Cross-Border Joint Venture and Strategic Alliance Guide (India)

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This Cross-Border Joint Venture and Strategic Alliance Guide (India) discusses relevant law and practice related to the formation and operation of cross-border joint ventures, including corporate and contractual joint ventures, in India. For other jurisdictions see the Cross-Border Joint Venture and Strategic Alliance Resource Kit.

Structures

What are the standard forms of joint ventures / strategic alliances and common features of each?

A joint venture is the coming together of two or more persons or entities to achieve a common goal or objective whereby the persons or entities contribute their share of capital or assets or make other contributions and agree to share the risks and rewards of that venture. The joint venture partners agree on achieving a common goal and their rights, roles, and responsibilities with respect to the joint venture.

Typically, joint ventures in India are formed as:

- Incorporated joint ventures –or–
- Unincorporated joint ventures

Incorporated joint ventures are undertaken through an incorporated entity such as a limited liability company or a limited liability partnership (LLP). In an incorporated joint venture, the joint venture partners will have an economic interest based on the capital or assets contributed to the venture. In a company, their interest is in the form of share capital, whereas in an LLP, their interest is in the form of a pre-agreed profit-sharing ratio.

In cases of unincorporated joint ventures, the venture is pursued without using any legal entity. For example, sometimes a traditional form of a partnership firm established under the provisions of the Indian Partnership Act, 1932 (i.e., a firm that is not an LLP), is used. Sometimes, joint ventures are entered into by simply executing a cooperation agreement, collaboration agreement, or strategic alliance agreement, which sets outs the terms of the joint venture.

What are some of the key corporate governance, tax, regulatory, and timing considerations that could impact the choice of structure?

Some of the key issues that could impact the structure of a joint venture include the following:

- **Domicile of the joint venture partners.** If the joint venture partners are located in India, there is a lot of flexibility in the type of structure that can be adopted. However, where one or more of the joint venture partners is/are resident(s) outside India, the modes of joint ventures become restricted. India is an exchange-

controlled economy and the provisions of the Foreign Exchange Management Act, 1999 (FEMA), and related rules/regulations apply in relation to foreign investment in India and payments to be made to persons resident outside India. Foreign investment is permitted in a limited liability company, and in many cases, in an LLP. Unincorporated joint ventures, such as collaboration agreements, may be entered into and payment of trademark fees, license fees, technical assistance fees, or service fees under such agreements to a joint venture partner resident outside India will be subject to rules/regulations framed under FEMA as well. However, foreign investment in an unincorporated partnership on a repatriation basis needs prior regulatory approval and is not common in the Indian context.

- **Sources of funding.** Funding is a very critical aspect of a joint venture. The funding for a joint venture can either be from internal sources (i.e., by the joint venture partners or through internal accruals of the joint venture) or through external sources, such as third-party debt. In the case of a joint venture between an Indian partner and a foreign partner, separate regulations under FEMA apply both in the cases of equity funding and debt funding. Debt may be raised from a foreign partner under the external commercial borrowing (ECB) route or by the issuance of non-convertible debentures (NCDs). Only certain types of entities are permitted to raise an ECB or issue NCDs to foreign investors.
- **Profit-sharing mechanism.** In a company, the profit sharing is based on the equity share capital held by the joint venture partners. Equity share capital with differential rights for dividends is permitted in a limited number of companies only and subject to some stringent conditions. In an LLP and unincorporated partnership, the profit sharing can be agreed to under the relevant agreement.
- **Limitation of liability.** The liability of joint venture partners is limited in a limited liability company to the extent of the shares held by them only to the extent of capital unpaid by the partners on those shares, and in an LLP to the extent set out in the LLP agreement. The liability of joint venture partners in an unincorporated partnership is unlimited under Indian law. Under contractual joint ventures, the parties are free to agree on the liability among themselves.
- **Tax benefits.** Tax considerations are often a determining factor in the choice of entity. For instance, LLPs have gained favor in the recent past, as distributions to the LLP partners is not subject to tax in the hands of the LLP. While a company as a joint venture is preferred, it may not be as tax effective as an LLP.
- **Life of a joint venture.** If a joint venture is to be for a limited duration, usually a company or an LLP is not preferred, as winding down a company or an LLP could be time-consuming. In such cases, parties may prefer an unincorporated partnership or structure the joint venture through a contract which terminates on completion of the venture.
- **Regulatory approvals.** Certain regulatory approvals may only be obtained by incorporated entities and therefore, in such cases only incorporated joint ventures are set up.
- **Public offer and listing.** If the intention of the joint venture partners is to make public offers and list the joint venture entity on Indian stock exchanges at a later stage, then such joint venture would have to be structured as a company because the current regulatory framework does not provide for listing of LLPs and unincorporated joint ventures.
- **Timing considerations.** It usually takes between four and six weeks to incorporate a limited liability company or an LLP in India once the relevant applications have been made. Unincorporated partnerships can be set up faster, although in some states in India, such partnerships also need to be registered. Contractual joint ventures usually do not need registration and can be entered into by executing the relevant contracts.

