

Comparative Guide Series

Franchising

Indonesia & India

Prepared by:



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ADVAYALEGAL

Indonesia

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A. Definition and Scope of Franchising

1. What is the legal definition of “*franchise*” pursuant to the relevant laws and regulations in your jurisdiction? Does your jurisdiction provide specific definition for “*franchise*”?

Franchise is defined as “*a special right owned by an individual or entity over the unique characteristics of a certain business system, which has been proven to be successful to promote goods and/or services, and can be used by another party pursuant to a Franchise Agreement*” (Art. 1 Point 1 of Minister of Trade (“**MoT**”) Regulation No. 71 of 2019 on Franchising (“**MoT Regulation 71/2019**”).

The term “franchise” shall **not** be used by businesses that meet the following criteria:

- (i) have unique business characteristics that cannot be easily imitated by other parties;
- (ii) have been proven to be profitable;
- (iii) have written standard operating procedure for the services and/or goods offered;
- (iv) are easy to learn and practical;
- (v) provide continuous support to the franchisee; and
- (vi) are registered as Intellectual Property Rights (**e.g.**, trademark, trade secret, patent, etc.) at the relevant authority.

(Article 2(2) of MoT Regulation 71/2019).

2. How is franchising typically structured in your jurisdiction?

Indonesia is silent on the terms of how franchise companies are typically structured. MoT Regulation 71/2019 states that a franchise business can be established by either an

individual or a business entity. In practice, many franchise businesses in Indonesia are typically structured as Limited Liability Company or *Perseroan Terbatas* (“PT”).

3. What is the limitation of activities for businesses that are defined as a “franchising business”, as both franchisor and franchisee under your jurisdiction?

MoT Regulation 71/2019 does not provide any limitation of activities for franchise business actors. Both the franchisor and franchisee can carry on with their activities so long that such business actors are carrying are still within the permitted activities that it is being licensed for.

However, MoT Regulation 71/2019 requires both franchisor and franchisee to prioritize domestically produced goods and/or services, and raw materials in the processing stages. Moreover, a franchisor is also required to work in cooperation with small-and-medium-scaled businesses operating as either franchisees or suppliers to support production of the goods and/or services.

4. Are there any activities that franchisor and franchisee are prohibited to engage in? What are the consequences for conducting such prohibited activities?

MoT Regulation 71/2019 does not prohibit specific activities of the franchisor or franchisee. However, note that the franchise business should comply with Law No. 5 of 1999 on Prohibition of Monopolistic and Unfair Business Practice as lastly amended by Law 11 of 2020 on Job Creation (“**Omnibus Law**”), whereas parties are prohibited from practicing a potential monopoly business.

In addition, a foreign franchisor must ensure that its franchisees and/or master franchisees comply with the provisions regulating foreign direct investment, including the foreign ownership limitation, minimum capital requirement, and licensing requirements. Although a foreign ownership limitation is no longer applicable under the current Omnibus Law regime, franchising business actors need to comply with the applicable licensing requirements pursuant to the Risk-Based Business Licensing (“**RBA**”).

B. Governing Authority & Business Association

5. **Is there any specific government agency that regulates and oversees franchising activities in your jurisdiction? Please define what power and authorities such governing agency have towards franchise business activities?**

Franchising activities are governed by MoT and the regional government (*of the relevant franchising business*). Both agencies are responsible for the facilitation, evaluation, and supervision of the business activities.

The facilitation provided by MoT through the Director of Business and Distributor Development includes, among other things, training and/or consultation on the franchise system, supports for the domestic franchisors participating in national and/or international franchise exhibitions. Meanwhile, the evaluation and supervision functions are carried out based on the annual reporting submitted by the franchise organizers.

6. **Are there any trade associations for the franchise sector? Is it mandatory for franchise business actors to join such trade associations and what are the consequences of not becoming a member?**

No. The Indonesian government does not establish a national franchise association.

However, several franchising associations are established by business players. One of them is the Indonesian Franchise Association (*Asosiasi Franchise Indonesia*), which members are Indonesian franchisors, franchisees, and master franchisors. The association provides the code of ethics for promoting franchising business in Indonesia. However, there are **no** statutory obligation to join this association. The membership is not mandatory for maintaining the regulatory compliance, as well as applying for the Franchise Registration Certificate.

C. Regulatory Framework & Licensing Requirement

7. What are the applicable laws, legislations and regulations that governs franchising activities and licensing in your jurisdiction?

