
Guide to

Joint Ventures in India

Options, Regulations and Restrictions
for Foreign Nationals and Companies

April 2021 Edition
(Eighth Edition)

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Notes:

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1. Introduction

India's economic growth is attracting business houses from across the world. Joint Venture is a popular method to enter a country whose legal and business environment is unknown. However, joint ventures face many hurdles – statutory as well as relationship centered.

Even after more than two and a half decades of liberalization, India imposes restrictions on foreign investment in some sectors. Foreign companies also need to be aware of the corporate structures that they can choose when working in India. Sometimes a contractual joint venture is a better option than an equity-based joint venture. The choice of model of joint venture is, of course, determined by the objectives that the partners have and also whether they intend their relationship to be long term or short term.

This Guide attempts to throw light on the options available to foreign nationals and companies when entering into joint ventures in India.

As and when the Indian partner is selected and broad contours of the relationship underlying the joint venture have been firmed up, it is necessary to create the legal documents that will bind the parties together. At this stage it is necessary to draft, negotiate and execute a Shareholders' Agreement or Joint Venture Agreement. Surely, it is not easy to freeze the terms of a relationship to a well-drafted document that will stand the test of time. This Guide gives some key points that are critical in this regard.

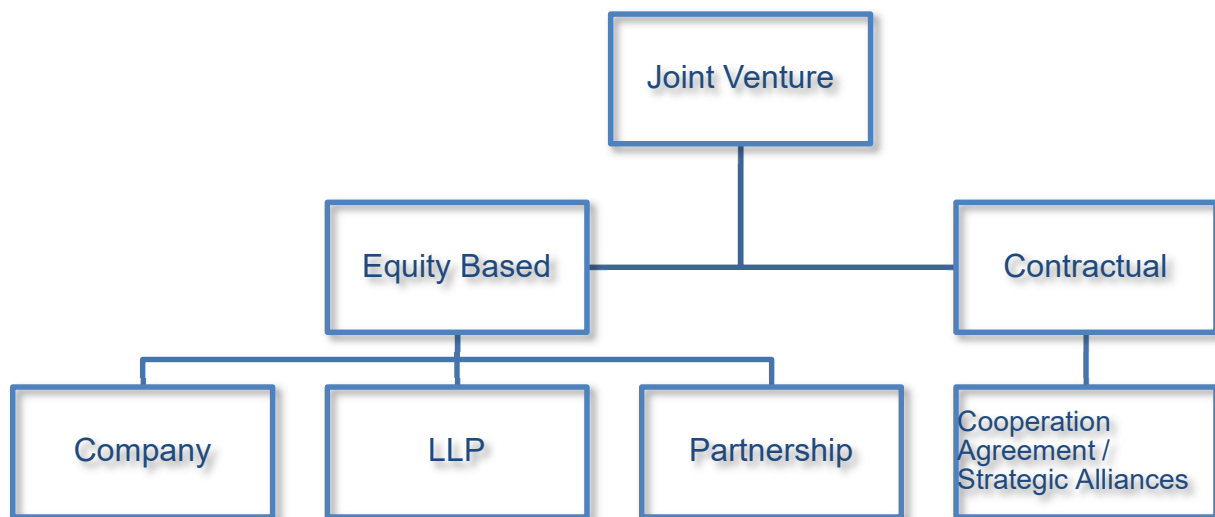
In India till a few years back, almost all equity-based ventures were structured in the form of a company. However, with the government permitting foreign investment in Limited Liability Partnership (LLP) Firms, there is significant interest in LLP firms.

Articles of Association is a most important document that controls the management and operations of a company. Generally, not sufficient attention is given to drafting of Articles. We give a brief write-up on the relevance of careful drafting of Articles in a joint venture company. In case of an LLP, Partnership Agreement determines the relationship between partners. We have tried to give some guidance about drafting of a Partnership Deed for an LLP firm.

2. Types of Joint Ventures

The two options available for establishing a joint venture in India are:

- ✓ Contractual joint venture
- ✓ Equity based joint venture



Contractual Joint Venture (CJV)

In a contractual joint venture, a new jointly-owned entity is not created. There is an agreement to work together but there is no agreement to give birth to an entity owned by the parties who are working together. The two parties do not share ownership of the business entity but each of the two parties exercises some elements of control in the joint venture. A typical example of a contractual joint venture is a franchisee relationship.

In a contractual relationship the key elements are:

- a. Two or more parties have a common intention – of running a business venture
- b. Each party brings some inputs
- c. Both parties exercise some controls on the business venture
- d. Typically, sharing of the surplus generated is by way of share in the top line (revenue) and not by sharing the bottom line (profits)
- e. The relationship is not a transaction-to-transaction relationship but has a character of relatively longer duration.

Generally speaking, the above five can be called as the distinguishing characteristics of a Contractual Joint Venture as opposed to a Contractual Transaction-based relationship.

Foreign companies often resort to contractual joint ventures when they do not wish to invest in the equity capital of a business in India even though they wish to exercise controls and want to decide the shape that the venture takes. For example, a foreign company may have a Technology Collaboration agreement with an Indian company whereby the foreign company controls all key aspects of running the business. In such a case the foreign company may like to retain the option of taking equity at a future date in the Indian company run by its technology. This will mean that though to begin with the venture is a contractual joint venture, the parties may convert it into an equity based joint venture at a later date.

