

JOINT VENTURES IN INDIA: A COMPARATIVE ANALYSIS WITH LAWS OF OTHER COUNTRIES AND REFORMS

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Joint Ventures are generally entered into by countries of more than one nation, to facilitate trade and exchange of services between them. India is a country which does not possess any specific law on Joint Ventures; therefore it places great reliance on other laws to draw out governing principles for Joint Ventures. Reliance is placed on Indian Partnership Act, Arbitration Act etc. However, every country has different laws for governing Joint Ventures. This paper aims to analyse the provisions of different countries regarding Joint Ventures and provide suitable remedies and suggestions which can be applied in Indian context.

Introduction

A Joint Venture (hereinafter JV) may be defined as a contractual agreement or a business relationship between two or more people for the purpose of executing a particular business undertaking. A person for this purpose can even be a corporate entity i.e. something just having a legal existence.¹ In a joint venture, all parties agree to share in the profits and losses of the enterprise. Despite this being a common practice in the corporate world today, joint ventures have never received a concrete definition.² The Hon'ble Supreme Court tried to define the term Joint Venture in the case of *Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd. and Anr.*,³ where it held that expression "joint venture" connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. Therefore, the use of the words 'joint venture' or 'collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses.

JV are everyday gaining importance due to the immense potential it provides to the parties involved. Establishing a JV with an ideal partner provides a fast way to bank upon the resources available with the other partner, and share each other's' capabilities, access new markets, strengthen position in the current markets, or diversify into new businesses. It also allows better exploitation of skills and strengths of an enterprise. Be it commercial, financial, technical, managerial, manufacturing, marketing or research skills.⁴ Further, Joint Ventures have contributed in keeping with the modern tempo, by the discovery and development of

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¹ Maharashtra Agricultural Universities Amendment Act, 2003, section 2(b), (India).

² *Gvprel-Mee vs Government Of Andhra Pradesh*, (2005) 5 A.L.D. 450 (India).

³ *Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd. and Anr.* III (2008) CPJ 48 (SC).

⁴ K.R. SAMPATH, LAW AND PROCEDURE ON CORPORATE RESTRUCTURE LEADING TO MERGERS, AMALGAMATIONS, TAKEOVERS, JOINT VENTURES LLPs AND CORPORATE RESTRUCTURE, 667, (7th e.d., 2011).

fissionable materials and the construction and operation of power reactors and atomic furnaces.⁵

Joint Ventures are witnessing a boom in India because it is a tough task for Indian companies to achieve expected levels of global presence with deficiencies in terms of product quality, technology, infrastructure and even management processes. Further, these deficiencies can be negated by way of an alliance with a foreign counterpart who is strategically fit. Alliances between those possessing varying expertise and capabilities in technology, marketing and distribution, etc. are necessary to meet the growing needs of modern business.

The test to determine whether a contractual relation amounts to a joint venture was propounded by the Hon'ble Court in the case of *New Horizons Ltd. v. Union of India*,⁶ wherein it was held that when apart from having equity participation, the two parties pool together their resources and all the constituents of the company, contribute assets, share risks and have a community of interest, it amounts to a joint venture.

Types of Joint Ventures-

Joint ventures are classified into two major fields' i.e.

- a) Equity Joint Ventures
- b) Contractual Joint Ventures

Equity Joint Ventures are the one wherein two or more partners create a Joint Venture and each one owns a share of equity.⁷ Equity joint ventures are most common for ventures involving foreign investment in developing countries. They occasionally involve participation of partners in the equity capital of an existing company, but much more frequently in the incorporation of a new company. The latter may be the more practicable method, because it is often more convenient to obtain new documents of incorporation with the desired provisions than to adapt an existing structure to the new way of doing business.⁸

Contractual joint ventures are often entered into in the countries where the law does not recognise the concept of private ownership of property i.e. countries with centrally planned economies.⁹ Due to their less permanent nature, contractual joint ventures are sometimes used as a preliminary to equity joint ventures i.e. in periods of engagement preceding the culmination of the Joint Company. In such a period Contractual arrangements can be made for the supply of capital, equipment, industrial property, technical assistance and know-how by the foreign partner to the Government or local partner in return for royalties, which may depend on production, sales, profits etc. However, despite being similar in various parameters there exists a basic difference amongst the two i.e. of the legal entity. An equity joint venture

⁵ Joint Ventures: Origin, Nature and Development by Walter H. E. Jaeger, American University Law Review, Vol. 9, (1960).

