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Joint Ventures 2024

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India: Law & Practice

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INDIA

Law and Practice

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Chadha & Co. is a full-service corporate and commercial law firm based in New Delhi, which advises foreign companies doing business in India on their Indian legal and regulatory issues. Clients include Fortune 500 companies as well as SMEs and family-owned businesses from over 40 countries, across industries and areas of law. The firm includes several foreign staff, and the team is supported by industry domain experts. It has a strong reputation for advising on inbound investment, M&A, joint ventures, technology transfers, contracts, competition, private equity, tax, corporate governance, litigation and arbitration, white-collar crime, employment and real estate, among other areas. As well as substantial experience in advising multinational clients on acquisitions, mergers, joint ventures, etc, in India, the firm has a well-respected regulatory practice and maintains close working relations with the government and regulatory agencies in India, enabling it to provide comprehensive advice, representation and solutions.

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1. Market Trends

1.1 Recent Changes

In recent times, India has witnessed significant advancements in its clean energy and automotive sectors, marked by a notable increase in joint ventures. The surge in the clean energy sector is propelled by several key government initiatives such as the National Green Hydrogen Mission and the Green Hydrogen Policy formulated under it, the Global Biofuels Alliance and the Central Public Sector Undertaking (CPSU) Scheme Phase-II (Government Producer Scheme). India now also allows foreign direct investment (FDI) of up to 100% via the automatic route for renewable energy projects, including solar energy projects.

Simultaneously, India's automotive industry has undergone a notable shift in its joint venture strategies, moving beyond traditional manufacturing-focused partnerships towards alliances centred on research and development (R&D), technology transfer, and innovation. Government initiatives such as the FAME India Scheme Phase-II, Product Linked Incentive Scheme, Battery Swapping Policy, Electric Mobility Promotion Scheme, 2024 and tax reduction on electric vehicles are driving forces behind this strategic shift.

These trends underscore how joint ventures are playing a pivotal role in driving technological advancement, fostering innovation, and accelerating the transition towards a sustainable and environmentally responsible future in both the energy and automotive sectors.

The surge in joint ventures and collaborative projects focused on renewable energy, electric vehicles, and other emerging clean technologies is driving greater demand for specialised legal services in India, in areas such as project finance, IP, regulatory compliance, and M&A.

1.2 Key Industries

Recently, several industries, including energy, automotive, construction, finance, and heavy industries, have experienced a significant increase in joint venture activity. This increase is driven by multiple factors across these sectors. Government initiatives at both national and state levels are actively promoting clean energy and sustainable development, which encourages collaboration among companies.

Technological advancements, aimed at improving efficiency and reducing costs, are also pivotal in driving these partnerships forward. Additionally, stricter regulatory compliance with environmental regulations and emission standards has necessitated industries, particularly heavy industries, forging innovative and strategic joint ventures to effectively meet these regulatory requirements.

2. Types of Joint Venture (JV)

2.1 JV Vehicles

In India, joint ventures are typically established either as incorporated joint ventures or as unincorporated joint ventures. An incorporated joint venture, in the form of a private limited company or a public limited company, is the most commonly used structure for setting up a joint venture company in India, especially by companies engaged in manufacturing activities.

A joint venture through a limited liability partnership is not as frequently used in India, but they do find application in fields like professional services and businesses where personal liability

protection is desired while maintaining flexibility in operations.

Unincorporated joint ventures are also not extensively prevalent in India, but they do serve specific purposes. These arrangements are well suited for short-term project-based collaborations and are contractual in nature. The most common forms of unincorporated joint ventures in India are unregistered partnerships, strategic alliances, contractual joint ventures and consortiums. They are used where the parties share mutual business interests and intend to collaborate for a common commercial objective but prefer to remain loosely associated with the other parties.

The main advantages of an incorporated joint venture are that it:

- is a separate legal entity with its own distinct identity;
- gives limited liability to its shareholders and partners;
- possesses perpetual succession;
- has clear structures for accounting and governance; and
- has the ability to own assets in its name.

However, some of the disadvantages are that the process of incorporating a company, including a joint venture company, involves compliance with legal and regulatory requirements, which may be complex and time-consuming. Furthermore, company incorporation involves costs such as registration and legal fees, and compliance costs.

Some of the key advantages of an unincorporated joint venture are that the formation costs and compliance requirements are generally lower compared to those of incorporated joint venture entities. In addition, the parties involved may have greater control over the management and operation of the joint venture. However, some of the major disadvantages are that it does not have a distinct legal entity separate from its participants, it accords unlimited personal liability to its shareholders and partners, and it cannot own assets in its name.

