

Doing business in India

Business risks - commercial disputes



Australian Government
Australian Trade Commission



Introduction

India is Australia's fifth largest export market and is an increasingly important business destination for many Australian companies.

The growing economy, along with Australia's strong political relationship with India, provides a strong foundation for Australian businesses to do business in India and with Indian companies. Australian companies could potentially be confronted by issues or problems irrespective of the size of the company. Therefore, if Australian companies are planning to do business in India, or are already doing business with Indian companies, it is important for Australian companies to have a broad overview of the Indian legal system in order to protect their interest.

The following information is designed to assist Australian companies with understanding dispute resolution, the role of Austrade and potential avenues for support.

The Australian Government role in commercial disputes in India

The Australian Government is often called upon to provide assistance to Australian companies involved in commercial disputes. Very often there is little that it can do to assist.

The Australian Government can provide companies with assistance that includes navigating India's legal system, providing referral lists of local law firms and arbitrators, sharing basic information on potentially applicable trade agreements and providing advice on relevant India's business practices. The Australian Government is not in a position to provide Australian companies or individuals with legal advice and it cannot interfere in Indian legal processes and law enforcement - including in relation to the return of property stolen in India; or the refund of deposits or payments for goods and services rendered in India.

The Australian Government is only able to intervene in commercial disputes in very limited circumstances – generally where Australian businesses have been discriminated against or treated unfairly by local authorities and all legal avenues have been exhausted.

In India, Austrade can provide Australian companies a referral to legal or financial firms for professional advice.

An overview of the Indian legal system

India is a quasi-federal nation comprising of 28 States and 7 Union (federally administered) Territories with a diversity of cultures, languages, religions and customs. The legal system of India is based on the English Common Law system. Many of the codified laws of India were enacted during British rule. Indian legal/judicial system derives its authority and powers from the Constitution of India ('Constitution') and various other statutes enacted by the Central as well as the State Legislatures.

In spite of India adopting the features of a federal system of Government, the Constitution has provided for the setting up of a single integrated system of courts to administer both Union and State laws. The Supreme Court of India is the apex court of India, followed by High Courts at the state level which cater to one or more number of states. Below the High Courts exist the subordinate courts comprising of the District Courts at the district level and other lower courts. Special tribunals also exist to deal with specialised areas such as consumer disputes.

The Supreme Court of India

The Supreme Court has original, appellate, and advisory jurisdiction. Appeals lie to the Supreme Court from judgments, decrees, convictions, sentences or final order of High Courts in the territory of India, and from certain tribunals.

High courts

High courts are at the head of a State's judicial administration and have the power of superintendence over all courts and tribunals within their territorial jurisdiction. They also have appellate jurisdiction over civil and criminal cases.

District courts

At the district level, the Court of the District judge is the principal court of original jurisdiction. Subordinate judges and munsiffs (also called civil judges in metropolitan cities) come under the District Judge and their jurisdiction is decided on the basis of territorial and pecuniary considerations, which differ from state to state.

Specialised tribunals

In addition to civil courts and criminal courts, there are various specialised tribunals constituted to adjudicate disputes:

- **Company Law Board (CLB)** was constituted under the Companies Act, 1956 to deal with issues relating to the company affairs. An appeal lies to a High Court from the orders of the CLB
- **Competition Commission:** The Indian Parliament has enacted Competition Act, 2002 (antitrust Law on the lines of WTO) which mandates inter alia to provide prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India
- **Debt Recovery Tribunals (DRT)** deals with matters relating to recovery of the debts of banks and financial institutions in excess of Indian Rupees 1 million [Approximately A\$ 18000] while recovery of debts less than Indian Rupees 1 million are determined by the competent civil courts
- **Securities Appellate Tribunal (SAT)** deals with matters relating to securities and entertains appeals arising from orders passed by the Securities & Exchange Board of India or any of its adjudicating officers. The SAT also has jurisdiction to adjudicate certain issues relating to capital market transactions under the Companies Act, 1956
- **Telecom Disputes Settlement and Appellate Tribunal (TDSAT)** was established to adjudicate disputes and decide on appeals with a view to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector
- **Tax Tribunals** adjudicate and determine disputes relating to customs, excise, service tax, income tax, value added tax (VAT) and sales tax. The Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Income Tax Appellate Tribunal (ITAT) and VAT Tribunals (VT) and federal and the. Sales tax and VAT tribunals are state run.

