JOINT VENTURE IN INDIA – A GUIDE FOR INVESTORS

India is the world’s twelfth largest economy at market exchange rates and the fourth largest in purchasing power. Economic reforms have transformed it into the second fastest growing large economy in the globe. India is also the tenth most Industrialized nation of the world. A series of ambitious economic reforms aimed at deregulating the economy and stimulating foreign investment has moved India firmly into the front runners of Asia Pacific Region and unleashed the latent strength of a complex and rapidly changing nation. Today India has become the most exciting emerging markets in the world. Skilled Managerial and Technical manpower that supersedes the best available in the World. The Government’s ‘liberalization and economic reforms’ program was initiated way back in 1991 under the new Industrial Policy resolution. The Industrial Policy reforms have substantially reduced the industrial licensing requirements, removed restriction on expansion and facilitated easy access to foreign technology and foreign direct investment. India’s time tested institution offer foreign investor a transparent environment that guarantees the security of their long-term investments. These include a free vibrant press, a well-established judiciary, and a sophisticated legal accounting system and a user-friendly intellectual infrastructure.

Joint Ventures companies are the most preferred form of corporate entities for investment in India. There are broadly two types of foreign collaborations those take place in India namely Financial Collaborations (foreign equity participation) where foreign equity alone is involved and Technical Collaboration (technology transfer) involving licensing of technology by the foreign collaborator on due Compensation. Foreign Companies can set up their operations in India by entering into strategic alliances with Indian partners. There are no separate laws for joint ventures in India. The Companies Incorporated in India even upto 100% foreign equity in defined sectors are treated the same as domestic Companies. As per emerging market requirements, joint ventures have proved to be beneficial in many ways. From experience it is felt that Foreign and Indian Companies enter into JV Contracts mainly for mutual commercial benefit they may be as under:

- For exchange of Technology
• To get access to and enter Global (New) Markets
• To get capital investment
• To take up large projects which can not be handled by a single party
• To introduce internationally competitive products
• To economize cost of operations
• To expand business
• To create goodwill of the Company as a big group
• To manufacture a product in one country so as to export the same from manufacturing country to various countries so as to produce internationally competitive products.
• To globalize products and so on…

A foreign company can commence operations in India by incorporating a company under the Indian Companies Act, 1956 through either:

• A Joint Venture, or
• As an Wholly owned subsidiary.

A foreign company incorporated under the Companies Act is treated at par with any domestic Indian company within the scope of approval and subject to all Indian laws. Foreign Companies can set up their operations in India through:

• Liaison Office/Representative Office
• Project Office
• Branch Office…

Such Offices can undertake any permitted activities. Companies have to register themselves with the Registrar of Companies within 30 days of setting up place of business in India.

The Legal System in India does not provide for any difference with regard to disputes pertaining to Joint Ventures and Ordinary Contract related disputes. The provisions of contract act are applicable to Suits or other proceedings relating to Joint Ventures and the procedure followed is as per the provision of Code of Civil Procedure (CPC).
However, after the incorporation of a Company under Indian Law as a result of a Joint Venture, any dispute arising there from has to be dealt in under Indian Companies Act together with other applicable laws.

With liberalization and privatization, Indian industries have progressed manifold in past years. Also with limits of investment being increased up to 100% in certain sectors, most of the sectors coming under the foreign direct investment route has broadened the horizon for investments. Constantly progressive amendments to corporate laws, particularly corporate governance also facilitates a more transparent and smooth running and operation of companies at large including joint venture companies. The contracts have been incorporating internationally acclaimed terms and conditions. The contracts being framed or entered into are being implemented and enforced by Indian Courts on internationally acclaimed terms and conditions.

**Some important issues to be addressed before entering into JV Contracts**

There are certain issues, which must thoroughly be understood before entering into a Venture namely:

- a) Understand the other party, its commercial background and working culture
- b) Political Environment and Disturbances
- c) Due Diligence – financial/ Commercial, Technical/ Engineering and Legal
- d) Approval from Governmental/ Regulatory Bodies (RBI, SEBI., FIPB etc)
- e) Tax Issues
- f) Environment Clearances
- g) Authorized Capital & funding arrangements.
- h) Labour Laws
- i) Shareholding Pattern
- j) Right to Appoint Directors
- k) Exclusivity
- l) Breach of Contract
- m) Dispute Resolution
- n) Exit Mechanism
The most common areas, where a joint venture may attract legal attention or where a Company may invite trouble for itself are:-

- The Companies entering into joint ventures do not have the requisite approvals from all the concerned Regulatory Authorities.
- The Company is not able to interpret the prevailing tax system.
- The Company not able to resolve disputes arising from day to day functioning.
- The Company Management Control issues are not properly addressed.
- The Disparity between the parties in their ability in funding of business.
- The Company is not able to match up to the required quality norms.
- The parties to the Joint Venture do not have clear and defined exit mechanisms from the agreement they entered into.