Equity Based Joint Venture (EJV)

An equity joint venture agreement is one in which a separate business entity, jointly owned by two or more parties, is formed in accordance with the agreement of the parties. The key operative factor in such case is joint ownership by two or more parties.

The form of business entity may vary – company, partnership firm, trusts, limited liability partnership firms, venture capital funds etc. From the point of a foreign company, the most preferable form of business entity is either a company or a

limited liability partnership firm. We shall discuss this aspect in detail in the next section.

Generally speaking, in an equity based joint venture, the profits and losses of the jointly owned entity are distributed among the parties according to the ratio of the capital contributions made by them. However, the division of profits and losses is not the only characteristic of an equity-based joint venture. The key characteristics of equity-based joint ventures are as following:

- a. There is an agreement to either create a new entity or for one of the parties to join into ownership of an existing entity
- b. Shared Ownership by the parties involved
- c. Shared management of the jointly owned entity
- d. Shared responsibilities regarding capital investment and other financing arrangements.
- e. Shared profits and losses according to the Agreement.

It is not necessary that all the above five characteristics are fulfilled in every equity-based joint venture. For example, there are often agreements where one of the parties is investing but has no say in the management of the joint venture (JV) company.

There are also situations where a foreign company may want to exercise management control even though it is not investing in the JV company. Typically, if a foreign company is providing technology and other knowledge-based inputs, it may want to ensure that the JV company is managed as per its directions. In such cases the foreign company may retain an option to invest in the JV company at a future date. Such a structure may also be used by a foreign company to create a foothold for itself in a sector where Foreign Direct Investment (FDI) is not allowed.

3. Who Can Set Up Equity Based JV In India

Generally speaking, any non-resident entity can set up an equity based joint venture in India. However, some entities face restrictions under FDI Policy¹ of Government of India. The restrictions are as follows:

1. Beneficial owner of an investment or entity / citizen of a country that shares land border with India can invest only after approval of Government of India. Countries that share land borders with India are Pakistan, China, Nepal, Bhutan, Bangladesh, Myanmar and Afghanistan.
2. In addition to the above restrictions applicable to countries sharing land borders with India, citizen or entity of Pakistan cannot invest in defense, space, atomic energy and sectors prohibited for foreign investment.
3. NRI residents in Nepal and Bhutan as well as citizens of Nepal and Bhutan can invest on repatriation basis subject to investment coming in free foreign exchange (USD or EURO) through normal banking channels.
4. Foreign Portfolio Investors (FPI) may make investments in the manner and subject to the terms and conditions specified in Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

A FPI may purchase or sell equity instruments of an Indian company listed or to be listed on a recognised stock exchange in India subject to the following conditions, namely:-

(i) The total holding by each FPI or an investor group, shall be less than 10 percent of the total paid-up equity capital on a fully diluted basis or less than 10 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company and the total holdings of all FPIs put together, including any other direct and indirect foreign investments in the Indian company permitted under these rules, shall not exceed 24 per cent of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants. The said limit of 10 percent and 24 percent shall be called the individual and aggregate limit, respectively.

¹ Consolidated FDI Policy (Effective from 15October, 2020), Department for Promotion of Industry and Internal Trade (FDI Division), Ministry of Commerce and Industry, Government of India.

5. Foreign venture Capital Investor (FVCI) may make investments in the manner and subject to the terms and conditions specified in Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

SCHEDULE VII

(See rule 16)

Investment by a Foreign Venture Capital Investor (FVCI)

(1) Subject to the terms and conditions as may be laid down by the Central Government, a Foreign Venture Capital Investor (FVCI) may purchase, -

- (i) securities, issued by an Indian company engaged in any sector mentioned in paragraph (4) of this Schedule and whose securities are not listed on a recognised stock exchange at the time of issue of the said securities;
- (ii) units of a Venture Capital Fund (VCF) or of a Category I Alternative Investment Fund (Cat-I AIF) or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF.
- (iii) equity or equity linked instrument or debt instrument issued by an Indian 'start-up' irrespective of the sector in which the start-up is engaged. The definition of 'start-up' shall be as per Department for Promotion of Industry and Internal Trade's Notification No. G.S.R. 364(E), dated the 11th April, 2018 :

Provided that if the investment is in equity instruments, then the sectoral caps, entry routes and attendant conditions shall apply.

(5) List of sectors in which a Foreign Venture Capital Investor is allowed to invest is as follows :-

- (a) biotechnology;
- (b) IT related to hardware and software development;
- (c) nanotechnology;
- (d) seed research and development;
- (e) research and development of new chemical entities in pharmaceutical sector.
- (f) dairy industry;
- (g) poultry industry;
- (h) production of bio-fuels;
- (i) hotel-cum-convention centres with seating capacity of more than three thousand;
- (j) Infrastructure sector. The term "Infrastructure Sector" has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide notification F. No. 13/06/2009- INF, dated the March 27, 2012 as amended or updated.

