JOINT VENTURE: CONCEIVABLE ISSUES IN FORMATION AND MANAGEMENT

Sunil Tyagi
Zeus Law Associates
Kenji Suzuki
KW Partners LLC.

Introduction

The number of Japanese companies registered in India totalled 1,441, and the number of Japanese business establishments was 5,102, as of October 2018[1]. In the same survey conducted 10 years ago, the number of Japanese companies and business establishments were 438 and 555, which means that the number of companies and that of business establishment have been increased by more than 3.3 times, and more than 9 times, respectively, for the ten years. In comparison of the number of Japanese companies in overseas countries, it is estimated that India is ranked, next to China, the United States, Germany and some of Southeast Asian countries including Thailand and Vietnam[2]. By industry, almost half of the total (49.7%) is manufacturing, and out of it, the automotive and transportation equipment is the most. According to the survey on Overseas Business Operations by Japanese Manufacturing Companies, India ranked No.1 as the most promising countries over the medium-term (3 years)[3].

The way of Indian entry by companies varies, including local subsidiary, branch office, and liaison office. In case of full-scale entry, it is common to establish a local entity. In this case, it is an option to establish a joint venture by co-investing with local partner, in addition to a wholly-owned subsidiary. In case of industry sectors where 100% foreign direct investment is allowed, entry through wholly-owned subsidiary is a popular option for large-scale enterprises which own ample resources, however, joint venture also becomes an effective option for other enterprises which have limited management resources, particularly, management resources for overseas businesses. India is huge, and the nature of the market is substantially different from China or Southeast Asia, not to mention Japan. There, price competition is generally highly intensive, and a range of complicated issues including religion, caste and labour issues need to be taken into consideration. Prudent and reliable local partner will play key roles to address these issues, and could be critical to increase the chance of success. Suzuki and Honda, both of which have achieved today's great successes, started their Indian operations

[1] Survey by the Embassy of Japan in India and the Japan External Trade Organization (JETRO) released in December 2018. https://www.in.emb-japan.go.jp/PDF/2018_co_list_en_r.pdf
[2] Estimated based on the date from JETRO homepage (https://www.jetro.go.jp/en/)
[3] Survey Report on Overseas Business Operations by Japanese Manufacturing Companies_Result of the JBIC FY2019 Survey – Japan Bank for International Cooperation https://www.jbic.go.jp/en/information/press/press-2019/pdf/1127-012855_1.pdf

through joint venture with local partners (Suzuki formed the joint venture with Indian Government). On the other hand, in general, Indian people tend to be much more assertive than Japanese and their values and behaviour are very different from those of Japanese in many cases. If an inappropriate local partner is selected, the Japanese side is likely to experience substantial difficulties. For instance, in case of manufacturing, it is aimed to achieve profitability by improving product quality and productivity through a wide range of activities including stringent quality and delivery management, continuous cost reduction, as well as increasing business volume through expansion of sales channel and customer acquisition, which will usually take certain period of time. In case that the joint venture faces difficulties where original business plans have not been able to be achieved as scheduled, and unanticipated additional funding becomes necessary, disagreement between both parties may become more obvious. The disagreement is, for example, the way of thinking and value in matters including, quality of product and service, customer, additional investment, business strategy, management and employees, acceptable time horizon till profitability, commitment to the joint venture, and fundamental corporate philosophy, among others. In such cases, management decision may become increasingly difficult to make, which can result in complete stalemate in joint venture operations so that the status is developed into serious troubles. This problem might not be so easy to solve, and substantial amount of efforts, time and capital are necessary even in case the joint venture is turned around.

There are various issues to consider for market entry through joint venture. The most important is to identify and select a reliable partner, set up a joint venture with them under the term which is agreeable and acceptable. To achieve it, it is essential to make enough preparation to find out a desirable partner candidate(s), make extensive discussion with them critical terms and conditions, as well as detailed matters which should be agreed, and make agreement on written document. Particularly, the both parties need to reach agreement on how to solve foreseeable issues, prior to starting the joint venture. Once the relationship between parties gets worsen, nothing can be agreed effectively. To achieve this goal, it is imperative to get support from experts who are familiar to the local matters including business circumstances and legal systems.

