represents the supplier in India. Further, the supplier would be legally responsible for all the acts done by the agent in the course of business. The agent is generally not implicated in any financial risk, and all the risks associated with the product rest with the supplier. The agent is paid its commission based on sales made. Agents can have varying authority as per the contract entered into between the supplier and the agent. There are a few products where the appointment of an authorised agent in India is legally required, such as for pharmaceutical drugs and some medical devices.

Franchise

A foreign supplier may adopt a franchise arrangement to distribute its products in India. The said arrangement is generally adopted where

sharing of technical know-how and business methods is required. In India, many foreign suppliers have adopted the franchise model to sell their products.

Other forms of business models

Multinational brands generally enter the Indian market through distributors or franchisees, by formulating an agreement. This concept is usually adopted by new entrants to access the Indian market without establishing their own entities.

Foreign suppliers can also enter into a trademark licensing agreement, whereby they would license their trademark on receipt of the negotiated payments from the licensee. In such an arrangement, generally, the products are manufactured in India, and a royalty fee is paid on the products. The objective is to allow the Indian company to render services or manufacture goods under the foreign supplier's trademark as per the trademark licence agreement.

Companies sometimes opt for a strategic alliance by entering into joint ventures with Indian partners. Strategic alliances are typically adopted by foreign suppliers when local expertise or support of an Indian partner is required for the foreign suppliers to cater to the Indian market in an effective manner, or where there are other synergies of business.

8 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 distributor is primarily governed by the contract entered into between the parties. The Indian Contract Act 1872 (Contract Act) governs the fundamental principles of the contract. There is no government agency that regulates the entire relationship between the foreign supplier and Indian distributor. However, certain government agencies have regulatory roles based on the specific legal issues where the government agency has a legislative mandate to enforce any specific law. For example, issues related to competition law under a contract are enforced by the Competition Commission of India (CCI), which ensures that any contractual arrangement between the parties does not lead to any appreciable adverse effect on competition in the relevant Indian market or creates any barriers to new entrants or forecloses competition and such like.

Similarly, the provisions of the Foreign Exchange Management Act 1999 (FEMA) are attracted whenever there is involvement of foreign currency and payment-related issues for import of goods into India. The regulatory authority in this regard is the Reserve Bank of India. Further, issues pertaining to warranties, transfer of risks and ownership of goods are governed by the provisions of the Sale of Goods Act 1930. The quality of goods and trade practices are governed by the Consumer Protection Act 1986, which provides for various safeguards against unfair trade practices, defects in goods and deficiency in services.

To ensure the proper use of the intellectual property of the foreign supplier, the provisions of the Trade Marks Act 1999 and the Patents Act 1970 are of relevance.

9 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?

There is no legal prohibition on a supplier terminating a contract unilaterally without any reasons, if the contract provides for the same. The right of termination of a contract and the conditions therefor are governed by the terms of the contract between the parties. The distributor agreement usually stipulates the terms and conditions under which the parties to the contract may terminate the contract. Typically, the contract provides for termination right of a party during the subsistence of the contract for any breach of material obligations, misrepresentation, omission or commission of certain acts, infringement of intellectual property and so on. Care should be taken to incorporate reasonable terms for termination of the contract by a party; otherwise the affected party generally tends to challenge the termination of contract on the ground of unreasonableness. However, generally, the courts in India

respect and uphold the contractual terms, if the contract is not totally unbiased.

Contract termination without cause is permitted in India, provided that the terminating party gives a reasonable notice or compensation to the other party. The supplier is under no legal obligation to renew the contract after the contract terminates by passage of time. Indian courts have held that even in the absence of a termination clause in the contract enabling either party to terminate the agreement, the contract can be terminated even without assigning any reason and by serving a reasonable notice or paying compensation in lieu of notice.