The umbrella regulation that governs franchising activities in Indonesia is MoT Regulation 71/2019. Its enactment replaces and revokes the previous regulations:

- (i) MoT Regulation No. 53/M-DAG/PER/8/2012 of 2012 on Franchising;
- (ii) MoT Regulation No. 68/M-DAG/PER/10/2012 of 2012 on Franchises for Modern Store Business;
- (iii) MoT Regulation No. 07/M-DAG/PER/2/2013 of 2013 on Development of Partnerships in Food and Beverage Franchises; and
- (iv) MoT Regulation No. 60/M-DAG/PER/2013 of 2013 on Franchise Logos.

8. What are the required licenses and registrations that must be obtained by franchise business actors to be able to legally operate in your jurisdiction?

Each franchisor and franchisee must obtain a Business Identification Number/ *Nomor Induk Berusaha* (“**NIB**”) and a Franchise Registration Certificate/ *Surat Tanda Pendaftaran Waralaba* (“**STPW**”) under its name.

For this purpose, a prospective franchisor must first register on the OSS system and submit the relevant STPW documentation (**i.e.**, (i) Franchise Offering Prospectus (“**Prospectus**”) submitted by the franchisor or sub-franchisor; and/or (ii) Franchising Agreement submitted by the franchisee).

9. Is there any requirement for specific types of entities for a franchisor and franchisee to operate in your jurisdiction?

No. As mentioned in our response to question 2 above, there is no requirement on types of entity of franchisor or franchisee. According to MoT Regulation 71/2019, a franchisee or franchisor can be an individual or a business entity (no specifics on the form of entity).

10. What are the mandatory reporting obligations or other statutory compliances to be undertaken by the franchisor and franchisee?

MoT Regulation 71/2019 requires both franchisor and franchisee to submit their annual business activity reports before the deadline on 31 June of the following year. For this purpose, the franchisor is required to submit their report to the Directorate of Business and Distribution Development under the Ministry of Trade. On the other hand, a franchisee shall submit its report to the Department of Industry, Trade, Cooperatives, Small-and-Medium Enterprise of DKI Jakarta (if the business is located in Jakarta) or the relevant local office in charge of the trading sector.

11. What are the applicable administrative or criminal sanctions that franchisor and franchisee may be subject to in case of non-compliance to the (i) licensing obligation and/or (ii) reporting and/or (iii) other compliances? How do the relevant authorities impose such sanctions?

We note that non-compliance with MoT Regulation 71/2019 may be subject to administrative, not criminal sanctions. The failure to comply with the franchise licensing obligation may result in sanctions under the prevailing laws and regulations. However, the regulation does not elaborate on this matter.

In addition, MoT may issue 3 (three) consecutive warning letters (each of which will be applicable for a period of 2 (two) weeks) for non-compliance with the reporting obligation and franchise requirements. If the franchisor or franchisee fails to comply with the terms and conditions of the warning letter(s), the STPW may be temporarily suspended leading to revocation of the STPW (subject to certain conditions).

D. Franchise Agreement

12. Does your jurisdiction require certain clauses to be included in a Franchise Agreement?

MoT Regulation 71/2019 regulates the clauses, which should be included in the Franchise Agreement:

- a. Identity of parties;
- b. Types of intellectual property rights owned by the franchisor, including but not limited to company brand and logo; design; management, and marketing system, or food recipes.

- c. Types of the franchise's business activities
- d. Party's rights and obligations
- e. Facilitation, including trainee programs and operational guidance given by the franchisor to the franchisee.
- f. Business area;
- g. Term of the Franchise Agreement;
- h. The agreed reward payment method;
- i. The franchise ownership and transfer of ownership clause;
- j. Dispute settlement
- k. Procedure of agreement extension and termination;
- l. Warranty; and
- m. Total amount of business areas and/or franchise outlets.

13. Is sub-franchising structure allowed in your jurisdiction? If yes, how is the contractual relationship structured between the franchisor and the sub-franchisor? What are the rights and obligations of each party involved?

Yes, sub-franchising structure is allowed under the Indonesian laws.

Sub-franchising is usually done through a Master Franchising Agreement. The franchise would appoint a local company to act as a master franchisee that has the rights to: (i) exploit the intellectual property rights, including without limitation, the trademarks, manuals and 'know-how' (franchise system) to develop, establish, and operate its franchise units in a specific territory; and (ii) grant sub-franchises and sub-license the trademarks and franchise system to operate franchise units in the territory.

