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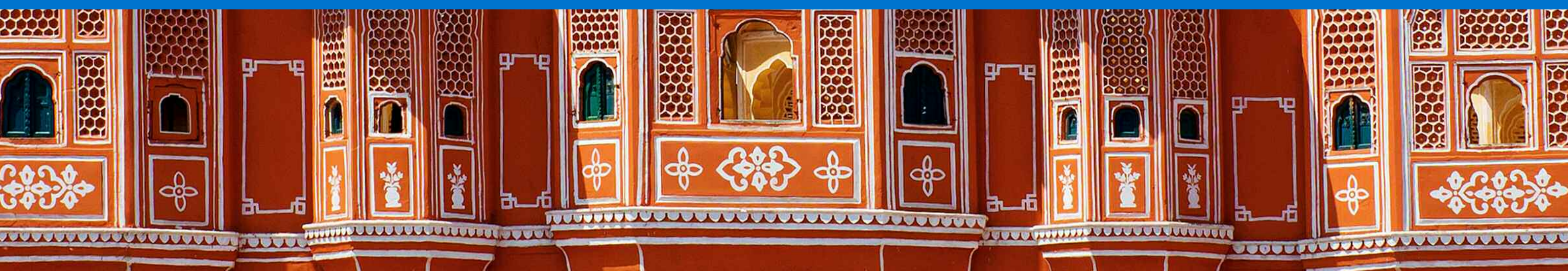
India: Essential tips for successful trading



India: Essential tips for successful trading

As the world's largest democracy and second most populous country, India has an enormous domestic consumption base and a well-established legal system. Indian law shares basic principles of commercial law with Britain and other common law systems and all laws, superior court judgements and proceedings are in English.

Supplying goods and services to Indian customers is no different from supplying customers elsewhere in the world but there are some practical steps that can smooth the process and enable you to deal with some peculiarities of Indian law. Here are some essential tips that can help to make your trading relationship a lasting and successful one.

Choose how and where to resolve disputes

Resolving a dispute successfully through the Indian courts can be time-consuming. To avoid this, it is advisable for the parties to a commercial transaction to agree on arbitration as the way to conclusively resolve disputes.

Indian arbitration legislation is based on the Model Law adopted by the United Nations Commission on International Trade Law. In the case of foreign arbitral (i. e. arbitration) awards, while India follows the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it recognises as reciprocal nations only a few of the 148 nations that have signed the Convention and publishes a list of those recognised territories in its Official Gazette.

When arbitration takes place in India or where certain parts of Indian arbitration legislation are not specifically excluded it is susceptible to interference by Indian courts. While a recent pronouncement of the Supreme Court of India has limited interference by courts, parties should seek specialist advice on structuring the dispute resolution framework in their contracts.

Broadly speaking, the foreign supplier and the Indian buyer have the freedom to choose the law that they want to govern the supply agreement. Although an Indian buyer is naturally likely to prefer Indian law, it is fairly common for supply agreements between Indian buyers and foreign suppliers to have non-Indian law as the governing law, since a material part of such agreements is to be performed by the supplier outside India. This is especially true if the foreign supplier has an "upper hand" in the negotiations.

While choosing between Indian and foreign law for the contract, the foreign supplier should also remember that Indian law governing the sale of goods is in several respects different from the United Nations Convention on Contracts for the International Sale of Goods which many European suppliers may be used to.

Even if Indian laws govern their agreement, the supplier and the buyer may still opt to have their dispute resolution procedure governed by a different set of rules of arbitration. For instance, in a supply agreement governed by the laws of India, the parties may agree that any dispute shall be settled by arbitration conducted under the rules of the International Chamber of Commerce, London Court of International Arbitration or Singapore International Centre of Arbitration, at any geographic location. So, in other words, the laws governing the agreement and the rules of arbitration may be different.

Family comes first

The family and family ties are important in the Indian business environment. Most Indian businesses are owned by a "promoter"

family which has a significant say in the governance of the company. This makes negotiating with a family-owned private business very different from the same discussion with a similarly sized western enterprise with its professional ownership and management and widely dispersed shareholders. Business decisions can be influenced by considerations such as keeping control within the family, a promoter's personal legacy and jobs for family members. With no distinct separation between ownership and management, the company is run very much in accordance with the wishes of the promoters. This may also apply in the case of publicly traded companies.