Status of Direct Investment in India

It is long established that India, with its vast pool of human resources and untapped market areas, is an attractive and preferred destination for foreign individuals and companies to achieve economic growth by capitalizing upon lucrative business opportunities that it offers. India, with a population of over 1.3 billion, is one of the largest consumerist markets in the world.

India's relaxed foreign direct investment ('**FDI**') policy norms and booming business environment is evident in view of the increasing FDI equity inflows recorded during the past decade. Additionally, the Make In India initiative has also drawn significant FDIs and Foreign Institutional Investments into India. Moreover, the ease of doing business rank of India has moved 14 steps ahead from the ranking in the last year. From 77th rank in 2019, India's rank has gone up to 63 in 2020. Different sectors or industries allow varied rates of FDI. In some of the sectors, 100% FDI is allowed, while in other sectors including print media such as newspaper and periodicals, insurance, and multi brand retail trading, 26% to 51% of FDI is allowed. However, there are also some industries in which FDI is completely prohibited such as lottery business, chit funds, gambling business, atomic energy etc. The Consolidated FDI Policy, 2017 which provides different rates for different sectors can be accessed at *https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf.*

With the blurring of geographical borders, the strengths of the Indian market can be profitably capitalized by way of entering into one of the various forms of business organizations with an Indian partner. Joint venture formation is one of such numerous forms.

What is a joint venture?

A joint venture ('**JV**') means any agreement whereby two or more parties collaborate with each other to pool their resources for the purpose of running a long – term business or to achieve a particular commercial objective.

A JV has not been defined under the Companies Act, 2013 or in the rules and regulations made thereunder. However, the Indian Accounting Standard (Ind AS) 27 which deals with 'Financial Reporting of Interests in Joint Ventures', defines a JV to mean a contractual arrangement whereby two or more parties undertake an economic activity that is subject to joint control. [4]

Vide General Circular No.09/2017, dated September 05, 2017, the Ministry of Corporate Affairs has clarified that a JV would mean a joint arrangement, entered into in writing, whereby the parties that have joint control of the arrangement, have rights to the net assets of the arrangement.[5]

Amongst the various forms of corporate structure, a JV company is the most preferred form of association for foreign investors who are interested in doing business in India.

Incapability to foresee the possible contingencies and standoffs which might emanate during the course of running a JV company and lack of deliberation to arrive at a mechanism to address those situations can become a major issue which can later result in closure of a JV. The foreign investors must endeavour to have these issues satisfactorily addressed in the JV documentation, to minimize the potential for any discord at a later stage.

This article discusses critical issues which foreign investors must settle with the potential local partners while structuring the JV, and finalizing the documentation.

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[4] Accounting Standard 27 Financial Reporting of Interests in Joint Ventures issued by Council of Institute of Chartered Accountants of India.
[5] http://www.mca.gov.in/Ministry/pdf/GeneralCircular_05092017.pdf.

1. **Selection of Prudent Local Partner(s)**

One of the major difficulties faced by any foreign investor, is the identification and selection of a suitable and reliable local partner(s), with whom a foreign investor can potentially collaborate in order to carry out business. Selection of a good and prudent local partner or associate is the key to the success of any JV and for selection of a local partner, compatibility is the foremost criteria.

Studies demonstrate that about a significant percentage of international JVs fail on account of various factors. More often than not, the causes for such failures remain cultural incompatibilities, differences in management style and practices, disagreement with respect to control over the operations of the JV. In addition, lack of consensus with regard to business strategies and policies has also been a significant contributor towards failure of a JV. Therefore, it is necessary to work out such modalities in order to allow the parties to run the JV in a smooth and effective manner.