Options for resolving a dispute

Preparation is the key to successfully resolving commercial disputes. Australian organisations need to be aware of options available if there are issues and determine the options that best suits their commercial requirements. There are no specific restrictions on the format in which international commercial disputes ought to be resolved in India. It is often preferred to start low-key and slowly escalate the issue if necessary. This means starting with negotiation, moving to mediation, and as a final step, arbitration, or litigation.

Companies might also consider inserting a clause on Arbitration for dispute resolution in any contract, where the transaction is of a significant size. Indian Arbitration legislation i.e. Arbitration and Conciliation Act 1996 is based on the UNCITRAL Model Law. Arbitration allows for a commercial dispute to be heard by an independent panel (institutions like Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) etc. in a neutral venue. It may also be beneficial for the said arbitration clauses to be straightforward, clearly specifying the rules to be adopted for arbitration, seat of arbitration etc. Vague and ambiguous clauses should be avoided.

Direct negotiation between parties

Under most circumstances negotiation is the most efficient means of dispute resolution. Wherever possible it is recommended that an open dialogue be maintained between you and your customer / partner to negotiate an amicable solution.

Australian organisations tend to place significant emphasis on the legal rights and obligations of parties to a commercial dispute. Breach of contract generally results in termination of the contract and damages for any losses incurred.

Companies need to consider that although India is based on a similar legal framework to Australia, the Indian legal system can be inefficient and legal proceedings can be protracted. The Indian legal system is over-burdened with cases, difficult to navigate and can be an extremely lengthy and costly. Each dispute issue is unique and there are no common approaches. The regulatory framework in India is constantly evolving. Achieving a resolution outside the legal system is generally a preferred option where possible, and often through other personal and business networks. The process of mediation between the parties is being encouraged by the courts and special mediation cells have been established by various courts to facilitate expeditious disposal of cases.

Arbitration is a recommended option for resolving commercial disputes as it is comparatively more efficient and less time consuming method than protracted court litigation. Therefore, all commercial contracts should ideally contain arbitration as the exclusive dispute resolution mechanism.

Income tax disputes

In case an Australian organisation considers that actions of Indian Income Tax authorities are not in accordance with the India Australia Double Tax Avoidance Agreement (DTAA), then, notwithstanding the remedies available under domestic income tax laws of India in respect of such actions, it can invoke the provisions of Article 25 of the DTAA, which provides for resolution of such matters through Mutual Agreement Procedures (MAP). In terms of the said Article 25, the Australian company should, present its case within three years of the said action of the Indian Income Tax authorities to the Australian tax authorities who shall endeavor, if the case appears to be justified and if the Australian tax authorities themselves are not able to arrive at an appropriate solution, to jointly resolve the case with the Indian tax authorities with a view to the avoidance of taxation not in accordance with the DTAA. The equivalent clause in the India Finland Double Taxation Avoidance Agreement has recently been invoked by Nokia in its tax dispute with the Indian Income Tax authorities.

The importance of strong business relationships

Austrade recommends that Australian business undertake comprehensive due diligence (legal, technical and financial) on potential partners in any foreign market to meet obligations under the Bribery and Corruption Act. Australian businesses are requested to check potential partner / organisation's reputation and credit worthiness.

While due diligence should be a must where the commercial exposure is high, there can be no substitute for a strong business relationship that is built on trust and mutual goals. Maintaining regular communication, visiting India to see your operation and good governance are critical foundations for successful exporting.