Furthermore, the franchisor provides the necessary technical assistance in connection with the franchised business to the master franchisee. In turn, the master franchisee must provide the assistance to its sub-franchisees.

14. What are the material and procedural requirements that apply to the franchise agreement in your jurisdiction (i.e., registration of Franchise Agreement to certain government authority)?

As highlighted in point 7 above, the franchisor and/or franchisee acting as a sub-franchisor must provide a Prospectus, then disclose its comprehensive business data and information to the prospective franchisee not less than 2 (two) weeks prior to the execution

of Franchise Agreement (**Note:** For a completed list of Prospectus material, please refer to Appendix I of MoT Regulation 7/2019). Upon the execution of the franchise agreement, the parties shall submit the Prospectus and sign the agreement on OSS for the issuance of NIB and STPW.

Please note that MoT Regulation 71/2019 requires the Prospectus and franchise agreement to be made in Bahasa Indonesia. If they are made in a foreign language, they should be translated into Indonesian language by a sworn translator, legalized by a notary, and authenticated by the Indonesian embassy in the home country of the franchisor.

15. What are the procedures for the renewal and termination of franchise agreements?

MoT Regulation 71/2019 does not set up a specific provision with regards to the renewal and termination of franchise agreements. The regulation only provides the procedure of submission of the amended agreements to maintain the franchise license.

E. Cross Border Franchising

16. Are there any restrictions applicable specifically to foreign franchisors when entering your jurisdiction?

No. MoT 71/2019 does not stipulate any limitation for foreign franchisors.

17. What is the most typical structure used by foreign franchisors to enter your jurisdiction? Please provide a brief explanation of structures commonly used in your jurisdiction.

Most foreign franchise businesses in Indonesia are commonly structured under a PT. However, please note that a franchisor is prohibited to appoint franchisees who have a direct or indirect control over the franchisor (e.g., shareholders, subsidiaries, or affiliates). Consequently, a foreign franchisor must appoint a separate entity that does not have any direct or indirect control over it to be its independent Indonesian franchisee.

18. What are the key aspects to be considered by foreign businesses before adopting a franchise model in your jurisdiction?

Given that Indonesia is an archipelagic country with a high population and consumption level, the most common franchise model in Indonesia is master franchising, as mentioned in point 12 above. This way, the master franchisee would be the one that takes care of all the sub-franchising agreements with the sub-franchisees within the agreed covering area. This model is considered highly profitable and practicable for foreign franchisors to obtain their business expansion as well as market targets in Indonesia.

19. What are the typical dispute resolution mechanisms adopted by foreign franchisors in your jurisdiction?

Most Foreign franchisors would use arbitration or any alternative dispute resolution, such as consultation, negotiation, mediation, or reconciliation as the typical dispute resolution mechanism. Furthermore, both foreign and domestic arbitral awards are enforceable in Indonesia, which also require an execution order to be issued by the relevant court.

Statutorily, MoT Regulation 71/2019 requires that a franchising agreement must contain a dispute resolution clause under the Indonesian law. To comply with this provision, it is advisable to use the local arbitration body as the dispute resolution forum.

F. Intellectual Property, Employment, and Tax

20. How are the franchisor's intellectual Property Rights (e.g., trademarks and know-how, trade secrets) protected in your jurisdiction? What specific impacts does this have in the context of franchising?

Franchisors can protect their intellectual property rights, i.e., trademarks, know-how, and trade secrets, under the Indonesian prevailing laws. The know-how, i.e., industrial designs, copyrights, or trade secrets, may be protected under the patent or relevant Intellectual Property Law.

It is important to note that MoT Regulation 71/2019 requires a franchisor to register its trademark with the Indonesian Trademark Office of the Directorate General of Intellectual Property Rights before entering into the Franchise Agreement. As such, a clearance trademark search is essential for the franchisor to ensure that no party has filed for the same trademark.

21. Are there any relevant considerations for franchisors from an employment law and taxation perspective?

In terms of taxation, franchisors and franchisees are obliged to pay the income tax. Some taxes that should be considered are Value Added Tax (“VAT”), the withholding tax, and the final permanent establishment tax.

