

The logo for iclg, featuring a lowercase 'i' with a small orange dot above it, followed by 'c', 'l', and 'g' in a bold, black, sans-serif font.

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Franchise **2025**

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Contributing Editor:

Iain Bowler

Freeths LLP

glg Global Legal Group

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1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

India does not have a specific franchise law, so the concept can be understood by referring to the Finance Act, 1999, which previously governed service tax and has been replaced by the Goods and Services Tax (GST). According to the Finance Act, 1999, a franchise can be defined as an agreement enabling the franchisee to sell or produce goods, offer services or conduct processes associated with the franchisor, regardless of whether it involves a trademark, service mark, trade name or logo.

1.2 What laws regulate the offer and sale of franchises?

Parties involved in the franchise agreement must be aware of the applicable GST and Income Tax. Generally, the offer and sale of franchises find a legal basis in laws such as:

- The Indian Contract Act, 1872.
- The Foreign Exchange Management Act, 1999 (FEMA).
- The Competition Act, 2002.
- The Trademarks Act, 1999.
- The Copyright Act, 1957.
- The Patents Act, 1970.
- The Design Act, 2000.
- The Income Tax Act, 1961.
- The Arbitration and Conciliation Act, 1996.
- The Specific Relief Act, 1963.
- The Information Technology Act, 2000.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a “franchisee” for purposes of any franchise disclosure or registration laws?

In India, it is common to see business arrangements where the franchisor either grants exclusive master franchise rights to a single franchisee for the entire country or opts to appoint multiple franchisees, each responsible for a designated jurisdiction.

1.4 Are there any registration requirements relating to the franchise system?

Registration is not mandatory, but it is required to obtain GST registration depending on the turnover.

1.5 Are there mandatory pre-sale disclosure obligations?

There is no legal obligation for a franchisor to disclose information to a franchisee. Typically, franchise transactions are conducted in good faith, and both parties are responsible for conducting thorough due diligence before entering into a franchise agreement. However, it is advisable to have a franchise disclosure document as best practice, as it enhances the credibility of both the franchisor and the franchisee in the arrangement.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

There are no specific pre-sale disclosure obligations.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

There are no specific statutory obligations to make continuing disclosure to existing franchisees.

1.8 What are the consequences of not complying with mandatory pre-sale disclosure obligations?

In the absence of specific statutes governing franchising and pre-sale disclosure obligations, any failure to comply would be addressed under the common law doctrine of equity.

1.9 Are there any other requirements that must be met before a franchise may be offered or sold?

There are no statutory requirements, but it is good practice to conduct due diligence, protect trademarks and have watertight franchise contracts in compliance with the Indian Contract Act, 1872.

1.10 Is membership of any national franchise association mandatory or commercially advisable?

There is no requirement for membership in any national franchise association.

1.11 Does membership of a national franchise association impose any additional obligations on franchisors?

As there is no mandate for membership in a national franchise association, there are no additional obligations. It is entirely up to the parties involved in franchising to decide whether or not to join any national franchise association.

1.12 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

There is no requirement for any translation of documents into a local language. However, certain states have started asking businesses to display business names in the local language on signboards.

2 Business Organisations Through Which a Franchised Business Can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

Any franchisor from outside India who wishes to invest in an Indian company should first be aware of India's foreign direct investment (FDI) policy. According to FDI policy, investments can be made by: non-residents in the equity shares; fully, compulsorily and mandatorily convertible debentures; and fully, compulsorily and mandatorily convertible preference shares of an Indian company through the Automatic Route or the Government Route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from the Government of India for the investment. Under the Government Route, prior approval from the government of India is required. Proposals for foreign investment under the Government Route are considered by the respective administrative ministry/department. Further, payments to the overseas franchisor must conform to the Reserve Bank of India (RBI) norms and FEMA regulations.

2.2 What forms of business entity are typically used by franchisors?

There are various business structures that franchisors can opt for. A franchisor can establish a presence in India through a subsidiary or a joint venture. If a subsidiary is being set up, the franchise should follow the guidelines laid down by FDI policy and check for compliances regarding the percentage stake that a foreign national can have and the type of incorporation of the new subsidiary, i.e., as a private limited company or any other type of incorporation.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

If a new business entity is created, then the new entity must be registered under a relevant business incorporation structure, i.e., a private limited company or limited liability partnership. The new entity must apply for relevant tax certificates such as GST.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

The Competition Act, 2002 deals with the prohibition of agreements that are anti-competitive and arrangements that constitute abuse of a dominant position. The Competition (Amendment) Bill, 2023, was passed by both the lower house and the upper house of the Indian parliament and came into effect on April 11, 2023. One of the important changes made in the Amendment Act is the deal value threshold. A person or business is not allowed to participate in a combination, such as a merger, acquisition or amalgamation, under the Amendment Act if it could have a significant negative impact on competition. The definition of combination has been widened by the Amendment Act to now encompass deals with a value greater than INR 2000 crore (about GBP 192 million). Additionally, transactions involving businesses that have "substantial business operations in India" must be reported.

