



GUIDE TO GOING GLOBAL CORPORATE

India



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INTRODUCTION

Welcome to the 2022 edition of DLA Piper's *Guide to Going Global – Corporate*.

GUIDE TO GOING GLOBAL SERIES

To compete and be successful today, companies need to develop and scale their businesses globally. Each country presents its own set of unique laws, rules and regulations and business practices that companies must understand to be successful. In order to help clients meet the opportunities and challenges of expanding internationally, we have created a handy set of global guides that cover the basics companies need to know when going into and doing business in new countries. The *Guide to Going Global* series reviews business-relevant corporate, employment, intellectual property and technology, executive compensation, and tax laws in key jurisdictions around the world.

CORPORATE

The *Guide to Going Global – Corporate* has been created based on our research, our experience and feedback we have received from clients in both established and emerging businesses that have expanded internationally. We hope it will be a helpful resource for you.

The *Guide to Going Global – Corporate* covers corporate basics in 54 key jurisdictions across the Americas, Asia Pacific, Europe and the Middle East. We touch on a wide range of corporate issues for companies expanding internationally, including establishing a corporate presence and choice of entity, liability considerations, tax presence and tax filings, capital requirements, the formation process, director, officer and shareholder requirements, registration processes, office lease processes and possible exit strategies.

With more than 600 lawyers, DLA Piper's global Corporate group is one of the largest in the world, with one of the widest geographical footprints of any global law firm and experience across the legal areas companies need as they expand internationally. With both global experience and local knowledge, we partner with our clients wherever they do business to find solutions and manage their risk in relation to their challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to seek advice regarding the specific matters that concern you. If you wish to speak to any of our contributors, you may find their contact details at the end of the guide.

We hope you find this guide valuable, and we welcome your feedback.

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

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INDIA



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FORM OF ENTITY

Private limited company

Separate and distinct legal entity. Managed by a board of directors, which is responsible for making major business decisions and overseeing the general affairs of the company, subject to the Articles of Association of the company, and within the provisions of the Companies Act, 2013. Directors are elected by the shareholders of the company.

ENTITY SET UP

Private limited company

- Preferred choice of corporate entity by foreign investors because it is simpler to administer.
- India is an exchange-controlled economy, and there are certain restrictions or conditions in case of foreign investment in identified sectors. Under the Foreign Direct Investment (FDI) policy of India, 100-percent FDI is permissible in various sectors (including manufacturing, services sectors, single brand product retail trading). FDI is prohibited in a few sectors (such as gambling and lottery business). In certain sectors, there are limits on the permissible FDI under the automatic route (such as 74% FDI is permitted in brownfield pharmaceutical). In sectors like print media and multi brand retail trading, the prior approval of the government is required for FDI.
- The Indian foreign exchange control regime was amended in April 2020 to restrict FDI from certain countries. The prior approval of the government will be required in case of investment from an entity of a country which shares land borders with India (such as, among others, China and Hong Kong), or where the beneficial owner of an investment into India is situated in or is a citizen of any such country. Similarly, in case of transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the purview of para above, such subsequent change in beneficial ownership will also require approval of the government.
- All issuances and transfers of shares involving foreign investors have to comply with the prescribed 'pricing guidelines' issued by the Reserve Bank of India (RBI) from time to time. The shares of unlisted companies can be acquired by a foreign investor at a price which is not less than the fair value of the shares of the

Indian company determined by a chartered accountant or a SEBI registered merchant banker or a practicing cost accountant, in accordance with internationally accepted accounting principle and on an arms' length basis.

- For tax purposes, companies are broadly classified as follows under the (Indian) Income Tax Act 1961:
 - domestic company: an Indian company formed under the Companies Act, 2013 or Companies Act, 1956
 - foreign company: a company which is not a domestic company

Indian companies are taxed in India on their worldwide income, irrespective of its source and origin. Foreign companies are taxed only on income which accrues from operations carried out in India. In certain cases foreign companies may be taxed on income which is deemed to have arisen in India and includes royalty, fees for technical services, interest, gains from sale of capital assets situated in India (including gains from sale of shares in an Indian company) and dividends from Indian companies.