4. Forms of Equity Based JV

Every equity based joint venture gives birth to a new entity. Government of India permits certain type of entities and frowns upon some others. Different types of entities and the government's attitude to them are summed up below:

- **Company** – A limited liability company is the most preferred structure for joint venture entities in India. Government also encourages investment being in the form of equity capital of a company incorporated in India. Companies in India are mainly of two types – private limited and public limited. There is **no minimum share capital prescribed either for private limited company or public limited company**. A private limited company must have at least two shareholders, while a public limited company must have seven shareholders. The only exception to this is a one-person company. The shareholders may be foreign citizens or foreign companies. Companies Act 2013 makes it mandatory that at least one director of every company is resident of India. The resident director need not be a citizen of India.
- **Partnership Firm** – Such an entity is NOT permitted for joint ventures by foreign residents in India in most of the cases. Exceptions are made in case of firms owned and controlled by Non Resident Indians (citizens of India residing out of India). Generally speaking, a foreign company should not think of using partnership firm as a vehicle for a joint venture.
- **Limited Liability Partnership (LLP) Firm**– LLP Firm structure is regulated in India by The Limited Liability Partnership Act, 2008. Foreign investment in an LLP firm is allowed only in sectors / activities where 100% FDI is permitted through automatic route. LLP Firms are partnership firms with limited liability of partners. An LLP Firm combines the convenience of a partnership firm with the limited liability feature earlier found only in a company. An LLP Firm needs minimum two partners. It also requires minimum two Designated Partners out of which at least one should be resident of India. The two partners can also be appointed as Designated Partners. There is no requirement of minimum capital contribution to incorporate an LLP Firm.

- **Venture Capital Fund** – A duly registered Foreign Venture Capital Investor is allowed to invest subject to the terms and conditions specified in Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019. (Relevant extracts are given in Chapter 3).
- **Trusts** – A foreign company is not allowed to use Trust as a form of a joint venture entity in India.
- **Investment Vehicle** – SEBI has introduced regulations for some funds like Real Estate Investments Trusts, Infrastructure Investment Funds, Alternative Investment Funds. Such funds are now permitted to receive foreign investment from a person resident outside India.
- **Other Entities** – Foreign companies are not allowed to use any structures other than those mentioned above for the purpose of equity based joint venture entities.

To sum up one can say that the most acceptable and convenient forms of equity based joint venture in India are a limited liability company and a limited liability partnership (LLP) firm.

5. Comparison - JV Company vs. LLP vs. Contractual JV

	Joint Venture Company	LLP Firm	Contractual Joint Venture
Liability	Limited However, liability under torts may be unlimited as faced by Union Carbide in case of Bhopal Gas Tragedy	Limited Liability may be unlimited in case of wrongful act/omission by the partner.	Limited by Contract Liability under torts may be unlimited.
Complexity In Formation	For foreign promoters, time is taken mostly for getting documents attested and time taken in courier of the said documents. These are required for getting Digital Signature and Director Identification Number (DIN). Estimated time – 4 weeks.		Very low level of statutory regulation of contractual joint ventures. Zero lead time to start activities.
	Company formation may take about 1 week after the DIN's have been obtained for all directors.	Easy incorporation process. May take about 1weekafter the DIN's have been obtained for all partners.	
Cost of Incorporation	More than Rs.35,000. Depends on authorized share capital and the state where registered office is located.	Between Rs.15,000 - Rs.30,000	No incorporation cost.
Minimum Participants (Partners / Shareholders)	Two shareholders. May be local residents or foreign residents.	Two Partners May be local residents or foreign residents	Entry of participants depends upon the Joint Venture Agreement.
Maximum Participants (Partners / Shareholders)	Maximum 200 shareholders for private company. No limit for public company.	No maximum limit on number of partners.	Depends upon the form of organization with whom Joint Venture Agreement is made.

	Joint Venture Company	LLP Firm	Contractual Joint Venture
Capital	Capital investment made by the parties as per the JV Agreement. Subject to Sectoral caps prescribed by Government of India (discussed in next section)	Investment by partners as per the LLP Agreement. Investment is allowed only in sectors where 100% foreign investment is allowed under automatic route without conditions.	Depends on terms of contract. There are no constraints prescribed by Government of India.
Management Controls	As per the terms of the JV Agreement. Statutory protection of rights of JV partners.	Partners jointly and severally control the activities. Rights and duties prescribed under the LLP Agreement.	As per the Contract. Limited statutory protection of rights.
Ownership	Ownership shared by the parties.	Ownership shared by partners to the extent of capital contributed by each of them.	Ownership is not shared.
Resident Director / Designated Partner	One Resident Director needed. An individual is resident of India if he / she stays in India for 182 days or more during the financial year. Resident need not be citizen of India. Not necessary for a Director to hold any shares.	One Resident Designated Partner needed. An individual is resident of India if he / she stays in India for 182 days or more during the year. Resident need not be citizen of India. Not necessary for a Designated Partner to be Partner.	Not Applicable
Government Approvals	Subject to Foreign Direct Investment Policy of Government of India, approval may either be automatic or need formal approval of Government of India (discussed in next section).	Investment permitted only through automatic route in sectors where 100% foreign investment allowed under automatic route without conditions.	Normally, no approvals are required. Contractual JV's are not permitted in the fields of gambling, betting and lottery.

	Joint Venture Company	LLP Firm	Contractual Joint Venture
Exit Route	Three options – either JV partner may buy the other; both partners may sell their shares to a third party; and the company may go for voluntary liquidation under Insolvency and Bankruptcy Code of India, 2016. In case the company has no operations, it may be possible to go for striking off the name.	May be wound up by the option of the parties and situations mentioned in the LLP Agreement. Winding up a LLP Firm is easy as compared to a company.	Subject to the terms of the contract.