Another important facet of the Amendment Act is with regard to IPR. According to the Act's Section 3, an entity's Intellectual Property Rights in Copyright, Patents, Trademarks and Designs may be utilised as a defence in cases involving anti-competitive agreements. However, this justification is not available in cases involving the abuse of a dominating position. The Amendment Act has not changed this position, and entities cannot use the protection of their IPRs as a defence in cases involving unfair/discriminatory pricing, predatory pricing, conditions in the purchase or sale of goods or services, limitations, or restrictions on the production of goods, technological or scientific development relating to goods or services to the detriment of consumers, denying other players access to the market, or any other abuse of a dominant position.

3.2 Is there a maximum permitted term for a franchise agreement?

There is no maximum or minimum term for a franchise agreement, and it is at the discretion of the franchisor and franchisee to set the terms in the agreement.

3.3 Is there a maximum permitted term for any related product supply agreement?

No, there is no maximum permitted term.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

A franchisor can control the prices at which its franchisee partner resells its products in India, provided that the terms

of the agreement and price control mechanism comply with the provisions of the Competition Act, 2002. This resale price provision is referred to as resale price maintenance (RPM). Care must be taken to have RPM, as the franchisor may otherwise attract the scrutiny of the Competition Commission (CCT) by being anti-competitive.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

There are no minimum obligations that a franchisor must observe; however, it is based on the territory assigned in a franchise agreement. The territory assigned can differ in each agreement, i.e., it can be exclusive or non-exclusive. The territory assigned can include an exclusive territory, i.e., when a franchise is sold with an exclusive territory, it means the franchisor cannot sell other franchises in that area. The second form of territorial franchising is on a non-exclusive territory basis, i.e., where a franchise is sold in a non-exclusive territory, the franchisor can sell other franchises to people in that territory.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Both in-term and post-term non-compete and non-solicitation covenants can be enforceable if found reasonable and not a complete restraint of trade.

4 Protecting the Brand and Other Intellectual Property

4.1 How are trade marks protected?

Trademark registration in India is governed by the Trademark Act, 1999. This comprehensive legislation delineates the procedures for registering trademarks and the mechanisms for enforcing trademark rights in instances of infringement. Notably, Indian trademark law places significant emphasis on the prior use of a mark, which can influence the registration process and the resolution of disputes.

To obtain trademark registration in India, an application must be filed before the Indian Trademark Registry. It is crucial to understand that trademark rights conferred by registration are geographically limited to the territory of India. Therefore, a trademark registered in India holds validity only within the country's borders.

Upon successful registration, a trademark is initially valid for a period of 10 years. This registration can be renewed indefinitely, provided renewal applications are filed in a timely manner. The exclusive rights granted to the registered owner include the right to use the trademark and the ability to seek legal recourse in cases of infringement.

In addition to statutory protection, Indian laws also recognise the common law concept of “passing off”. This doctrine allows for legal action against the unauthorised use of an unregistered trademark, provided the owner can demonstrate that the business's goodwill or reputation is linked to the unregistered mark.

In summary, the Trademark Act, 1999, provides a robust framework for trademark protection in India, ensuring that both registered and unregistered trademarks can be safeguarded against misuse, thereby maintaining the integrity and value of the brands they represent.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

India does not have specific legislation dedicated to protecting know-how, trade secrets and other business-critical confidential information like an Operations Manual. However, these valuable intellectual assets can still be protected under various legal frameworks.

Protection is primarily achieved through common law principles, which are supported by contractual agreements and several relevant statutes. The Indian Contract Act, 1872, is instrumental in enforcing confidentiality agreements and non-disclosure agreements (NDAs). The Indian Penal Code, 1860 also provides remedies against breaches of confidentiality under certain circumstances.

Additionally, the Copyright Act, 1957, can offer protection to the extent that the confidential information involves copyrighted material. Businesses often rely on these legal provisions, along with well-drafted contracts, to safeguard their confidential information and trade secrets effectively.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Certainly, the operations manual and proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement are protected by the Copyright Act, 1957, in India. This law covers various forms of intellectual property, including written manuals and software, granting the creators exclusive rights over their use and distribution.

While copyright registration is not mandatory in India, obtaining a copyright registration certificate is highly beneficial. This certificate serves as *prima facie* evidence of ownership and can significantly strengthen the case in legal proceedings related to copyright infringement.

5 Liability

5.1 What remedies can be enforced against a franchisor for failing to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

In India, there are no specific legal requirements for disclosure in franchising. However, if a franchisor fails to comply with mandatory disclosure obligations, a franchisee can take legal action to address this non-compliance.

The franchisee may pursue the following remedies:

1. **Civil Lawsuit:** The franchisee can initiate a civil lawsuit against the franchisor. This could involve claims for breach of contract or misrepresentation, depending on the specifics of the case and the terms outlined in the franchise agreement.
2. **Criminal Complaint:** In some situations, the franchisee might file a criminal complaint for criminal breach of trust under the Indian Penal Code if the franchisor's actions are deemed to constitute a breach of trust.

The franchisee's entitlement to rescind the franchise agreement or claim damages would depend on the terms and conditions stipulated in the franchise agreement. Typically, these agreements contain clauses that outline the circumstances

under which the agreement can be terminated and the remedies available to the parties involved.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

In the context of sub-franchising, the allocation of liability for non-compliance with disclosure obligations or pre-contractual misrepresentation between the franchisor and the master franchisee is primarily governed by the Master Franchise Agreement (MFA).