Can a joint venture or strategic alliance be formed for any purpose?

There is no restriction on the purpose for which a joint venture can be formed as long as the venture is for a legally permissible activity. However, in case of a joint venture between an Indian partner and a foreign partner, the provisions of FEMA and the foreign direct investment policy of India (FDI Policy) would be applicable. Under the FDI Policy, foreign direct investment (FDI) is prohibited in certain sectors, such as real estate (other than development of townships, construction of residential/commercial premises, roads or bridges, real estate investment trusts), lottery, gambling and betting, atomic energy, operation of railways (other than for certain infrastructure required for construction, operation and maintenance of railways) etc. Therefore, a joint venture in these activities with a foreign partner will not be permitted.

There are certain sectors where FDI up to 100% is permitted without approval of the government of India (such as manufacturing, construction and development, greenfield pharmaceuticals (those investments where the foreign investor invests in the construction of new production and operational facilities from the ground up), healthcare, and infrastructure) and certain sectors

where foreign investment up to certain limits is permitted with prior government approval. Therefore, for the latter activities, FDI can be made only up to the permitted level of foreign shareholding. For example, in the insurance sector and defense sector, the permitted foreign shareholding is 74% and therefore, the foreign joint venture partner can hold only up to 74%. Beyond this, it will require approval of the government of India. For example, in defence, government may approve FDI beyond 49% if it is likely to result in access to modern technology.

It may be noted that in certain cases and sectors (such as print media, establishment of satellites, private security agencies and multi-brand retail), FDI can only be made if approved by the government. Therefore, for a joint venture with a foreign partner in these sectors, a prior approval of the government (through the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry) is required before the foreign partner can make any FDI in the Indian joint venture company. Further, prior approval of the government is required in case of any FDI from any entity located in a country that shares a land border with India (such as China, Pakistan, Nepal) or where the beneficial owner of any investment in India is situated in or is a citizen of any such country which shares a land border with India.

Are there any forms of joint ventures or strategic alliances that are more typically used in certain industries (such as real estate, pharmaceutical, or technology)? Why are such forms favored?

The structure and form of a joint venture does not really depend upon the sector or industry in which the joint venture is entered into.

Generally, the preferred choice for joint venture partners is to form a limited liability company. This is because the liability of joint venture partners in a limited liability company will be limited only to the extent of their unpaid share capital, if any, committed to the joint venture company. In other words, if the joint venture partners have paid the entire amount on their share capital, they would not be bound to make any further contribution to the company or third parties (on behalf of the company), even if the joint venture company becomes insolvent, their personal assets will not be at stake. In addition, there are other advantages to have a limited liability company, including that it is a more regulated form of entity with established law and judicial regime.

If there is a specific requirement for a particular sector or industry, then the joint venture agreement (JVA) or the shareholders' agreement (SHA) between the partners should provide for those sector specific requirements.

It may be noted that sometimes in the case of infrastructure projects, the government tender documents will require successful bidders to set up a specific form of entity for the project. Also, in the real estate development sector, many times, joint development agreements are entered into between the landowners and the developers, as such arrangements are more efficient from a stamp duty perspective.

Are there any industries that would not permit or would not be conducive to a joint venture or strategic alliance?

There are no industries in which a joint venture is not permitted, subject of course to the limitations of forming a joint venture with foreign partners, as described above, where the FEMA provisions and the FDI Policy is applicable.

How is a joint venture or strategic alliance structured to minimize potential liability? Are there instances where parties to a venture or alliance may knowingly choose a vehicle without limited liability and, if so, why would such party make that choice?

As mentioned above, usually, joint ventures are structured as limited liability companies or in some cases, as LLPs. In both these structures, the liability of the joint venture partners is capped.

In some cases, parties may choose to have a joint venture through an unincorporated partnership form (where each partner's liability is unlimited). This may be done because it is legally not permitted to carry out such business through a company or LLP (such as legal services). Sometimes, it may be done to minimize the tax impact on the partners. For instance, profits received in the hands of the partners of an unincorporated partnership firm are not taxable, as the partnership firm pays the taxes before distribution of profits.