Due Diligence of local partner: Before zeroing on a specific partner, utmost care must be taken to identify and inspect the legal, financial and tax related aspects of the prospective partner(s). A formal due diligence must be conducted by appointing professional agencies to check the background and history of the potential partner(s) by conducting desktop research, site visit and meetings. It is also important to conduct a background check of the promoters and analyse aspects including their political exposures, the past as well as the on-going joint ventures entered into by the prospective partner(s), the outcome thereof and the past disputes & litigations that they may have been involved in.

2. **Contracts**

Once the basic and preliminary due diligence about the local partner is complete and the foreign investor decides to explore dealing with such partner by engaging itself in negotiations with such partner, the parties begin to formalise their relationship by entering into various agreements in a stepwise manner.

Confidentiality cum Non-Disclosure Agreement: In a JV, it is rather common for the potential partners to evaluate each other's expertise and abilities and meticulously discuss the terms of the transaction. In such a scenario, the parties usually sign a confidentiality cum non-disclosure agreement for the purpose of keeping all the discussions and negotiations confidential.

Memorandum of Understanding / Letter of Intent / Term Sheet (Preliminary Document): The proposed investment by foreign partner could either be:

- in any existing company of the prospective partner; or

- by incorporating a new company.

If the proposal is pertaining to an investment into a new company to be incorporated jointly, parties agree on basic commercial terms on which they will proceed to form their relationship. Such in principle terms are agreed and captured in a preliminary document which forms the basis of proceeding further for the parties. Another condition precedent to proceeding further, (in case of investment in an existing company), is the satisfactory due diligence by foreign partner of the existing company or of the business of the existing company or any other subject as may be important to such transaction.

The preliminary document highlights the broad vision of business plan, the intention of the parties, broad interest, duties and responsibilities of the parties and the basis of the future of the JV. Moreover, it explicitly specifies whether it is binding or not. This document being one of the fundamental documents in the process of JV formation requires detailed negotiation before finalization.

Due Diligence of existing company: After the execution of preliminary document, if the investment is proposed to be in an existing company, a due diligence of the existing company is carried out. Generally due diligence is carried out through the legal, financial and technical consultants of the foreign partner. It covers all financial, corporate, legal and technical aspects along with compliances related to the business and prospective JV company.

Joint Venture Agreement / Shareholders' Agreement: If the foreign investor is satisfied with the due diligence process and chooses to move forward with the proposed transaction, first definitive agreement is entered into between the parties.

If the investment is in an existing company by purchase of shares, the agreement entered into for purchase of shares is called a Share Purchase Agreement ('**SPA**'). If the investment is by investing funds in the existing company through subscription of shares, it is called or Share Subscription Agreement ('**SSA**'). Simultaneously or as soon as investment is made, a Shareholders Agreement ('**SHA**') is also executed between the parties to prescribe their shareholding ratio as well as to provide terms that govern the relationship of the parties.

If the investment is in a new company proposed to be incorporated, the agreement that may be executed before the incorporation of a JV Company is called a Joint Venture Agreement (**JVA**). The JVA makes provisions for incorporation of company by the parties and governs the relationship between the parties.

As mentioned above, JVA or SHA is an essential document which governs mutual rights and obligations of the parties to the JV and regulates the relationship amongst shareholders. It stipulates the provisions with respect to the management and operation of the company. In addition, it addresses the matters such as right to transfer interests in shares, voting rights, etc. and manages the operation of the JV by detailing the procedure to appoint directors etc. The JVA / SHA broadly sets out the following terms and conditions which must be conscientiously negotiated and finalized:

i. Structure of the JV;
ii. Object and scope of the JV;
iii. Scope of operations;
iv. Shareholding pattern;
v. Appointment of Board of Directors;
vi. Management Committee;
vii. Shareholders' rights including affirmative voting rights in case of minority;
viii. Quorum and venue for general meetings;
ix. Casting vote provisions;
x. Funding or Financial Contributions;
xi. Transferability of shares;
xii. Intellectual Property Rights;
xiii. Course of action in a deadlock situation;
xiv. Non-compete and non-solicitation;
xv. Termination and consequences of termination;
xvi. Exit Mechanism;
xvii. Dispute Resolution Mechanism; and
xviii. Governing law and jurisdiction;

Further, in case an investor chooses to invest in an existing company, an SHA has to be entered into in addition to a SSA or SPA or both, as the case may be.