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

The termination of contract by either party with or without cause does not statutorily require a party to pay any compensation or indemnity to the other party. Compensation or indemnity is paid by the party terminating the contract only in the event that the contract was terminated unlawfully or in contravention of the terms and conditions stipulated under the contract. In the event that the contract is terminated unlawfully or in contravention of the terms and conditions of the contract, then the compensation or indemnity is paid in accordance with the terms of the contract, and in the absence of any express agreement for the same, the compensation amount is determined by the courts.

11 Will your jurisdiction enforce a distribution contract provision prohibiting 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?

The parties to the contract can formulate any terms and conditions within the ambit of the Contract Act, and the courts may enforce a provision prohibiting the transfer of the distribution rights to the supplier's products. The Supreme Court, in the case of *M/s Gujarat Bottling Co Ltd and Others v The Coca Cola Company and Others*, has observed that franchise agreements usually incorporate a condition that the franchisee shall not deal with competing goods. Such a condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser and it cannot be regarded as restraint of trade. The restriction on transfer of all or part of the ownership of a distributor or an agent to a third party after the termination of contract may not be enforceable, as the prudence for enforcement of such provisions in India is that no party can restrain the other party from trading, and only a reasonable restriction can be imposed.

Regulation of the distribution relationship

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

Confidentiality provisions in agreements, during and after the term of such agreements, are generally enforceable in India provided the agreement does not restrain anyone from exercising a lawful profession, trade or business of any kind.

There is no specific legislation to protect confidential information. However, the courts have upheld protection of such information on the basis of the terms and conditions of the contract, and principles of equity and common law action for breach of confidence.

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

Indian courts have drawn a clear distinction between non-compete covenants after the term of the agreement and non-compete covenants post the term of an agreement. To determine enforceability of such covenants, the courts consider the question whether the covenant is or is not in restraint of trade.

It is well established that the non-compete covenants operative during the period of a contract are generally enforceable if the restriction is reasonable in the context of the particular trade and business, and where the restriction is required to enhance the level of service to the customers and efficiently manage the sale of products.

In a recent judgment of the Delhi High Court, where there is a reference to franchise agreements for distribution of goods and services,

it has been observed that certain agreements often incorporate terms restricting the rights of the franchisee to deal with competing goods for facilitating the distribution of the goods of the franchiser, and this cannot be regarded as a restraint of trade.

Non-compete covenants, after the expiry or termination of the contract, are generally difficult to enforce as they are considered as a restraint in exercising a lawful profession, trade or business. An exception to this restriction is an agreement not to carry on a business of which the goodwill is sold.

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

Control of the resale price by a supplier is generally considered as an anticompetitive agreement, if the same causes, or is likely to cause, an appreciable adverse effect on competition in India. In terms of the (Indian) Competition Act 2002 (Competition Act), agreements between parties to sell goods at different stages or levels of the production chain in different markets on the condition that the prices to be charged on the resale by the distributor or purchaser shall be the prices prescribed by the supplier or seller, are anticompetitive agreements and shall be void if they cause, or are likely to cause, an 'appreciable adverse effect on competition' (AAEC) in India. Such a provision is referred to as 'resale price maintenance' (RPM). However, the exception to this restriction is if the agreement clearly states that prices lower than those stipulated by the seller may be charged.

The AAEC needs to be determined on the basis of the factors provided under the Competition Act. In cases relating to RPM issues, the CCI has used the market share of the product in question as the centrepiece in its analysis and has found that where the market in question was generally competitive, the RPM was less likely to cause an AAEC in India.

Therefore, a supplier can control the prices at which its distribution partner resells its products in India, provided the terms of the agreement and price control mechanism are in compliance with the provisions of the Competition Act.

15 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?

A supplier can influence resale prices by suggesting resale prices, establishing a minimum advertised price policy both for physical or online sale, or by announcing that it will not deal with customers who do not follow its pricing policy or such like, if such agreement includes the exception provided in the Competition Act in the case of RPM, and if the terms of pricing do not cause, or are not likely to cause, AAEC under the Competition Act for the given market or products.