2.2 Choice of JV Vehicle

The factors or drivers that determine the selection of the appropriate joint venture vehicle are a combination of commercial considerations and regulatory requirements, including:

- the intended business activities of the joint venture company in India – eg, manufacturing, project execution, services or trading;
- the intended duration of the collaboration by the joint venture parties;
- the limitation of liability exposure to the joint venture parties, contingent on the nature of the business of the joint venture companies and the degree of associated risk;
- the proposed management framework and the degree of involvement by the joint venture parties in the management of the joint venture;
- the requirement for capital and flexibility to access financing options;
- the intended exit mechanisms from the joint venture and the ease of exit for the joint venture parties;
- considerations related to tax; and
- regulatory requirements.

3. Regulation

3.1 Regulators

The primary regulators that play a role in overseeing and regulating joint ventures in India include the following.

- The Department for Promotion of Industry and Internal Trade (DPIIT) plays a significant role in regulating FDI in the country. It formulates and reviews the foreign investment policy of India and determines the sectors in which FDI is permitted, prohibited or subject to certain conditions. For sectors that require government approval for FDI, the joint venture partners must submit their proposal to DPIIT for consideration and approval. DPIIT assesses the proposal's compliance with FDI regulations, including any security clearances that might be necessary.
- The Reserve Bank of India (RBI) is India's central bank and plays a crucial role in regulating various financial activities, including joint ventures that involve foreign investment or cross-border transactions.
- The Competition Commission of India (CCI) is the regulatory authority responsible for enforcing competition laws in India. Its primary role is to promote and sustain fair competition in the market, prevent anti-competitive practices, protect consumer interests and ensure a level playing field for businesses, including joint ventures.
- The Registrar of Companies (RoC) is a government authority that plays a crucial role in the administration and regulation of companies, including joint venture companies, by overseeing their registration, maintenance of records and compliance with statutory requirements.

Several statutes and regulations govern joint ventures in India, addressing various legal, regulatory and sector-specific aspects. The primary statutes and regulations that regulate joint ventures in India include the following.

- The Companies Act, 2013 governs the formation, operations, management and dissolution of companies, including joint venture companies. It outlines the legal requirements for incorporating joint ventures, and their governance, shareholding and reporting obligations.
- The Foreign Exchange Management Act, 1999 (FEMA) regulates foreign exchange transactions, including those related to joint ventures involving foreign investment. It provides guidelines for FDI, external commercial borrowing and other cross-border transactions.
- India's FDI policy outlines the sectors and activities where foreign investment is allowed and the conditions governing such investments. It also prescribes the sectoral caps for foreign investments, the mode through which foreign investment can flow into and out of India, the prescribed instruments that can be used and the entry conditions attached thereto, if any. Joint ventures involving foreign investment need to adhere to the FDI policy guidelines.
- The Competition Act aims to prevent anti-competitive practices and promote fair competition. It regulates mergers, acquisitions and other combinations that impact competition, including joint ventures.
- The Indian Contract Act, 1872 (ICA) provides the fundamental legal framework for forming and enforcing contracts, including joint venture agreements, in India. It governs the essential principles of offer, acceptance, consideration, capacity to contract, and other key elements that are crucial in establishing the

terms and conditions of joint venture agreements.

3.2 AML

As a member of the Financial Action Task Force (FATF), India is mandated to achieve the FATF's objectives of tackling money laundering and terrorist financing. India has therefore put several anti-money laundering (AML) regulations in place to tackle money laundering and terrorist financing activities, including the following.