6. LLP Firm as a Special Purpose Vehicle

A Limited Liability Partnership (LLP) Firm combines the simplicity of a partnership firm with the advantage of limited liability available in the case of a company. Before the passing of The Limited Liability Partnership Act in 2008, a foreign company intending to participate in tender or some other project in consortium with an Indian company had only the option of setting up a company to use as a Special Purpose Vehicle (SPV). Using a company as an SPV has the disadvantage that a company is difficult to wind up. Foreign companies are not allowed to invest in partnership firms. Moreover, consortium members do not want to be saddled with unlimited liability as is the case in a partnership firm under The Indian Partnership Act, 1932. Earlier, foreign companies were not allowed to invest in any form of structure except a company. Foreign Investment in some LLP firms is allowed in the areas where 100% foreign equity participation is allowed without any conditions.

LLP firm as an SPV between a foreign company and an Indian company has the advantage of being easy to wind up after the purpose is over and the liability of the two partner companies is limited. Key advantages of using an LLP firm as an SPV as compared to a company are as follows:

- a) Low cost of incorporation of an LLP.
- b) Flexibility of rules of governance based on Agreement between the Partners.
- c) Partners can be companies while management is by Designated Partners who are individuals. This way ownership and management are separated.
- d) Low annual maintenance cost.
- e) Before the start of operations, there may be no need to get the accounts audited.
- f) Share in profit that a partner gets from an LLP is tax free in the hands of the partner, while the dividend from a company is taxable. A company has a lower rate of taxation as compared to an LLP. But if one takes into account the tax on dividend, a company may not be advantageous as compared to an LLP.

- g) Voluntary winding of an LLP firm which has no creditors is very easy and can be done without intervention of any court or tribunal.

Investment in LLP Firms is permitted only in sectors in which 100% FDI is permitted through automatic route without any performance linked conditions. Relevant extract from the FDI Policy reads as follows:

FDI in LLPs is permitted subject to the following conditions:

- (i) FDI is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions.
- (ii) An Indian company or an LLP, having foreign investment, is also permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.
- (iii) Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route.
- (iv) FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.

So, an LLP is the recommended option if the following conditions are fulfilled:

- a) The JV intends to operate in a sector where 100% FDI is permitted without any performance conditions. Some examples of such sectors are – horticulture, plantation, coal mining, oil and gas exploration, industrial parks etc.

- b) The LLP Firm is intended to be wound up at some point of time in not-too-distant future.

Often a foreign company and an Indian company may decide to work together and explore opportunities together in India. They may participate in tenders and other government biddings etc. with uncertainty about the date of actual start of business. In such cases, an LLP firm may be an ideal choice. The LLP firm can keep exploring and if after a few months or years, the firm fails to strike any opportunity the LLP firm may be wound up without any difficult procedures.

7. Joint Venture for Participating in Tenders

Foreign companies often wish to participate in India's growth story by bidding against tenders issued by government departments or agencies or undertakings of India. The tenders usually prescribe some qualification criterion for eligible bidders. Forming a joint venture with an Indian company enables the foreign company to satisfy the qualification criterion.

Conditions prescribed by tender documents in India vary greatly. A few examples of the prescribed conditions are given in **Schedule A**.



National Highways Authority of India

(Ministry of Road Transport & Highways)

Government of India

(International Competitive Bidding)

BIDDING DOCUMENT

(Item Rate Contract)

A noticeable fact in some tenders is that the tender prescribes, "*The joint venture agreement should be registered, so as to be legally valid and binding on all partners*". Some tenders also mention of a "registered joint venture agreement". Very often the

persons who draft tender document do not know that (a) a joint venture agreement does not need to be registered under The Registration Act, 1908 and (b) registration of a document does not enhance its legal validity or binding force.

The problem faced by bidders against a tender is that mistakes committed by the persons who draft the tender have not only to be tolerated but have to be taken care of. So, even though a joint venture agreement does not need to be registered in India, companies have been finding ways to get joint venture agreements registered. In the absence of any clear legal method of registration of JV agreements under law, the view of the concerned officer of the tendering agency becomes the final view that must be humored. Some of the methods used for registration of joint venture agreements are as follows:

- a) Submitting the JV Agreement to the concerned sub-registrar of the district and getting it registered under The Registration Act, 1908. Cost involved is nominal.
- b) Converting the JV Agreement into a Limited Liability Partnership Agreement and getting an LLP firm registered.
- c) Incorporating the JV Agreement into Articles of Association of the JV company and getting the company incorporated.

It may be mentioned here that the condition of a registered JV Agreement is found only in tender documents of some states. Obviously, someone who did not know law very well wrote it a few years ago and it has carried on becoming a standard condition in tender documents of that state. We hope that better sense will soon prevail in that state and authorities issuing tenders will modify their tender documents.

The key points of action for foreign companies wishing to participate in government tenders in India can be summed up as follows:

- Please study carefully the tender conditions related to joint venture in tender documents usually issued by the department or agency or authority whose tenders you wish to participate in.
- Most of the conditions prescribed in the tender document will need to be incorporated in the joint venture agreement.