Further, there could be instances where the joint venture is only for a specific purpose or short lived—in that case, parties may not want to set up a legal entity, as winding down such an entity could be time-consuming. Instead, they may decide to enter into an unincorporated partnership agreement or other collaboration or alliance agreement to carry on the joint venture which terminates on completion of the venture or specified objective.

Also, as mentioned above, in the real estate development sector, often the landowner and builder will enter into a joint development agreement to develop a project. The developer will usually take full ownership of and liability regarding the project and agrees to indemnify the landowner. This is because a significant amount of stamp duty is payable if the underlying land is transferred in the name of the developer, and thereafter, transferred from the developer to purchasers of the individual units.

Statutory Framework

What is the applicable statutory framework for each structure discussed above?

Company. A limited liability company is incorporated in accordance with the provisions of the Companies Act, 2013 (Companies Act), and rules and regulations framed thereunder. For the first time, the term "joint venture" has been defined in the Companies Act through the Companies Amendment Act, 2017. However, it may be noted that the term has been defined only for the purpose of the definition of an "associate company" under the Companies Act. Joint venture has been defined to mean a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

LLP. A limited liability partnership is incorporated in accordance with the provisions of the Limited Liability Partnership Act, 2008, and rules and regulations framed thereunder.

Unincorporated Partnership. An unincorporated partnership is formed under the provisions of the Indian Partnership Act, 1932.

Agreements. Contractual agreements between parties are governed by the provisions of the Indian Contract Act, 1872.

Are there statutory or other limits on the duration of a joint venture or strategic alliance?

Joint ventures can be formed to pursue a definite activity, for a specific period or for an indefinite period. If they are set up to fulfill a specific objective or for a finite period, then upon accomplishment of the objective or expiration of the period, the joint venture can be terminated. These are however subject to contractual agreements between the joint venture parties and there is generally no statutory limit or duration for a joint venture in India. Where there is FDI in an Indian joint venture, there may be minimum lock-in periods applicable before the foreign joint venture partner can exit. For example, in the construction development sector, if there is FDI in a completed project, the foreign joint venture partner is locked in for three years from the date of the FDI.

Do joint ventures or strategic alliances have to be registered with any federal or local body other than the Registrar of Companies where the charter or other organizational documents must be filed in order to effect the entity's formation?

Joint ventures do not have to be *per se* registered with any regulatory authority. However, depending upon the form of the entity used for the joint venture, there could be a requirement of registration of that entity. While on the one hand, the limited liability company and an LLP require registration with the Registrar of Companies (ROC) in the jurisdiction where they are incorporated, no such registration is required for a traditional form of unincorporated partnership or for a joint venture pursued through a cooperation/alliance agreement. However, in some cases, the partners of the unincorporated partnership firm may register their partnership deed. Also, in some states in India, an unincorporated partnership needs to be registered with the local authorities.

Further, depending on the business being carried on, the joint venture entity or alliance may have to be registered with or approved by some regulatory authorities. By way of illustration:

- An insurance joint venture will need approval of and registration with the Insurance Regulatory and Development Authority.
- A joint venture for non-banking financial services will need approval of the Reserve Bank of India (RBI).
- A joint venture for an asset management companies will need to be approved by the Securities and Exchange Board of India.
- A joint development agreement in the real estate development sector will need to be registered with the local land registry.

Regulatory Environment

Are joint ventures or strategic relationships specifically regulated?

There are no specific regulations framed to regulate a joint venture. General corporate commercial and economic laws and industry-specific regulations will be applicable to any joint venture in India. Further, FDI in a joint venture is subject to compliance with the FDI Policy, FEMA, and the rules and regulations thereunder.

Are there any antitrust matters to be considered in forming a joint venture or strategic alliance?

The Competition Act, 2002, and the rules and regulations framed thereunder prohibit entering into anti-competitive agreements. The Competition Act, 2002, among other things, provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition, or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India. Any agreement entered into in contravention of this will be void. In this regard, it is also provided that any agreement entered, or any practice carried on, or decision taken by any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provisions of services which has the below attributes, shall be presumed to have an appreciable adverse effect on competition.

- Directly or indirectly determines purchase or sale prices
- Limits or controls production, supply, markets, technical development, investment, or provision of services
- Shares the market or source or production or provisions of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way
- Directly or indirectly results in bid rigging or collusive bidding (Bid rigging means any agreement between enterprises or persons referred to above who are engaged in identical or similar production or trading of goods or provision of services that has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.)