Put it in writing and check the buyer's authority

The Indian law on contract does not specifically prescribe the form of contract or the manner in which the contract must be executed for it to be valid and enforceable. However, it is recommended that supply agreements be in writing and signed by the supplier and the buyer. Certain contracts are required to be in writing by specific statutory laws in India including those on the transfer of property and on intellectual property. In addition, all supply agreements must contain sufficient information about the specification, quantity and quality of the products, the purchase price and payment provisions, and the specific terms and time of the supply, e. g. by using INCOTERMS.

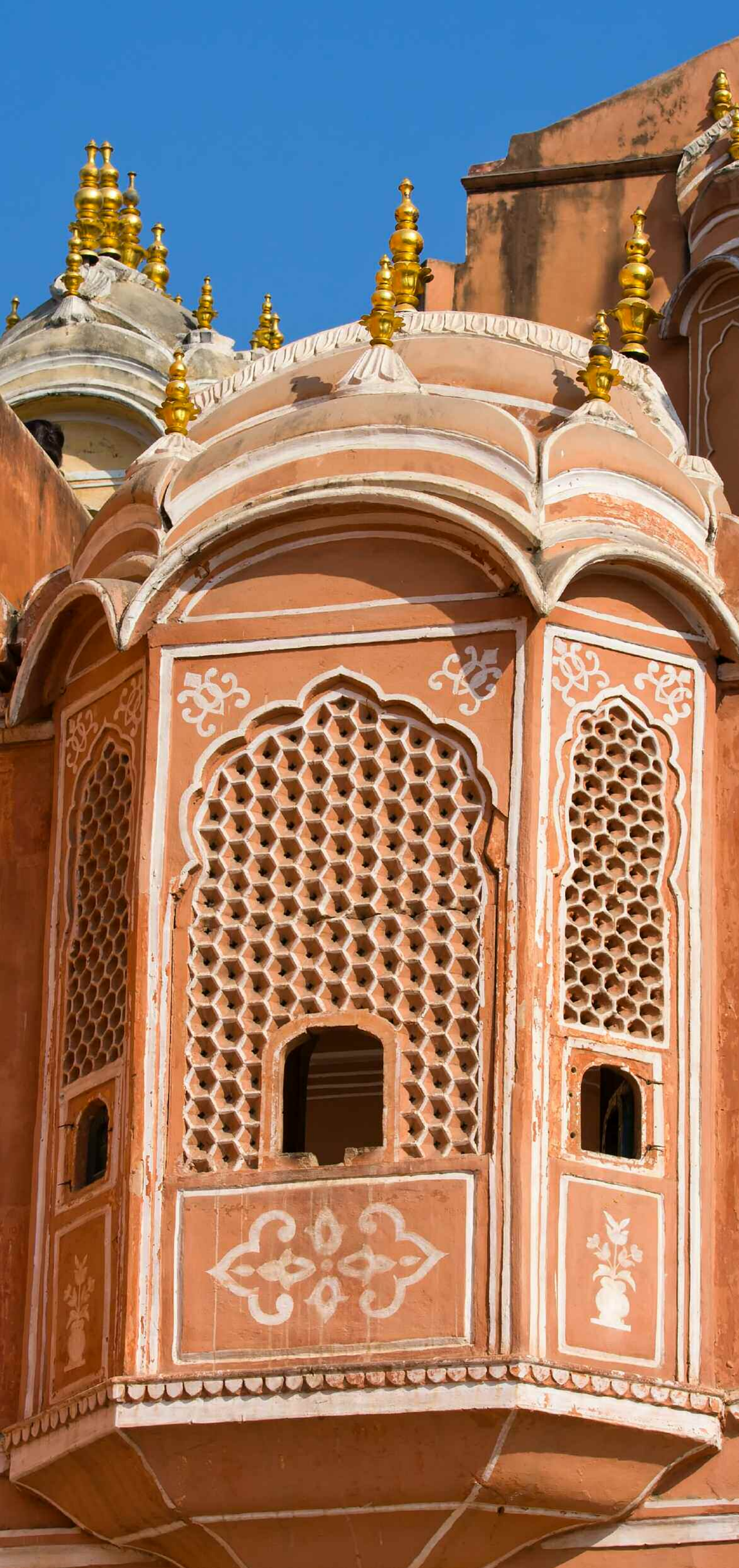
Indian law recognises electronic transactions and will presume that an electronic contract has been validly concluded by the parties concerned if it has been made with the digital signatures of the parties.