- While negotiating with prospective JV partners, it is necessary to keep the tender conditions in mind. For example, if the tender document states that each JV partner should have at least 26% share, it is futile to negotiate a JV Agreement where your partner has less than 26% share.
- Generally speaking, many tenders allow a JV Agreement or MOU to be submitted with the techno-commercial bid. A special-purpose-vehicle or joint venture entity may be formed after the bid is successful. If the tender permits so, the JV Agreement / MOU should be submitted with the bid and it should be clearly mentioned that a JV LLP / Company will be formed after the bid is successful.
- In some cases, the tendering authority wants the JV LLP / Company to be formed prior to the submission of bid. This creates a problem for unsuccessful bids. One does not want to have in one's portfolio stillborn companies formed for submission of bids which in due course failed to materialize. The problem can be solved by two ways – (a) Form an LLP firm that can be wound up easily when the bid fails (b) Keep shell companies in one's portfolio; the shell companies can have very small capital and shareholders & directors may be changed as may be required with each JV Agreement submitted with different tenders.

To sum up, it may be said that forming a joint venture for the purpose of bidding against a tender is a complex process that needs thorough study of the tender document along with understanding of the business needs of the joint venture partners.

8. Prohibited Sectors / Countries for Equity-based JV

Foreign companies are not permitted to establish joint ventures in the following areas:

- Lottery Business
- Gambling and Betting
- Chit Funds(Except on non-repatriation basis by Non-Resident Indians)
- Nidhi Company
- Trading in Transferable Development Rights
- Real Estate business or construction of farm houses; 'Real estate business' shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts
- Manufacture of tobacco products and substitutes
- Activities / sectors not open to private sector investment e.g. Atomic Energy and Railway Operations (excluding permitted areas of Railway Infrastructure)
- Foreign collaboration in any form for lottery business, gambling and betting activities

Beneficial owner of an investment or entity / citizen of a country that shares land border with India can invest only after approval of Government of India. Countries that share land borders with India are Pakistan, China, Nepal, Bhutan, Bangladesh, Myanmar and Afghanistan.

9. Automatic Approval Route Sectors

For most sectors, investment by a foreign company is under automatic approval route. In such sectors, the banker of Indian company receiving investment receives an application addressed to Reserve Bank of India (RBI). The approval of RBI is deemed to be granted from the date of receipt of the application by the banker.

It should be noted that foreign direct investment up to 100% of the equity capital of Indian company is permitted in all sectors / activities which are not listed in the FDI Policy of Government of India. Such investment is permitted through the automatic route. However, it is subject to laws / regulations; security and other conditions as applicable to such sectors / activities in India.

As mentioned earlier, investment in LLP Firms is permitted only in sectors in which 100% FDI is permitted through automatic route without any performance linked conditions.

Sectors in which 100% of Indian company is allowed to be held by foreign company are as follows:

- Floriculture, Horticulture, and Cultivation of Vegetables & Mushrooms under controlled conditions; (LLP route allowed).
- Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, Apiculture, under controlled conditions (LLP route allowed).
- Tea, coffee, rubber, cardamom, palm oil and olive oil plantations (LLP Route allowed).
- Development and production of Seeds and planting material (LLP route allowed).
- Services related to agro and allied sectors (LLP route allowed).

- Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores (LLP route allowed).
- Coal & Lignite mining and Setting up coal processing plants (LLP route allowed).
- Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector (LLP route allowed).
- Manufacturing including contract manufacturing; A manufacturer is allowed to sell its products (excluding food products) through wholesale or retail or ecommerce (LLP route allowed).
- Up-linking of non-‘News and Current Affairs’ TV channels / Down-linking of TV channels (LLP route not allowed).
- Teleports, Direct to Home (DTH), Cable Networks, Mobile TV, Headend-in-the Sky Broadcasting Service (LLP route allowed).
- Airports – Greenfield projects and Existing Projects (LLP route not allowed).
- Scheduled Air Transport Service / Domestic Scheduled Passenger Airline, Regional Air Transport Service (Automatic up to 49% Government route up to 100%), (automatic up to 100% for Non- Resident Indians) (LLP route not allowed).
- Non-scheduled air transport services (LLP route not allowed).
- Helicopter services/seaplane services requiring DGCA approval (LLP route not allowed).
- Maintenance and Repair organizations; flying training institutes; and technical training institutions in the area of civil aviation (LLP route not allowed).

- Ground handling services in the field of civil aviation (LLP route not allowed).
- Construction-development projects including development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships (LLP route not allowed).
- Real estate broking service (LLP route allowed).
- Industrial Parks – New and Existing (LLP route not allowed).
- Cash & Carry Wholesale Trading / Wholesale Trading (including sourcing from MSME's) (LLP route not allowed).
- Private security agencies (Automatic up to 49%, government route up to 74%) (LLP route not allowed).
- E-Commerce Activities (B-2-B or marketplace model) (LLP route not allowed).
- Telecom Services (Automatic up to 49%, government route up to 100%) (LLP route not allowed).
- Single Brand Product Retailing (LLP route not allowed).
- Duty-free Shops (LLP route not allowed).
- Railway Infrastructure (LLP Route not allowed).
- Asset Reconstruction Companies. (LLP route allowed).
- Credit Information Companies (LLP route not allowed).
- Private banking sector (Automatic up to 49%, government route up to 74%) (LLP route not allowed).

- Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations (Automatic up to 49%) (LLP route not allowed).
- Insurance companies (Automatic up to 49%) (LLP route not allowed).
- Insurance Intermediaries including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrators, surveyors and loss assessors and such other entities (LLP route not allowed).
- Non-Banking Financial Companies.
- Pension sector (Automatic up to 49%) (LLP route not allowed).
- Power Exchanges (Automatic up to 49%) (LLP route not allowed).
- White Label ATM Operations (LLP route not allowed).
- Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India. (LLP route not allowed).
- Pharmaceuticals – Greenfield (LLP route allowed).
- Pharmaceuticals – Brownfield (Automatic up to 74%, government route beyond 74%) (LLP route not allowed).