1. **Contractual allocation of liability:** The MFA typically outlines the responsibilities and obligations of both the franchisor and the master franchisee. This agreement will specify who is responsible for disclosure compliance and how liability is allocated in cases of misrepresentation or failure to disclose necessary information.
2. **Indemnity clauses:** Often, franchisors include indemnity clauses in the MFA, requiring the master franchisee to indemnify the franchisor against any claims arising from the master franchisee's failure to comply with disclosure obligations or any pre-contractual misrepresentation. This means that if the master franchisee fails to fulfil these obligations, they must cover any resulting costs or damages incurred by the franchisor.
3. **Enforceability of indemnity:** The enforceability of an indemnity clause in India is generally upheld, provided it is not deemed unconscionable or contrary to public policy. However, there are a few considerations:
 - **Clear and unambiguous terms:** The indemnity clause must be clearly defined and unambiguous in its terms.
 - **Scope of indemnity:** The scope of the indemnity should be reasonable and not excessively broad.
 - **Legal limitations:** Certain liabilities, such as those arising from fraud, gross negligence or wilful misconduct, may not be indemnifiable under Indian law.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including a disclaimer in the franchise agreement?

In India, including a disclaimer in the franchise agreement may help a franchisor limit liability for pre-contractual misrepresentation to some extent, but it cannot completely absolve the franchisor from such liability.

1. **Disclaimer clauses:** Disclaimer clauses in agreements are generally acceptable under Indian law. They can help limit the scope of the franchisor's liability by clearly stating that certain representations or warranties are not being made.
2. **Indian Contract Act, 1872:** According to the Indian Contract Act, 1872, if consent to an agreement is caused by coercion, fraud or misrepresentation, the contract is voidable at the option of the party whose consent was so caused. This means that a franchisee has the right to rescind the contract if they entered into it based on misrepresentation, regardless of the presence of a disclaimer.

3. **Limitations of disclaimers:** While disclaimers can limit the remedies available to the franchisee, they cannot completely eliminate the right to rescind the agreement in cases of pre-contractual misrepresentation. Indian courts are likely to scrutinise such disclaimers to ensure they do not unfairly disadvantage one party, especially in cases involving fraud or significant misrepresentation.
4. **Practical implications:** Including a disclaimer may reduce the likelihood of successful claims for damages or other remedies beyond rescission. However, it does not provide absolute protection against all forms of liability for misrepresentation.

5.4 Does local law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

Indian law permits class actions to be brought by a number of aggrieved franchisees. According to the Code of Civil Procedure, 1908 (Order 1 Rule 8), "*one person may sue or defend on behalf of all in the same interest*". This provision allows for representative suits where a group of people with the same interest can collectively bring a legal action.

Regarding class action waiver clauses, Section 28 of the Indian Contract Act, 1872 states that any agreement that restrains a party from enforcing their legal rights is void. This means that any clause in a contract that attempts to waive the right to participate in a class action would generally be considered void and unenforceable in India.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

There is no obligatory mandate for franchise documents to be governed by local laws. The decision regarding the governing law is left to the discretion of the franchisor and franchisee. There is no universally established standard or norm concerning the choice of governing law in franchise agreements.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Yes, Indian courts can provide remedies, including interlocutory relief (injunctions), against a franchisee to prevent damage to a brand or misuse of business-critical confidential information. Here are the key points:

1. **Interlocutory relief by local courts:** Indian courts can grant interlocutory relief, such as injunctions, to prevent imminent harm to a brand or misuse of confidential information. Such relief is available under the Indian legal system to protect the interests of the parties involved while the main dispute is being resolved.
2. **Enforcement of foreign orders:** Indian courts may enforce orders granted by foreign courts, including those for interlocutory relief, under certain conditions. The enforcement of foreign judgments and orders in India is

governed by Section 13 and Section 44A of the Code of Civil Procedure, 1908. For a foreign judgment or order to be enforceable in India, it must be:

- Passed by a competent court.
- On the merits of the case.
- In accordance with the principles of natural justice.
- Not obtained by fraud.
- Not contrary to Indian public policy.

3. **Ex parte and interim orders:** Indian courts are also capable of issuing *ex parte* and interim orders to prevent potential damage or misuse of confidential information before the opposing party has a chance to respond.
4. **Practical considerations:** While Indian courts can enforce foreign orders and grant local relief, the practical aspects of obtaining and enforcing such orders should be considered. It may involve procedural steps and legal representation to navigate the Indian judicial system effectively.

6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?

Yes, arbitration is recognised as a viable means of dispute resolution in India. The country is a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indian arbitration is governed by the Arbitration and Conciliation Act, 1996, which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules of 1976.

Arbitration in India

- **Governing law:** The Arbitration and Conciliation Act, 1996, regulates arbitration in India, providing a comprehensive legal framework for both domestic and international arbitration.
- **Recognition of foreign arbitral awards:** As a signatory to the New York Arbitration Convention, India recognises and enforces foreign arbitral awards, subject to certain conditions and procedural requirements.

Popular Arbitral Institutions

- **Domestic institutions:**
 - **Mumbai Centre for International Arbitration (MCIA):** Known for its modern infrastructure and professional administration of arbitration cases.
 - **Delhi International Arbitration Centre (DIAC):** A prominent centre that handles a large number of arbitration cases, especially involving Government contracts.
 - **Arbitration & Conciliation Centre – Bengaluru (ACCB):** Recognised for its efficiency and support for arbitration proceedings in the region.
- **International institutions:**
 - **International Chamber of Commerce (ICC):** Widely respected for its global reach and extensive experience in handling international arbitration cases.