Since most of the rights and obligations of the parties emanate from the SHA / JVA, these documents along with the other ancillary documents may be drafted, vetted, negotiated and finalized carefully only after consulting lawyers well-versed in international and multi-jurisdictional laws and procedures and applicable Indian laws.

Understanding of terms and conditions of JVA /SHA: We will now proceed to understand the significance of various terms and conditions of the JVA or SHA.

- **Shareholding and the Rights attached thereto**

The terms of JVA / SHA with respect to percentage of shareholding in the JV company are required to be negotiated in a careful manner as the ownership rights of the parties emanate therefrom.

Subject to the agreement between the parties to a JV, the rights that are usually attached to shareholders holding different stakes in the JV have been tabulated herein below:

Shareholding Threshold	Rights Attached
A. Less than or up to 10%	i. Right to attend the shareholder's meetings. ii. Every equity shareholder shall have a right to vote on every resolution placed before the company. iii. Meeting of the shareholders at shorter notice requires consent of not less than 95% of the shareholders entitled to vote. iv. Right to inspect the particulars of the register required to be kept at the registered office of the company, containing the details of the directors and key managerial personnel. v. Right to inspect minute-books of the general meetings of the company. vi. Right to receive a copy of the financial statements of the company.
B. More than 10% but up to 25%	In addition to the rights provided under Part A hereinabove: i. Right to requisition an extraordinary general meeting. ii. Right to approach the National Company Law Tribunal ('**Hon'ble Tribunal'**) to challenge variation of rights of shareholders. iii. Right to move an application before the Hon'ble Tribunal for reliefs in cases of oppression and mismanagement. iv. Right to initiate a class action suit in specified circumstances.
C. More than 25% but less than 50%	The shareholders holding more than 25% but less than 50% shall have the below mentioned rights in addition to the rights provided under Part A and B hereinabove. However, they have the right to prevent the passing of special resolutions* for which 75%

	affirmative votes are required. Therefore, the consent of such shareholders is mandatory for the following critical issues: i. change of line of business; ii. change of name; iii. modifications of by-laws; iv. buy-back of shares; v. inter-corporate loans & investments crossing the permissible threshold limits; vi. mergers & demergers; vii. selling substantial business; viii. removal of Auditors; ix. shifting the registered office from one State to another. Thus, such shareholders have the right to block resolutions on special matters.
D. 50%	In addition to the rights provided under Part A, B and C hereinabove, the shareholders holding 50% shall have the option to prevent the passing of ordinary resolutions – i.e., those resolutions which require simple majority. However, the other 50% shareholders shall also have the same right so there is a risk of deadlock in case parties have different positions in a specific agenda.
E. More than 50% but less than 75%	The shareholders holding more than 50% but less than 75% shall have the following rights in addition to the rights provided under Part A, B, C and D hereinabove: Right to pass ordinary resolutions – i.e., those resolutions which require simple majority. Such shareholders have the right to manage most of the affairs of the company. However, they will still not be in a position to pass any special resolution on their own.

F. 75% but less than 90%	The shareholder holding 75% or more but less than 90% shares are, in addition to the rights stipulated in Part A, B, C, D and E above, entitled to pass all resolutions – i.e., ordinary as well as special resolutions. Such shareholders virtually control all the aspects of the company. The matters that requisition a special resolution include alteration of Articles of Association ('**AoA**') or Memorandum of Association ('**MoA**') under Section 13 and Section 14 of the Companies Act, 2013 respectively, reduction of share capital under Section 66 of the Companies Act, 2013, restriction on the powers of the Board under Section 180 of the Companies Act, 2013 etc.
G. 90% or more	In addition to the rights enumerated above, shareholding of 90% or more entails effective ownership of the company. Such shareholders have the right to offer to buy out the minority shareholders.