Free market reforms in India have spurred great deal of foreign investments yet there are certain crucial major issues, which a foreign entity should be aware of:

- Many companies do not understand how Indian Companies function and often end up choosing wrong partners.
- There is a wide disparity between the funding abilities of the partners.
- Bureaucratic problems continue at State level for getting all the necessary approvals.
- Management Control issues if not addressed properly continues to be major hindrance.
- Lack of awareness about the prevalent local system also poses a lot of difficulty.
- Cultural differences between the parties are one of the major reasons for a lot of misunderstandings.

OTHER ASPECTS

Arbitration/ Alternate Dispute Resolution (ADR)
Looking at the load on the judiciary system, and with the advent of Arbitration system, the parties to a contractual relationship are usually keen to resolve any potential dispute that may arise out of their relationship, through Conciliation or Arbitration. Arbitration is
considered an appropriate means to resolving any eventual disputes between or among the parties.

The New Indian Arbitration & Conciliation Act 1996 has been framed on the lines of the UNCITRAL Model Law on International Commercial Arbitration. The dominant feature of the new law is that it recognizes the autonomy of the parties in the conduct of arbitral proceedings. The Law promotes transparency in the matter of ‘decision making’ by the arbitral tribunal by providing that the arbitral tribunal shall give reasons for its arbitral award. The arbitral award itself once it becomes final, would be enforced as if it were a decree of the court.

The arbitral tribunal has the competence to decide on its own jurisdiction and to consider objection with respect to the existence or validity of the arbitration agreement. The arbitral tribunal is not bound to conduct the proceedings according to the procedural laws. The parties are at liberty to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

### Environmental Guidelines

Environmental considerations, in the wake of industrial developments, cannot be ignored. The Environment Protection Act empowers the Central Government to take all such measures, it considers necessary for preventing and abating pollution. A ‘No Objection Certificate’ from appropriate Environmental Agency of either Central Government or State Government or both is a must for the establishment of any Industry in India. An intended party is required to prepare and submit ‘Environment Impact Assessment Report’ after which no objection is issued by the respective authority subject to various conditions, if any.

### Repatriation

Foreign Capital invested in India with the approval of the Government of India is allowed to repatriate from India along with full capital appreciation. However these guidelines are subject to change, as per policy of Government of India, from time to time.
Taxation
India has well developed tax structures. The main taxes/duties that the Union Government is empowered to levy are Income Tax, Custom Duties, Central Excise, Sales and Service Tax. Since liberalization in 1991 tax system in India has undergone a radical change, in line with the liberal economic policy. Some of the changes are Reduction in Customs and excise duties, lowering of corporate tax and widening of the tax base and toning up the tax administration.

Income Tax Proceedings
The Assessing Officer assesses as to how much income tax is payable by an individual or a Company etc under the Income Tax Act. The Assessing Officer if convinced that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income then he may direct that such assessee shall pay penalty which shall not be less than the amount of tax sought to be evaded, but which shall not exceed three (3) times the amount of tax sought to be evaded. The order of Assessing Officer can be challenged on a question of fact or law, before the Commissioner Income Tax (CIT). Further the order of CIT can be challenged on any question of fact or law before Income Tax Appellate Tribunal (ITAT) under the Act. If the assessee is still grieved from the order of ITAT, he can challenge the order of ITAT before the concerned High Court under writ jurisdiction i.e. under the Article 226 and/or 227 of the Constitution of India. However such a challenge/ petition is maintainable before the High Court only on question(s) of law. The last resort is Special Leave Petition (SLP) before the Supreme Court of India. An SLP can be filed against the judgment of High Court under Article 136 of the Constitution of India only on a question of law.

Stock Market
India has developed its stock market on the world level, its' development in information, communication and network technologies have created paradigm shifts in the securities market operations. Technology has enabled organizations to build new sources of competitive advantage, bring about innovations in products and services, and to provide for new business opportunities. Stock Exchanges of India have realized the potential of IT and have moved over to electronic trading systems long back, which is cheaper, has wider reach and provide a better mechanism for trade and post trade execution.
Some dos and dons for Investors:

- The Companies entering in to joint ventures need to have the requisite approvals from all the concerned Regulatory Authorities.
- The Company entering in to joint venture must clearly understand about the prevailing tax system.
- The Companies entering in to joint ventures must clearly point as to how they are going to resolve their disputes arising out of the relationship.
- The Confidentiality of the agreement of the joint venture must be maintained till the time of parties to joint venture have not signed a formal agreement.
- The parties to the joint venture must ensure that their Brand is continuously developed and at the same time is protected.
- Non-compete etc.

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