- **Singapore International Arbitration Centre (SIAC):** Favoured for its efficiency, neutrality and user-friendly approach, particularly in Asia.
- **London Court of International Arbitration (LCIA):** Known for its strong legal framework and high standards of arbitrator expertise.
- **Hong Kong International Arbitration Centre (HKIAC):** Preferred for its strategic location and robust arbitration rules.

Preference for Arbitral Rules

Businesses that accept arbitration as a dispute resolution method often favour the rules set by these leading arbitral institutions due to their clarity, fairness and efficiency. The choice of arbitral rules typically depends on the nature of the dispute, the parties involved and the specifics of the arbitration agreement.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

In India, the length of term for a commercial property lease is typically negotiated between the landlord and the tenant based on their mutual agreement. Indian laws do not mandate a specific duration for commercial property leases, allowing flexibility based on the parties' needs and preferences.

Common Term Lengths

- **Typical duration:** Commercial leases commonly have terms ranging from three to 10 years.
- **Flexibility:** The actual duration can be shorter or longer, depending on factors such as:
 - The nature of the business.
 - Rental market conditions.
 - Specific requirements and negotiations of the parties involved.

Considerations

- **Renewal options:** Leases often include options for renewal, allowing tenants to extend the lease term based on predefined conditions.
- **Rent escalation clauses:** Many commercial leases include clauses that specify how and when the rent will increase over the term of the lease.
- **Termination clauses:** These define the conditions under which either party can terminate the lease before the end of the term.

Importance of Written Agreements

- **Clarity and protection:** It is crucial for both parties to clearly define the lease terms and other terms and conditions in a written lease agreement. This ensures legal clarity and protection of their respective rights.
- **Legal enforceability:** A well-drafted lease agreement helps prevent disputes and provides a clear framework for resolving any issues that may arise during the lease term.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

In India, the concept of an option/conditional lease assignment, where a franchisor has the right to step into the franchisee/tenant's shoes under the lease or direct a third party (such as a replacement franchisee) to do so upon the failure of the original tenant or termination of the franchise agreement, is generally understood and enforceable.

The enforceability of such provisions will depend on various factors, including the specific terms and conditions of the lease agreement, any applicable laws or regulations, and the interpretation of the courts. It is crucial to ensure that the lease agreement clearly outlines the rights, obligations and conditions related to an option/conditional lease assignment to avoid ambiguity and potential disputes.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

According to Indian laws, there are restrictions on non-national entities holding an interest in real estate or being able to sub-lease property. The acquisition and ownership of real estate in India by non-national entities are regulated under the FEMA and the regulations issued by the RBI.

Non-national entities, including foreign companies, are generally prohibited from directly acquiring or owning agricultural land in India. However, they may be allowed to acquire and own immovable property for specific purposes, such as establishing a branch office, liaison office or wholly owned subsidiary for conducting business activities in India. Such acquisitions would typically require prior approval from the RBI or comply with prescribed conditions.

Similarly, the sub-leasing of property by non-national entities is subject to restrictions and would need to comply with applicable laws and regulations. The specific terms and conditions for sub-leasing, including the eligibility and permissions required, would depend on the nature of the property and the purpose of the sublease.

7.4 Give a general overview of the commercial real estate market. To what extent has the real estate market been affected by the Coronavirus pandemic? Specifically, can a tenant expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease in a flagship location)?

Overview of the Commercial Real Estate Market in India

The commercial real estate market in India has experienced significant fluctuations due to various economic factors, with the COVID-19 pandemic being a major recent influence. Here is an overview of the market and the impact of the pandemic:

General Market Trends

1. **Demand and supply:** The commercial real estate market, like others, operates on the principles of supply and demand. Major cities such as Mumbai, Delhi, Bengaluru and Hyderabad are key hubs for commercial real estate due to their economic activities and infrastructure.
2. **Sector performance:** The market is driven by sectors like IT and IT-enabled services, financial services, e-commerce and co-working spaces. These sectors have traditionally been the largest consumers of commercial real estate.
3. **Investment and development:** There has been a steady influx of investment into commercial real estate, both domestic and international, leading to significant developments in office spaces, retail outlets and industrial parks.

Impact of the COVID-19 Pandemic

1. **Lockdowns and remote work:** The pandemic-induced lockdowns led to a significant shift towards remote working, reducing the immediate demand for office spaces. Many companies downsized their office requirements or postponed expansion plans.
2. **Vacancy rates:** Increased vacancy rates were observed across major commercial hubs due to companies scaling down physical office spaces.
3. **Rental trends:** The reduced demand led to softening of rental values in many commercial areas. Landlords became more flexible with lease terms to attract and retain tenants.
4. **Market recovery:** As the situation stabilises, there has been a gradual recovery with businesses adopting hybrid working models, which still require some degree of physical office space.