Care should also be taken that the provision related to refusal to deal should not amount to abuse of dominant position by the seller under the Competition Act.

16 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, such a provision can be incorporated in the distribution contract, provided that such restriction does not amount to creating an AAEC in the relevant market in India.

17 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?

Generally, a seller can charge different prices to different customers based on location, type of customer, quantities purchased or otherwise. There is no legal restriction for the same. However, in the event that the seller is a foreign company and the distributors are based in India, and if different distributors import the goods at different prices, the issue relating to evasion of customs duty by the distributor importing at a lower price may arise. The issue would not be relevant where the Indian entity of the foreign seller imports into India and thereafter distributes its products to different distributors in India at different prices based on location, type of customer, quantities purchased, or otherwise.

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

Generally, an exclusive distribution agreement, including an agreement that limits, restricts or withholds the output or supply of any goods or allocates any area or market for the sale of the goods, is considered as an anticompetitive agreement, if such agreement causes, or is likely to cause, an AAEC in India. However, the Competition Act provides for an exception where such restriction is necessary for restraining any infringement of, or to protect, intellectual property rights.

Matters related to anticompetitive agreements are decided on a case-to-case basis on the basis of the rule of reason, which involves enquiry into the purpose and effects of an agreement, whether the restraint imposed is such that it merely regulates and perhaps promotes competition, or whether it is such that it may suppress or even destroy competition.

Therefore, a supplier can restrict the geographical area or categories of customers if the agreement is in compliance with the above provisions of competition law.

The concept of active sales efforts and passive sales are not recognised under Indian law. Restrictions, whether express or implied, are tested on the touchstone of the above legal principles.

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

Considering the views taken by the CCI while dealing with various complaints made against e-commerce websites in India, it can be concluded that offline and online markets are not two different relevant markets, and are only different channels of distribution of the same product. E-commerce entities need to maintain a level playing field. Therefore, the legal position relating to the suppliers' restriction on e-commerce sales by its distributors would be the same as explained in question 18 and would be considered under the category of exclusive distribution agreement. Accordingly, such restrictive covenants in the agreement may amount to being anticompetitive if the agreement causes, or is likely to cause, an AAEC in India.

As explained above, these cases are decided on their own specific facts, on the basis of the rule of reason, which involves enquiry into the purpose and effects of an agreement, whether the restraint imposed is in any manner reducing competition in India, or merely regulates and promotes competition. In such a case, restriction can be provided for in the agreement.

Any provision stating that e-commerce sales by distribution partners, or by e-commerce intermediaries to which the distribution partner sells, are not resold outside the distribution partner's assigned territory may be included, if it can be proved that the agreement does not cause, or is not likely to cause, an AAEC in India.

Further, there is no restriction on the supplier to require reports of such sales by territory. A provision for claiming 'invasion fees' or similar amount by the distribution partner may be incorporated in the distribution agreement, if such exclusive distribution agreement is not considered void under competition law.

20 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?

Yes, a supplier can refuse to deal with particular customers; however, restricting its distributor's ability to deal with particular customers under contract may be treated as an anticompetitive agreement if the agreement causes, or is likely to cause, an AAEC in India.

21 Under which 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?

As per the Competition Act, no distribution or agency agreement is required to be reported under the merger control regulation or require clearance by the CCI. However, the CCI may, on the basis of any

complaint made before it or on its own motion, initiate an inquiry if it comes to the knowledge of the CCI that any agreement is an anticompetitive agreement and such a transaction is likely to cause an AAEC in the relevant market in India.

To evaluate the AAEC, the CCI, among others, considers the following factors:

- 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.

22 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 laws of India regulate the relationship between suppliers and their distributors. In addition to the restrictions and regulations stated above, the competition laws prohibit the following agreements:

- any agreement in respect of production, supply, distribution, storage, acquisition or control of goods, which causes, or is likely to cause, an AAEC in India;
- any agreement which, directly or indirectly, determines purchase or sale prices, limits or controls production, supply, markets, technical development, shares the market or source of production by way of allocation of geographical area of market or type of goods or number of customers in the market; and
- tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, agreement for refusal to deal, resale price maintenance and so on, if such agreement causes, or is likely to cause, an AAEC in India.