Limited liability partnership

- The Limited Liability Partnership (LLP) Act, which was notified in 2009, allowed LLPs to be incorporated in India.
- LLP is a hybrid form of business with the features of both a legal entity as well as traditional partnership.
- Government approval dispensed with for foreign investments in the LLP where FDI is allowed under the automatic route; in sectors or activities where 100-percent FDI is allowed and no-FDI linked performance condition has been stipulated.
- Minimum of 2 partners (ie, owners) are required. There is no limit to the maximum number of partners. A legal entity or an individual can be a partner of an LLP.
- Every LLP must have at least 2 designated partners who are individuals, and at least 1 of them must be a resident in India. In case of an LLP where all partners are legal entities or 1 or more partners are individuals and legal entities, at least 2 individuals who are partners of such LLP or nominees of such legal entities must act as designated partners.
- Designated partners are responsible for all acts of an LLP, and designated partners must be accountable for regulatory and legal compliances. No minimum capitalization requirements.
- Similar process of incorporation to a private limited company.
- Designated partners must secure a Designated Partners Identification Number (DPIN) and digital signature prior to incorporation. If designated partners already have a DIN, the DIN may be used.
- Recently, LLPs have also been permitted to convert into a company under the automatic route.
- Typical charter documents include the LLP agreement. Partners typically contribute to the LLP as defined in

the LLP agreement and agree on a profit-sharing ratio.

- An LLP is required to get audit done only if:
 - Contributions of an LLP exceed INR 2.5 million or
 - Annual turnover of an LLP exceeds INR 4 million
- An LLP's income is subject to tax at 34.94 percent (assuming highest applicable surcharge and cess). No further tax on repatriation of the profits of an LLP to an overseas parent entity, and, hence, the effective tax rate in the case of an LLP is 34.94 percent.
- The FDI policy allows foreign direct investment under an automatic route in an LLP in specified sectors and has removed the specific prohibition on LLPs availing external commercial borrowings (ECBs). An LLP which has existing foreign investment is permitted to make downstream investments in another company or LLP in sectors in which 100-percent FDI is allowed under the automatic route and there are no FDI-linked performance conditions.
- May not be suitable for all types of business. Suited best for professionals and small to medium businesses.

Branch office

- A foreign company needs prior approval from the RBI to establish a branch and is not permitted to expand its activities or undertake any new trading, commercial or industrial activity other than that expressly approved by the RBI.
- Must register itself with the Registrar Of Companies and file audited accounts.
- Only specified activities permitted; cannot undertake any manufacturing activity in India.

Liaison office

- Suitable for foreign companies that wish to set up a representative office as a first step to explore and understand the business and investment climate in India.
- Serves as a communication channel between the parent company overseas and its present or prospective customers in India.
- Must obtain prior approval from RBI before establishing a liaison office.
- Must register itself with the Registrar of Companies and file audited accounts.
- Limited activity: may establish business contacts and may gather market intelligence to promote the products or services of the overseas parent company but cannot undertake any business activity in India or earn any income in India.

MINIMUM CAPITAL REQUIREMENT

Private limited company

No minimum capital requirement stipulated under the law. Typically, companies are incorporated with a nominal capital of INR 100,000.;

LEGAL LIABILITY

Private limited company

Private limited companies provide limited liability to its shareholders, and the shareholders have no personal liability beyond the amount they originally paid for their shares.

TAX PRESENCE

Private limited company

A private limited company is taxed at 2 levels. First, the company pays a corporate tax on its corporate income; then, the company pays dividend distribution tax on profits distributed to shareholders (declared prior to April 1, 2020). With effect from April 1, 2020, a dividend paid by an Indian company is taxable in the hands of the recipient shareholder.