Lease Terms and Negotiations

1. **Rent-free periods:** Due to the pandemic, tenants have gained more leverage in lease negotiations. Landlords are more likely to offer rent-free periods to attract tenants. Typically, these rent-free periods range from one to three months, but longer periods can be negotiated depending on the specific circumstances and the property's location.
2. **Key money:** "Key money", or premiums paid for prime locations, has traditionally been common in flagship locations. However, the economic impact of the pandemic has led to a reduction in such demands. In some cases, key money has been reduced by up to 50% as landlords seek to secure tenants amidst a challenging market.

Regulatory Framework

1. **Model Tenancy Act, 2021:** The Union Cabinet approved the Model Tenancy Act in 2021, which aims to balance the interests of landlords and tenants. Key provisions include:
 - **Security deposit:** For commercial premises, the security deposit is capped at six months of monthly rent.
 - **Standardisation of practices:** The Act seeks to standardise rental agreements and protect the rights of both parties.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

There are no statutory restrictions in India, although these can be enforced if mentioned in the franchise agreement.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

There are no limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights one might typically expect to see in a franchise agreement?

In India, there are not specific mandatory local laws that directly override the termination rights typically found in a franchise agreement. Generally, the termination rights are governed by the terms agreed upon by the franchisor and franchisee in the contract. However, there are some important considerations to keep in mind:

1. **Compliance with general laws:** The termination provisions must comply with broader legal principles under the Indian Contract Act, 1872. This Act ensures that contracts, including franchise agreements, are valid and enforceable.
2. **Breach of contract:** Under the Indian Contract Act, parties have the right to terminate a contract based on the terms they've agreed to or due to specific circumstances like a breach of contract.
3. **Fairness and reasonableness:** Indian courts can intervene if they find that the termination was done unfairly or arbitrarily. In such cases, they might provide remedies or damages to the party that was unfairly treated.

9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that has existed for a number of years to an end, which will apply irrespective of the length of the notice period set out in the franchise agreement?

Under Indian laws, there are no specific local rules that impose a minimum notice period for ending a business relationship, such as a franchise agreement, irrespective of the notice period mentioned in the agreement. The notice period for terminating a business relationship, including a franchise agreement, is generally governed by the terms and conditions specified in the agreement itself.

The Indian Contract Act, 1872, provides the framework for contract termination, which includes the right to terminate based on the agreed-upon terms and conditions. Parties are expected to adhere to the contractual obligations and notice periods as mutually agreed upon in the franchise agreement.

It is important for franchisors and franchisees to carefully review and negotiate the notice provisions in the franchise agreement to ensure they comply with their intended business relationship and provide sufficient notice for termination. Parties can agree on specific notice periods that meet their requirements, taking into consideration the nature of the business, industry practices and any specific legal provisions that may be applicable.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In India, a franchisor is generally not considered responsible for the acts or omissions of a franchisee's employees. A franchisee is typically regarded as an independent contractor, and there is no inherent agency relationship between a franchisor and a franchisee. However, there are certain scenarios where a franchisor could be held liable.

General Principles

1. **Independent contractor relationship:** Under typical franchise agreements, the franchisee operates as an independent contractor. This means the franchisee is responsible for its own day-to-day operations, and the franchisor does not control these operations in a manner that would establish an employer-employee relationship.
2. **Vicarious liability:** Indian courts usually do not hold a franchisor vicariously liable for the acts or omissions of a franchisee's employees. The franchisee is considered responsible for its employees' actions within the scope of its business operations.

Risk of Being Regarded as a Joint Employer

1. **Principal-agent relationship:** If the franchisor exercises significant control over the franchisee's operations, there is a risk that the relationship could be interpreted as a principal-agent relationship. In such cases, the franchisor could be held liable for the franchisee's acts or omissions.
2. **Employer-employee relationship:** If a franchisor's involvement in the franchisee's business operations extends to controlling employment practices, such as hiring, firing and supervision of the franchisee's employees, there is a potential risk that the franchisor could be seen as a joint employer.

Mitigation Strategies

To mitigate the risk of being regarded as a joint employer, franchisors can take the following steps:

1. **Clearly define roles and responsibilities:** Clearly outline in the franchise agreement that the franchisee is an independent contractor responsible for its own employees and day-to-day operations.
2. **Limit control over employment practices:** Avoid exerting control over the franchisee's employment decisions. Franchisors should refrain from getting involved in the hiring, firing, training or supervision of the franchisee's employees.
3. **Avoid detailed operational control:** Maintain a distinction between the operational standards set by the franchisor and the day-to-day operational control

exercised by the franchisee. The franchisor should focus on brand standards and leave the operational details to the franchisee.

4. **Training and compliance:** Provide training to franchisees on compliance with employment laws and regulations, emphasising that franchisees must independently ensure such compliance.
5. **Contractual clauses:** Include clauses in the franchise agreement that explicitly state the franchisee's responsibility for employment matters and disclaim any employer-employee relationship between the franchisor and the franchisee's employees.
6. **Regular review and updates:** Regularly review and update the franchise agreements to ensure they reflect the independent contractor status and avoid language that could imply control over the franchisee's employees.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

A franchisor would not typically be held vicariously liable for the acts of the franchisee's employees, as the franchisor-franchisee relationship is a principal-to-principal relationship. In the event there is a principal-agent relationship or an employer-employee relationship, the franchisor could be held liable for any acts/omissions committed by the franchisee's employees.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

In India, payments of royalties to an overseas franchisor for the use of trademarks, technical services or other services under a franchise agreement are governed by the FEMA. Here are the key points to consider:

Regulatory Framework

1. **FEMA compliance:** Royalty payments are classified as current account transactions and are generally permissible under the automatic route as per the FEMA (Current Account Transactions Rules), 2000. This means that prior approval from the RBI is not required for such remittances.
2. **Historical caps:** Previously, there were caps on royalty payments without prior regulatory approvals: 5% on local sales and 8% on exports, with a lump-sum payment limit of USD 2 million. These caps were removed in December 2009, allowing for more flexibility in royalty payments.
3. **Shareholder approval for listed companies:** According to SEBI regulations, for listed entities, payments made to related parties overseas for brand usage or royalty are considered material if the transaction(s) exceed 5% of the annual consolidated turnover. Such transactions require shareholder approval, where related parties cannot vote on the resolution.

Mitigating Compliance Risks

1. **Clear documentation:** Ensure all royalty agreements are well-documented, detailing the nature of the intangible assets and the benefits derived from them. This helps in justifying the payments to regulatory and tax authorities.
2. **Arm's length principle:** Ensure that the royalty payments are at arm's length, meaning they are consistent with what would be paid between unrelated parties in similar circumstances. This helps ensure compliance with transfer pricing regulations.
3. **Regular audits:** Conduct regular audits of royalty payments and the underlying agreements to ensure compliance with both FEMA and tax regulations.
4. **Seek professional advice:** Given the complexity and frequent changes in regulations, it is advisable to seek professional advice to stay updated and compliant with the legal requirements for cross-border payments.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

In India, the payment of royalties under a trademark licence or in respect of the transfer of technology is subject to mandatory withholding tax requirements under the Income Tax Act, 1961.

Withholding Tax on Royalty Payments

1. **Domestic payments:** For royalty payments made to a domestic entity, the withholding tax rate is 10% under Section 194J of the Income Tax Act, 1961.
2. **Payments to non-residents:** When royalties are paid to a non-resident or a foreign entity, the withholding tax rate is also 10% under Section 195 of the Income Tax Act, 1961. However, the actual rate can be influenced by the provisions of Double Taxation Avoidance Agreements (DTAAs) between India and the country of the non-resident.

Double Taxation Avoidance Agreements (DTAAs)

India has entered into DTAAs with various countries to avoid double taxation. Under these agreements, the tax rates on royalties can be lower than the domestic rate. If a beneficial rate is available under a DTAA, the non-resident franchisor can avail themselves of this benefit by providing a Tax Residency Certificate (TRC) and other required documentation to the Indian tax authorities.

Structuring Payments to Avoid Withholding Tax

1. **Recharacterisation risks:** Structuring payments as management services fees rather than royalties to avoid withholding tax may not always be effective. The Indian tax authorities closely scrutinise such arrangements, and if they determine that the payments are essentially for the use of a trademark or technology, they may recharacterise them as royalties, subjecting them to the applicable withholding tax.
2. **Arm's length principle:** Even if payments are structured differently, they must comply with the arm's length principle under transfer pricing regulations. Mischaracterisation could lead to penalties and interest on the tax due.

3. **Clear documentation:** Ensure that the nature of the services provided under management fees is clearly documented and distinct from the use of intellectual property to avoid recharacterisation.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

There is no strict requirement for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency in India. Transactions can be made in foreign currencies, provided they comply with FEMA regulations and any relevant contractual terms. This allows for flexibility in conducting international business transactions.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

While the franchisor-franchisee relationship is generally seen as a principal-to-principal relationship in India, careful drafting of the franchise agreement and maintaining operational independence are crucial to mitigating the risk of the franchisee being treated as a commercial agent. Clear contractual terms, independent business operations and regular legal reviews can help ensure that the relationship remains as intended, protecting both parties from unintended liabilities.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

Under Indian laws, there is no specific statutory requirement for a franchisor to deal with a franchisee in good faith or to act fairly in its dealings with franchisees according to an objective test of fairness and reasonableness. The relationship between a franchisor and a franchisee is primarily governed by the terms and conditions outlined in the franchise agreement.

However, it is important to note that the Indian Contract Act, 1872, which governs the general principles of contract law in India, imposes an obligation of good faith on the parties to a contract. This means that the parties are expected to act honestly and reasonably in their contractual dealings. While the Act does not specifically address franchising, the principle of good faith is generally recognised and applied by Indian courts in contractual relationships.

In practice, it is advisable for franchisors to deal with franchisees fairly and reasonably to maintain a positive working relationship and protect the reputation of their brand. This can include providing support, timely communication, and addressing any concerns or disputes reasonably and transparently. Operating in good faith and acting fairly in dealings with franchisees can help foster a successful and sustainable franchise system.

Franchise agreements often include provisions that outline the rights, responsibilities and expectations of both parties. It is crucial to review and negotiate the terms of the franchise agreement carefully to ensure a fair and balanced relationship between the franchisor and franchisee.

While there is no specific legal requirement for good faith dealing, parties may seek legal remedies if there are instances of bad faith, fraud or unconscionable conduct that could be challenged under general contract law principles or other applicable laws.

13.2 Is there any limitation on a good faith obligation being unenforceable if it only applies from franchisee to franchisor, rather than being mutual?