In addition to the rights under Part A above, the shareholders holding 10% or less, also have another right. In case an acquirer becomes a registered holder of 90% or more of issued equity share capital, minority shareholders are permitted to offer their shares to the acquirer at a price determined on the basis of a valuation of a registered valuer. Therefore, all the shareholders have an exit opportunity as dissenting shareholders regardless of their shareholding.

*****A Special Resolution is a resolution whereby the intention to propose the resolution as a special resolution is specified in the notice calling the general meeting or in other intimation and out of the total votes, at least $3/4^{th}$ affirmative votes are required to pass the resolution.

- **Reserved Matters / Affirmative veto matters**

Generally minority shareholders while negotiating terms of JVA / SHA, in order to protect their rights, demand that for taking a decision on certain matters, no decision can be taken without the consent of minority shareholders. Such matters are called reserved matters.

Having reserved matters and / or affirmative rights under an SHA is an effective mechanism which can be used by minority shareholders to protect their interests in a company. These matters are negotiated at the time of finalizing the terms of a JVA / SHA in order to avoid onesided decision making. Some examples of reserved matters which minority shareholders generally insist on are enumerated herein below :

i. Amendment to the AoA / MoA of a JV company;
ii. Shifting registered office from one State to another;
iii. Appointment and removal of KMP;
iv. Change of name of the JV company;
v. Change of line of business;
vi. Sale of substantial business;
vii. Debt funding in the form of loans, inter-corporate deposits, debentures etc.;
viii. Merger and de-merger;
ix. Initiating critical legal disputes;
x. Expenditure beyond permissible limits.

- **<u>Equal shareholding (50:50) and Deadlock situation</u>**

In case of equal shareholding between the parties, if there is a disagreement with respect to any aspect, no decision can be taken in a shareholders meeting and such a situation is called deadlock. The deadlock can result in complete stalemate in the functioning of the JV. The manner in which such circumstances are to be dealt with are required to be deliberated upon beforehand so that the necessary course of action can be resorted to. Mechanisms such as Russian Roulette may be adopted whereby each party can make an offer to buy the other at a specified price. Whosoever offers higher price gets the chance to buy the other party's entire shareholding.

Casting Vote: A deadlock can also arise with respect to a particular matter during the voting process carried out in a meeting of Board of Directors. However, in case of deadlock in meeting of board of directors, unless otherwise provided in the AoA, in case of an equality of votes, the Chairman has a second or casting vote. Therefore, in cases where shareholding of both the partners are equal (50:50), it is important to discuss and decide the terms relating to casting vote and if no casting vote is to be given to the chairman then the same must be expressly set out and incorporated in the AoA.

Further, before crystallizing the shareholding pattern, it is necessary that the parties consider the following aspects:

i. Equity participation by local & foreign investors
ii. Agreement to future issue of capital
iii. Voting rights the parties will have as shareholders
iv. Special voting rights attached to any or all shares, if any

v. Quorum and notice requirements for shareholder meetings. [*Discussed under the 'Management Structure*]
vi. Limitation on possible locations for shareholders' meetings, if any
vii. Transfer or sale of shares and restriction related thereto
viii. What happens if any one party wants to sell out?
ix. Buyback of shares
x. Method of valuation of shares for the purposes of the transfer provisions;
xi. In case transfers are permitted, pre-emption rights (rights of first refusal), if any, of other parties before any sale to a third party takes place
xii. Should any transfers (Ex. intra-group transfers or transfers to family trusts) be permitted free of pre-emption rights?
xiii. 'Russian Roulette' or 'Drag-Along' or 'Piggy Back' ('Tag Along') rights
xiv. Will any new shareholder be required to become a party to the JVA?
xv. Will the JVs name have to be changed if one of the partners exits the JV?
xvi. What will happen to the arrangements between an exiting shareholder and the JV, such as intra-group loans, intellectual property licences, supply agreements, technical collaboration agreements, management services, and so on?

