

# India: A Safe Haven For Foreign Investment – A Look At Joint Ventures And Laws That Govern Them



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## I. INTRODUCTION

From a country referred to by Winston Churchill as a mere 'geographic expression,' India has come a long way. Today India has emerged as one of the world's hot spots for information technology. This long journey is not a mere accident but the result of a rigorous discipline in building a strong technological tradition. The emphasis on education has been a main reason for the metamorphosis of India. From a country where everything 'foren' was shunned, today India concentrates on evolving progressive economic development plans, infrastructure and technical education strategies to cater to national as well as multinational businesses. A decade ago political debates concentrated on allowing foreign capital into India. Today the debate is on how best to allow foreign companies into the country. Indians have tasted capitalism and now demand a more sumptuous meal of the same.

India has a lot of advantages from a business point of view. The time zone synchronizes perfectly with America – a timing that can actually make business in the U.S. 24/7. With a population of over a billion people, India has the market for the best and the worst of what America creates. India is also the world's largest English speaking nation making it easy for American businesses to market the products to the billion consumers eager to contribute to international business.

Previously, multinationals found it tough to get out of the bureaucratic maze to carry on with business. Today India has well defined policies paving paths amidst the maze. The experiment with the software indus-

try demonstrated India's potential as a professional force with ability to match the needs and the demands of the western world. The currency has become convertible and licenses are obtainable. Industries like power and telecommunication that have long been sheltered by the government are being let out for privatization. This has opened the immense potential for multinationals to make money. Every sector in India has a market waiting to be captured. India is a western businessperson's heaven – it has the potential for any business. Starting from basic infrastructure like roads and telecommunications to complicated technologies, India has a place for competition. The requirement is to understand the policies and local psyche and work within it. Interestingly, all the political, economic and cultural issues that foreign businesses are likely to encounter eventually reflect in the form of legal hurdles. This paper discusses the various policies to enable understanding of the legal systems in India.

Part II discusses the laws in India and their implementation. Part III demonstrates the best *modus* for successfully litigating in India by analyzing the positions taken by courts in cases where multinationals are involved. Part IV concludes with an outline of the requirement of companies to be sensitive to locals'

1. The parameters are: (1) lump sum payments for royalty payment should not exceed US\$2 million; (2) royalty payment should not exceed 5% on domestic sales and 8% on export sales; total payment; and (3) total payment under (1) and (2) should not exceed 8% of sales over a period of 10 years from the date of the agreement or 7 years from the date of commencement of commercial production.

needs. Factors worth considering are detailed while finalizing a joint venture agreement by examining some joint ventures.

## II. INDIAN LAWS ON FOREIGN INVESTMENT

This part details the legal procedures in India. The discussion begins with the types of joint ventures that may be preferred as well as the laws and approvals for establishing such ventures.

**Types of joint ventures:** There are several different modes of doing business with India. Some typical modes of setting up business in India are: (a) *Technical Know-How or Royalty Agreement* where the Indian partner pays a royalty (also known as technical knowhow fees) either as a one time payment or as a percentage of turnover against the know how obtained from the foreign partner. If the royalty payments fit within the parameters<sup>1</sup> levied by government, the approval from the Reserve Bank of India (RBI) is automatic or else one has to get the approval of Secretariat of Industrial Approvals (SIA) at New Delhi; (b) *Financial Collaboration or Equity Participation Agreement* where the foreign partner becomes a shareholder either in an existing Indian company or a newly incorporated company.

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Although the policies of Indian government together with RBI regulations<sup>2</sup> play a significant part, foreign enterprise can successfully negotiate its equity participation at the agreement stage; (c) *Techno-Financial Collaboration* which is a combination of Royalty agreement and Equity Participation Agreement. The parties could have an equity and technical knowhow participation; and (d) *Setting up a branch or office in India*: A branch or an office of a foreign enterprise in India constitutes a permanent establishment in India and requires RBI permission. All profits attributable to such a branch in India are taxable in India. Depending on the legal requirements, the nature of industry, level of foreign participation, and other parameters, variations need to be tailored to the needs of foreign enterprises.