There is no limitation on good faith obligations being unenforceable. In case of a breach of trust between the parties, legal remedies exist for both parties.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

In India, there are no specific laws exclusively regulating the relationship between franchisors and franchisees once a franchise agreement has been entered into. The relationship is primarily governed by the terms and conditions of the franchise agreement itself. However, several general laws and regulations apply to various aspects of this relationship:

1. **Indian Contract Act, 1872**
 - **General principles:** This act governs the validity, interpretation and enforcement of contracts in India, including franchise agreements. It establishes the rights and obligations of both parties and provides remedies for breaches of contract.
2. **Competition Act, 2002**
 - **Anti-competitive practices:** This law regulates anti-competitive practices and prohibits agreements that cause an appreciable adverse effect on competition. Franchise agreements that include restrictive provisions, such as non-compete clauses, may be scrutinised under this law.
3. **Intellectual property laws**
 - **Trademark Act, 1999:** Governs the use and protection of trademarks, which are often a crucial part of franchise agreements.
 - **Copyright Act, 1957:** Addresses the use and protection of copyrighted materials included in franchise operations.
 - **Patent Act, 1970:** Relevant if the franchise involves patented processes or products.
4. **Consumer Protection Act, 2019**
 - **Consumer rights:** This act aims to protect consumer interests and provides remedies for unfair trade practices. Franchisees who qualify as consumers can seek redress under this law for deceptive practices or unfair treatment by franchisors.

Adherence and Dispute Resolution

While specific laws exclusively governing the franchisor-franchisee relationship do not exist, both parties must:

- **Adhere to contract terms:** Comply with the terms set out in the franchise agreement.
- **Maintain communication:** Ensure open lines of communication to address and resolve issues promptly.
- **Dispute resolution mechanisms:** Utilise agreed-upon mechanisms in the franchise agreement for resolving disputes, which may include arbitration or mediation.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

In India, there are no specific statutory disclosure obligations that apply exclusively to the renewal of an existing franchise at the end of the franchise agreement term. The process and obligations related to renewal are primarily governed by the terms and conditions set forth in the original franchise agreement. Here are the key points to consider:

Governing by Franchise Agreement

1. **Initial agreement provisions:** The original franchise agreement typically outlines the terms, conditions and requirements for renewal. This includes details such as:
 - Notice period for renewal.
 - Eligibility criteria for the franchisee.
 - Renewal fees, if any.
 - Conditions or requirements that must be met for renewal.
2. **Review of provisions:** It is crucial for both the franchisor and franchisee to review these provisions carefully to understand their rights and obligations regarding the renewal process.

Good Business Practices for Renewal

While there are no statutory obligations, certain best practices should be followed to ensure a smooth renewal process:

1. **Providing necessary information:** The franchisor should provide the franchisee with all relevant information and documentation necessary for making an informed renewal decision. This may include:
 - Updated terms and conditions.
 - Changes in fees or royalty structures.
 - New operational guidelines or manuals.
 - Financial disclosures or performance data.
2. **Open communication:** Maintaining clear and open communication between the franchisor and franchisee is essential. This helps address any concerns or questions the franchisee may have about the renewal terms.
3. **Timely notice:** Both parties should adhere to the notice period stipulated in the original agreement, ensuring that renewal discussions begin well in advance of the agreement's expiration.

Typical Renewal Process

1. **Eligibility check:** The franchisee's performance and adherence to the terms of the original agreement are often evaluated to determine eligibility for renewal.
2. **Negotiation of terms:** If there are changes to the terms or conditions, these are typically negotiated and agreed upon during the renewal process.
3. **Documentation:** Any changes or updates to the agreement are documented, and a new or amended franchise agreement is signed by both parties.

Practical Considerations

1. **Legal review:** It is advisable for both franchisors and franchisees to seek legal counsel to review the renewal terms and ensure that all provisions comply with applicable laws and protect their respective interests.

2. **Transparency:** Being transparent about any changes and the reasons behind them can help build trust and ensure a mutually beneficial renewal process.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

In India, there is no overriding legal right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term. The right to renew or extend the franchise agreement is typically governed by the terms and conditions outlined in the original franchise agreement, and is subject to mutual agreement between the franchisor and the franchisee.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

In India, a franchisee is generally not entitled to compensation or damages for non-renewal or refusal to extend a franchise agreement unless the franchise agreement explicitly provides for such compensation or damages. The entitlement to any compensation or damages depends on the specific terms and conditions outlined in the franchise agreement.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

Yes, a franchisor can validly restrict a franchisee from selling, transferring, assigning or disposing of its franchise. To make these restrictions effective, the relevant terms and conditions must be explicitly stated in the franchise agreement.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

Yes, a franchisor can include "step-in" rights in a franchise agreement, which allow the franchisor to take over ownership and management of the franchised business in the event of a breach by the franchisee. However, there are specific considerations and compliance requirements to ensure these rights are enforceable under Indian law.

Key Considerations and Compliance Requirements

1. **FEMA regulations:**
 - FEMA regulations must be adhered to, particularly if the franchisor is a foreign entity.
 - Direct entry into property leases by foreign companies is restricted except in certain circumstances.

Therefore, the franchisor may need to establish a legal entity in India to which the franchise can be assigned.