For written contracts, all Indian states levy a stamp duty. The amount of the stamp duty payable varies from state to state and may, in some instances, be a percentage of the value of the transaction. Non-payment or underpayment of stamp duty may result in the relevant document being inadmissible as evidence in a court of law or even impounded. For that reason, it is important to check the amount of stamp duty payable before signing a supply agreement. It is also helpful for foreign suppliers to be aware that certain types of contracts in India require compulsory registration with local authorities, including the transfer of immovable property.

Foreign suppliers can easily check whether their Indian counterparty has valid authority to enter into the supply agreement. All powers of operations and management of an Indian company are vested with its board of directors. The board of directors must therefore enter into the supply agreement and authorise an individual or individuals to sign the contract on behalf of the company. Typically, the board of directors would delegate some of its powers to an executive of the company (the managing director or chief executive officer and/or, at the next level, perhaps a purchase officer) who would then act under such authorisation. It is therefore important to check the authority under which the signatory acts: ideally by sight of the relevant extracts from the minutes of the meeting of the board of directors or a power of attorney issued by the company authorising an individual to act on its behalf. Individuals, on the other hand, may act directly or through an agent who has a valid power of attorney.

Comply with India's foreign trade policy and take advantage of special schemes

Foreign trade in India is regulated by the Directorate General of Foreign Trade (DGFT) which, from time to time, announces and updates the policies and procedures that have to be followed for exports from and imports to India. Foreign suppliers should make themselves aware of these requirements and check that both they and their Indian counterparty are compliant. For example, one requirement is that all Indian importers and exporters need to register with their regional licensing authority and obtain a registration number before they can start trading, unless specifically exempt (such exemptions are, for instance, made for



Indian central and state government departments important principles and agencies). Exporters can also apply for status as an Export House; Star Export House; Trading House; Star Trading House; or Premier Trading House based on their export performance. A status holder enjoys certain privileges under the foreign trade policy, such as the issue of import and export licenses and customs clearances on a self-declaration basis and other privileges as mentioned in India's foreign trade policy. Foreign suppliers should also ensure that they stay up to date with the Bureau of Indian Standards' rulings on imported products.

India's foreign trade policy also offers special import schemes that may be of benefit to suppliers: for instance, there are schemes under which capital goods can be imported duty free or at a concessional duty rate, subject to export obligations or where companies are located in special economic zones. Enterprises in special economic zones can also import on a lease financing basis and may enjoy privileges such as waivers from certain government approvals or a single window clearance process. There are also special sectoral schemes such as those for diamonds, gems and jewellery. Special import schemes may also allow a relaxation of foreign exchange regulations, e. g. the setting up of foreign currency accounts in Indian banks.

Check what can – and cannot – be freely imported

Goods can be freely exported from or imported to India, except when restricted by its foreign trade policy and applicable domestic laws. Most goods can be imported freely without a special license. However, three categories of imports to India are subject to certain restrictions. The first is prohibited imports, which includes ivory and clothing made from wild animals. The second is that of channelled (canalised) items, i.e. those that can be imported only through specified state agencies. For example, wheat can be imported only by Food Corporation of India. The third category is that of restricted items which may be imported only under an import license or a public notice issued by the DGFT, unless it is

acknowledged to be a commercial sample. These include certain consumer goods, certain stones, some pesticides, drugs and medicines, some electronic items and several items reserved for production by small businesses. Where restrictions apply, the conditions of the special license — on quantity, specifications or value of goods, minimum price or import by actual users must be complied with to the letter by the importer. However, special status holders (see above) have automatic license to import goods under the restricted category.

The DGFT publishes the list of prohibited, restricted and canalised items periodically. Any foreign supplier intending to supply goods to Indian customers should clarify which category its goods fall into and if the requirements for that category are satisfied. If the goods require an import license, the contract between the foreign supplier and its Indian customer should provide what is to happen if the license is refused, cancelled or expires.

Watch out for competition law

A new competition law regime has recently come into effect in India. Under the regime, agreements or practices that cause or are likely to cause an appreciable adverse effect on competition in India are not valid. Horizontal agreements or practices, i.e. those between parties engaged in identical or similar trade of provision of goods or services, are presumed, by definition, to have an appreciable adverse effect. Vertical agreements or practices, i.e. those between parties engaged in different supply chain levels, are prohibited if they are found to be anti-competitive: for example if they fix prices, limit or control production or supply or allocate customers or territories.