The first three methods above are "joint ventures" and the fourth is more of a "solo venture." There is yet another means of gaining entry into India - by "acquisition." Acquisition of a domestic corporation by a foreign corporation might be rewarding as more capital is infused and new management is inducted, although acquisitions may also be shunned as a loss of the domestic corporation to a foreign corporation. Indians prefer joint venture rather than acquisition to enable domestic capital to play a substantial role in the economic development and to ensure less foreign domination.

Foreign corporations have a choice of entering into a joint venture with the state, Enron being a prime example - the Enron Corporation of USA entered into an agreement with Maharashtra State Electricity Board (MSEB) to build a mega power plant on a coastal site at Dabhol in Maharashtra. Even a passive minority participation of the government may be a sufficient reason for the host country to be proactive with

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2. Certain high priority industries are earmarked by Indian government for 100% foreign investment. Industries falling under other categories are allowed up to 74% foreign investment.

the deal since the representatives sitting on the board are in a better position to scrutinize the activities of the business. However, foreign corporations may reject such associations as a mark of socialism. Joint ventures with private corporations tend to be free from inherent hurdles built into dealing with the state. In such ventures, the degree of control and management exercised by various partners play a major role. The principal shareholders can control operations without owning majority interests and confine local shareholders to rights of dividends and participation in general board meetings. Foreign corporations with minority participation can compensate for the absence of voting control through technical control. Some corporations consider technical control more important than voting control. The host country may try to counter this by insisting on adequate training schemes not only for skilled labor but also at the scientific and managerial level. Minority shareholders have several protective devices available either in the local company law or by incorporation in the memorandum of understanding.

**Laws on foreign investment:** Notwithstanding the mode of investment, foreign companies in India need governmental and other approvals for implementing projects and repatriating payments. The following section details the relevant laws to facilitate repatriation.

*Foreign company wishing to establish in India:* A foreign investor has the choice of either directly setting up operations in India through a branch office or a representative office or liaison office or project office of the foreign company. A foreign company is one that is incorporated in a country outside India and has a place of business in India. Such branches or representatives have to be registered with the Registrar of Companies in the area where they are registered within 30 days. These offices are not allowed to undertake any business activity in India. They cannot earn any income in India. The role of such offices is limited to collecting information and provid-

ing information. Alternatively, a foreign company may work through an Indian arm either by establishing a subsidiary or a joint venture company. These companies need approval from the RBI, follow the foreign exchange laws, and acquire the status of a company under the Indian Companies Act, 1956.

*Establishing a new company:* Corporate identity is acquired in India by registration under the Companies Act, 1956. The memorandum of association (MA) and articles of association (AA) have to be filed with the registrar of companies in the area where the company is located. The MA is drafted in standardized formats specified in the Schedule I<sup>3</sup> of the Companies Act, 1956. The memorandum should specify the name, place of the registered office of the company and also state the main object of the company. Companies can search for names for a fee of \$3 to \$5. The AA contains regulations for internal management. The MA and AA along with a standard statutory declaration should be filed with the registrar of companies. Once the statutory fees are paid, the registrar of companies issues the Certificate of Incorporation of the Company. A private company or a company having no share capital can commence its business immediately after it has been incorporated. However, other companies can commence their activities only after they have obtained Certificate of Commencement of Business. Name registration in the Companies Act, 1956 is exclusive of the name registration formalities under the intellectual property (hereinafter, IP) laws.

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3. Schedules I has tables B, C, D and E. Each of these bear formats applicable for different companies. Table B applies to companies limited by shares. The memorandum of association should be in any one of the forms specified in the tables B, C, D and E of Schedule I of the Companies Act, 1956. Table C is applicable to the companies limited by guarantee and not having share capital. Table D applies to company limited by guarantee and having a share capital. Table E applies to unlimited companies.