- **Restriction on transfer of Shares and Exit Mechanism**

As per the definition of a 'Private Company' stipulated under Section 2(68) of the Companies Act, 2013, a private company means a company which by its articles can restrict the right to transfer its shares. Therefore, a private company can place restrictions on the free transferability of shares. However, the Companies Act, 2013 is silent on the nature of such restrictions. On the other hand, the shares of a listed company are freely transferrable.

Exit Mechanisms: While deliberating upon the terms of an SHA, the parties should also mindfully ponder upon the exit routes available to the parties. The said rights and restrictions relating to exit must be decided beforehand so as to avoid any possible gridlocks in future. Usually, the common exit options which may be mentioned in an SHA are specified hereunder:

- Pre-emptive rights: A clause to the effect that in case a shareholder wants to exit the company by selling off his / her shares, he / she is barred to sell off the said shares to an outsider without first offering the same to the existing shareholder who has the option to buy his / her shares.

- Tag along option: A right available to minority shareholders to tag along with a selling shareholder and sell his shares in the process.

- Drag along option: Suitable for majority shareholders to drag along the other shareholders while selling their shareholding.

- Russian Roulette: Under this mechanism, one of the parties to the JV can make an offer to the other party to purchase the other party's share or sell to the other party its share at a specified price. The mechanism can be adopted in a deadlock situation in a 50:50 JV.
- Valuation of shares: The approach and method of valuation of shares in case the parties wish to sell their shares also needs to be agreed.

3. Incorporation of Company or amendments in Memorandum and Articles of Association of the existing company

Once the JVA or SHA as the case may, is entered into between the parties, the next step is to set up the JV Company (if new company is to be incorporated) or to amend the charter documents -i.e., the MoA and the AoA of the existing company to capture the terms of JVA/SHA.

In case of incorporation of a new JV company, the promoters are required to file numerous documents with the Registrar of Companies. Two of the most significant documents are Memorandum of Association and Articles of Association, which serve as the charter documents of the JV company. In order to avoid any potential impasse in the functioning of the JV, it is imperative that the MoA and AoA are properly contemplated upon, drafted and finalized. MoA contains name clause, place clause, object clause, liability clause and capital clause. Hence, MoA furnishes the details and particulars including the proposed name of the company, the place of its registered office, its objects, liabilities of its members and its share capital. The parties to the JV should ensure that the main object clause is wide enough to cover the proposed activities of the JV Company. It is pertinent to mention that if the FDI is in a sector falling under the automatic route where no prior approval of the Government of India is required, the Objects clause must not contain any object or activity which is restricted or prohibited under the Foreign Exchange Management Act.

AoA is a binding legal document that formalises the constitution of the new company (JV) and contains regulations for internal management of the company thereof. It sets out the rules or bye-laws for the conduct of meetings of the Board of Directors and Shareholders, issue and transfer of Shares, different class rights of shareholders, powers and duties of Directors, Managing Director etc.

Some of the terms and condition of the JVA / SHA entered into between parties does not bind the third parties unless these are incorporated in the AoA of the JV company. The terms of the JVA / SHA are required to be incorporated in and be consistent with the terms of the AoA, as in the event of any dispute between the AoA and the JVA / SHA, the AoA prevails with regard to third parties. The AoA and MoA prevails over the JVA / SHA and the Companies Act, 2013 has an overriding effect over the AoA and the MoA as per Section 6 thereof.

4. Management Structure

- **Composition of Board of Directors**

The management of a JV, to a great extent, depends upon the percentage of shareholding held by the JV partners. The rights arising out of different level of shareholding have already been elaborated above. The percentage of shareholding can be a decisive factor in determination of the position of a partner / associate in the JV so formed.