VAT is imposed on: (i) supplies of goods and services within or imported into the Indonesian customs area; and (ii) services performed abroad but consumed in Indonesia. Therefore, the provision of services by the franchisor to the franchisee is subject to VAT.

For the withholding tax, franchisors shall be liable for Art. 23/26 Withholding Tax. Furthermore, foreign companies with no permanent establishment in Indonesia are only subject to a final withholding tax on certain types of income derived from Indonesian sources.

Generally, Law No. 13 of 2003 as amended by Law No. 11 of 2020 on Job Creation does not apply to foreign franchisors located overseas, unless they employ Indonesians or expatriates to work in Indonesia. However, to minimize the risk of a franchisee’s employee being deemed as an employee of the franchisor, the Franchising Agreement should clearly express that the franchisor relationship with the franchisee is that of an independent contractor.

G. Miscellaneous

22. In which sectors is franchising most common and successful in your jurisdiction? And what is the outlook in this sector in the upcoming years?

Franchising has expanded rapidly, particularly in food and beverage industry, followed by retail (more to fashion retail, department stores), lifestyle (such as fitness centers or yoga studios), and education industries.

23. Are there any other specific concerns in connection with franchise business in your jurisdiction apart from the above?

Exploitation of the intellectual property, confidential information, manuals, and guidelines is one of the most significant risks a franchisor may face. Misuse of information and failure to fulfill the standard customer service by the franchised units may affect the goodwill, reputation, and image of the franchisor and its business, which may result in economic losses. Thus, these issues need to be handled carefully in the applicable franchise agreement.

In addition, the franchisor must foresee the compliance of the franchisee to file and obtain the required licenses and authorizations for the establishment and operation of the franchised units. If the franchisee fails to do that, the franchised unit may be subject to closure by the authorities, which will cause direct or indirect economic losses to the franchisor.



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India

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A. Definition and Scope of Franchising

1. What is the legal definition of “*franchise*” pursuant to the relevant laws and regulations in your jurisdiction? Does your jurisdiction provide specific definition for “*franchise*”?

Currently, India does not have any specific legislation dealing with “franchise” and the business relationship is essentially governed by the commercial understanding between the franchisor and the franchisee. However, for the purpose of taxation, the term ‘franchise’ is defined under the (Indian) Finance Act 1999 as: *“An agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol as the case may be, is involved.”*

2. How is franchising typically structured in your jurisdiction?

As there are no specific legislations dealing with franchise in India, the franchisor entities are typically set up as a private limited company or a limited liability partnership. These entities have independent corporate existence with limited liability and are governed by a robust regulatory regime.

A franchisor may also consider other entity structures such as a sole proprietorship concern or a partnership firm. A sole proprietorship concern is owned and operated by an individual having unlimited personal liability for all debts and liabilities incurred during the course of business. A partnership firm on the other hand is an association of two or more persons jointly engaged in a business enterprise where the profits and losses are shared proportionally as per mutual agreement. Typically, each partner in a partnership firm is jointly and severally liable for all acts of the firm. While these entities offer no limited liability protection, their key advantage is the ease of setting-up, simple operating structure and

minimal compliance requirements. However, these options are not available for foreign franchisors as foreign investment is not permitted in these entities.

A franchisor who intends to enter the Indian market for a short duration may consider setting up a liaison office (“LO”) or a branch office (“BO”). A LO merely acts as a channel of communication between the foreign franchisor’s head office outside India and parties in India and is prohibited from undertaking any business activities in India or earning any income in India. A BO acts as a buying or selling agent of the foreign parent in India besides rendering professional services and exporting or importing goods. While a BO has greater flexibility in terms of permitted activities over an LO, prior approval from India’s central bank, the Reserve Bank of India (RBI), is required for setting up both an LO or a BO.

3. What is the limitation of activities for businesses that are defined as a “*franchising business*”, as both franchisor and franchisee under your jurisdiction?

While there is no specific franchise law in India all foreign businesses looking to enter the Indian market or invest in Indian entities must comply with the provisions of the prevailing Foreign Direct Investment Policy (FDI Policy) and the Foreign Exchange Management Act 1999 along with the rules made therein (FEMA).

As per the FDI Policy, foreign investors can invest in India either through i) the automatic or the ii) approval route. Under the automatic route, no prior approval is required for foreign investment, whereas in the case of the approval route, government approval is required to be obtained prior to making any foreign investment.