However, it may be noted that the above provisions do not apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition, or control of goods or provisions of services.

Further, the Competition Act, 2002, prohibits entering into any combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Therefore, any acquisition of shares in an Indian enterprise may need prior approval of the Competition Commission of India if certain thresholds in relation to turnover and asset size are crossed. This is however, subject to a number of exceptions.

Formation

What are the procedures in forming a joint venture or strategic alliance?

Company. In order to form a limited liability company, a registration with the ROC is required. For this purpose, a standard set of documents is required to be submitted to the ROC. In the case of a limited liability company, as a first step, digital signatures are required for the proposed directors of the company. In the case of a private limited company, a minimum of two directors are required and in the case of a public limited company, a minimum of three directors are required. Once digital signatures are obtained, all directors are required to obtain a director identification number (DIN). Thereafter, the availability of the proposed name for the entity needs to be checked to ensure that the proposed name does not resemble or is similar to the name of an entity already registered and in existence. Upon acquiring the name for the proposed entity, the application for registration of the entity is made to the ROC along with the standard documents, including the charter documents, (i.e., memorandum and articles of association for a company). Upon being satisfied with the application and the documents submitted, the ROC gives a certificate of incorporation that brings the entity into existence.

LLP. Just as in the case of a limited liability company, in order to register an LLP, first all designated partners need to obtain a Designated Partner Identification Number (DPIN), which can be done by filing a simple e-form. In case the designated partner already has a DIN, then that can also be used as DPIN. Thereafter, a digital signature certificate is required. All the filings to be done by the LLP are required to be filed with the use of digital signatures by the person authorized to sign the documents. The availability of the proposed name for the LLP then needs to be checked to ensure that the proposed name does not resemble or is similar to the name of any LLP already registered and in existence. Upon acquiring the name for the proposed entity, the application for registration of an LLP is made to the ROC, along with the incorporation document and subscriber's statement. Once the LLP is incorporated, an initial LLP agreement is to be filed within 30 days of incorporation.

Unincorporated Partnership. In the case of an unincorporated partnership, the partners enter into a partnership agreement or deed of partnership.

What documentation/agreements are required to form a joint venture or strategic alliance?

The roles, responsibilities, rights and obligations of joint venture partners are generally recorded in a legally binding JVA or the SHA. Sometimes, although in very rare situations, the parties could just have a verbal understanding with no written agreement (i.e., an oral agreement). As mentioned, it is uncommon to see parties only have an oral agreement.

Some of the important terms of the joint venture that are provided in the JVA and SHA include:

- Objective, purpose, and scope of the joint venture
- Manner of participation/contribution to the capital of the joint venture by the joint venture partners
- Manner of further/additional funding to be made to the joint venture by the joint venture partners
- Corporate governance matters, such as the composition of the board of directors / governing body of the joint venture, manner of holding board of directors' and shareholders' meetings, quorum for these meeting, manner of approving resolutions at the board of directors/shareholders level
- Management and conduct of day-to-day operations of the joint venture and the roles and responsibilities of each of the joint venture partners in this regard
- Manner of distribution of profits from the joint venture
- Terms and conditions and restrictions on the transfer of shares/contribution/capital by the joint venture partners (i.e., provisions like right of first offer, right of first refusal, tag along right, drag along right, etc.)
- Resolution of deadlock between the joint venture partners
- Restrictions, if any, on the joint venture partners or the joint venture entity
- Non-compete and non-solicitation provisions
- Representations and warranties by joint venture partners to each other
- Provisions related to indemnification in the case of breach of any representation or warranty or breach of covenants
- Grounds of termination of the joint venture and the consequences thereof
- Confidentiality and non-disclosure provisions
- Reserved matters or affirmative vote matters (i.e., those matters that require vote/consent of some or all joint venture partners before implementing that business decision)
- The governing law for the joint venture and the dispute resolution related provisions

Company. The terms will be recorded in a JVA or SHA and which are also incorporated in the articles of association of the company.

LLP. The terms will be recorded in the LLP Agreement.

Unincorporated Partnership. The terms will be recorded in the deed of partnership.

Collaboration or Alliance Agreements. The terms will be recorded in a written contract between the parties.

What filings with governmental authorities (if any) are required to form the joint venture or strategic alliance?