- The Prevention of Money Laundering Act, 2002 (PMLA) is the primary legislation for tackling money laundering and related criminal activities in India. The PMLA and rules notified thereunder impose an obligation on banking companies, financial institutions, intermediaries and persons carrying on a designated business or profession to maintain records evidencing the identity of their clients, including joint venture companies in India. In turn, banks and financial institutions are required to report this information to the appropriate government authorities upon the triggering of certain prescribed parameters.
- FEMA deals with foreign exchange transactions and regulates the cross-border movement of funds to prevent illegal activities related to foreign exchange. It mandates the entities involved in foreign exchange transactions – banks, financial institutions, authorised dealers, etc – to follow robust know your customer (KYC) procedures, conduct thorough customer due diligence and maintain records of the same, and share information related to foreign exchange transactions with enforcement agencies, regulatory authorities and other designated agencies to tackle money laundering effectively.
- Securities and Exchange Board of India (SEBI) guidelines: as the regulator for the securities markets in India, SEBI has issued AML guidelines that apply to intermediaries registered with SEBI and other recognised entities under the SEBI Act, 1992, and rules and regulations made thereunder. These guidelines require the intermediaries to establish policies and procedures to prevent money laundering, which must include:
  (a) the communication of group policies related to preventing money laundering and terrorist financing to management and staff members who deal with account information;
  (b) adopting client acceptance policies and procedures that are sensitive to the risk of money laundering and terrorist financing;
  (c) undertaking client due diligence measures, including proper identification requirements;
  (d) the maintenance of records;
  (e) co-operation with law enforcement authorities, including timely information disclosure; and
  (f) the use of internal audits or compliance functions to ensure adherence to policies, procedures and controls related to preventing money laundering and terrorist financing.
- RBI Master Direction – KYC Direction, 2016 (the "KYC Direction"): all RBI-regulated entities in India, including banks, non-banking finance companies, asset reconstruction companies, etc, are required to follow the KYC master directions issued by RBI while establishing business relationships with customers. These directions require these regulated entities to undertake several activities to prevent money laundering, such as establishing customer identity, undertaking client due diligence, maintaining records of various types of transactions, and reporting these transactions to the Financial Intelligence Unit

of India. In 2023, RBI introduced amendments to the KYC Direction, requiring regulated entities to undertake certain additional activities. These include adopting best practices based on FATF standards and guidelines, ensuring customers update their KYC details in a timely way, and continuously monitoring and complying with the UNSC Sanctions list.
- India has signed various Tax Information Exchange Agreements and Double Taxation Avoidance Agreements with other countries to facilitate the exchange of information and prevent tax evasion and money laundering.

3.3 Restrictions and National Security Considerations

In India, the laws and regulations do not typically impose any restrictions on joint venture partners seeking to collaborate. However, national security clearances are required in a few sectors, such as defence, civil aviation and broadcasting. Furthermore, at present, FDI into India and the formation of a joint venture with an entity from any country that shares a land border with India – China (including Hong Kong), Nepal, Pakistan, Bhutan, etc – require prior permission from the Indian government. This process involves multiple layers of security clearance due to national security concerns.

3.4 Competition Considerations

In India, matters concerning antitrust and competition are governed by the Competition Act and the rules and regulations made thereunder. The Competition Act, read together with the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011, mandates that all acquisitions of shares, voting rights, assets or control and mergers and amalgamations (combinations) that cross prescribed thresholds must be notified to the Competition Commission of India for its approval prior to completion of the transaction. The applicable thresholds for this mandatory notification are determined based on assets or turnover, both in India and abroad, and are as follows.

- At the enterprise level, the parties to the combination jointly have:
  - (a) in India, assets valued at more than INR25 billion or a turnover of more than INR75 billion; or
  - (b) in India or outside India, in aggregate, assets valued at more than USD1.25 billion, including at least INR12.5 billion in India, or turnover of more than USD3.75 billion, including at least INR37.5 billion in India.
- At the group level, the group acquirer of the combination jointly has:
  - (a) in India, assets valued at more than INR100 billion or a turnover of more than INR300 billion; or
  - (b) in India or outside India, in aggregate, assets valued at more than USD5 billion, including at least INR12.5 billion in India, or a turnover of more than USD15 billion, including at least INR37.5 billion in India.

Furthermore, there exists a de minimis exemption, or a small target exemption, which excludes certain transactions from being classified as a combination under the Competition Act. Accordingly, enterprises that are parties to a combination where the value of assets being acquired, taken control of, merged or amalgamated is not more than INR4.5 billion in India, or where the turnover is not more than INR12.5 billion in India, are exempt from the pre-notification requirement under the Competition Act. The de minimis exemption is currently in effect until 7 March 2026. In general, the Competition Act prohibits combinations that cause, or are likely to cause, an appreciable adverse effect on competition

within the relevant market in India and any such combination is considered void.

3.5 Listed Party Participants

Under the guidelines outlined in the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (SEBI Regulations), every listed entity is mandated to make disclosures of any events or information that the board of directors of the listed company believe to be material. Joint venture agreements are deemed to be material events under the Regulations. Therefore, if a joint venture partner is a listed entity, it is obliged to disclose the joint venture agreement to the relevant stock exchange where its shares are listed.