However, the above restrictions are not applicable where any agreement entered into by way of a joint venture, if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or for the purposes of protecting intellectual property rights.

Further, any agreement resulting in abuse of dominant position by a party whereby the agreement imposes unfair or discriminatory conditions in the purchase or sale of goods, or places restrictions on prices, limits or restricts the market, results in denial of market access, or makes the conclusion of contracts subject to acceptance of supplementary obligations (which, by their nature or according to commercial usage, have no connection with the subject of such contracts), is not permissible under the competition laws of India.

Competition law matters are dealt with by the CCI, as per the procedure provided under the Competition Act, to determine anticompetitive agreements and abuse of dominant position as provided in the Competition Act.

On completion of an inquiry in the manner prescribed under the Competition Act, the CCI has the power to pass any or all of the following orders:

- impose a penalty;
- direct modification of the agreements;
- pass an interim order to temporarily restrain any party from carrying on such act until the conclusion of the inquiry, or until further orders;
- discontinue and not to re-enter such agreement, or discontinue the abuse of dominant position, as the case may be; direct division of an enterprise enjoying dominant position to ensure that the enterprise does not abuse its dominant position;
- direct the enterprises concerned to abide by such other orders as the CCI may pass and comply with the directions, including payment of costs, if any; and
- pass any other order as it may deem fit.

Any person or trade association can file information before the CCI for making an inquiry under the Competition Act. The CCI may also initiate an inquiry on its own motion.

Where a party is aggrieved by the order of the CCI, the party may resort to the following remedies:

- appeal to the Competition Appellate Authority Tribunal;
- appeal to the Supreme Court of India against any order or decision of the Competition Appellate Authority Tribunal.

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

India broadly follows the International Exhaustion Policy, that is, after the first sale of goods, the right holder of such goods exhausts all the rights over the goods internationally and such goods can be legally imported and distributed anywhere globally.

India's stand on parallel imports is not very clear or uniform, as there is certain legislation, such as the Patents Act 1970 and the Trade Marks Act 1999, with specific provisions that allow parallel imports into India, and then there is legislation, such as the Design Act 2000, which prohibits parallel imports, provided such designs are registered in India under the said Act.

The Customs Department of India in 2012 clarified that it shall allow free movement of parallel-imported goods in India, provided that the goods do not bear a false trademark or bear a false trade description as per the terms of the Trade Marks Act 1999.

Notwithstanding the acceptance of parallel imports under the Trade Marks Act 1999, the Act prohibits such imports if the goods are counterfeit or materially altered or impaired. Parties may also seek an injunction from the courts on the ground of infringement of trademarks.

Therefore, parallel import into India may be restricted by the suppliers under the contractual remedies available to them.

24 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 share in its cost of advertising?

The supplier or distributor can advertise the products that they sell in the Indian market. Care should be taken that the contents of the advertisement should not be in violation of any laws in India. For example, the advertisement should be in compliance with the guidelines issued by the Advertising Standards Council of India. For certain products, such as cigarettes and other tobacco products, wine and spirits, and food products, the rules for advertising have been prescribed under law. Thus, the contents of advertisements for those products must be in compliance with the prescribed rules.

There is no legal prohibition on passing the cost of advertisement by the supplier to its distributors. The advertisement cost is a matter of agreement between the supplier and its distributors.

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

The first step towards the protection of intellectual property rights is to register it in the country of its origin, and then register it in India. Also, protection can be obtained under any relevant international intellectual property convention or agreement to which India is a signatory.

