

Field Fisher Waterhouse



Doing business in India



“ The firm is recommended for work with an international flavour.”

Chambers UK, 2009

About us

Field Fisher Waterhouse is a European law firm providing commercial solutions across a range of industry sectors. We have a particular focus on companies that are highly regulated and those with intellectual property and technology driven business models.

The firm has over 140 partners, 240 other lawyers and nearly 300 support staff across offices in Brussels, Hamburg, Paris, London and Manchester. The firm also has an exclusive relationship with Italian firm, La Scala.

Our main areas of practice are corporate and commercial, intellectual property (IP) and technology, banking and finance, regulatory and real estate. We also have particular expertise in competition & EU law, dispute resolution, employment, personal injury and clinical negligence, public sector and tax.

Our international client base chooses to work with us because we provide exceptional lawyers with industry expertise and strong commercial knowledge of their businesses, enabling us to work with them to maximise their market opportunities. We are acknowledged as leading experts in sectors such as technology and communications, energy, financial services, transport, retail, media and hotels and leisure as well as for our public sector work.

Our India Practice

Field Fisher Waterhouse's India practice is growing quickly in response to the region's recent economic development. A large number of Indian companies are investing in Europe, listing on stock exchanges, establishing subsidiary companies, business partnerships, joint ventures and acquiring companies abroad. Also, many European and American companies are investing in India or expanding their operations to the region through franchising and licensing.



“Field Fisher Waterhouse is now the choice for the big ticket international clients.”

Chambers UK, 2009

Areas of expertise

We work with a number of Indian law firms and Indian Advocates most of whom we have known for years.

Together with these firms we are able to advise clients across the range of areas including:

- corporate including M&A, joint ventures, private equity, venture capital, management buy-outs, management buy-ins
- commercial advice including contracts, entry/exit strategies
- real estate
- investment regulations
- antitrust
- franchising and licensing
- employment
- trade marks, copyright, patents and anticounterfeiting
- technology law including outsourcing, data protection, software licensing, e-commerce and new media
- disputes
- energy and infrastructure

We pride ourselves on providing legal advice in relation to entering into the Indian market and investments from India into Europe. Our lawyers have experience of litigation in the Indian courts. We have also advised the Indian Government, as a WIPO expert on IP and its role in commerce.

We pride ourselves on providing legal advice in relation to entering into the Indian market and investments from India into Europe. We also have professionals to do market research for us if required and we can recommend companies who can provide assistance with locating a business partner.

Culture and commerce is key

We understand the Indian culture and commerce which enables us to be more than mere legal advisers to our clients. We are also able to acquaint those of our clients wishing to do business in India with the cultural and commercial sensitivities. A burgeoning middle class means that there is a growing market for many goods.

“ ‘They are extremely responsive and always take immediate action’ commented one client .”

Chambers UK, 2009

There is a population of approximately 1.2 billion and a strong consumer base of over 300 million and growing, of which a significant percentage would be classified as high net worth individuals. Further, more than 50% of the population are under 25.

India's sovereign credit rating by the major ratings agencies has improved over time and there is a stable outlook with good economic prospects and an improving fiscal situation.

General issues

Market research and commercial issues

It is very important to conduct proper research before entering the Indian market. Product localisation and price point are just two issues that need to be addressed before entering the market.

Regional differences are important and need to be taken into account when planning an entry strategy. Delhi and Mumbai are seen as the main cities but are relatively saturated with goods and services. Cities such as Bangalore, Chennai, Kolkatta, Hyderabad and smaller cities like Chandhigarh, Ludhiana and Jalundar have a wealthy population. However, they are far less well served by goods and services.

Our in-depth knowledge of the Indian market allows us to advise clients on both the commercial and legal aspects of entering the country.

Finding a business partner – due diligence

In India it is useful to have a resourceful business partner who is well-known and well connected. An influential business partner can be helpful in relation to obtaining any requisite Governmental consents at Central, State or local level.

Prior to committing to a partner it is advisable to conduct legal and financial due diligence and this is an area in which we can assist.

Repatriation of money

The Indian Rupee is still not fully convertible and all financial transactions involving foreign exchange is managed and regulated by the Reserve Bank of India. The regulations are under constant review and therefore it is necessary to be aware of the latest position before being involved in any deal or transaction.

There are many ways for a foreign party to enter India. Foreign Direct Investment (FDI) is when funds from abroad are invested in India through shareholding in an Indian company, which can be in the form of a joint venture or subsidiary. Another method of entering India is through franchising, licensing or technical collaboration without shareholding, where the foreign party earns income from allowing the use of their brand name, management skills, business format or technology by an Indian party.

Since the Indian Government's foreign investment policy is divided into sectors it is import to check whether investment in your business sector is permitted, and if so to what extent. Further, it is necessary to know what consent are required, if any, and the formalities to be complied with.





In sectors such as multibrand retail, foreign direct investment has been prohibited but now the Indian Government is eager to liberalise and allow foreign players after it is able to convince its opponents on the positive aspects. In most sectors, there has been progressive liberalisation and removal of the requirement to obtain consent from Government authorities before making an investment, although reporting requirements have been retained by the RBI.

We are able to advise our clients upon how best to structure their investments in India so as to optimise their ability to repatriate their funds in the most tax efficient manner.

Specific issues

Corporate

Before an investor or business can structure their investments in India they have to find out whether they are permitted to invest directly in that sector, and if so to what extent. If the sector permits foreign shareholding in an Indian company, then to what extent is it automatically approved and above what threshold is Government consent required?

There are several structures that can be used, such as a wholly owned subsidiary in some sectors, joint venture companies, acquiring shares of existing Indian companies and having special purpose vehicles.