3.6 Control/Ownership Disclosure Requirements

A joint venture entity in India is required to disclose and report its ultimate beneficial ownership under various applicable laws and regulations, particularly under the Companies Act and the PMLA, as applicable. Furthermore, as a member of the FATF, India is committed to achieving the FATF's objectives, which include tackling money laundering and terrorist financing, so joint venture entities in India are required to disclose their ultimate beneficial ownership.

Specific rules have been framed under the Companies Act to govern significant beneficial ownership in an Indian company, namely the Companies (Significant Beneficial Owners) Rules, 2018 and its subsequent amendment in 2019. These rules define the concepts of "beneficial interest", "significant beneficial owner" and "significant influence" in the context of companies.

Furthermore, the PMLA mandates banking companies, financial institutions, intermediaries and persons carrying on a designated business or profession to maintain records evidencing the identity of their clients, including joint venture companies in India, and the beneficial owners thereof. In turn, banks and financial institutions are obliged to report this information to the relevant government authorities upon the triggering of certain prescribed parameters. The joint ventures may need to make relevant disclosures to the reporting entities. SEBI and RBI also have their own respective sets of directives concerning the disclosure and KYC requirements for ultimate beneficial ownership of Indian entities.

4. Legal Developments

4.1 Significant Recent Decisions or Regulatory Developments

In recent times, India has undergone significant legal and regulatory reforms that have impacted joint ventures in the country. These reforms include an active liberalisation of various sectors and relaxation of the FDI norms to make them more investor-friendly. Some key sectors like space, retail, defence, and telecommunications have witnessed a relaxation of regulations, enabling smoother entry for foreign companies to establish joint ventures with their Indian counterparts. Concurrently, there is a growing emphasis on industry localisation, catering not only to domestic demand but also integrating Indian businesses into global supply chains.

Furthermore, the Indian Supreme Court recently made a significant ruling that non-signatories to an arbitration agreement can be considered parties under the group of companies doctrine. This doctrine allows a non-signatory group company, which is part of a network of companies linked under a parent company, to be bound by an arbitration agreement signed by another group company. The Court held that this doctrine

applies if there is a discernible common intention to include the non-signatory in the arbitration agreement. This intention can be established through factors such as the non-signatory's participation in contract negotiations, involvement in the performance or termination of the contract, and other actions indicating its role in the contractual relationship.

This ruling of the Supreme Court has significantly broadened the scope of arbitration agreements in India and is particularly relevant for joint ventures, where multiple entities often participate in negotiations, performance, or termination of contracts. The decision not only ensures a more inclusive and efficient dispute resolution process by allowing all relevant entities within a corporate group to be held accountable in arbitration proceedings, but also encourages the development of more robust and secure joint venture agreements.

5. Negotiating the Terms

5.1 Negotiation Documentation

During the negotiating stage of a joint venture, several key documents and provisions are generally used to facilitate discussions, ensure confidentiality and outline the basic terms and conditions. In the pre-joint venture stage, the parties typically consider the following basic documents and market standard provisions.

Basic Documents

- Heads of Terms (HoTs) or Term Sheets, which can also be written in the form of a memorandum of understanding, a letter of intent or a letter of agreement, outline the key terms and conditions upon which the parties to the transaction have agreed in principle. They usually include a broad outline of the objectives of the joint venture, the responsibilities of each of the parties, the ownership structure, governance, capital contributions, management and exit mechanisms.
- A Non-Disclosure Agreement (NDA) is executed before the parties conduct due diligence on each other. It is signed between the parties to protect the confidentiality of sensitive information shared during the negotiation process.
- A Due Diligence Questionnaire (DDQ) is a comprehensive set of questions and requests for information that the parties exchange during the due diligence process. It helps both parties assess each other's financial, legal, operational and other aspects relevant to the joint venture.
- Exclusivity Agreement (Exclusivity Deed): In some cases, the parties might agree to an exclusivity period during which they commit not to negotiate or enter into discussions with other potential joint venture partners. An exclusivity agreement binds the parties for the term agreed upon.
- A Pre-Joint Venture Business Plan outlining the joint venture's objectives, strategies, market analysis, financial projections and anticipated challenges can be helpful during the negotiation process.

Market Standard Provisions

The parties should:

- clearly define the purpose and objectives of the joint venture, including the specific business activities it will engage in;
- specify the contributions (financial, assets, technology, etc) that they will each make to the joint venture, and outline the responsibilities and roles of each of the parties;
- decide on the ownership structure and equity distribution between them;

- define the governance structure, decision-making processes and management of the joint venture;
- address the ownership and licensing of IP rights in the joint venture, if such rights are relevant in any specific transaction;
- outline the conditions that must be fulfilled before they proceed with the joint venture;
- specify the duration of the joint venture, the conditions for termination, and the procedure for exit mechanisms;
- discuss and understand any specific regulatory or legal requirements that may impact the formation and operation of the joint venture; and
- specify the mechanism for resolving disputes that may arise during the pre-joint venture stage and thereafter.