There are certain intellectual properties, such as patents, that require mandatory registration for protection against any infringement. Trademarks are not mandatorily registrable. The protection of an unregistered trademark is also available under Indian law. However, a registered trademark enjoys better protection and infringement action is available for a registered trademark, unlike in the case of an unregistered trademark, where only a passing-off action can be initiated.

Similarly, copyright protection in India is provided automatically to the author of any original work. Registration is not mandatory. As India is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, an author from any country that is a signatory of this convention is entitled to such rights as they allow to their own nationals, in addition to any rights granted under the convention. Notwithstanding this, it is advisable to register the copyright in India.

For patents, a separate registration must be done in India.

Apart from registration of registrable intellectual property, for those intellectual properties that are not registrable in India, such as trade secrets and know-how, strict non-disclosure and non-compete clauses can be incorporated in the distribution agreement. The distribution agreement can incorporate an indemnification clause against the distributor in case of any infringement of intellectual property rights by the distributor or any third party.

Further, the supplier can contractually limit the right of the distributor over the intellectual property owned by the supplier by granting a limited licence to use the intellectual property right over any product, on specific terms and conditions. It is advisable for the licence agreement to specify that transfer of any specific intellectual property right is without goodwill. Goodwill is a separate intangible asset.

Technology transfer agreements are common in India and they are legally enforceable, provided they are not anticompetitive or indulge in abuse of dominant position under the Competition Act.

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

India has several legislative provisions pertaining to the rights of a consumer against a defective product. The main provision relevant to a supplier or a distributor is the Consumer Protection Act 1986. This statute provides for general product liability, protection from defective goods, and the redress available to the consumer. The other specific provisions in India pertaining to the quality, quantity and standards of the products that may be relevant to the supplier or distributor are, inter alia:

- the Indian Contract Act 1872;
- the Legal Metrology Act 2009 and the Legal Metrology (Packaged Commodities) Rules 2011;
- the Competition Act 2002;
- the Food Safety and Standards Act 2006;
- the Drugs and Cosmetics Act 1940;
- the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 and the Drugs and Magic Remedies (Objectionable Advertisements) Rules 1955;
- the Essential Commodities Act 1955;
- the Bureau of Indian Standards Act 1986; and
- the Standards of Weights and Measures Act 1976.

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

There is no general legislation pertaining to recall of products distributed in the Indian market; however, there are certain specific legislative mandates for the recall of the distributed products. For instance, the Food Safety and Standards Authority of India has framed regulations, namely the Food Safety and Standards (Food Recall) Regulations 2017, which provide for the recall of food products that are considered unsafe. Further, the car industry is guided by the Voluntary Code on Vehicle Recall formulated by the Society of Indian Automobile Manufacturers, but that code is not legally binding and is voluntary in nature. The recalls done by the car industry are usually on account of safety issues, bad publicity, loss of reputation and such like. Further, the government has proposed the Motor Vehicle (Amendment) Bill 2017, wherein it is proposed that the central government would have the power to order a manufacturer to recall vehicles if they pose a risk to society.

In addition to the above, the courts have intervened on various occasions and have ordered the recall of products. In the event that the product quality does not match the standard prescribed under various applicable legislative measures, the authority concerned may also order the product to be recalled.

The parties can between themselves agree to the terms and conditions in the distribution agreement in the event of recall pertaining to cost absorption, and the roles and responsibilities of the supplier and distributor. In various legal precedents, the courts have emphasised that a manufacturer may be held liable for a manufacturing defect.

28 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?

Warranty is generally contractually provided by the seller to the buyer by way of express provisions in the agreement, and the extent

of warranty is also envisaged therein. However, the Sale of Goods Act 1930 imposes a duty whereby the sale of a product is subject to certain implied conditions pertaining to the quality of the goods. The said provision states that where the buyer, expressly or by implication, makes the seller aware of the purpose for which the goods are required, so as to show that the buyer has relied on the seller's skill or judgement, and the goods are to be used in the course of the seller's business to supply, there is an implied condition that the goods must be reasonably fit for such purpose, unless there is a contract for sale that there is no implied condition to the fitness of the product for any particular purpose.