Sale or redemption of shares in the company is taxed as capital gains. Any indirect transfer of India shares may trigger indirect transfer tax provisions.

INCORPORATION PROCESS

Private limited company

Reserve name; submit memorandum of association and articles of association with the appropriate Registrar of Companies (ROC) in the state where the incorporation is sought. Current online incorporation forms provide for the reservation of name, allotment of DIN, the allotment of tax IDs (PAN and TAN) along with the incorporation. E-form AGILE provides additional facility to apply for Goods and Services Tax registration (GST), Employees State Insurance registration (ESI) and Employees Provident Fund Registration (EPF) at the time of the incorporation of the company itself.

BUSINESS RECOGNITION

Private limited company

Highly regarded.

SHAREHOLDER MEETING REQUIREMENTS

Private limited company

1st annual general meeting (AGM) to be held within 9 months from the date of closing of the first financial year of the company subject to other conditions. Subsequent (AGM) within 6 months from close of year. A gap between 2 AGMs cannot be more than 15 months.

BOARD OF DIRECTOR MEETING REQUIREMENTS

Private limited company

At least 4 times in a year. Maximum gap between 2 meetings should not be more than 120 days. Every director is required to attend at least 1 meeting in a year.

ANNUAL COMPANY TAX RETURNS

Private limited company

All taxpayers are required to follow a uniform financial year from April 1 to March 31 for the purposes of filing tax returns. The law requires that the taxpayer companies must file their prescribed periodical tax returns on or before a due date specified in the respective legislations.

BUSINESS REGISTRATION FILING REQUIREMENTS

Private limited company

A company can commence any business or exercise any borrowing power after (i) it has filed a business commencement declaration within 180 days from incorporation certifying that the initial share capital has been remitted by the shareholders and (ii) the company has adhered to registered office verification rules.

Every company is required to file annual return in e-Form MGT-7 with the relevant RoC within 60 days from the date on which the AGM is held. Similarly, a copy of the financial statements, including a consolidated financial statement, if any, along with all the documents which are required to be attached to such financial statements under the Companies Act, 2013 duly adopted at the AGM of the company, are required to be filed with the RoC within 30 days of the date of the AGM.

Financial year

Every company's financial year is the period ending on March 31 every year. Only exception available is for subsidiaries of foreign companies to enable them to align with financial year of the parent company. However, such a change is required to be approved by the National Company Law Tribunal (NCLT).

BUSINESS EXPANSION

Private limited company

No need to change as business expands. Can be easily converted into a public company at any time if required.

EXIT STRATEGY

Private limited company

Cease operations; file closure documents with ROC.

ANNUAL CORPORATE MAINTENANCE REQUIREMENTS

Private limited company

Annual shareholder meetings; quarterly board meetings.

DIRECTOR / OFFICER REQUIREMENTS

Private limited company

At least 2 directors; new company law regulations mandate the appointment of a resident director. Consequently recommend 3 directors: 1 from India and 2 from parent company's location.

For more information on directors' duties, see our [Global Guide to Directors' Duties](#).

LOCAL CORPORATE SECRETARY REQUIREMENT

Private limited company

Must appoint a company secretary where the paid-up capital of the company exceeds INR100 million. Until such threshold, the company may appoint a third-party service provider to manage corporate compliance.

LOCAL LEGAL OR ADMIN REPRESENTATIVE REQUIREMENT

Private limited company

None except for the forthcoming local director requirement.

LOCAL OFFICE LEASE REQUIREMENT

Private limited company

Local physical office or correspondence address capable of accepting letters/post is mandatory at the time of incorporation. The local physical office acts as the registered office of the entity in the incorporation documents. In case the company is an incorporated basis correspondence address, the company is required to intimate the relevant RoC of its registered office within 30 days of its incorporation.

OTHER PHYSICAL PRESENCE REQUIREMENTS

Private limited company

None under the Companies Act, 2013.

SUFFICIENCY OF VIRTUAL OFFICE

Private limited company

No. See “Provision of local registered address by law firm or third-party service provider.”