These documents and provisions can vary depending on the nature and complexity of the joint venture. In addition, at the pre-joint venture stage, most of the terms and conditions are typically non-binding, subject to further negotiation and contingent on the successful completion of the due diligence process and the signing of a formal, definitive joint venture agreement.

5.2 Disclosure Requirements and Timing

The SEBI Regulations require every listed entity to disclose events or information that the board of directors believe to be material. These disclosures must be made within 24 hours of the occurrence of the event or information.

Joint venture agreements are considered material events as per the SEBI Regulations. Therefore, if a joint venture partner is a listed entity, it must disclose the joint venture agreement and the material terms thereof to the relevant stock exchange where its shares are listed.

Furthermore, the Indian competition laws mandate that all forms of domestic and international acquisitions and mergers resulting from joint venture arrangements that exceed jurisdictional prescribed thresholds must receive prior approval from the Competition Commission of India before the transaction is completed.

5.3 Set-Up

Joint ventures in India are typically formed as incorporated joint ventures or unincorporated joint ventures. An incorporated joint venture is typically set up by incorporating a company in the form of a private limited company or public limited company under the Companies Act, or a limited liability partnership under the Limited Liability Partnership Act, 2008. It can be established by setting up a new entity or investing in an existing entity as per the modalities agreed upon between the parties. The memorandum and articles of association are essential documents that are required to be filed for the purpose of registering these entities.

Unincorporated joint ventures are contractual in nature; the most common ones include unregistered partnerships, strategic alliances, contractual joint ventures and consortiums.

6. The JV Agreement

6.1 Agreement Documentation

Documenting the terms of a joint venture is essential for establishing a clear understanding between the parties involved and governing the relationship effectively. The documentation process may vary depending on the form of the joint venture vehicle chosen, such as an incorporated company, a limited liability partnership (LLP), an unincorporated partnership or a contractual joint venture.

In the case of an incorporated company, the terms are generally recorded in a joint venture agreement or a shareholders' agreement. These terms are also incorporated into the articles of association of the joint venture company. In the case of an LLP, the terms would be recorded in the LLP agreement. For an unincorporated partnership, the terms would be recorded in a deed of partnership, and in the case of a contractual joint venture, the terms would typically be recorded in a collaboration agreement, alliance agreement or consortium agreement.

However, regardless of the form of the joint venture vehicle, the main terms that a joint venture agreement would typically be expected to cover include:

- objectives and purpose – this clause clearly defines the objectives, purpose and scope of the joint venture company, outlining the specific business activities it will undertake;
- contribution to capital – this clause specifies the contributions of each joint venture party (financial, assets, technology, etc) to the joint venture company;
- additional funding – this clause specifies the manner in which further funding will be made to the joint venture company by the parties;
- corporate governance matters – this clause outlines the composition of the board of directors or governing body of the joint venture company, the manner of holding board of directors' and shareholders' meetings, the quorum for these meetings, and the manner of approving resolutions at the board of directors or shareholder level;
- management – this clause sets out the management and conduct of the day-to-day operations of the joint venture company and the responsibilities and powers of each of the parties in this regard;
- distribution of profits – this clause outlines the manner of distribution of profits from the joint venture company;
- transfer of shares, contributions or capital – this clause sets out the terms and conditions and restrictions on the transfer of shares, contributions or capital by the joint venture partners (provisions like right of first offer, right of first refusal, tag-along right, drag-along right, etc);
- transfer of technology and intellectual property – if technology transfers or transfers of intellectual property are involved, this clause details the terms of such transfer, licensing or usage rights;
- confidentiality and non-compete – this clause includes provisions to maintain the confidentiality of sensitive information and impose non-compete obligations on the parties during the term and post-termination of the joint venture;
- indemnification – this clause outlines the provisions related to indemnification in the case of a breach of any representation, warranty or covenant by a party;
- termination – this clause outlines the grounds for termination of the joint venture company and the consequences thereof;
- reserved matters – this clause specifies the list of reserved matters or affirmative vote matters (ie, those matters that require the vote or consent of some or all of the parties before implementing a business decision);
- governing law and jurisdiction – this clause specifies the governing law and jurisdiction for any disputes related to the joint venture agreement; and
- dispute resolution – this clause establishes the mechanism for resolving disputes arising out of or relating to the joint venture agreement, such as through mediation, arbitration or other dispute resolution methods.