Exclusivity obligations, tying and bundling offers, discount and incentive schemes and resale price maintenance in supply agreements may also be deemed invalid.

Any supply agreement or practice that is found to be anticompetitive under this regime could lead to an order to discontinue or modify the agreement or to the imposition of a hefty financial penalty.

Consult your banker in India for advice on foreign exchange ssues

The Indian Rupee is not a fully convertible currency. Foreign exchange transactions are broadly classified into capital and current account transactions. Capital account transactions, such as investment in Indian securities and foreign currency borrowings by Indian companies, are more heavily regulated.

Current account transactions, such as payments for the import of goods and services into India and exports out of India, are permitted but subject to regulations regarding manner of payments.

It is essential that transactions with Indian buyers are conducted through normal and proper banking channels, and failure to do so will very likely result in a violation of the Indian foreign exchange laws - and possibly constitute a violation of other laws as well. India’s central bank, the Reserve Bank of India (RBI), has delegated many of its functions connected to the implementation of foreign exchange laws, especially those related to flings and reporting, to banks that are specifically authorised to deal in foreign exchange. Foreign suppliers can and should get in touch with one of these banks for advice on current foreign exchange regulations, their impact on a planned transaction and the procedural and reporting requirements that may have to be completed.

Consider having a local presence

Foreign suppliers should consider whether a local presence in India to market, distribute or package goods and expand or diversify within the market would be a worthwhile move.

There are many ways in which a foreign supplier can establish a local presence in India. These range from setting up a liaison

office, with the RBI's prior permission, to act solely as a channel of communication between the foreign company and the Indian customers, to establishing a branch office, again with RBI's permission, to manage the import and wholesale sale of goods.

More complex arrangements include:

(a) equity joint ventures with a local partner, in accordance with the foreign direct investment policy for different sectors and non-resident holding limits applicable to an Indian company, or

(b) the outright acquisition of the local business and a relatively modest number of the so-called "PIPE" (private investment in public equity) transactions.

Foreign direct investment in Indian companies may be classified as either:

(a) completely prohibited (for instance, lottery and gambling),

(b) completely free (most manufacturing and services sectors), or

(c) restricted to a certain percentage of foreign holding or subject to approval or certain investment conditions.

The last of these applies to insurance, telecommunications, broadcasting, print media, retail trading, banking, financing activities, construction and real estate, defence, pharmaceuticals, civil aviation and certain other sectors considered sensitive from the perspective of foreign ownership.

Joint ventures may be a necessity for a foreigner seeking to invest in a sector where foreign ownership is restricted to less than 100%. In any case, joint ventures are considered the preferred entry route for foreign investors as it is expected that the Indian partner will help steer an easier route through the Indian market. Negotiating an Indian joint venture can be somewhat complicated and various legal and cultural issues must be carefully considered, including the rights of shareholders, exit provisions and taxation implications.

It is therefore important to obtain legal advice before investing in an Indian company or purchasing Indian securities.

Secure your payment

There is no reason to be concerned about the risk of non-payment simply because the goods or services are being supplied to India. Nevertheless, a supplier should take the same level of care as is taken in sales in their home market or to any other foreign market. This means, checking the Indian buyer's creditworthiness. In addition, it is common practice for payments made by Indian buyers to suppliers abroad to be secured. The main types of security available in India are the same as those that most suppliers will be familiar with, including bank guarantees and letters of credit.

Whatever type of security the parties agree on, it is essential to clearly define the payment obligations in the underlying supply agreement to ensure that the secured obligations are defined in sufficiently specific terms. This is particularly important where the supply agreement takes the form of a framework agreement and deliveries and payments are made on the basis of separate orders.

Protect your credit sales

As is true with any sales contract made on credit terms and to any country, even if all the above rules are strictly complied with, there is always a certain level of risk of non-payment and unpredictability. That risk can range from the buyer's default on payment or unexpected insolvency, to factors beyond either party's control, such as natural disasters that prevent completion of the sale, or changes to India's foreign trade policy.

It is therefore advisable for the supplier to seek protection in the form of credit insurance to mitigate those potential risks that due diligence alone cannot avoid. Credit insurance provides not only protection, but also reassurance about the identity and creditworthiness of your potential customers. Moreover, the protection afforded by credit insurance allows the supplier to offer more competitive terms of payment - often the deciding factor for the potential customer.

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