PROVISION OF LOCAL REGISTERED ADDRESS BY LAW FIRM OR THIRD-PARTY SERVICE PROVIDER

Private limited company

Allowed for incorporation; preferable to use it temporarily.

PROVISION OF LOCAL DIRECTOR OR CORPORATE SECRETARY BY LAW FIRM OR THIRD-PARTY SERVICE PROVIDER

Private limited company

Allowed for incorporation. However, considering the liability that could fall on the local directors, provision of local director by law firm or third-party service providers is based on references and on a case-to-case basis.

NATIONALITY OR RESIDENCY REQUIREMENTS FOR SHAREHOLDERS, DIRECTORS AND OFFICERS

Private limited company

None except for the local director requirement and the restriction on investment from countries which share land border with India.

RESTRICTIONS REGARDING APPOINTMENT OF NOMINEE SHAREHOLDERS OR DIRECTORS

Private limited company

None. However, reporting requirements apply.

SUMMARY OF DIRECTOR'S, OFFICER'S AND SHAREHOLDER'S AUTHORITY

AND LIMITATIONS THEREOF

Private limited company

Directors are elected by the shareholders and are responsible for the overall management of the company. They govern the organization by establishing broad policies and objectives. Directors are personally liable for breach of fiduciary duty, *ultra vires* acts, negligence, *mala fide* acts and breach of statutory duties.

PUBLIC DISCLOSURE OF IDENTITY OF DIRECTORS, OFFICERS AND SHAREHOLDERS

Private limited company

Identity of directors and officers is publicly disclosed; identity of shareholders of private, non-listed companies is not publicly disclosed. However, this may be obtained on payment of certain nominal fees on the online portal of the Ministry of Corporate Affairs.

MINIMUM AND MAXIMUM NUMBER OF DIRECTORS AND SHAREHOLDERS

Private limited company

There must be a minimum of 2 shareholders and a maximum of 200. For directors, the minimum is 2 and the maximum is 15.

MINIMUM NUMBER OF SHAREHOLDERS REQUIRED

Private limited company

Two shareholders.

REMOVAL OF DIRECTORS OR OFFICERS

Private limited company

Removal of directors is allowed by majority of the shareholders. Size of the board of directors cannot fall below 2.

REQUIRED AND OPTIONAL OFFICERS

Private limited company

None.

BOARD MEETING REQUIREMENTS

Private limited company

At least 4 times in a year. Maximum gap between 2 meetings should not be more than 120 days. Every director is required to attend at least 1 meeting in a year.

QUORUM REQUIREMENTS FOR SHAREHOLDER AND BOARD MEETINGS

Private limited company

For a shareholder meeting, 2 members must be present during the shareholder meeting. Corporate shareholders may appoint authorized signatories to attend the meetings on their behalf. For directors, 1/3 of its total strength or 2 directors, whichever is higher must be present during a board meeting; alternatively, at least a majority of the directors must execute written resolutions. Written resolutions (referred to as circular resolutions) cannot be used for all purposes.

Meetings can also be held via videoconference which is recorded and stored. Meetings via video conference cannot be used for certain purposes.

MUST A BANK ACCOUNT BE OPENED PRIOR TO INCORPORATION, AND MUST THE BANK ACCOUNT BE LOCAL?

Private limited company

As per the prescribed process, all companies are required to mandatorily file an application for opening a bank account along with the incorporation form. This application is part of the incorporation form which is submitted with the RoC. Presently, the companies have the option to open the bank account with Punjab National Bank, State Bank of India, ICICI Bank, Kotak Mahindra Bank, Bank of Baroda, UBI, IndusInd Bank or HDFC Bank.

Post incorporation, the NewCo may open additional accounts with its preferred banks.

AUDITING OF LOCAL FINANCIALS. IF SO, MUST THE AUDITOR BE LOCATED IN LOCAL JURISDICTION, AND MUST THE COMPANY'S BOOKS BE KEPT LOCALLY?