⁶ *New Horizons Ltd. v. Union of India* (1995) 1 S.C.C. 478 (India).

⁷ *East India Hotels Limited and Anr. v. Union of India (UOI) and Anr.* (2008) 104 D.R.J. 430 (India).

⁸ Industrial Joint-Venture Agreements with Specimen Clauses of Model Forms, cl. 2.

⁹ *Ibid*

creates a separate legal entity for the parties to it, like the Cipla and BioFarm joint venture. Whereas under a contractual joint venture a separate legal entity isn't set up.

Joint Venture and Partnership-

Joint venture and partnership might appear similar in nature but despite the similar appearance both have major difference too. A Joint venture is an agreement wherein two companies come together, for a specific purpose. Whereas, a partnership is wherein two or more individuals come together to enter into a venture to earn profits. Second, the major purpose of a Partnership is to earn profits whereas it is not the case in Joint Ventures as there it is not just the profit that binds the people.¹⁰ A partnership is generally for many years or as the going concern principal says it is expected to go on for eternity. But a Joint Venture exists generally for specific years only. Further, under a Partnership if one of the partners resigns or quits, the firm is reconstituted,¹¹ whereas under a Joint Venture, the venture still continues.¹² The last major difference the two have, is of the situations to follow after the dissolution of the entity. A registered partnership firm under Partnership Act may still have certain obligations, rights and liabilities even after dissolution by virtue of Section 45¹³, 46¹⁴, and 47¹⁵ whereas the contrary is in the case of joint ventures.

Joint Ventures in India

Joint Venture agreements are very broad in nature and involve various components in them. However, the core elements of how Joint Ventures operate in India are discussed below.

Rights of Parties to Joint Ventures-

The Hon'ble Court in *Asia Foundations and Constructions Ltd. v. State of Gujarat*,¹⁶ held that the rights, duties and liabilities of joint ventures are similar or analogous to those which govern the corresponding rights, duties and liabilities of a partner. Therefore, unless expressly laid down, an analogy for the same has to be drawn from the Indian Partnership Act.

Section 17 of Indian Partnership Act, lays down two situations regarding rights and duties of a partner i.e. after the change in a firm the mutual rights and duties of the partners remain the same as they were immediately before the change. Second, if the firm after the expiration of the final term the firm continues to carry on its functions, the rights and duties remain same

¹⁰ Robert Wallace, *Strategic Partnership: An Entrepreneur's Guide to Joint Ventures and Alliances* 89 (1st e.d, 2004).

¹¹ Indian Partnership Act, 1932, Section 32(2) (India).

¹² *Chahal Engg and Construction Co. v. State of Gujarat* (1987) 1 Comp. LJ 1 (India)

¹³ Indian Partnership Act, 1932, Section 45 (India).

¹⁴ Indian Partnership Act, 1932, Section 46 (India).

¹⁵ Indian Partnership Act, 1932, Section 47, (India).

¹⁶ *Ibid.*

as they were before such expiry.¹⁷ However, what needs to be kept in mind is that there should not be anything more than a want of evidence to the contrary.¹⁸

Dissolution of a Joint Ventures-

In India, the common customary practice provides for dissolution by 3 major ways which are-

a) Differences between mutual evaluations and actual situations:

The first situation wherein a Joint Venture can be dissolved is wherein the evaluation of a partner at the time of negotiation goes wrong. It is a situation wherein the ability of a partner company is considerably lower than that assumed at the time of negotiating a joint venture. Another, situation being wherein the partner is unable to obtain a strong commitment (degree of involvement) from a partner leading to waning of the enthusiasm for operating a joint venture.

b) Change in the positioning of a joint venture business:

Another way wherein a Joint Venture can be terminated is when the position of the business undergoes a major change. A situation wherein an Indian operation is turned into a manufacturing base for the global market. In such case the Joint Venture can be terminated as it is going against the core purpose for its establishment.