India recently amended the Companies Act in the year 2000. The minimum paid up capital for a private company would be Rs. 1,000,000/- and Rs. 5,000,000/- or higher for a public company. The offer of any securities to more than 50 people in one financial year will be treated as a public offer. Section 3 of the Act details that a public company can include a private company as a subsidiary. A company incorporated or to be incorporated outside India is allowed to offer Indian Depository Receipts under the rules framed by the Central Government. Every company is required to maintain the statutory books and documents as required by the Companies Act. In addition to the Central Government, the Securities Exchange Board of India is authorized to carry out inspection of books of account of listed companies under Section 209A of the Act.

*Foreign Exchange Regulations and Reserve Bank approvals:* The opening of a representative office is subject to approval from the RBI. Expenses should be met entirely through inward remittances of foreign exchange from the Head Office abroad. These offices are required to file Annual Audited Accounts, an annual activity report with the RBI. Normally, permission to set up such offices is initially granted for a period of 3 years and may be extended from time to time. However, approvals from RBI can be obtained for establishing specific projects in India. Foreign companies or foreign nationals are required to obtain permission from the RBI to be appointed as the agent in India. A foreign company can commence operations in India through the incorporation of a company under the provisions of the Indian Companies Act, 1956. Foreign equity in such Indian companies can be up to a maximum of 100%. Companies that seek to establish a joint venture should also get the required approvals. Approvals for foreign equity up to 50%, 51% and 74% are given on an automatic basis subject to fulfillment of prescribed parameters in certain industries as specified by

the Government. The RBI accords automatic approval to all such cases. Approvals in all other cases (where the proposed foreign equity exceeds 50% or 51% or 74% as the case is) require prior specific approval from the Foreign Investment Promotion Board (hereinafter, FIPB). Prior approval is also required for certain specified industries. Similarly, FIPB approvals have to be obtained for setting up a wholly owned subsidiary. The operation of the FIPB is very flexible. Permission for 100% ownership is granted where proprietary or sophisticated technology is brought into India. However, specific permission is required where export of the production out of India is proposed.

*Taking care of trademarks (IP):* The Trade Marks Act, 1999 (hereinafter, TMA) presently governs the registration and protection of trademarks in India. Under this Act, registration of the trademark is prima facie evidence of the validity of the trademark. Registration vests the exclusive right over the mark in relation to the goods in respect of which it is registered. The trademarks office provides for a mechanism to search the availability of names. A search can be requested from the trademarks office. It may take more than three months to receive the search report from the trademarks Registry. Indian trademarks attorneys also carry out unofficial searches. These searches tend to be accurate since attorneys search the registered marks and pending application. For example in the New Delhi branch registry records were updated only up to 1973/74 in the year 1997. India recognizes the common law right of 'passing off.' Therefore, a person using an unregistered trademark for several years can prevent use of a registered trademark or registration of a mark.

The registrar of trademarks is the highest statutory authority for the registration of trademarks. The application is submitted to the registrar for the registration of a trademark. The 1999 Act has simplified the procedure for registration of the trademarks. Under the previous

law, application for the registration of a trademark could only be for goods belonging within a single class of the Fourth Schedule. The Act of 1999 provides for a single application for registration in more than one class. The registrar is the final authority to determine whether the goods in question fall within the right classification. The registrar may require an affidavit from the applicant along with proof testifying to the use of the mark by the applicant earlier. Every application for the registration of a trademark shall contain a representation of the mark and be accompanied with twenty-five representations of the mark. The name of the owner, trade description (manufacturers and/or merchants) and the list of goods in respect of which the registration is requested should be included in the application. Normally, the registrar objects if the mark is not distinctive or if it is identical or deceptively similar to a trademark already registered or pending registration in the name of a third party. Trademarks of some single ingredient drugs are also not allowed registration in India. In respect to single ingredient drugs, the Central Government has the power to direct that certain names cannot be registered as trademarks and can only be used as generic drugs. Analgin, Aspirin and salts such as adipatic, citrate, and phosphate are examples of this. Normally these directions will not apply to drugs which are meant for export only. Once the objection phase is covered, the mark is advertised in the trademark journal. From the date of publication, four months is available to the public to oppose registration by filing an opposition. If no opposition is filed within the prescribed period, (or if the opposition filed is dismissed by the registrar) then the mark proceeds for registration. Foreigners and nationals not living in India may apply for registration of trademarks but they must provide the registry with an address for service in India.