There are conditions prescribed for the areas where LLP route is not allowed. In cases where we have mentioned that LLP route is allowed, it is our opinion that the conditions prescribed are not “FDI-linked performance conditions”. However, the authorities may well take a different view. In all cases, it is necessary that one consults the FDI Policy of Government of India and the concerned authorities for specific conditions applicable to one’s chosen area of activity.

Notably, any activity that is not listed in FDI Policy is considered as a sector where 100% FDI is allowed under automatic route.

In addition to the above sectors (where 100% foreign direct investment is permitted) there are other sectors where **lower limits are prescribed** even though the **approval process is automatic**. Examples of such sectors are as follows:

Sector	Permitted Percentage of Investment	Remarks
Petroleum refining by the Public Sector Undertakings (PSU) without any disinvestment or dilution of domestic equity in the existing PSUs	49%	Automatic
Defence Sector	100%	Automatic up to 49%. Above 49% under government route wherever it is likely to result in access to modern technology or for other reasons to be recorded
Telecom Services	100%	Automatic up to 49%, Government Route beyond 49% up to 100%
Scheduled Air Transport Service / Domestic Scheduled Passenger Airline and Regional Air Transport Service	100%	Automatic up to 49%, Government Route beyond 49%. (Automatic up to 100% for NRI's)

Sector	Permitted Percentage of Investment	Remarks
Insurance	49%	Automatic
Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49%	Automatic
Pension sector	49%	Automatic

The above list is not exhaustive. In the above sectors, investment in LLP Firms is not allowed.

10. Government Approval Route Sectors

There are some sectors / activities where the approval for investing in an Indian company has to be obtained from Government of India. The process of granting approval is handled by the respective administrative ministry. Competent authorities for granting government approval are as follows:

S. No.	Activity/ sector	Administrative Ministry/ Department
(i)	Mining	Ministry of Mines
(ii)	Defence	
	a) Items requiring Industrial Licence under the Industries (Development & Regulation) Act, 1951, and/or Arms Act, 1959 for which the powers have been delegated by Ministry of Home Affairs to DPIIT	Department of Defence Production, Ministry of Defence
	b) Manufacturing of Small Arms and Ammunitions covered under Arms Act 1959	Ministry of Home Affairs
(iii)	Broadcasting	Ministry of Information & Broadcasting
(iv)	Print Media/Digital Media	
(v)	Civil Aviation	Ministry of Civil Aviation
(vi)	Satellites	Department of Space
(vii)	Telecommunication	Department of Telecommunications
(viii)	Private Security Agencies	Ministry of Home Affairs

(ix) (a)	Applications involving investments from an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country {as required in terms of Press Note 3 of 2020 read with Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2020 dated 22.04.2020}	Concerned Administrative Ministry/Department as identified by the DPIIT
(ix)(b)	Cases pertaining to sectors/activities under Government approval route requiring security clearance as per the extant Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, FDI Policy and security guidelines, as amended from time to time	Nodal Administrative Ministries/Departments
(x)	Trading (Multi Brand Retail Trading and Food Product retail trading)	Department for Promotion of Industry and Internal Trade
(xi)	FDI proposals by Non-Resident Indians (NRIs)/ Export Oriented Units requiring approval of the Government	Concerned Administrative Ministry/Department as identified by the DPIIT
(xii)	Applications relating to issue of equity shares under the FDI policy under the Government route for import of capital goods/machinery/equipment (excluding second-hand machinery)	
(xiii)	Applications relating to issue of equity shares for pre-operative/pre-incorporation expenses (including payments of rent etc.)	

(xiv)	Financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight	Department of Economic Affairs
(xv)	Applications for foreign investment into a Core Investment Company or an Indian company engaged only in the activity of investing in the capital of other India Company(ies)	
(xvi)	Banking (Public and Private)	Department of Financial Services
(xvii)	Pharmaceuticals	Department of Pharmaceuticals

There are sectors where 100% foreign direct investment is permitted but Government approval is required. Examples of such sectors are as follows:

- Mining and mineral separation of titanium bearing minerals & ores, its value addition and integrated activities.
- Publishing / printing of Scientific and Technical Magazines / specialty journals / periodicals.
- Publication of facsimile edition of foreign newspapers.
- Satellites - establishment and operation.
- Pharmaceuticals – Brownfield (74% under automatic route).

Apart from the sectors mentioned above in which 100% investment is allowed by a foreign company with the approval of the Government, there are some sectors in the Government entry route with lower limits. Examples of such sectors are as follows:

Sector	Permitted Percentage of Investment	Remarks
Terrestrial Broadcasting FM (FM Radio)	49%	Government approval
Up-linking a News & Current Affairs TV Channel	49%	Government approval
Uploading / Streaming of News & Current Affairs through Digital Media	26%	Government approval
Publishing of Newspaper and periodicals dealing with news and current affairs	26%	Government approval
Publication of Indian editions of foreign magazines dealing with news and current affairs	26%	Government approval
Private Security Agencies	74%	Government Approval beyond 49% and up to 74%
Multi Brand Retail Trading	51%	Government Approval
Banking –Private sector	74%	Automatic up to 49% Government route beyond 49% and up to 74%
Banking- Public Sector	20%	FDI and Portfolio Investment

FDI – Foreign Direct Investment
FPI – Foreign Portfolio Investor
NRI – Non-Resident Indian

All the above sectors are subject to various regulations / guidelines / conditions. Readers are advised to refer the relevant regulations / guidelines / conditions issued by various Ministries along with the Consolidated FDI Policy.