Methods of payment

Common methods of payments in India are listed below. Australian organisations are advised to ensure that the documents demonstrating the contract contain unambiguous and clear terms and conditions in writing to enable the exporter to take invoke appropriate legal remedies in the event of any default by the Indian importer.

The most common terms of purchase are as follows:

- Consignment Purchase
- Advance payment
- Down Payment
- Open Account
- Documentary Collections
- Letters of Credit

Consignment purchase

In this method of purchase the importer makes the payment only once the goods or imported items are sold to the end user. In case of no selling, the same item is returned to the foreign supplier. Consignment purchase is considered the most risky and time consuming process of payment for the exporter. Issues relating to Customs & India's Foreign Exchange Management Act [FEMA] may arise in return of goods, especially if import duty has been paid at the time of import.

Advance payment

An importer makes the payment for the items to be imported in advance prior to the shipment of goods. This process of payment involves risk factors for the importers but this process is safe for the exporter. This method of payment is inexpensive as it involves direct importer-exporter contact without the involvement of commercial bank.

Open account

In case of an open account, an importer takes the delivery of the goods / product and ensures that the payment will be made to the supplier / exporter make at a specific date in the future. Open Account method of payment offers no protection in case of non-payment to the exporter. Besides, the Reserve Bank of India ("RBI") requires compliance of 6 month payment period, failing which the RBI needs to be informed.

Documentary collection

Documentary Collection is an important bank payment method, under which the sale transaction is settled by the bank through an exchange of documents. In this process the seller / exporter instructs his bank to forward documents related to the export of goods to the buyer / importer's bank with a request to present these documents to the buyer / importer for payment, indicating when and on what conditions these documents can be released to the buyer / importer

The buyer may obtain possession of goods and clear them through customs, if the buyer has the shipping documents such as original bill of lading, certificate of origin, etc. However, the documents are provided to the buyer after payment has been made ("Documents against Payment") or payment undertaking has been made - the buyer has accepted a bill of exchange issued by the seller and payable at a certain date in the future (maturity date) ("Documents against Acceptance").

Documentary Collections makes it easy to conduct import-export operations within low cost. But it does not provide same level of protection as the letter of credit as it does not involve any types of bank guarantee like letter of credit.

This process is risky as enforcement of such documents in an appropriate jurisdiction would be difficult. It is often noticed that Banks from different jurisdiction struggle within the legal system to enforce such documents.

Letter of credit

A letter of credit is a well-known method of payment in international trade. Under an import letter of credit the importer's bank guarantees to the supplier / exporter that the bank will pay the amount mentioned in the agreement as the supplier or exporter meets the terms and conditions of the letter of credit. In this method of payment the bank plays an intermediary role to help complete the trade transaction. The bank deals only in documents and does not inspect the goods themselves. Letters of Credit are issued subject to the Uniforms Customs & Practice for Documentary Credits (UCPDC) (UCP 600) including INCOTERMS. This set of rules is produced by the International Chamber of Commerce and Industries (ICC).

Documents against acceptance

Instructions given by an exporter to a bank that the documents attached to the draft for collection are deliverable to the drawee only against his or her acceptance of the draft.

In India all the banks are well versed with above payment methods and exchange control guidelines are strict and monitored by RBI.

The Australian Trade Commission

The Australian Trade Commission – Austrade – is the Australian Government’s trade, investment and education promotion agency.

Through a global network of offices, Austrade assists Australian companies to grow their international business, attracts productive foreign direct investment into Australia and promotes Australia’s education sector internationally.

Austrade provides information and advice that can help Australian companies reduce the time, cost and risk of exporting. We also provide a range of services to Australian exporters looking to expand their business in growth and emerging markets, including:

- information and advice on doing business in international markets
- help with overseas market selection
- identification of relevant overseas contacts
- assistance with market entry and expansion
- identification and follow-up of specific international business opportunities.

We also administer the Export Market Development Grant (EMDG) scheme – the Australian Government’s financial assistance program for aspiring and current exporters.

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DISCLAIMER

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This article has been prepared with the assistance of Seth Dua & Associates

Publication date: October 2013