Currently, foreign investment up to 100% is permitted in a majority of sectors in India under the automatic route. Some specified sectors have sectoral caps where foreign investment is permitted only up to a certain limit (i.e., 26 % or 49 % of the total capital infused), under the automatic or approval route. However, certain sectors have a blanket ban on foreign investment such as lottery business, gambling and betting, real estate business, manufacture of tobacco or cigarettes and atomic energy. Additionally, foreign investment may also be subject to sector-specific norms such as entry conditions, end-use restrictions, lock-in period, etc.

4. Are there any activities that franchisor and franchisee are prohibited to engage in? What are the consequences for conducting such prohibited activities?

In the absence of a specific legislation dealing with franchise, there are no specific exemptions and exclusions for franchise business. However, as mentioned in our response to Question No. 3, foreign businesses looking to enter the Indian market or invest in Indian entities must comply with the prevailing FDI Policy and FEMA regulations. Any non-compliance of these regulations may lead to statutory authorities initiating proceedings under applicable criminal and civil laws.

B. Governing Authority & Business Association

5. Is there any specific government agency that regulates and oversees franchising activities in your jurisdiction? Please define what power and authorities such governing agency have towards franchise business activities?

As there is no specific legislation dealing with franchise in India, all aspects of a franchise arrangement are governed by the terms of the franchise agreement.

The following laws are broadly relevant to a franchise business:

- The Indian Contract Act, 1872 is the primary law governing the formation of commercial contracts in India. It lays down the essentials of a valid contract and identifies contracts that are per se invalid or voidable at the option of the parties.
- The Competition Act, 2002 prohibits arrangements with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services that cause an appreciable adverse effect on competition within India.
- The Consumer Protection Act, 2019 seeks to provide remedies to consumers for deficiency in services and defective products sold by manufacturers/ service providers/ e-commerce businesses. While the consumer may seek remedy from both the franchisor and the franchisee, the product liability and claims will lie with the franchisee if it is expressly specified under the franchise agreement.
- The Trademarks Act, 1999, the Patent Act, 1970, the Design Act, 2000, and the Copyright Act, 1957 govern the protection of trademark, patent, design, copyright aspects involved in the franchise agreement.
- The Income Tax Act, 1961 governs the tax aspects of income generated through the franchising business in India.
- The Specific Relief (Amendment) Act, 2018 grants remedies such as specific performance of a contract, injunctions, damages or substituted performance for the protection of rights of the parties in cases of breach of the franchise agreement.

- The FDI Policy and FEMA regulations govern all transactions involving inflow and outflow of foreign exchange from India, including foreign investment in Indian entities and the payments of royalty or franchisee fees to the foreign franchisor.
- Other sector-specific legislations may be applicable to a franchise depending on the nature of the franchise business.

6. Are there any trade associations for the franchise sector? Is it mandatory for franchise business actors to join such trade associations and what are the consequences of not becoming a member?

While there are trade associations for the franchise sector, they are voluntary in nature and not mandatory.

C. Regulatory Framework & Licensing Requirement

7. What are the applicable laws and regulations that governs franchising activities and licensing in your jurisdiction?

Currently, there are no specific laws in India that governs franchising activities. However, other laws listed above in response to Question No. 5 will apply.

8. What are the required licenses and registrations that must be obtained by franchise business actors to be able to legally operate in your jurisdiction?

A franchisee may be required to obtain certain types of licenses and approvals depending on the industry and kind of business activity that the franchisee is operational in. For example, a food chain franchisee may require a license under food laws. Registrations such as permanent account number (PAN), tax deduction account number (TAN), goods and services tax (GST) registration are mandatory.

9. Is there any requirement for specific types of entities for a franchisor and franchisee to operate in your jurisdiction?

No, the requirements will be as per the franchise contract executed between the parties.

10. What are the mandatory reporting obligations or other statutory compliances to be undertaken by the franchisor and franchisee?

There are no mandatory reporting obligations specific to a franchise. Statutory compliances relating to operation of a business entity such as payment of taxes, reporting of foreign investments, if any, etc. will apply as the case may be.

11. What are the applicable administrative or criminal sanctions that franchisor and franchisee may be subject to in case of non-compliance to the (i) licensing obligation and/or (ii) reporting obligation and/or (iii) other compliances? How do the relevant authorities impose such sanction/s?