11. Approval for Technology Transfer, Brand Name Use, Royalty Payment etc.

Agreements for Technology Transfer, Use of Brand Name, Royalty Payment etc. are accorded approval by automatic route. In other words, such agreements do not need any prior permission from either the government or the Reserve Bank of India.

Before 2009, Government of India regulations used to limit the royalty that could be paid to a foreign collaborator / brand owner. The restrictions were removed vide Press Note No. 8 (2009) dated 16th December 2009.

From 2009 to 2010, royalty and fees under technology collaboration agreements were regulated by Foreign Exchange Management (Current Account Transaction) Rules, 2000. However, the restrictions were removed by Foreign Exchange Management (Current Account Transactions) (Amendment) Rules, 2010 vide Notification No. GSR382(E) dated 05.05.2010 w.e.f. 16.12.2010.

As on date, there are no limits or restrictions either on royalty or fees under technology transfer agreements.

12. Documents for Joint Ventures

Finalization of a joint venture goes through many stages. The first may be called courtship when the two partners flirt with each other without any commitment. The second may be called the engagement phase when there is a level of commitment but still it is not very firm or long-term. The final stage can be compared to a marriage.

Documentation at each stage is different. Generally speaking, Indian companies wish to have a Memorandum of Understanding (MOU) to define the relationship at the courtship stage. The MOU is a brief document without much legal jargon. The MOU states the duties of both parties and lays down a road map for the future.

During the engagement phase, a Contractual Joint Venture may be envisaged. The parties are putting in relatively higher amount of resources at this stage. Hence, it is customary to have well-drafted legally binding contracts. The contracts are generally of a fixed duration or are related to specific events like getting an order or achieving certain sales volumes.

At the marriage stage, the parties have developed higher confidence in each other. So, an equity-based joint venture is considered. The documentation for an equity Joint Venture must take into account all possibilities that may arise over a fairly long period of time. Hence, the Joint Venture Agreement or Shareholders' Agreement or LLP Partnership Deed must be prepared very carefully to avoid any confusion even many years down the line.

Generally speaking, most equity Joint Ventures in India are structured in the form of private or public limited liability companies. In a company, Articles of Association is a very important document. Companies Act, 2013 gives the promoters freedom to draft the articles as per their requirements. It is hence, advisable to devote time and attention to the Articles and not depend on a standard off-the-shelf draft, especially in case of a joint venture company where one of the partners is a foreign national / company.

13. Essential Features of a Shareholders' Agreement /Joint Venture Agreement / LLP Partnership Agreement

Before one starts to draft a Shareholders' Agreement (SHA) (often called Joint Venture Agreement in India) or a LLP Partnership Deed (PD), one must realize that the SHA / PD is not a document for the government or the courts. SHA / PD is a working document and should be drafted with business essentials in focus. Sadly, lawyers / attorneys / advocates rarely have an understanding of business. So, the entrepreneur or top management must get involved in preparing the SHA / PD. One surely needs professional help in drafting an SHA / PD. However, beware of a legal professional who has no experience of business and is only adept at steering his clients through courts.

The key questions that an SHA / PD must address are common-sense ones that any entrepreneur is bound to ask when he / she joins hands with another entrepreneur. Examples of such questions are as follows:

- Who will bring in what resources – monetary, manpower, technology, management systems?
- What business will the new company / LLP Firm be engaged in?
- How will the Board of Directors (Designated Partners) be constituted?
- How will the Board of Directors (Designated Partners) decide matters – by majority vote / by consensus?
- Who will be the Chairman / Chairperson of the company?
- Who will be the Managing Director of the company / Managing Designated Partner of LLP Firm? What will be the powers of the Managing Director / Managing Designated Partner?

- Will decisions related to capital expenditure be taken by the Board of Directors (Designated Partners, in case of LLP Firm) or by the JV partners?
- Will there be decisions that will be taken only at the level of the promoters / partners (persons who sign the SHA / PD) and not at the level of the Board of Directors (Designated Partners)?
- Who will control finance? Who will sign the cheques?
- Who will be responsible for marketing?
- Who will be responsible for technical matters like selection of machinery, choice of technology, production planning etc.?
- Who will decide about future expansion projects or major capital expenditure?
- Will the promoters / partners communicate only at meeting of Board of Directors (Designated Partners) or will there be some other meetings between promoters only?
- What happens if one of the promoters / partners is not able or not willing to fulfill his commitments in the SHA / PD?
- What will be the Schedule of activities? What happens if there are slippages from the Schedule?
- How to resolve differences that might arise between the promoters / partners?
- What will be the Exit Route for one or both of the promoters / partners?
- What happens after the promoters / partners fall out? How to decide the price of equity shares / value of enterprise at the time of separation?

The above examples are indicative and are not exhaustive. Obviously, the questions and answers that are critical to a particular business enterprise are unique to that enterprise.

If you are an entrepreneur or a key management person involved in preparing an SHA / PD, please list the key questions and answers that appear to you most critical. At this stage there is absolutely no need for any legalese or format or structure. Once the key critical points have been listed, it is time to ask a professional to take over.