2. **Drafting the agreement:**
 - The franchise agreement must explicitly state the step-in rights, detailing the conditions under which the franchisor can exercise these rights.
 - Clear terms regarding the franchisor's authority to manage or own the franchised business upon termination must be included.
3. **Legal entity requirement:**
 - To enforce step-in rights, a foreign franchisor must set up a legal entity in India, such as a subsidiary or a branch office, to comply with local laws and facilitate the management of the franchised business.
4. **Registration and formalities:**
 - The transfer or assignment of the franchised business to the franchisor's legal entity in India must be properly documented and registered, if required, under applicable laws.
 - Compliance with any sector-specific regulations and obtaining necessary approvals or licences is essential to ensure enforceability.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the jurisdiction and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Yes, a power of attorney (PoA) in favour of the franchisor within the franchise agreement, enabling it to complete formalities required for a franchise migration under pre-emption or "step-in" rights, can be recognised and treated as valid by Indian courts. However, it is advisable to execute a separate power of attorney to ensure clarity and effectiveness.

17 Electronic Signatures and Document Retention

17.1 Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a "wet ink" version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

Electronic signatures that meet the requirements of the Information Technology Act, 2000 are considered on par with agreements executed with wet ink and are recognised as a valid way of creating and binding an enforceable agreement.

17.2 If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a "wet ink" version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

Executed franchise agreements stored electronically are valid for any future use. However, it is advisable to keep the paper version of the agreement.

18 Current Developments

18.1 What is the biggest challenge franchising is facing in your jurisdiction and how are franchisors responding to that challenge?

Tier-2 and tier-3 cities in India represent a significant opportunity for business expansion due to their growing middle-class population, increasing disposable incomes and evolving consumer preferences.

Key Challenges

1. **Finding the right franchisee partners:** Identifying reliable and capable franchisee partners in these regions can be challenging due to:
 - Limited exposure to franchising concepts.
 - A lack of experienced entrepreneurs who understand the franchising model.
 - Potential franchisees having limited access to the necessary capital and resources.
2. **Logistics and supply chain management:** Effective logistics and supply chain operations are crucial for the success of franchises, particularly in tier-2 and tier-3 cities, which face:
 - Inadequate infrastructure.
 - Difficulty in maintaining consistent supply and distribution channels.
 - Higher costs and complexities in reaching remote or less accessible areas.
3. **Franchisors' responses**
 1. **Enhanced support and training:** Franchisors are increasingly investing in comprehensive support systems, including:
 - Providing extensive training programs for franchisees to ensure they understand the business model and can manage operations effectively.
 - Offering ongoing support in marketing, operations and management to help franchisees succeed.
 2. **Strategic partnerships:** Forming strategic alliances with local businesses and logistics providers to:
 - Improve supply chain efficiencies and reduce operational costs.
 - Leverage local knowledge and networks to navigate logistical challenges.
 3. **Technology integration:** Leveraging technology to streamline operations and enhance efficiency, such as:
 - Using advanced logistics and inventory management systems to ensure timely deliveries and reduce stockouts.
 - Implementing e-commerce platforms to expand reach and offer convenient shopping options to consumers in these regions.
4. **Customised business models:** Adapting business models to suit the local market conditions and consumer preferences in tier-2 and tier-3 cities, including:
 - Modifying product offerings to meet local tastes and preferences.
 - Adjusting pricing strategies to align with the purchasing power of consumers in these regions.



Dr. Shivani Shrivastava is an Advocate and a registered Patent and Trademark Agent and is currently Partner at Lexorbis. With over 18 years of professional experience, she specialises in the field of Intellectual Property (IP). Her educational background includes a Ph.D. in Bioinformatics and an M.Sc. in Plant Science. In addition, she has completed the Executive Programme (TLPWE) from IIM Calcutta. Dr. Shivani Shrivastava actively engages with clients, playing a crucial role in managing their IP portfolios. Her expertise extends to providing guidance and mentorship to individuals, start-ups, and small and medium enterprises, assisting them in developing effective IP strategies and managing their IP portfolios. She is well-versed in various aspects of IP-related business dealings, such as IP valuation, due diligence, technology transfer and licensing, among others.

LexOrbis

606–607, 6th Floor, Gamma Block, Sigma Soft Tech Park
No.7 Whitefield Main Road, Varthur Hobli
Bengaluru – 560066, Karnataka
India

Tel: +91 80 4324 5900

Email: shivani@lexorbis.com

LinkedIn: www.linkedin.com/in/shivanishrivastavadr



C. R. Jacob is a Senior Strategist for Intellectual Property & Business at LexOrbis. At LexOrbis, he regularly advises large and small organisations, and especially startups, in their IP strategy and business strategy, IP prosecution, IP Valuation and IP commercialisation. He founded IP Astra, a boutique IP consulting firm, which was later merged with LexOrbis. He was on the Board of Directors at BPE Biotree India Pvt Ltd, a biopharma equipment manufacturer, which is now a member of Zeta Group, Austria. He is also an investor in an eyewear startup.

LexOrbis

606–607, 6th Floor, Gamma Block, Sigma Soft Tech Park
No.7 Whitefield Main Road, Varthur Hobli
Bengaluru – 560066, Karnataka
India

Tel: +91 80 4324 5900

Email: jacob@lexorbis.com

LinkedIn: www.linkedin.com/in/jacob-c-r-8ab684193

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The **International Comparative Legal Guides** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

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- Real Estate
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