6.2 Decision-Making

The parties involved in a joint venture may deal with or exercise their control over the joint venture company's decision-making at both the board and shareholder levels. Certain decisions are made by the board, while certain other decisions are only made with the approval of the shareholders (ie, the joint venture parties).

The decision-making process and the rights of the board members and shareholders in relation thereto are outlined in the Companies Act. Typically, these statutory rights require decision-making by a majority of the votes at the board level.

At the shareholder level, certain decisions require approval by an ordinary resolution (ie, by simple majority), and certain important matters require approval by a special resolution (ie, by approval of a three-quarters majority of the shareholders present and voting). However, the joint venture agreement between the parties and the constitutional documents of the joint venture company may contain more stringent requirements for decision-making at the board level and at the shareholder level than is required under the Companies Act.

6.3 Funding

In India, joint venture entities are typically funded through capital infusions by the joint venture partners or by taking on debt. The capital in the company is infused by way of equity instruments, or debentures and preference shares that are compulsorily convertible into equity shares. Debt funding involves various sources, including loans from the joint venture partners, loans from banks and financial institutions in the form of term loans, working capital loans or project financing.

Indian joint venture entities can also secure loans from their foreign joint venture partners or foreign banks and financial institutions through external commercial borrowings (ECB), provided they adhere to the prescribed conditions, such as an all-in cost ceiling per annum, a minimum average maturity period, and the end use of the loan proceedings. The Indian authorised dealer bank of the joint venture entity is permitted to allow the creation of a charge on immovable assets, movable assets, financial securities and the issue of corporate or personal guarantees in favour of the overseas lender to secure the ECB to be raised by the Indian joint venture.

The joint venture agreement typically outlines the funding options available to the joint venture entity and establishes the priority for exploring or utilising these options.

It is also important to explicitly spell out the implications of future funding in the joint venture agreement, including provisions for addressing dilution and related matters.

6.4 Deadlocks

Deadlock resolution provisions in joint venture agreements typically follow an escalation matrix with several successive steps. The deadlock may first be referred to the senior officers of the joint venture parties in order to find a commercially reasonable and amicable resolution within a specified timeframe. If the deadlock is not resolved within this timeframe, the parties may have the option to exercise their exit rights, such as put and call options and drag-along and tag-along rights, as may be outlined in their joint venture agreement.

The parties are also given the right to resolve deadlocks through the dispute resolution mechanisms agreed upon in the joint venture agree-

ment. The sequence of exercising these rights for the purpose of resolving deadlocks is contingent on the choice of the joint venture party to achieve a particular commercial objective or their intention to continue their association with the other party involved.

6.5 Other Documentation

Depending on the nature of the joint venture, the industry, the type of financing arrangements and the relationship between the parties involved, other agreements generally include:

- a shareholders' agreement – if the joint venture involves equity participation, a shareholders' agreement may be signed between the shareholders/parties to regulate their rights, responsibilities and shareholding in the joint venture;
- a technology transfer agreement – if the joint venture involves the transfer of technology or intellectual property, a separate technology transfer agreement may be signed by the parties to detail the terms of the transfer, licensing or usage of technology;
- a marketing or distribution agreement – for a joint venture focused on marketing or distribution, a separate marketing or distribution agreement may be signed by the parties to outline the distribution rights and marketing obligations;
- a research and development (R&D) agreement – if the joint venture involves joint research and development efforts, a separate R&D agreement may be signed by the parties to specify the roles, responsibilities and cost-sharing arrangements;
- a service agreement – for a joint venture providing services to each other or third parties, a service agreement may be signed to define the quality, performance and deliverables of the services; and
- an employment agreement/secondment agreement – if employees are seconded or transferred between the parties, employment or secondment agreements may be signed by the parties to define the terms of employment, responsibilities and remuneration.

7. The JV Board

7.1 Board Structure

Board structures in India are unitary in nature. Generally, there are two common ways to structure a board in the case of a joint venture entity:

- the proportional representation method, under which the representation on the board of directors is in proportion to the shareholding ratio of the parties involved in the joint venture company, so each party's representation on the board corresponds to their respective ownership stake; and
- the equal representation method, under which the board is structured in such a manner that the minority shareholders (ie, shareholders having less than 50% of the shares in the joint venture company) also have equal representation on the board.