There are no specific filings required to form a joint venture. As mentioned above, companies and LLPs have to be registered with the ROC. Filings with specific regulators may be required depending on the nature of the business of the joint venture. In the case of any FDI in the joint venture entity, certain filings in relation to receipt of foreign capital and issuance of securities to foreign joint venture partners will have to be made with the RBI through authorized dealer banks in India.

Becoming a Member/Partner

What are the different levels of equity and voting participation in the various forms of joint ventures and strategic alliances? How flexible is each of the structures?

In the case of a joint venture structured as a company, the voting rights usually depend upon the level of shareholding. Under Indian law, every equity shareholder of a company limited by shares and holding equity share capital has a right to vote on every resolution placed before the company. The voting can either be by show of hands or by poll. In case the voting is by poll, the voting rights will be in proportion to that member's share in the paid-up equity share capital of the company.

Minority partners in joint ventures also usually insist on certain protective rights such as anti-dilution rights, pre-emptive rights upon new share issuances, and veto rights or affirmative rights where their consent is required in relation to certain business matters.

There is also a concept of issuing shares with differential voting rights under the Companies Act. Private companies are allowed to issue such shares. Other companies (except for listed companies which cannot issue inferior voting rights share vis-à-vis the rights on equity shares that are already listed) may issue such shares subject to compliance with certain conditions. In case the joint venture company has issued differential voting right shares, then the voting rights of the joint venture partners will be dependent on the terms of the differential voting rights shares.

In an LLP and unincorporated partnership firm, the voting rights that partners have would be subject to the terms of the relevant agreement they have entered into. Normally, the voting rights would be based on the amount of capital contributed by the partners, although the partners may agree to other terms, as set forth in a contract.

What forms of contributions (e.g., cash versus in-kind) may be made by members/partners?

Joint venture contributions by partners are typically in the form of cash. However, in-kind contributions (such as the transfer of assets or the provision of services) are also permissible, although not very common. In the case of a joint venture with a foreign partner, contribution other than cash, by a foreign partner is not permitted (except in certain instances).

Further, the contribution by a foreign partner in an Indian company has to be made at not less than the value of shares calculated by a valuer in compliance with the pricing guidelines prescribed by the RBI. For example, for unlisted companies, the RBI guidelines provide that the investment in an Indian company cannot be less than the value arrived by a valuer calculated in accordance with the internationally accepted pricing methodology for valuation on an arm's length basis.

The JVA usually provides for the manner of contribution by the joint venture partners, and states that their contribution will be in the ratio of their shareholdings. Only when a joint venture partner is not interested in further contributing can the other joint venture partner(s) take-up the unsubscribed contribution of the other partner(s).

The Companies Act allows the issuance of shares for consideration other than cash, provided that a report of a registered valuer is obtained in respect of valuation of the consideration and filed with the ROC. In addition to filing of the registered valuer's report, a copy of the contract, duly stamped with the appropriate value of stamp duty, pursuant to which the shares were allotted together with any contract of sale (if relating to a property or an asset or a contract for services or other consideration), is also required to be filed with the ROC. Even in the case of an oral contract, the company has to file the complete particulars of the contract, stamped with the same stamp duty as would have been payable had the contract been a written contract.

Are there any statutory or other requirements regarding the number (i.e., minimum or maximum) or type of members (as in age requirements, legal status, or individual or juridical person) in the joint venture or strategic alliance?

Key considerations regarding joint venture partners are set forth in the chart below.

Type of entity	Minimum members	Maximum Members	Other conditions
Company (private)	2 members	200 members	• Members can be individuals, trustees, bodies corporate, Hindu Undivided Family (although the shares are held in the name of the Karta), LLP • Individuals must be more than 18 years; below 18 years must be represented by their guardian
Company (public)	7 members	Not limited	

LLP	2 partners	Not limited	• Limited partners may be individuals or a body corporate • Designated partners have to be individuals • Must have at least 2 designated partners and 1 designated partner must be resident in India
Unincorporated Partnership	2 partners	50 (no limit in the case of Hindu Undivided Family or an association or partnership, if it is formed by professions (such as lawyers) who are governed by any special statutes)	

Can a public sector body be a member/partner in the joint venture or strategic alliance?

Yes. In the case of the government, the shares in a joint venture company are held in the name of the President of India.

What restrictions, other than contractual ones, are there on a member/partner transferring its interest in the joint venture or strategic alliance?