As already mentioned, there are no specific licensing or reporting obligations imposed on a franchisor and a franchisee under Indian law other than the contractual remedies of franchisee under the franchise agreement and legal relief for violation of contractual obligations as set out under Indian contract law. Therefore, if a franchisor violates specific obligations under the franchise agreement or wrongfully cancels or rescinds the franchise contract, it would amount to a breach of contract. In such cases, the franchisee can invoke the indemnity for the loss suffered (if provided in the franchise agreement), initiate legal proceedings seeking damages for such breach of contract and also consider instituting criminal proceedings against the franchisor for criminal breach of trust.

Franchisees receiving foreign investment must comply with the reporting requirements under FEMA regulations as non-compliance will expose the Indian company to monetary penalties.

D. Franchise Agreement

12. Does your jurisdiction require certain clauses to be included in a Franchise Agreement?

No, there are no specific clauses to be included in a franchise agreement other than those generally applicable to all commercial contracts under Indian contract law. Common clauses include those related to matters such as pricing, duration, exclusive territories, non-compete restrictions, employee non-solicitation, jurisdiction, confidentiality and dispute resolution. While it is common to impose non-compete obligations on the counter party during and after the term of the franchise contract, such obligations have been held to be unenforceable by Indian courts after the termination of the franchise contract if it is in restraint of trade. However, in case of sale of business where the goodwill of the company is also being sold, reasonable non-compete restrictions may be enforced against the seller of the business.

13. Is sub-franchising structure allowed in your jurisdiction? If yes, how is the contractual relationship structured between the franchisor and the sub-franchisor? What are the rights and obligations of each party involved?

Yes, a sub-franchising structure is permissible in India subject to the terms of the contract between the parties.

14. What are the material and procedural requirements that apply to the franchise agreement in your jurisdiction (i.e., registration of Franchise Agreement to certain government authority)?

The franchise agreement has to be properly executed by the franchisor and the franchisee and witnessed by two individuals besides being adequately stamped as per applicable stamp laws (depending on the place of execution of the agreement and/or location of the franchise). There is no registration requirement.

15. What are the procedures for the renewal and termination of franchise agreements?

The process for renewal and termination of franchise agreements is governed by the terms of such agreements. Either party to the franchise agreement may terminate a franchise relationship upon the occurrence of the events of termination specified in the franchise contract.

Additionally, the franchisor may also terminate the franchise relationship in special circumstances identified under the Indian Contract Act, 1872. These include:

- the franchisor being induced to offer and sell the franchise to the franchisee by fraudulent acts of the franchisee or under undue influence of the franchisee; and
- performance of franchisee's obligations under the contract becoming impossible for reasons other than those caused by the franchisee itself or the franchisor.

While there are no specific legal restrictions on a franchisor's ability to terminate a franchise relationship, the Indian insolvency law prohibits a corporate debtor undergoing liquidation from terminating any contract that would result in disposal of its rights during the pendency of the insolvency proceeding.

Further, the franchisor may refuse to renew the franchise agreement if the contract does not provide for renewal or expressly prohibits renewal of the same or if renewal is subject to specific performance criteria that have not been complied with by the franchisee.

E. Cross border Franchising

16. Are there any restrictions applicable specifically to foreign franchisors when entering your jurisdiction?

Please refer to our response under Question No.3.

17. What is the most typical structure used by foreign franchisors to enter your jurisdiction? Please provide a brief explanation of structure/s commonly used in your jurisdiction.

Please refer to our response under Question No.2.

18. What are the key aspects to be considered by foreign businesses before adopting a franchise model in your jurisdiction?

A tough regulatory environment for doing business often acts as a dampener for multinational corporations looking to enter India. Absence of a 'single window' clearance, multiplicity of laws and a need to obtain approvals across different states compound the problem for a foreign player looking to set up in India.

The diversity of the local market is often too complex for foreign players as cultural, linguistic and socio-economic issues make it difficult to move forward with a 'one –size fits all' approach. A local partner therefore adds tremendous value in terms of understanding the intricacies of the local market, real estate issues, consumer preferences and tastes, etc. that may help the foreign retailer make a calculated strategic foray into the new market. International entities find it comfortable to work with local partners that already have an established manufacturing/distribution/marketing set up and provide the foreign party direct access to harness the market opportunities. Hence, foreign businesses could consider franchising as a way of testing the waters for its brand/ its products in a new market without incurring heavy setting up costs.