The Board of Directors of a public limited company and a private limited company are required to have a minimum of 3 directors and 2 directors respectively. Further, a company can have a maximum of 15 directors. It is essential to pre-decide the appointment of directors and ensure an equitable representation of all the parties on the Board in order to avoid any potential conflicts.

Following are some of the aspects relating to the constitution of Board of Directors that need a careful consideration by the parties to a JV:

- Foreign National: The applicable Indian legislations, namely, the Companies Act 2013, the Foreign Exchange Management Act, 1999, the Securities and Exchange Board of India Act, 1992, does not prohibit a foreign national from becoming a director in the Board of directors of an Indian company, however, subject to fulfillment of prescribed conditions.
- Resident Director: Every company is required to have one resident director on the Board – i.e., one who stays in India for a total period of 182 days in the previous calendar year.
- Managing Director: A foreign national, intending to become a managing or a whole-time director, should not be less than 21 years of age and not more than 70 years of age. He should neither be insolvent nor have, at any time, been convicted of any offence for a period of more than 6 months. For listed companies, the foreign national should be staying in India at a stretch for at least twelve months, immediately preceding the date of his appointment. In case, any of the above mentioned criterion is not fulfilled then Central Government's approval is required.

- **Meetings of Board of Directors**

Following provisions of law are required to be kept in mind with respect to procedural requirements of Board meetings:

- Number of meetings: Section 173 of the Companies Act, 2013 mandates every company to hold its first meeting of the Board within 30 days from the date of its incorporation and henceforth hold at least 4 meetings every year in such a manner that not more than 120 days – i.e., 3 months should intervene between 2 meetings.

- Notice requirement: For the purpose of convening a meeting, a written notice of at least 7 days is required to be given to every director at his / her address registered with the company. Such notice can be sent by hand delivery or by post or by electronic means.

- Quorum: The quorum prescribed for Board meetings is one-third of the total strength or two directors, whichever is higher. It is pertinent for a prospective foreign partner to mandatorily have at least one of their representatives on the quorum of the Board meetings in order to ensure a balanced representation of interests and prevention of unilateral decision making.

- Location of the Meeting**:** The Board meetings take place at the scheduled venue stated in the notice for the said meetings. A meeting may be held at the registered office of the company or at any other place, including a remote place. A meeting may be held in India or abroad. In case the AoA provides for a specific place / city in which the meetings should be held, the meetings should be held only at that place / city. If a meeting of the Board is held elsewhere, contrary to such clause in the AoA, none of the decisions taken by the Board at such meeting can be put into operation in any manner.[6] The Companies Act, 2013 does not prescribe any restrictions with respect to the conduct of a Board meeting and the same may be held at the convenience of the parties.

- Decision making process: The decisions on the agendas are made by a process of passing resolutions which entail the process of voting. The same can be done by way of show of hands or electronically. Further, members of a private company may request that a written resolution be circulated. According to Section 111, the company, upon requisition in writing by members of the Board, provide a notice to the members regarding any resolution which may be moved at the meeting and circulate any statement which describes the matters that may be dealt with at the meeting.

- Chairman of the Board Meeting: The appointment of a Chairman is usually done by adopting the process of election whereby the members of the Board elect a person from amongst themselves to act as a Chairman. As per Secretarial Standards on General Meetings (SS-2) issued by the Institute of Company Secretaries of India, a Chairman is required to conduct the general meetings. Further, as stipulated above, as per the Secretarial Standard on the Meetings of the Board of Directors (SS-1), in the event of equality of votes on a particular matter at a meeting, the Chairman may cast a second or casting vote on such matter, subject however to any provision to the contrary, in the AoA.