Further, where goods of a particular description are purchased from a specialised seller who deals in goods of that description, there is an implied condition that they should be of merchantable quality, unless the buyer has examined the goods. In such a case, there shall be no implied condition with regard to defects that such an examination should have revealed.

Therefore, the sale agreement that is provided to the customer or to the end user can be formulated to limit the scope of warranties. However, the consumer courts, on various occasions, have extended the scope of warranty and have provided relief to the customer. In the absence of any warranty provided by the seller or any other conditions, the Indian courts have resorted to the imposition of the trade practice and have enforced a general warranty that may be applicable.

29 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?

There are no specific restrictions relating to the exchange of information between a supplier and its distributors about the customers and end users of their products. Data protection laws are not very evolved in India, unlike other jurisdictions, such as the United Kingdom. Aspects such as the purpose for collecting personal information, how this information will be used and so on are dealt with under different Indian laws. Specially, data in electronic form is protected, and regulations for the manner of its use have been provided under the Information Technology Act 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011. Accordingly, if a corporation that deals with sensitive information is negligent in implementing and maintaining reasonable security practices to protect such sensitive information that results in wrongful loss or wrongful gain to any person, such a corporation may be liable to pay damages to the person affected thereby.

The courts in India have also taken the view that the right to privacy is a fundamental right, protected under the Constitution of India.

Therefore, in the absence of a comprehensive law relating to data protection, the provision for the sharing of data, ownership of data and so on should be expressly included in the agreement with the distributor. Covenants for confidentiality should also be incorporated in the agreement requiring the distributor to comply with the law.

30 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?

According to the Contract Act, there are no legal impediments in the event that a supplier wants to approve or reject the persons managing the distributor's business, if such a right is given to the supplier in the contract. Further, if provided under the contract, the supplier has a right to terminate the contract for the reason of being dissatisfied with the management of the distributors, and the same can be enforced. Caution must be taken when rejecting the management of the distributor, as the same distributor may claim unlawful termination and embroil the supplier in such a case. Therefore, an objective criterion for arriving at the conclusion of dissatisfaction or non-performance should be provided in the agreement in order to avoid any misinterpretation in case of a dispute. The contract for distribution must be carefully drafted to envisage the right to accept or reject the management of the distributor.

31 Are there circumstances under which a distributor or agent 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?

Generally, agreements between suppliers and distributors are on a principal-to-principal basis. However, the terms of the agreement determine the nature of the relationship between the parties. In some cases, depending upon the level of supervision, control, approval process, organisational interference and such like, the relationship between the parties may not be considered as on a principal-to-principal basis, but the distributor may be treated as an agent or employee of the supplier. In the event that the courts reach a conclusion that a distributor or agent is an employee, then the same may result in implications under labour laws. Under Indian labour laws, employees are entitled to minimum wages, overtime, severance consequences, maternity benefits and other benefits.

The supplier can safeguard the potential risk of an agent or distributor being characterised as an employee of the supplier by carefully drafting the distribution agreement and incorporating covenants that safeguard the interests of the supplier.

32 Is the payment of commission to a commercial agent regulated?

Commission to be paid to a commercial agent is not regulated under Indian laws. The remuneration or commission to commercial agents is generally decided by the parties contractually considering the market practice, work attributable to the agent, and the time period for the commission of the work attributed after taking into account the transaction that the commercial agent would undertake. The (Indian) Ministry of Defence in the *Defence Procurement Manual* provides guidelines regarding commission paid to an agent in defence procurement.

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

Indian law does not provide any statutory provision wherein there is any requirement to perform a contract in good faith and fair dealings. Contracts are enforced strictly as per the terms of the agreement, and the courts have held that the intention of the parties should be construed on the basis of the terms of the contract only. However, the courts have emphasised the principle of negotiations between the parties in good faith (especially in insurance contracts, as the same is quintessential) but no rules have been laid down for contracts in general. The courts may give effect to the obligation to act in good faith in contracts. In trade practice, if the conduct of the parties undermines the just and fair standards of the industry, then enforceability of such clauses in the contract may be questioned on the basis of unreasonableness or contra proferentem rules.