Further, another reason might be that with declining profit, the business might become a non-core business as compared to other businesses, therefore resulting in the importance of the said joint venture business declining. Therefore, a company might want to reduce its commitment by selling its equity stake.

c) Disagreement over management policy¹⁹:

A Joint Venture comes to end in cases wherein the Joint Venture undergoes a major change in its management policy. One such change is a change of a partner's president. In situations wherein the President of a partner company changes and the new President is inclined to seek accomplishments in a short time in terms of the profitability of joint venture business. Further, the new president regards the joint venture business as non-core business.

Another, method wherein Joint Venture can come to an end is due to a disagreement over strategies. For example, if the company wants to maintain existing prices by introducing new products and a partner company wants to sell existing products at lower prices. Another situation is where a partner company becomes a competitor or a partner company starts manufacturing products at its factories that compete with a company's products.

FDI and Joint Ventures-

¹⁷ Indian Partnership Act, 1932, Section 17(b) (India).

¹⁸ POLLOCK AND MULLAH, THE INDIAN PARTNERSHIP ACT, 108, (7th ed., 2011).

¹⁹ Issues Related to the Negotiation and Establishment of Joint Ventures with Indian Companies by Wataru Kadobayashi and others., Nomura Research Institute, NRI Paper No. 189 (2013).

Joint Ventures are a kind of arrangements which are followed both domestically and internationally by countries. India follows a very participative and encouraging Foreign Investment policy. Under the said policy an investor can start a Joint Venture in India by two means, they being-

a) Automatic Route:

The first situation wherein a foreign company can invest in India is using the automatic route. Under such route FDI is allowed without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time. Here, the only requirement is a notification to the concerned regional office of RBI within 30 days of receipt of inward remittances.²⁰

b) Government Route:

In cases where the automatic route is not allowed then in those cases prior approval of the Foreign Investment Promotion Board is required. This route includes restricted sectors wherein a previous Joint Venture in the same or allied field existed. Further, any company which has received FDI either under the Automatic route or the Government route is required to comply with provisions of the FDI policy including reporting the FDI to the Reserve Bank.

Dispute Resolution in India-

A dispute is defined as an assertion of a claim by one party and denial by the other.²¹ Further, to ascertain whether a dispute has arisen or not the facts and circumstances of the case need to be determined from.²² While entering into a Joint Venture the parties reasonable expect disputes to arise, in areas like legal contractual relationships concerning rights and obligations of the parties, funding of joint ventures, new investments, exploring new markets, business reorganisation, appointment of managerial personnel etc.²³ While negotiating and formulating the terms of the JV the parties may provide various means of dispute resolution like mutual negotiation, mediation, arbitration etc.

Arbitration-

Arbitration law in India is mentioned under the Arbitration and Conciliation Act 1996. Since, there is no specific law for Joint Ventures in India, a great reliance is placed on the Arbitration law with respect to dispute resolution. Regarding the jurisdiction of an arbitrator under the law it is said that dispute should be the subject of arbitration agreement i.e. the

²⁰ *Foreign Investments in India*, (Mar. 5, 2015, 8:30:45 pm), <http://www.rbi.org.in/scripts/FAQView.aspx?Id=26>

²¹ *Gujarat State Co-op Land Development Bank v. PR Mankad*, (1979) 3 S.C.C. 123 (India).

²² *Inder Singh Rekhi v. Delhi Development Authority* (1988) 2 S.C.C. 338 (India).