In the case of a private company, the shares are not freely transferable and prior approval of the board of directors is required before any transfer. Shares of a public company are freely transferable—while they need board approval for transfer as well, the grounds on which such transfer can be refused in a public company are very limited. However, SHAs that provide transfer restrictions are valid and binding between the shareholders of the company including a public company. Such transfer restrictions are incorporated in the articles of association of the company.

There are no statutory restrictions on transfer of partnership interests, but these are often documented in the LLP Agreement or partnership deed.

In certain sectors, any change in certain percentage of shareholding or change in control of an Indian company may need regulatory approval (for example, the banking sector, insurance sector and non-banking financial services sector).

In the case of any subscription to shares of a listed company, there are certain lock-in restrictions prescribed under Indian securities law, thus in that case shares cannot be transferred for a certain time period.

The FDI Policy also provides that any optionality clauses (which obligate the Indian company or Indian shareholders to buy back the securities held by the foreign partner) are permitted subject to certain conditions. Such buy-back of securities from the foreign investor is permitted at the price prevailing / value determined at the time of exercise of the option so as to enable the investor to exit without any assured price. The provision of optionality clauses is subject to the following conditions:

- There is a minimum lock-in period of one year or a minimum lock-in period as prescribed under FDI regulations for a specific sector, if any, whichever is higher.
- After the lock-in period, as applicable above, the non-resident investor exercising option/right shall be eligible to exit without any assured price.

Therefore, a non-resident joint venture partner cannot have a put option right with an assured price on investment.

Restrictive Covenants

What restrictive covenants can apply to members/partners relating to corporate opportunity, non-competition, and non-solicitation?

It is very common for JVAs to provide for a restriction on competing in a similar business as the joint venture during the term of the joint venture, and for a few years after the termination of the joint venture. While non-compete provisions are enforceable during the term of the joint venture, such provisions may not be enforceable once the

joint venture is terminated. This is because any kind of restriction to undertake any business after the joint venture is terminated may amount to a restriction on carrying on trade that is void pursuant to the Indian Contract Act, 1872. However, if as a result of the termination of the joint venture, the entire stake of the joint venture is bought by one joint venture partner from the other joint venture partner(s) for consideration, then the selling joint venture partner could be restricted from carrying on a similar business within reasonable time limits and geographical boundaries.

Non-solicitation provisions are also found in such agreements, and can be enforceable both during and after the termination of the JVA.

Management

How is the joint venture or strategic alliance managed in the different structures? Are there statutorily mandated supermajority provisions?

The management of the joint venture company vests with its board of directors. The board of directors is not permitted to exercise any power or do any act or thing that is required, whether by statute or by the memorandum or articles of a company, to be exercised or done by the company in a shareholders' meeting.

Resolutions under the Companies Act are approved either by a simple majority vote (called the ordinary resolution requiring 50% plus one vote of members present and voting) or a supermajority vote (called the special resolution requiring at least 75% vote of members present and voting). There are certain powers that the board can only exercise with consent from the shareholders of the company by way of special resolution.

In the case where a joint venture partner holds less than the required level of shareholdings to block the other joint venture partner(s) from passing an ordinary resolution or special resolution, as the case may be, there are generally (through the JVA) reserved matters or affirmative voting rights, which will not be approved unless the minority joint venture partner approves.

The management of an LLP is governed by the terms of the LLP Agreement. The partners in the LLP will appoint or nominate at least two partners as designated partners. The designated partners in the LLP are normally in charge of the day-to-day functioning of the LLP and compliance of applicable laws.

In an unincorporated partnership, the management is governed purely by the terms of the partnership deed.

What mechanisms are there for resolving deadlocks on major decisions?

There are no statutory mechanisms to resolve deadlocks. However, contractually, joint venture partners are free to formulate deadlock resolution mechanisms. These could range from mediation and arbitration, to put / call options, Texas shootouts, Russian roulettes, Mexican shootouts, drag-along rights, and liquidation of the company.

What procedures apply for electing and removing managers in joint ventures and strategic alliances?

The shareholders have the power to appoint or remove directors (including a managing or full-time director) by an ordinary resolution, provided the director is given a reasonable opportunity of being heard. Before removing a director, a special notice is required, a copy of which the company has to send to the concerned director. The concerned director is given the right to present her/his case through representation that, if a request is made by such a director, has to be provided to the shareholders of the company, if time permits. If the representation cannot be sent to the shareholders of the company due to lack of time, the director may require that such representation be read at the meeting.