Assignments of trademarks are required to be advertised in the trademark journal within the pre-

scribed period. The TMA does not allow marks to be assigned to different persons conferring exclusive right to each party to use the mark. It is possible to assign a mark with territorial limitations, such as assignment to company A for use within India and to company B for exports only. The registry is more stringent in respect of conditional assignments. A condition that the mark shall revert back to the assignor in case of insolvency or liquidation of the assignee will be construed as violation of Section 12 of the Transfer of Property Act, 1952. Normally, the registrar imposes conditions to allow such assignments. The other alternative is to license a trademark. License Agreements are also recorded under the TMA by making an application in the required Form to the Central Government. The licensee becomes the Registered User (hereinafter, RU) and the use by the RU is deemed to be made by the proprietor. A RU is a person with the right to use the trademark. Companies enter into registered user agreements, licensing the use of their trademark for a royalty or for other specific gains. This is more common in the case of joint ventures and other foreign collaboration Agreements. Under Section 49 of the Act, the Government may refuse the application or accept it either absolutely or subject to conditions. In practice, the Government normally allows the use of foreign trademarks in all fields (including exports) except consumer products for sale within India. The rationale being that use of foreign marks on consumer goods distorts the consumers' preferences against other indigenous manufacturers.

In the case of new joint ventures and collaborations, the approval letters from the FIPB contain the standard prohibition clause that the foreign brand name shall not be used for domestic sales. Some manufacturers circumvent this by using the mark in conjunction with a brand name owned by the Indian partner and joint venture company Maruthi Suzuki, Modi Xerox, BPL Sanyo, Hero Honda, LML Vespa are the best

examples. Companies also resort to common law licenses. These are not recorded as RU in the trademarks office. The use of a mark by a common law license does not accrue to the benefit of the proprietor and therefore may actually be more advantageous to the proprietor.

*Protecting patents:* The Patent Act, 1970 (hereinafter, the Act) was amended in the year 1999 after India's dispute in the WTO. The system is yet not in tune with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) to which India is a signatory. India still restricts certain types of inventions from being patented, which include software and certain biotech inventions. Applications can be made for one invention only. These are accompanied by provisional or complete specification. Where a provisional specification is filed, the complete specification shall be filed within 12 months from the date of filing. A specification should describe the invention and have a title to it. A complete specification should fully describe the invention and its use and the method of performance. It should also detail the best method of performing the invention and end with claims defining the scope of the invention. The advantage of filing the provisional specification is to get the priority of the application from the date of filing the specification.

Applications for patenting substances intended for use, or capable of being used as medicine or drug will be considered separately. These will be examined to verify whether the invention falls within Section 3 (which detail the items excluded from patentability) or Section 4 of the Act which are inventions related to atomic energy. Before 1999, inventions that fell within this category were only given process and not product patents. After the amendment in 1999, such inventions will qualify for the grant of the Exclusive Marketing Rights (hereinafter, EMR). This amendment was made pursuant to the TRIPS agreement. India has a transition period of 5 years with effect from January 1995 under Article 65 of the TRIPS agreement

to apply the provisions of the Agreement. This mandated the amendment in the law before January 2000. India has another 5 years before it will be required to provide product patent protection to areas of technology not protected so far. The provision for the EMR is in tune with the transition provisions detailed in Article 70.8 and 70.9 of the TRIPS Agreement.<sup>4</sup>

In order to get the EMR rights, a foreign applicant has to ensure that a patent has been granted on an application filed in a WTO member country after the entry into force of the WTO Agreement (January 1995). The Indian application should have been filed after January 1995. Additionally, the marketing approvals must have been obtained both abroad and in India (from the Drug Controller).