Private limited company

An annual audit is mandatory. The auditor may be located in any state in India. The company's books of accounts should be kept locally with either the company or a third-party service provider. The Act now stipulates mandatory rotation of auditors. Instead of the annual appointment, individual auditors can hold office for a maximum period of 5 years, whereas audit firms may retain the post for up to 10 years. The first auditor of the company should be appointed by the board within 30 days from incorporation or within 90 days from incorporation by the shareholders on failure to appoint within 30 days.

Corporate books, such as the minute book and other statutory registers, should be kept with the company. The common seal, if available, should also be kept with the company. The requirement for a common seal has now been made optional, and the director's signature is acceptable in lieu of the common seal of the company.

REQUIREMENT REGARDING PAR VALUE OF STOCK

Private limited company

No minimum par value for private limited companies. Normally, used par value is INR 10 per share.

INCREASING OF CAPITALIZATION IF NEEDED

Private limited company

Effectuated by amending the charter document, which requires authorization from both the board of directors and a majority of the shareholders. Further filing requirements with the ROC apply along with the payment of filing fees calculated based on the amount of authorized capital being increased.

SUMMARY OF HOW FUNDS CAN BE REPATRIATED FROM YOUR JURISDICTION (IE DIVIDENDS OR REDEMPTION)

Private limited company

Funds can be repatriated abroad from India via dividends or redemption – commonly referred to as buyback of equity.

RESTRICTIONS ON TRANSFERABILITY OF SHARES

Private limited company

In general, shares of a private limited company are not freely transferable. Shares can be transferred via private sales, with the approval of the board and subject to conditions of the charter documents. A public offer to sell shares or invite fresh capital subscriptions cannot be made (ie, shares cannot be offered to the public). Shares can generally be transferred between existing shareholders.

OBTAINING A NAME AND NAMING REQUIREMENTS

Private limited company

The name should reflect the main objects/business of the Indian company. In case the Indian company uses the same name as used abroad, a letter from the foreign company must also be given. In all states, a corporate ending such as “private limited.” must be used. Further, it is recommended that generic names be avoided and the proposed name include a descriptor. Name can be reserved for a maximum period of 60 days (initially, it will be reserved for a period of 20 days, which can be further extended to another 40 days upon payment of requisite fees) from the date of approval. If not incorporated within this time, the name lapses and becomes available to other applicants. Upon expiry of 60 days, a fresh application is required.

SUMMARY OF "KNOW YOUR CLIENT" REQUIREMENTS

Private limited company

Know-your-client requirements are mandatory for incorporation as well as for the opening of a bank account. Significant beneficial owner filing requirements apply to all shareholders who hold more than 10 percent or more in the company.

APPROVAL REQUIREMENTS FOR AMENDING CHARTER DOCUMENT

Private limited company

Both the board of directors and a majority of shareholders must formally approve any amendment to the charter documents.

LICENSES REQUIRED TO CONDUCT BUSINESS IN JURISDICTION

Private limited company

In addition to incorporation, an entity must obtain registration under:

- (a) The Shops and Establishment Act: shops and commercial establishments (including companies) are required to register under the provisions of state-specific shops and establishments laws. Such laws regulate the working and employment conditions of the employees.
- (b) Importer Exporter Code (IEC): The IEC is required to be obtained by persons (including companies) importing or exporting goods and services from India. In addition to the foregoing, companies may require registrations which are specific to a location (ie, the place from where the business is being conducted and basis the proposed business activities).

As part of the incorporation application, the following licenses and registrations are also issued:

- (a) Permanent Account Number (PAN)
- (b) Tax Deduction Account Number (TAN)
- (c) registrations with the Employees Provident Fund Organization (EPFO) and the Employees State Insurance Corporation (ESIC) and
- (d) Goods and Service Tax Registration (GST)

PROCESS OF PURCHASING AND UTILIZING A SHELF COMPANY

Private limited company

Not widely used.

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