A director can also voluntarily resign from the directorship by giving a notice in writing to the company. The board of directors of the company has to take note of the resignation on receipt of such notice and will have to inform the ROC. The fact of the resignation has to be recorded in the report of the board of directors at the immediately following general meeting of the shareholders of the company. The director who has resigned may also submit the copy of his resignation, along with the detailed reasons for the resignation, to the ROC within 30 days of resignation.

Certain classes of companies (except private limited companies) are required to appoint a full-time key managerial officer (personnel) (i.e., a managing director or chief executive officer or manager) and in their absence a full-time director and a company secretary and a chief financial officer. Removal of these personnel (other than a managing director or full time director, which can be removed by the shareholders as described above) can be effected in accordance with the terms of appointment of these personnel.

In the case of an LLP, the designated partners are appointed in accordance with the terms of the LLP agreement, provided the designated partners give their consent to act as the designated partner. Any vacancy arising in the office of designated partners has to be filled with a new designated partner within 30 days. In the event a designated partner is not appointed, or if at any given time there is only one designated partner, then each partner of the LLP will be deemed to be a designated partner. The cessation of a designated partner, as such, will be in accordance with the terms provided in the LLP agreement.

Allocating Profits, Losses, and Distributions

How are profits, losses, and distributions allocated among partners/members? Are there legal or regulatory restrictions that may limit the ability of the partners/members to make such allocations on their own?

Where the joint venture is structured as a company, the profits of the joint venture are distributed to the joint venture partners in the form of dividend. The provisions related to payment of dividend are provided under the Companies Act. A dividend cannot be declared unless there are profits. Dividends can be paid out of the profits of the current year or past year(s). Dividends can either be paid as an interim dividend (i.e., the dividend paid by the board of directors of the company between two annual general meetings) or as a final dividend (i.e., at the annual general meeting). Annual general meetings are mandatory shareholders' meetings that are required to be held each year. The dividend is recommended by the board of directors of the company and declared by the shareholders in the annual general meeting. It may be noted that the shareholders cannot pay a dividend higher than that recommended by the board of directors. However, it is possible for the shareholders to lower the dividend recommended by the board. The repatriation of profits in the form of dividend to a foreign partner is also permitted under FEMA without any approval of any governmental or regulatory authority. Further, there is no limit on such repatriation.

In an LLP or an unincorporated partnership, the profits can be distributed to the partners without any statutory restriction, but subject to the terms of the LLP Agreement or partnership agreement, as the case may be.

Indemnification

What indemnification provisions would apply in a joint venture or strategic alliance?

Generally, it is common to find indemnification provisions in a JVA for indemnifying the non-defaulting joint venture partner by the defaulting joint venture partner in case of breach of any representation, warranty, or covenant provided in the JVA. JVAs typically have a detailed clause on indemnification that provides for the process of seeking an indemnification claim in the case of breach. In many instances, the indemnification clauses provide an indemnity cap and a limit on the period of time up to when the indemnification claim can be made. Although there are few judicial precedents allowing indemnity payment without RBI approval but practically in case the indemnification payment has to be made to a person resident outside India (i.e., the foreign partner), prior permission of the RBI is required.

Exit or Termination

How does a partner/member exit a joint venture or strategic alliance?

The exit of a joint venture partner is a contractual right provided in the JVA. Generally, there are restrictions on exit and the joint venture could provide for a lock-in period where the joint venture partners will not be allowed to exit. However, in cases such as breach of the terms of the JVA by a joint venture partner, the non-defaulting partner is generally given a right to exit by selling the shares or its interest in the joint venture to the defaulting partner at a premium over the fair value of the shares. The joint venture partner could also exit by selling the shares to a third party by first offering the shares to the other joint venture partner(s). Sometimes the joint venture partner can exit the venture if the joint venture company buys back the shares held by the joint venture partner.

It should be noted that any such sale is subject to the pricing guidelines of the RBI where one of the joint venture partners is a person resident outside India. If the exiting partner is the foreign partner, then as per the FDI Policy, the foreign partner cannot receive more than the fair value of the shares prevailing at the time of exit. The valuation of the shares is done by a valuer in accordance with internationally accepted methods of valuation.

How is a joint venture or strategic alliance terminated?

As mentioned above, the termination of the joint venture is generally effected upon (1) the completion of the purpose of the joint venture, (2) the expiration of its specified term, or (3) breach of the JVA by one of the partners. The JVA provides for various grounds of termination and the consequences of the termination.

Is the termination of a joint venture or strategic alliance subject to the approval of any governmental body?

Being a contractual arrangement, the termination of a joint venture does not require any approval of any governmental authority. However, if the company or an LLP is sought to be wound up, approval of the National Company Law Tribunal in the jurisdiction where the company or an LLP is set up is required.