The amendment of 1999 introduced Chapter IVA dealing with EMR. This amendment introduced Section 24A(1) which mandated the controller of patents (hereinafter, Controller) to refer every application seeking an EMR to an examiner. The examiner then verifies whether it is an invention for which a patent can be granted under Section 3 and 4 of the Act (and not under Section 5 which previously excluded drugs etc.). Unless the Controller is satisfied that the claimed substance will not qualify for a patent under Section 3 of the Act, (in which case he can reject the application), he may proceed to grant EMR. Section 24 A (2) read with Rule 33G of the Patent Rules, 1973 allows the Controller to conduct tests and report it within 90 days thereby avoiding delays. The critical aspect is the issue of subjectivity vested on Controller to see whether it is an invention falling within Section 3 and 4 which will be the decisive factor for granting the EMR. However, this cannot be avoided since the office mechanism

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4. TRIPS article 70.8 and 70.9. Article 70.8 mandate that members should make available, from the date of entry into the WTO, means to file patent applications for pharmaceuticals, agricultural and chemical products. Article 70.9 provides for the grant of exclusive marketing rights.

is not well equipped to accommodate a more expansive process.

Section 24 B (1) (b) authorizes the grant of an EMR for five years for inventions made in India on or after January 1, 1995 for which a claim for process patent has been made, and granted. This provision has been criticized as being discriminatory on the basis of place of invention and contrary to the national treatment provision of TRIPS. However, the discrimination here is actually not on the basis of place of invention but on the grant of a process patent. The Act provides for this discrimination because in India there will only be process patent applications (as the product patent regime is not in place yet) and this can be disadvantageous to the applicant. In the case of substances that can be used as medicines or drugs, Section 24 B (2) provides that prior publication or use before the filing of the claim for patent later by the applicant either in India or in a convention country will not constitute EMR infringement. However, it implies that such prior use excludes use by the third persons. It also does not specify whether such use by a third person (or even by the person himself), will bar patentability of the invention (as in the United States). If it does bar, then a person who clearly has an unpatentable invention is getting an EMR for five years. If it does not bar patentability, then it will violate Section 13 that bars patentability if the document has been published earlier in India or abroad. To qualify as a prior user, commercial use by the third party should be mandatory. Rule 33 F of the draft rules states that documents relating to specifications and trial or use referred to in Section 24B (2) shall include public document, public trial or use and interestingly, specifies that it shall not include personal document or secret trial or use. It implies that such a secret use by a person who later applies for a patent can constitute an EMR infringement. Section 24C lifts the ban on importation of patented material which prevailed in Section 90 (D). A product on which an EMR has been

granted can be freely imported from abroad. There is no need to produce the product locally.

The unauthorized making, using or selling of the claimed invention in an unexpired patent constitutes infringement of a patent. The legal remedy lies in filing for an action for either an interim or a permanent injunction. Actions for damages or an action for account of profits or to seek adequate compensation can also be filed in a District Court or High Court under Section 108. If the defendant counterclaims for revocation of the patent, the suit along with the counterclaim will be transferred to the High Court for decision. The procedure to be followed in conducting a suit for infringement is governed by the relevant provisions of the Civil Procedure Code.

*Environmental compliance:* India also provides for various environmental compliances under the respective laws. The Environment (Protection) Act, 1986 (hereinafter, the Act) mandates industries to ensure that emission or discharge of environmental pollutants is not in excess of the standards prescribed in the schedule. Where the discharge of any environmental pollutant in excess of the prescribed standards occurs, the person in charge of the place at which such discharge occurs or the occupier is bound to prevent or to mitigate the environmental pollution caused as a result of such discharge. Central Government has the power under Section 10 of the Act to inspect the premises to determine the standard of environment compliance. A notification mandates environmental clearance from the Government for specified industries similar to the environment impact assessment in the United States. A detailed project report has to be submitted to the Central Government along with operational details for environmental clearance. Petrochemical, drugs and other such industries require Central Government permission while tanneries, dyes etc. require the State Government permission. Industries that handle or are likely to handle hazardous materials should be insured under the

Public Liability Insurance Act, 1991. The Water Cess Act, 1977 (Prevention and Control of Pollution) provides for the payment of a cess on water consumed by persons carrying on certain industries and by local authorities. Parties liable to pay cess under this Act can install a plant for the treatment of sewage and trade effluent to be entitled for a 25% rebate on cess.