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

There is no provision under Indian law that provides for the registration of distribution agreements with a government agency or to obtain an approval from a government agency for the same. When dealing with intellectual property, a trademark licence agreement may be registered with the trademark office in India.

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

Anti-bribery and corruption laws in India are applicable only in the instance of dealing with public officers or servants. The relationship between private suppliers and distributors would not come within the ambit of anti-bribery or anti-corruption laws in India. The said issues are to be dealt with on the basis of contractual covenants and policies framed by the suppliers and the distributors. It is fairly common in India to include bribery and corruption as a termination event of an agreement between suppliers and distributors.

36 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 Contract Act labels all contracts that restrain the exercise of lawful profession, trade or business of any kind by any party, as void. Through legal precedents, the courts have allowed reasonable restraints to be enforceable. Proper care must be taken to ensure that such contracts are drafted concisely in compliance with the provisions of the Contract Act, competition laws, consumer protection laws and other applicable laws.

Governing law and choice of forum

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

As a general rule, choice of law for governing the contract in the context of international commercial contracts is well recognised by the courts in India. The parties to the contract are free to agree on the applicable law of the contract between them, where the supplier is a foreign party and the distributor is an Indian party. If the supplier establishes its own entity in India and the distribution contract is signed between the Indian entity and the Indian distributor, then the governing law has to be the Indian law, as the contract, in such a case, would be between two Indian parties.

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

Indian arbitration law enables the parties to choose any type of arbitral tribunal, whether ad hoc arbitration or institutional arbitration, to resolve their disputes. The place of arbitration can also be decided by the parties in the agreement. Parties can either agree for a foreign-seated arbitration, or a domestic arbitration to be conducted in India. An arbitral award passed either through a foreign-seated arbitration or a domestic arbitration is enforceable in India. However, at the time of choosing the place of arbitration outside India, care should be taken that the country is a signatory of the New York Convention or Geneva Convention for the enforcement of a foreign arbitral award. A foreign arbitral award passed in such a country would be easier to enforce in India as Indian arbitration law specifically provides for the enforcement of such a foreign award.

39 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?

Foreign businesses or suppliers are free to approach local courts (of competent jurisdiction) in India, unless arbitration is the consented form of dispute resolution or settlement. Where the dispute resolution mechanism is agreed as arbitration in the agreement by the parties, then the parties may approach the court in India only for limited purposes, such as interim measures and so on. That right is also dependent upon the agreement between the parties, since as per Indian arbitration law, the availability of the recourse of interim measures through an Indian court is a matter of agreement. Foreign businesses can expect fair treatment and the decisions of courts are free from bias. Since the procedures through Indian courts can be tedious, costly and time-consuming, the parties often agree on arbitration to resolve their disputes. However, a law relating to the specific Indian commercial courts has recently been enacted prescribing time-bound resolution of disputes through commercial courts. Therefore, the advantages and disadvantages of court procedure and arbitration should be evaluated in the context of the facts of each case before deciding the appropriate dispute resolution process.

40 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?

An agreement to mediate or arbitrate disputes between the parties is well recognised under Indian law, and hence is enforceable in India. The choice of arbitral tribunal, place of arbitration, language of arbitration and such like is available to the parties. The parties may agree upon the manner of conducting the arbitration. It is common for foreign businesses to agree to arbitration for resolving disputes with their Indian business partners and distributors. The arbitration process provides for a certain liberty to the parties to resolve their disputes in the manner they want, especially with regard to timeline, number of arbitrators and so on, and arbitral awards are enforceable by Indian courts, subject to meeting the prescribed conditions under the arbitration laws for enforceability of the arbitral award.



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