Foreign Members/Partners

What statutes or rules govern joint ventures or strategic alliances with foreign parties?

As mentioned above, any foreign investment in an Indian entity is governed by FEMA and rules and regulations framed thereunder.

What are the material provisions of such statutes or rules?

Please refer to the responses above.

What constitutes a "foreign" member or partner of a joint venture or strategic alliance? If there is an attribution rule that traces the ultimate ownership of a local member/partner to a foreign entity, what are the equity-holding and voting-rights thresholds for deeming "control" at each ownership chain?

If a person is resident outside India or is owned or controlled by a person resident outside India, it will be treated as a "foreign partner" for the purposes of a joint venture. In terms of the FDI Policy, a company is considered to be owned by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies that are ultimately owned and controlled by resident Indian citizens. In the case of an LLP, an LLP will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately owned and controlled by resident Indian citizens and such Indian citizens and entities share in a majority of the profits.

Further, in terms of the FDI Policy, control has been defined to include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. In the case of an LLP, control will mean the right to appoint a majority of the designated directors, where such designated partners, with the specific exclusion to others, have control over all the policies of the LLP.

Do such statutes or rules have any limitations regarding foreign members/partners in a joint venture or strategic alliance?

Please refer to our responses above.

What permits, consents, or registrations are required by foreign members/partners of a joint venture or strategic alliance?

There is no permit, consent, or registration required for investing in a joint venture or strategic alliance, except for the approval of the government of India as described above.

Are there any economic incentives for foreign direct investments in a joint venture or strategic alliance?

There are no specific economic incentives for FDI in an Indian joint venture or strategic alliance.

Are there mandatory minimums or maximum equity investments or contributions for a foreign joint venture or strategic alliance member/partner?

There are maximum limits up to which FDI can be made, depending on the sector in which the investment has to be made. However, there are no minimum mandatory equity investments or contributions, except in the case of multi-brand retail trading where the minimum amount invested as FDI by the foreign investor has to be US$100 million.

Are there any restrictions regarding distributions to, or repatriation of profits by, foreign partners/ members?

There are no limits or restrictions on distribution of profits to foreign partners.

As mentioned previously, any buyback of shares held by a foreign partner cannot be at a price higher than the fair value determined by an independent valuer based on an internationally accepted valuation methodology.

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Aashit chairs the Finance Practice at JSA. He specialises in banking & finance, debt restructuring and insolvency, mergers & acquisitions, private equity and investment funds.

He also regularly advises Indian and multinational banks, NBFCs, financial institutions, debt funds and Indian borrowers in relation to (i) credit facilities to Indian borrowers, including in relation to capital expenditure, project financing, real estate financing, acquisition financing and trade finance, (ii) credit facilities to overseas subsidiaries of Indian entities for the purpose of overseas acquisitions and leveraged buy-outs, and (iii) structuring and implementing debt, quasi-debt and equity transactions, which are compliant with Indian exchange control and banking regulations. He has been actively involved in various debt restructuring and security enforcement assignments, and the corporate insolvency resolution process (*CIRP*) under the new Insolvency and Bankruptcy Code, 2016 (*IBC*).

He has also advised arrangers, investors and issuers on various privately placed non-convertible debentures which may be listed on Indian stock exchanges.

In the areas of M&A, private equity and foreign investment, Aashit advises private equity funds, corporates and multinational institutions in their investments and divestments in Indian companies under the automatic route and approval route in a variety of sectors. Aashit has also assisted in devising and implementing exit strategies from Indian investments. He also advises in setting up of private equity funds, offshore funds, venture capital funds and alternative investment funds.

Aashit has been practicing law since 2001 and has been at JSA since 2005. Prior to JSA, Aashit worked with a couple of other reputed Indian law firms.

Aashit has been recognised a leading lawyer and distinguished practitioner in the banking and finance practice by international publications such as IFLR, Chambers and Partners and AsiaLaw, and a leading lawyer for private equity and M&A by IFLR 2019.

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Lalit is a Corporate, M&A and Private Equity lawyer with over twenty years of experience. He has substantial transactional experience in advising both Indian and foreign entities in several complicated domestic and international corporate commercial transactions including private and public M&A, private equity (acted both as investor's and company's counsel), joint ventures, complex corporate restructuring including mergers, demergers, business sale, buyouts, foreign direct investment (*FDI*), offshore investment (*ODI*) and corporate and securities laws advisory.

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