*Labor laws:* Compliance with the labor laws is imminent for good industrial relations. This is the area where the procedures are easiest to comply with but are generally neglected. The Factories Act, 1948 applies wherever 10 or more people carry on a manufacturing process. Every employer is required to obtain prior permission from the State Government or Chief Inspector for using the land to construct or extend the factory. If on an application to the State Government or Chief Inspector nothing is heard within 3 months, the permission is deemed granted. This Act has provisions for maintaining hygienic environment, safety measures and welfare provisions. Most of these provisions are no different from those in developed nations. However, in practice companies that seem to follow it meticulously in the developed nations tend to take these provisions lightly in the developing nations. The Union Carbide accident in India is one of the most well known examples.<sup>5</sup> There are several others that are not well known but have caused similar havoc and damage. The Indian Government tends to be more attentive

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5. On Dec. 3, 1984, a leak of ill maintained methyl isocyanate at a plant in Bhopal, India, owned and operated by Union Carbide India Limited (UCIL) caused death to 3,800 persons. 40 persons experienced permanent total disability, and 2,680 persons experienced permanent partial disability. In February 1989, the Supreme Court of India directed Union Carbide Corporation (UCC) and Union Carbide India Limited to pay a total of \$470 million in full settlement of all claims arising from the tragedy. Consequentially, in November 1994, UCC sold 50.9% in Union Carbide India Limited to McLeod Russel (India) Ltd. of Calcutta. See also, <http://www.bhopal.com/review.htm>.

to compliance by foreign companies. It is desirable for the foreign companies to follow the factory laws in India more meticulously. The Payment of Bonus Act, 1965 is applicable to factories and other establishments where twenty or more persons are employed on any day during an accounting year. The gratuity and provident fund are other requirements that employers will have to comply with.

### III. LITIGATING IN INDIA

This part demonstrates changes in the outlook of the court in tune with the economic policies of the country. The pros and cons in handling litigation are discussed by analyzing cases where multinationals were involved.

One of the common concerns of any corporation in establishing a joint venture with a foreign corporation is the level of legal protection available to it in foreign courts. Very often, companies fear that they get discriminated by virtue of their nationality or by virtue of their market success in foreign markets. This was a genuine cause for concern for multinational corporations doing business in India during early 1990s. Now the trend has shifted in their favor and courts have come to recognize the benefits of being just and fair to foreign corporations even if it would mean ruling against powerful Indian corporations. This trend is particularly evident where copyrights and trademarks are involved. In a landmark decision, despite the fact that the defendants had registered the trademark "Whirlpool" in India, the Supreme Court of India upheld the contention that Whirlpool Corporation was entitled to maintain passing off action against the defendants.<sup>6</sup> Ever since, courts in India have come to recognize the concept of "trans-border reputation" of foreign trademarks extending to India. Scotch Whiskey Association<sup>7</sup>, Daimler Benz AG<sup>8</sup>, Glaxo Operations, UK<sup>9</sup>, Phillip Morris<sup>10</sup>, to name a few, have had a similar success in

Indian courts. In some cases when a joint venture fails, one of the corporations might be tempted into cashing in on the trademark, corporate name or trading style of the foreign corporation. Indian courts took notice of such situations and have extended the trans-border reputation of trademarks to corporate names or trading styles.<sup>11</sup>

Similarly, Indian courts hold a good record in granting *Anton-pillar* orders under which a civil action can be pursued instead of a criminal action. These orders enable the plaintiff to conduct raids to seize pirated goods with the help of a court appointee and the plaintiff's own counsel. For example, Lewis Corporation and Microsoft Corporation have been very successful in India in curbing pirated goods. In case of a criminal action, law enforcement authorities will have to be involved. By avoiding a criminal action, the plaintiff can successfully conduct a raid by limiting the knowledge about the raid to a select few. The biggest advantage is that in such cases the defendants are unaware beforehand.