²³ *SETH DUA AND ASSOCIATES, JOINT VENTURES AND MERGERS ACQUISITIONS IN INDIA*, 184, (1st e.d., 2006).

authority of the arbitrators to decide the dispute in question which means that the dispute should be arbitrable. If it is not, then it cannot be arbitrated.²⁴

Further, the governing law of the arbitration is same as the governing law of the contract. The parties have the freedom to choose which ever law they want themselves to abide to. The Hon'ble Court has held that if the parties have specifically chosen the law governing the contract, the arbitration proceedings will continue in that manner, however if such is not the case then the procedural aspect of the conduct of arbitration will be determined by the law of the place.²⁵ Another option the parties have is to choose International Commerce Chamber Rules to govern their conduct and actions.

Conciliation-

Another method of dispute resolution followed in Joint Ventures in India is Conciliation. Conciliation is a process wherein the conciliator does not give a decision but encourages the parties to come to a settlement themselves. The judgement of the conciliator is not binding but persuasive unlike the arbitrator.

Joint ventures in other Countries-

The definition of the term Joint Venture varies from country to country. Canada, defines it as an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust and where, in the case of an investment to which this Act applies, all the undivided ownership interests in the assets of the Canadian business or in the voting interests of the entity that is the subject of the investment are or will be owned by all the persons or entities that are so associated.²⁶ Further, to understand the concept of Joint Venture an analysis has been drawn by comparing laws on Joint Ventures of three countries which are-

England:

England is a country that is a part of the United Kingdom.²⁷ The Joint Venture policy of England is very different from that of India. The first major difference which the two countries have is that of a Partnership and a Joint Venture.

Unlike India, England does not differentiate between a Partnership and a JV. Under, the England policies, a Partnership is one form of entering a Joint Venture. Therefore, a JV in England can be set up by various means they being-

²⁴ Haryana Telecom Ltd. v. Sterlite Industries (1999) 5 S.C.C. 688 (India).

²⁵ National Thermal Power Corpn v. The Singer Company A.I.R. 1993 SC 998 (India).

²⁶ Investment Canada Act, Section 3(c) (Canada). Available at <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home>.

²⁷ United Kingdom Statistics, (Mar. 6, 2015, 7:30:49) statistics.gov.uk

- a) A limited liability company;
- b) A partnership organised under the Partnership Act 1890 (a "general partnership");
- c) A limited partnership organised under the Limited Partnerships Act
- d) A limited liability partnership organised under the Limited Liability Partnerships Act
- e) A European Economic Interest Grouping ("EEIG");
- f) An unlimited company;
- g) An overseas entity.²⁸

One major difference that emerges out of this comparison is that it would not be wrong to say that the law governing Joint Ventures in Britain, is in a way a codified one due to the ways that it propounds. Due to the existence of various Partnership Acts indirectly there do exist laws on the said matter.

Further, General Partnership under the British laws has unlimited liability which is just like the Indian laws wherein the liability is unlimited unless it is a Limited Liability Partnership.

Further, Joint Venture allows that when there has been a change of control of a party, the Joint Venture can be terminated.

USA-

The laws of USA are very similar to the laws of the UK as they allow a Joint Venture as a Partnership too. The history behind such a reason is that earlier Domestic and Foreign Partnerships were different entities.²⁹ The former was subject to Partnership Act and the latter to the section 1491 on excise tax. Further, faced with a United States company's desire to use a partnership as a joint venture vehicle, the Joint Venture via Partnership was introduced.

In USA, the dissolution and termination of a joint venture are governed by partnership law relating to dissolution and termination. If there is any written agreement made by the joint venture parties to the contrary, then such written agreement would determine a joint venture's dissolution.³⁰

A joint venture can be terminated in the following situations:

- if there is an agreement between joint venture parties to terminate a joint venture³¹
- if it is apparent that a joint venture is not profitable³²
- On death of a joint venture member if service offered by such joint venture member cannot be substituted by another person.

²⁸ Joint Ventures in England and Wales by Ashrst, International Investor Series No. 6, (2014).