We can, with the help of the appropriate Indian law firms around the country, advise and assist you on:

- pros and cons of various models from legal and practical points of view
- tax issues relating to the investments including any benefits from double taxation avoidance treaties
- application for consent from a Governmental authority if the need arises
- company procedures from formation to dissolution
- preparation of legal documentation including shareholders' agreements and detailed articles and memoranda of association to provide full protection under the law

Tax

For companies and businesses entering India there are important tax considerations. These include:

- what amounts to have an establishment or taxable presence in India
- transfer pricing
- withholding tax
- tax concessions in the Special Economic Zones (SEZs)
- treaties on avoidance of double taxation if a foreign individual is travelling frequently to India on work within a financial year, when tax liability arises

Franchising

Franchising is a new method of doing business in India but has become popular due to the restrictions in relation to direct foreign investment in retail, as well as a good way for foreign brands to expand without large financial outlays. It is also suitable to the Indian culture where people like to have control over their own business.

There are no specific franchise laws or registration requirements. However, franchising agreements and relationship between parties are governed by the Indian Contract Act and general commercial law.

There has been significant liberalisation in relation to foreign exchange with respect to payments for purchase or use of trade marks or franchise in India in the past few years. As a result, at present, there is no restriction imposed on an Indian party remitting payments to a foreign franchisor in terms of royalties, franchise fees, etc. Further, consent of authorities such as RBI or the Foreign Investment Promotion Board (FIPB) are no longer required.

Technology Law

Data Protection - There are restrictions on transferring personal data outside the EEA. However, these restrictions can be overcome in several ways, including entering into the EU Commission's standard contractual clauses, implementing a group data protection policy which meets UK/EU requirements or obtaining the informed consent of the data subject.

Foreign Technology Agreements - Technology transfer guidelines provide for foreign technology agreements either being allowed through the automatic route under powers delegated to the RBI or by the Government.

Automatic approval for technology collaboration agreements is granted provided certain conditions are met, including, for example, lump sum payments not exceeding US\$2m.

Notwithstanding automatic approvals, in certain instances Government approval for technology agreements would be necessary, for example, in cases where there are proposals attracting compulsory licensing.

Special Economic Zones (SEZs) - India has introduced SEZs to increase foreign investment. These are areas whose economic laws are more liberal than a country's typical economic laws. Incentives offered to develop SEZs include income tax exemption on export income for a block of 10 years in a 15 year period.

Employment

Companies wanting to do business in India will need to consider any employment issues arising out of employing or transferring employees to India. If there is a transfer of business to India, then the parties will need to consider the application of the EU Acquired Rights Directive.

In the case where a UK company expands its business in India or sets up a new company in India, it will need to consider local employment laws. However, if employees are moving to India to work in this new company with UK employment contracts, then any contractual and jurisdictional issues, including any pay and tax issues, will need to be considered. Seconding employees to India will also create employment issues on which businesses should seek advice.

Dispute resolution

Businesses investing in India may not have dispute resolution at the forefront of their considerations. However, focussing on the practical resolution of disputes that may arise before an investment is made may well prove a prudent step. In particular, those investing in India need to be aware that:

- the length of time taken by the Indian Courts to resolve cases may be significantly longer than in other jurisdictions and the standard of Indian first instance Court judgments is variable. Litigating in the Indian Courts can be lengthy, expensive and frustrating, although it is unavoidable in certain situations (for example where an application for an injunction from the Indian Court is required to remedy a breach of intellectual property rights in India).
- India is a party to the New York Convention of 1958 on arbitration awards, and foreign arbitration awards made in a country party to the New York Convention are enforceable under the Indian Arbitration and Conciliation Act 1996, provided that country has been notified as a 'reciprocating territory' by the Government of India.
- there is provision for reciprocal enforcement of money judgments between the Indian and English Courts: Foreign Judgments (Reciprocal Enforcement) Act 1933 (as extended by the Reciprocal Enforcement of Judgments (India) Order 1958). However this treaty has practical limitations and, where no reciprocal treaty exists between India and another jurisdiction, parties will be thrown back to enforcing a foreign judgment through the Indian Courts by starting a fresh claim in India on the basis of the foreign judgment.
- Given these issues, whichever law is chosen to be the governing law of an agreement, it may make considerable sense for suitable Indian lawyers to be instructed to check compliance with Indian legislation. It may also be important to identify at the outset (and to monitor throughout the life of the contract) whether the Indian contracting party has assets outside the Indian jurisdiction against which any foreign judgment or award obtained may be enforced.
- Field Fisher Waterhouse's lawyers have substantial experience of multi-jurisdictional litigation, arbitration and enforcement issues, and experience of guiding clients through disputes concerning Indian entities and/or assets. Our lawyers have been involved in numerous cases with Indian aspects, including in the banking and finance, manufacturing and travel industries.
- We have experience of parallel proceedings in India and other jurisdictions (for example, a letter of credit case involving proceedings in Dubai and India, and a manufacturing case involving proceedings in India and England), including strike out applications in the Indian Court. We also have experience of litigating in Mauritius, the leading offshore centre for Indian finance, and have been instructed in numerous substantial IP cases with Indian elements (*notably Vestergaard Frandsen A/S and others v Bestnet Europe and others*).
- We have a substantial network of contacts within the leading Indian law firms which means that we are well-placed to assist our clients in choosing the most appropriate Indian lawyers for a particular dispute, and to advise our clients in navigating through litigation, arbitration and enforcement in and involving India as efficiently as possible.

Conclusion

Should your business be looking to enter the Indian market, we can help identify the potential issues in various areas discussed above and help to make the entry as smooth as possible. Please do not hesitate to contact us if we can be of any help.

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