Intellectual property rights relating to technical knowhow, trade secrets etc., are governed by confidentiality clauses in the agreement between the parties. In the event of breach, the aggrieved party can seek either an injunction against disclosure or damages. In *Gujarat Bottling Company v. Coca Cola Company*,<sup>12</sup> the Gujarat

High Court observed that the Gujarat Bottling Company (hereinafter, GBC) was not fair in maneuvering the deal. The deal enabled PepsiCo Inc. to control GBC to gain an advantage over Coca Cola. The Supreme Court upheld the lower court decision prefacing its judgment as, "in the past nations often went to war for the protection and advancement of their economic rights. Things have changed now...."

Normally breaking up a joint venture can cost anywhere from 10% to 50% of the amount of the transactions costs incurred in organizing and maintaining a joint venture. However, when dealing with an Indian corporation, an American corporation can terminate the business with the knowledge that the cost of litigation in India is minuscule compared to litigation cost in the US. This is a major cushioning factor for most foreign corporations. Moreover, the Indian judiciary does not have the precedent of levying high damages like in the US. Converted into Indian currency, the damages become very manageable for foreign companies that establish in India. The Union Carbide litigation in India is a standing example of this. On the other hand, foreign corporations have the option of international arbitration rather than internal legal action to resolve dispute where huge sums are involved. For example, Enron chose international arbitration. By doing so, Enron has kept itself open to a negotiated settlement which will also open the doors for further business in India may be at a later point in time.

### IV. OTHER ASPECTS NEEDING SENSITIZATION

This part concentrates on the practical modus of doing business in India. One of the key features for multinational companies that have so far succeeded in the country is a sensitization to local needs. Companies like Enron and PepsiCo Inc. have had to bear the brunt of not having been sensitive to local needs.

6. N.R. Dongre v. Whirlpool Corporation, (1996) 5 SCC 714

7. *The Scotch Whiskey Association v. Pravara Sahakar Kharkhana*, AIR 1992 BOMBAY 292

8. *Daimler Benz AG v. Hybo Hindustan*, 19 IPLR 224 DELHI.

9. *Glaxo Operations U.K. Ltd. & Another v. Samrat Pharmaceuticals*, 1984 PTC 66 DELHI

10. *Phillip Morris v. GT Industries*, 17 IPLR 237 BOMBAY

11. In *Hawpar Brothers International v. Tiger Balm Company Private Ltd*, 1996 PTC (16) 311 (MADRAS), the Madras High Court directed the respondents that whenever they use the words, "TIGER BALM" in their corporate name or trading style, they shall state specifically that they have nothing to do with the Singapore company and its trademark "TIBER BALM." The Supreme Court of India upheld the decision of the High Court.

12. (1995) 5 SCC 545.

The fate of Enron holds yet another lesson to be learned.<sup>13</sup> Although the Central Government supported Enron with a contingent guarantee for the project, the company found itself in the thick of Maharashtra's politics. Therefore, though Enron entered India as a power generating company, amidst all the complex negotiations, the emphasis moved to power trading. This made it harder for both sides to conclude a complex and controversial negotiation. Finally, a panel recommended by the Indian State Government (the Maharashtra Panel) recommended that Enron, along with GE and Bechtel, absorb a 590 million loss before it left India for good.

Even the successful Indian companies have their tales of joint ventures. Wipro's joint ventures with GE and with British Telecom failed. Titan terminated the agreement with Timex. Some joint ventures were terminated to enable the foreign corporation to become independent after gaining the Indian market. Indian companies use what is called a flywheel clause to protect themselves from such termination. This clause obligates the foreign partner to pay a certain percent of the profit as penalty depending on the period of termination intended by the foreign partner. The clause applies only when the foreign partner invokes 'termination without cause'. Most Indian companies prepare for the probability of the multinational company terminating the agreement after gaining the local market. The Modi Corporation of India is a partner in several joint ventures, the most successful of them being Modi-

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13. It is reported that Enron had received thirty-four complaints and queries from NGOs, journalists, local residents whose land had been acquired, and government officials within the statutorily defined two-month period (September 21 to November 21, 1993). Reportedly several individuals informed the company that their land was bulldozed, ruining their crops, and requested that the company stop acquiring land from them. See Enron Corporation: Corporate Complicity in Human Rights Violation, available in, <http://www.hrw.org/reports/1999/enron/enron3-0.htm>