Weighted voting rights for board members are not recognised under Indian law. Accordingly, all board members possess equal voting rights, each carrying a single vote. There is an exception for the chairman of the board, who may hold the right to cast a second vote if there are equal numbers of votes for and against any resolution. However, it is imperative for this provision to be explicitly mentioned in the joint venture agreement and the articles of association of the joint venture company.

7.2 Directors' and Board' Duties and Functions

Directors hold a fiduciary duty to consistently act in the best interests of the company, which includes joint venture companies. They must act in good faith at all times to promote the company's objectives and are obliged by law to avoid situations where they could gain an undue advantage at the company's expense.

In situations where a director is appointed by a specific joint venture participant, an obligation or duty towards that participant may arise due to their nomination. However, this duty must not override their fiduciary duty to the joint venture company itself. If faced with such a conflict, the director is duty bound to take the decision that would be in the best interests of the company, failing which he or she would be in breach of their fiduciary duties.

Directors can delegate the following powers to a committee of directors, through a resolution:

- to borrow money;
- to invest the company's funds;
- to grant loans;
- to give guarantees; or
- to provide security in respect of loans.

7.3 Conflicts of Interest

Directors have a statutory obligation to avoid situations that give rise, or may give rise, to a conflict of interest, which means circumstances in which the directors have, or can have, a direct or indirect interest or duty that conflicts, or possibly may conflict, with the interests of the company. However, in practice, conflicts of interest do occasionally arise, especially when a shareholder is involved in business transactions with the joint venture company. To address these conflicts, the Companies Act permits directors to recuse themselves from participating in meetings where such conflicted transactions or matters are proposed to be considered. Moreover, significant decisions may be reserved for approval by the shareholders, thereby eliminating any decision-making powers of the directors and preventing any potential conflict at the board level.

8. Intellectual Property and the JV

8.1 Key IP Issues

There are several key IP issues that should be considered at the time of entering into a joint venture and before setting up the joint venture entity. If a joint venture involves the transfer of technology or IP, a separate technology transfer agreement may also be signed to detail the terms of the transfer, licensing or usage of technology or IP. The key IP issues to be addressed in a joint venture agreement/technology transfer agreement include the following.

- IP licence and usage rights: the terms and conditions of the IP licences granted by one joint venture party to the other party or to the joint venture company should be clearly defined in the joint venture agreement/technology transfer agreement. The scope, duration, territory, royalty or consideration to be paid for the licensed IP and any restrictions on the use of the licensed IP should be clearly defined in the agreement.
- Ownership of new IP: the joint venture agreement/technology transfer agreement should clearly outline the ownership and rights to any new IP created during the term of the joint venture. It should specify whether the new IP will be jointly owned or belong to one of the joint venture parties or the joint venture company.

- Confidentiality and non-disclosure: the joint venture agreement/technology transfer agreement should include provisions to maintain the confidentiality of sensitive information exchanged between the joint venture parties during the collaboration.
- Termination: the joint venture agreement/technology transfer agreement should address the treatment of IP assets upon the termination or dissolution of the joint venture company and how the IP assets would be transferred or divided amongst the joint venture parties.

8.2 Licensing and Assignment

IP rights are usually licensed to the joint venture entity by the joint venture parties, if necessary. In some cases, the IP may also be assigned to the joint venture entity. The terms and conditions of the licensing arrangements and assignments are subject to negotiation among the parties and can be commercially decided by them.

At present, there is no restriction on the payment of royalties by the Indian joint venture company to the foreign joint venture IP owners. The joint venture parties have the option to retain ownership rights to their background IP and license it to the joint venture entity.

Generally, when the joint venture comes to an end, the implications for the IP rights, including transferred IP, developed IP or foreground IP, are dealt with in the joint venture agreement itself. The parties may mutually agree on various options, such as a buyout of the IP from the joint venture entity, obtaining a licence for use, or a sale of the foreground IP to a third party and distribution of the proceeds.

9. ESG and the JV

9.1 ESG Regulations and Developments Affecting JVs

ESG norms essentially require every company to be held accountable for the responsibility it has towards the environment as well as the people who comprise the entire ecosystem, whether as employees, customers or other stakeholders. It helps in identifying and mitigating potential risks related to environmental and social issues, which can have financial implications for companies. Adopting ESG best practices can enhance a company's reputation, attract customers and improve brand value. Both the joint venture participants and the joint venture entity should therefore consider taking action and implementing measures in connection with ESG principles.