²⁹ LOWELL, UNITED STATES INTERNATIONAL TAXATION: AGREEMENTS, CHECKLISTS, AND COMMENTARY, 1 (12th e.d, 2011).

³⁰ Costa v. Borges, 145 Idaho 353 (Idaho 2008).

³¹ N. River Ins. Co. v. Spain Oil Corp., 135 Misc. 480 (N.Y. Sup. Ct. 1987).

³² Gundry v. Scrimger, 235 Mich. 62 (Mich. 1926).

Further, a joint venture can also be dissolved by judicial dissolution. A court can grant a judicial dissolution on the following grounds- Under the Act, a court can grant a judicial dissolution on the following grounds,³³

- if a joint venture member is shown to be of unsound mind;
- if there is disharmony and dissension among parties to a joint venture;
- if a joint venture member becomes in any other way incapable of performing his/her part of a joint venture contract;
- if a joint venture member has been guilty of any conduct that may in turn be prejudicial to a joint venture business;
- if a joint venture member wilfully or persistently commits a breach of a joint venture agreement;
- if a joint venture business can only be carried on at a loss and
- on other circumstances that render a dissolution equitable.

But the general trend that has been witnessed in cases of termination and dissolution is negative. The courts in the past have never been inclined to dissolve a Joint Venture. In the International Chamber of Commerce Arbitration Award,³⁴ the arbitrator refused to dissolve the JV wherein it thought that such a dissolution would have an impact on the third parties. Similar was the situation in the case of *Best Floor Sanding Ltd v Skyer Australia Ltd*.³⁵

China-

International Joint Ventures in China also bear similarities with that of India. In China there are two types of Joint Ventures, which are-

- a) Equity Joint Ventures
- b) Cooperative Joint Ventures

Under the Equity JV, prior approval of the China Government is required which makes it like the Government Route of entry in India. Further, the Chinese Government only allows at least 25% of entire registered capital in form of cash, trade property rights etc. Further, the profits under Equity JV is shared according to the investments made by various stake holders.

However, under Cooperative JV no minimum foreign capital requirement exists and it includes not just monetary but also contribution of labour, technical know-how etc.³⁶

³³ BPR Group Ltd. P'ship v. Bendetson, 453 Mass. 853 (Mass. 2009).

³⁴ International Chamber of Commerce Arbitration Award no 11090, 2002.

³⁵ Best Floor Sanding Ltd v Skyer Australia Ltd, (1999) V.S.C 170 (U.S.A.).

³⁶ *Investment in China*, (Mar.7, 2015, 6:30:23 pm)

Reforms

India is a country with very well defined norms and laws on almost every aspect. However, a grey area still remains i.e. Joint Ventures. India is a country that does not have any law on Joint Ventures. Therefore, the first and the most important reform that needs to be formulated is codifying a law for the Joint Ventures. Countries like England and USA despite not having a specific legislation for Joint Ventures rely on the Partnership Acts for solving disputes and queries as there Joint Ventures and Partnerships are not separate entities. However, in India though reliance is placed on Partnership Acts but it is not concrete as the two are different entities altogether.

Another reform can be with respect to Foreign Direct Investment i.e. the routes for the FDI. Despite, the Indian Foreign Policy being very participative and encouraging for the investors, a new policy with its reliance more on the automatic route should be formulated which will not only result in more investment and Joint Ventures but also will be less burdensome of a task. Further, the practicability and smooth functioning of this reform is contingent on the first reform of having a legislation. Having a legislation in the first place will enable the Government to keep a check on any bogus joint venture being formulated and will ensure that no frauds are committed.

Dispute Resolution is another area where India might need reformation, as Arbitration seems to be the only popular recourse that seems available. Conciliation as a dispute resolution mechanism should be promoted more by the companies as it is a less cumbersome and cost effective mechanism wherein it is just the parties deciding what is best for them. Such a mechanism allows a decision which is best suited for the parties as they are the judge in the cause. Government can set up their independent dispute conciliators to benefit the investors so as to garner more investments.

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