19. What are the typical dispute resolution mechanisms adopted by foreign franchisors in your jurisdiction?

The Indian legal system is based on the common law system and has a three-tiered structure with the Supreme Court of India being the apex court of the country situated in New Delhi, followed by the High Courts at the state level and the district and session courts. A separate civil and criminal judicial system also exists in each district.

Given the backlog of cases in Indian courts, increasingly, arbitration is a preferred mode of dispute resolution for commercial contracts, especially international contracts as litigation in India is usually an expensive and time consuming exercise. Conciliation and mediation mechanisms are also slowly gaining popularity.

As India is a signatory to the Geneva and New York Conventions, arbitral awards of most jurisdictions are enforceable in India as if they were made by an Indian court and the same can be challenged only on limited grounds specified by law. While Indian laws allow the choice of foreign jurisdiction in an international contract, only judgments made by superior courts of notified 'reciprocating territories' will be enforced.

F. Intellectual Property, Employment and Tax

20. How are the franchisor's intellectual property rights (e.g., trademarks and know-how, trade secrets) protected in your jurisdiction? What specific impact does this have in the context of franchising?

Since the grant of rights to use a franchisor's brand and intellectual property (IP) rights is the crux of a franchise agreement, apart from statutory protections, it is recommended to incorporate comprehensive provisions as regards the licence, use and return of franchisor's IP in the franchise agreement itself. This assumes importance given the risk of counterfeiting and piracy in India.

Besides this, a franchisor can consider registration of its trademarks in India as per the Indian Trademarks Act 1999 or the Madrid Protocol (administered by the International Bureau of the World Intellectual Property Organization) to ensure statutory protection to its trademarks being used in India. If the franchisor's trademark is not registered in India, the franchisor can initiate only an action for passing-off under common law and seek injunctive relief against the party infringing its trademark.

A franchisor's know-how and confidential information such as trade secrets, designs, copyrightable and patentable work are generally protected by registration under the following statutes:

- the Copyright Act, 1957;
- the Patents Act, 1970;
- the Geographical Indication of Goods (Registration & Protections) Act, 1999; and
- the Semiconductor Integrated Circuits Layout Design Act, 2000.

As trade secrets are not specifically dealt with in any of the above legislations, they are governed by the principles of equity laid down under common law.

21. Are there any relevant considerations for franchisors from an employment law and taxation perspective?

All business entities in India are required to obtain direct and relevant indirect tax registrations. Direct taxation in India is governed by the Income Tax Act 1961 (ITA) and provides for the taxation of residents and non-residents. Resident franchisors would be subject to tax in India on their worldwide income (being royalty, franchise fee, revenues shared) while the non-resident franchisors will be taxed only on their Indian income. Additionally, a non-resident franchisor may also avail itself of the benefits of any double tax avoidance treaty between India and the country of the foreign franchisor so long as the non-resident franchisor does not have any permanent establishment in India.

India has implemented a unified Goods and Services Tax (GST) regime throughout India with effect from July 2017 simplifying the indirect tax framework.

Since there is no specific legislation on franchise, the nature, mode of payment and quantum of franchise fees, royalties, etc. are entirely governed by the franchise agreement and applicable FEMA regulations where one of the parties is a non-resident.

From an employment law perspective, all aspects of franchise arrangement including labour and employment considerations are governed by the terms of the franchise agreement. It is therefore important to clarify the position as regards the position of the employees of the franchise in the franchise agreement and the relationship between the employees of the franchisee and the franchisor.

G. Miscellaneous

**22. In which sectors is franchising most common and successful in your jurisdiction?
And what is the outlook in this sector in the upcoming years?**

With India emerging as a global retail hotspot, franchising is a popular option for sectors such as food and beverages, fashion, lifestyle, health, beauty, wellness, and hospitality.

There are a host of reputed international brands operating in India such as Starbucks, 3M Car Care, Taco Bell and IKEA. While the Covid-19 pandemic has dampened the economic prospects of late, India still has plenty of untapped potential thanks to its market size.

23. Are there any other specific concerns in connection with franchise business in your jurisdiction apart from the above?

In a country like India where most businesses are family-run with promoters often running multiple businesses with intertwined and related party transactions, selection of a local partner whose interests are completely aligned with the franchisor is key. Also, enforcing conflict of interest, non-compete obligations and other contractual breaches can be tricky. These aspects need to be handled with sensitivity given the cross-cultural differences between partners.



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