Xerox. Companies like Modi believe that in a joint venture the Indian company knows the regulation, regulators, and the market conditions. The foreign company has the technology and the capital. Both enter into a relationship to make money. Chairman BK Modi is quoted to have said, "few years later if the foreign company becomes market savvy, no problem. We have made our money. Modi Corporation will get out and start a new business with another MNC." Alternately, Indian companies may shrewdly get out of businesses if the products of the multinational company fail in the market. The recent breakup between Telco, a company from the House of TATAs and Mercedes Benz is an example of this. The Indian company got out of the joint venture because the product (the E-Class car) was a failure in the market.

Foreign companies need to understand local psyche to capture the market. The General Electric, Hindustan Lever (a partner of Unilever), Nestle and other such corporations have not only captured the Indian market but have also gained consumer confidence and loyalty. These companies have managed to acquire the *desi* flavor required for survival in India by focusing on quality and steering clear of controversies.

Multinational companies normally tend to underestimate the ability of Indian companies to compete or complement their efforts. Multinational companies in the past have found it tough to treat Indian companies as their equals. It is assumed that Indian companies would be grappling with issues that American Chief Executive Officers (hereinafter, CEO) had already dealt with three or four years ago. On the contrary, they realize that the Indian CEOs have much in common with their US counterparts. Issues relating to employees, IT reliability and overhead costs are equally familiar to the Indian entrepreneurs. Corporate heads in India lead organizations across the world and derive business strategies. Indian CEOs sometimes have to work with

lesser infrastructure to produce the same results.

Multinational companies have terminated some joint ventures in haste. When India announced that it would open up its insurance sector, foreign insurers saw the unthinkable and latched onto the opportunity presented before them. They set up representative offices, and signed memorandum of understanding with numerous domestic players. In the urgency of it all, there was no careful reading of the scenario and the competencies of their partners. The domestic companies feared that the foreign insurers wanted the dominating role in the joint venture. They canvassed the Government for a bigger piece of the pie. The insurance guidelines issued by the Government eventually allowed only 26% equity participation for the foreign players in the market. This resulted in the breakup of several joint ventures in India.<sup>14</sup>

Foreign multinationals also tend to underestimate the professionalism of the Indian employees. Some of these can be attributed to the press in the US itself. Interestingly, the realities can be quite the contrary. Many successful Indian companies<sup>15</sup> have traditionally maintained a very productive work culture, requiring its employees to put in extra work hours and also by rewarding them generously.

Other aspects facilitating business in India include the media. Unlike in the US, where corporate communication departments create an arm's length relationship between top executives and the press, business leaders from India are remarkably accessible. Even journalists from the US agree that there is an unfettered interactivity in India, which is unheard of in the US. Lastly, Indian businessmen and professionals, like the rest of the public

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14. Examples include joint ventures between Dabur-All state, CGNU-Bombay Dyeing Eaglestar-ITC Cigna-Ranbaxy Allianz-Alpic Dabur-Liberty Mutual.

15. Examples are companies like Wipro, BPL, Reliance and Infosys Technologies.

in India, have creativity and skills to operate and thrive in an unstructured, chaotic and disorganized world. Business ventures with such go-getters are big assets to many foreign corporations that have otherwise got used to a mechanized, structured marketplace.

Like in any other relationship, a joint venture, especially with a foreign corporation, comes with several benefits and drawbacks. International joint ventures involve co-ownership and co-management among people from different cultural backgrounds. This involves catering to different agendas and objectives, not entirely in tune with each other. The best opportunity to minimize the drawbacks and maximize the benefits is at the agreement stage. It would be wise to focus not only on operational issues, but also on the less colorful issues of when and how to exit the joint venture. The agreement should carve provisions for distribution of tangible asset such as cash, machinery and intangible assets like trademarks and copyrights. An estimate of the breakup costs must also be included. While some of this might sound a little discouraging, one should not ignore the fact that joint ventures are the best means of gaining access to new markets, new technology, and ultimately to overcome national and international business barriers. A joint mission based on parity, pooled capabilities and resources, can be confident of a sure success.

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