[6] Guidance Note on Meetings of Board of Directors (Based on Revised SS-1 effective from October 1st, 2017) issued by the Institute of Company Secretaries of India

Therefore, if AoA expressly prohibits the exercise of casting vote by the Chairman, in which case, the Chairman shall not have a casting vote. In case the AoA are silent, the Chairman may have a casting vote and the discretion whether or not to use his casting vote vests entirely with the Chairman. Since the casting vote of a JV can be a decisive factor in so many matters, it becomes necessary for the prospective partners of a JV to either choose a Chairman beforehand or resort to the process of election for the same.

- Kinds of Board meetings**:** There are two kinds of general meetings which may be scheduled by a company for the purpose of carrying out the business of the company – i.e., annual general meeting ('**AGM'**) and extraordinary general meeting ('**EGM'**). As per Section 96, in addition to the other meetings scheduled by a company, it is mandatory to hold an AGM and not more than 15 months should elapse between two AGMs. The first AGM is required to be held within a period of 9 months from the date of closure of the first financial year. Further, whenever deemed fit, an extraordinary general may be called by the Board.

- **Other Important Aspects**

  - Appointment of Key Managerial Personnel: The companies as prescribed under the Companies Act, 2013, are required to appoint a whole-time key managerial personnel ('**KMP'**) including managing director or Chief Executive Officer or manager and in their absence, a whole-time director. A Company Secretary and a Chief Financial Officer are also required to be appointed. It is necessary for the parties to a JV, to decide in advance the party who shall be entitled to appoint the various KMP since it can be a huge factor which can potentially influence the decision making with regard to important aspects.

Parties must negotiate the appointment of KMPs of the company carefully and further ensure there are appropriate provisions in the agreement detailing the rights of the parties to nominate persons to the KMP positions.

5. Critical Financial and Legal Functions

The following are the functions that the foreign nationals and / or companies proposing to enter into a JV in India should be mindful of, as it may be a potential cause of concern if the provisions related to the same are not thought through and documented in the agreement between the parties:

i. Opening of Bank accounts and signatories thereof;
ii. Choosing authorized signatories for the purpose of executing various procedural and other documents;
iii. Legal compliances;

iv. Authorization to sue or defend the JV Company;

Since the foreign JV shareholder is not locally present to oversee day to day affairs of the company, it is critical for such shareholder to have its nominee as an authorized signatory/ representative for company's bank account operations and management, for execution of various critical documentation and for overseeing legal and finance functions to be able to control the company operations.

Conclusion

According to the data from International Monetary Fund's October World Economic Outlook, India is now the world's 5th largest economy. Hence, it has numerous economic opportunities which may be capitalized upon by the foreign nationals and / or companies. JVs are like marriages and require full time commitment, patience, understanding and compromise. The initial phase in process of formation of a JV is crucial and necessitates careful contemplation and negotiation on the terms and conditions of the JV, as well as understanding of provisions of Indian law. The foreign investors should deliberate upon and be well advised on the provisions of law and the issues that might arise in the formation and management of a joint venture, to be able to become a part of India's growth story.

Disclaimer: This publication is intended to provide a general guide to the subject matter and does not deal with every important topic or change in law and is not intended to be relied upon as a substitute for legal or other advice that may be relevant to the reader's specific circumstances. If you have found this publication of interest and would like to know more or wish to obtain legal advice relevant to your circumstances, please contact the author.

About the Author:
Sunil Tyagi is the Founder and Senior Partner at ZEUS Law having its principal office at Delhi, India. ZEUS Law is a full service law firm providing legal corporate and litigation advisory services to its clients across the various industries and sectors. ZEUS Law regularly advises its clients from Japan on their investments and joint ventures in India.

Email : sunil.tyagi@zeus.firm.in

TEL : +91 11 4173 3090

Kenji Suzuki is the Founder and Managing Partner at KW Partners, cross-border financial advisory and business consulting firm in Tokyo, Japan. The services include joint venture arrangement, equity financing, M&A, market entry and business development consultation. KW Partners provides services to clients from Japan and India.

Email : ksuzuki@kwpartners.co.jp

TEL : +81 3 6386 3996

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