At present, in India, there is no codified and consolidated legal framework that governs ESG-related issues. However, a plethora of laws cover ESG-related matters that apply to the operations of corporate entities in India, including:

- the Environment (Protection) Act, 1986;
- the Water (Prevention and Control of Pollution) Act, 1974, for environmental protection;
- the Factories Act, 1948;
- shops and establishment laws for employee benefits;
- the PMLA;
- the Prevention of Corruption Act, 1988;
- the Companies Act; and
- the SEBI Act, 1992, for corporate governance.

In addition, various other initiatives have been introduced by the Indian government in relation to ESG.

- The National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVGs) encourage businesses to take on social responsibility and advance economic development. In March 2019, NVGs were revised and the National Guidelines on Responsible Business Conduct (NGRBC) were released.
- The Report of the Committee on Business Responsibility Reporting by the Ministry of Corporate Affairs (an Indian government ministry responsible for regulating corporate affairs and ensuring the proper functioning of companies operating under various laws and regulations of India) mandates voluntary ESG disclosures for all other listed and unlisted companies.
- The Sustainable Finance Group was set up by RBI in May 2021, with the aim of introducing a regulatory framework, including appropriate ESG disclosures, that could be mandated for banks and other regulated entities to promote sustainable practices and mitigate climate-related risks.
- In July 2023, SEBI introduced the Business Responsibility and Sustainability Reporting (BRSR) Core framework, which extends its applicability to the value chain partners of the top 250 listed companies based on market capitalisation. Effective from the financial year 2024-25, these value chain partners will be required to make BRSR disclosures on a "comply-or-explain" basis, which means they must either comply with the specified disclosure requirements related to sustainability and business responsibility or provide an explanation for non-compliance.
- The Green Credit Rules, 2023 introduced by the Ministry of Environment, Forest and Climate Change in October 2023, mark a significant step towards promoting environmental conservation and sustainability in the country. As part of a broader initiative, these rules aim to incentivise industries, organisations, and individuals to engage in environmentally positive activities by generating "Green Credits", which are tradable in the domestic market.

A "Green Credit" is defined as a singular unit of an incentive provided for a specified activity, delivering a positive impact on the environment. These credits can be earned through a variety of activities, such as tree plantation, water management, waste management, air pollution reduction, etc.

By offering these incentives, the government aims to encourage the widespread adoption of environmentally responsible practices across different sectors.

10. Completion of the JV's Purpose, Winding Up and Redistribution of JV Assets

10.1 Termination of a JV

Contractual or unincorporated joint ventures come to an end by way of termination of the joint venture agreement, followed by the distribution of assets and remaining liabilities of the joint venture company. The terms outlined in the joint venture agreement play a pivotal role in determining the closure of the joint venture.

For incorporated joint ventures, including an LLP, the approach to ending the joint venture generally rests with the parties involved, who have the discretion to decide the method for concluding the joint venture. This may involve either winding-up the joint venture entity or transferring ownership of one party to another.

The general matters dealt with on termination of the joint venture include:

- the distribution of the assets and liabilities of the joint venture entity, according to the agreed-upon share of the parties;
- addressing the ownership and usage rights of any IP created during the term of the joint venture;
- addressing any costs associated with the termination and winding-up of the joint venture entity; and
- resolving any outstanding disputes between the parties during the termination process as per the procedure set out in the joint venture agreement.

10.2 Transferring Assets Between Participants

Transferring assets between joint venture participants requires careful consideration to ensure fairness, compliance with legal and accounting standards, and the protection of each party's interests. There can be differences between assets originally contributed to the joint venture company (contributed assets) and assets generated or acquired by the joint venture company during its operations (owned assets).

The key considerations for the transfer of contributed assets include the following:

- a valuation of the assets should be carried out by the parties based on an agreed-upon valuation method;
- the accounting treatment for the assets should be transparent, and any gains or losses resulting from the transfer should be appropriately accounted for in the joint venture company's financial statements;
- the transfer of the assets may have tax implications for both the transferring party and the joint venture company – the parties would be required to comply with the tax regulations; and
- all necessary legal formalities would be required to be followed by the parties, including obtaining required approvals, executing transfer documents and updating ownership records.

For the transfer of joint venture-owned assets, apart from the key considerations mentioned above, other key considerations include:

- identification of the assets by the parties before the valuation thereof is carried out, based on an agreed-upon valuation method; and
- evaluation of the impact of transferring the assets on the joint venture company's ongoing operations, as it may affect its ability to carry out its business activities.

The specific considerations and differences between transferring contributed assets and owned assets of the joint venture company will depend on the individual circumstances of the joint venture and the terms set out in the joint venture agreement.

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