It is the legal professional's job to convert your key points into an SHA / PD. However, even though the professional may be the world's best, an SHA / PD is too important a document to be left only to a professional. Please do read it yourself and check if each of the key points has been adequately addressed.

Often legal professionals have a tendency to draft in a language that only they can understand. If you have been unfortunate to get such a legal professional, please tell him / her politely that the SHA / PD is a working document between entrepreneurs / business persons and is not a court document. If the learned professional obliges you with a draft that you and your potential partner can understand, you can go ahead. On the other hand, if he / she persists with long sentences that seem to go on endlessly and a structure that gives you headache, it is time for you to get a different professional to assist you.

14. Essential Parts of a Joint Venture Agreement

There is no legally prescribed format for a joint venture agreement in India. However, it is advisable for a joint venture agreement to have the following parts:

A. Description

This is the first paragraph of the agreement. It usually begins with “*This Shareholders Agreement (hereinafter referred to as “this Agreement” or “the Agreement”) is executed on this day of the month of of year by and between:*”.

Date is usually a part of the Description. But it may also come at the end of the Agreement.

Key purpose of Description is to state the nature of the agreement.

B. Parties

Describing the parties by their name, address, nature of constitution along with some form of identification number is crucial. For a foreign company, country of its incorporation must be stated. For an Indian company, it is necessary to have its correct name, registered office address and Corporate Identification Number (CIN). For Indian individuals, Permanent Account Number (PAN) granted by income tax department should be stated.

It is important to ensure that details about parties are complete, detailed and accurate. Due diligence must be exercised in getting such details. For example, if the Indian company hesitates in giving its CIN or if the details provided by the company do not match the Master Data available on the site of Ministry of Corporate Affairs, Government of India, red flag must be raised immediately. A foreign company doing a joint venture agreement with a fictitious Indian company is obviously walking into trouble.

C. Recitals

Recitals state the situation as it existed prior to execution of the Agreement. Recitals are used to express the underlying assumptions, presumptions and mutually known facts at the time of execution of the Agreement. In case one of the parties has to plead fraud or cheating, recitals are useful.

Recitals also state the intentions and wishes of the parties. For example, it may be said – “*The Parties wish to work together to set up an Indian company for marketing the Products in South Asia*”. Such a statement is a wish and not a statement of mutual decision, which is likely to read as follows – “*The parties hereby agree to work together ...*”.

Any previous MOU / understanding / correspondence that had defined or influenced the relationship between the parties prior to the Agreement must be referred to in the Recitals. Whether the MOU / understanding / correspondence will cease to have further effect or will continue to bind the parties should come in the operative part or body of the Agreement (and not in the Recitals).

It should be noted that a mutual decision or agreement has no place in the Recitals.

D. Operative Part or Body

Operative part or body of a joint venture agreement defines the rules for future. In particular, it is important to pay attention to the following in an equity-based joint venture agreement:

- Name of the new entity being created
- Constitution of the new entity being created – LLP or company
- Equity investment by each party
- Rules about loans by either party to the new entity
- Activities to be undertaken by the new entity along with geographical limits, if any. This will include the products / services to be manufactured / marketed by the new entity.

- Roles and responsibilities of each party in functioning of JV company / LLP firm
- Constitution of Board of Directors (in case of company)
- Who will be Managing Director and who will be Chairman?
- Powers of Managing Director / Board of Directors
- Decision making in Board of Directors – by consensus or majority
- Matters to be decided only by consensus of the parties
- Remuneration payable to working partners or directors
- Schedule of proposed actions after execution of the JV agreement
- Rules about transfer of shares
- Targets / Milestones to be achieved
- Procedure for review of operations

E. Legal Part

While the operative part mentioned above relates to day-to-day functioning or operations of the joint venture, the legal part relates to matters that have no relevance on a day-to-day basis. Such matters become most important when relations turn sour or in case of unexpected developments. Some of such issues are as follows:

E1. Modification / amendment of the JV Agreement

It is common to provide that the Agreement may be modified by the Parties by mutual consent in writing. In rare cases a step-wise procedure to initiate and approve change may be provided.

E2. Duration

The joint venture may be project-specific or may be of a fixed duration (say, three or five or ten years). An example of project-specific agreement is when two or more parties join hands to bid for a tender. In such a case, it is clearly agreed that as and when the assignment received after successful bid against tender is duly completed or comes to an end, the joint venture agreement will end.

In time-bound joint ventures, the relationship is terminated at the expiry of the prescribed period unless the parties decide to renew the agreement for such further period as may be agreed.

In equity-based joint ventures, it is often mentioned that the joint venture will come to an end as and when either party sells its shares to the other.

It is important to think and discuss about duration at the time of drafting the joint venture agreement. Decision of the parties in this regard should be clearly articulated in the agreement.

E3. Termination

A joint venture agreement is like a marriage – easy to get into, very difficult to get out of.

Often JV agreements prohibit unilateral termination by either party. In some cases, both parties to the agreement may be restricted from terminating the JV agreement. An example of such restrictions is when a JV agreement is formed for bidding against a tender to a government authority. The authority may insist that the JV agreement shall not be amended or terminated without prior approval of the authority.

Even where there are no such restrictions imposed by a third party, the parties may not want easy termination. It is customary to provide for a termination notice giving reasons for termination. The party demanding termination is required to give 30 / 60 / 90 / 180 days notice in writing to the

other party. The party receiving termination notice is given an opportunity to correct the flaws or shortcomings or complaints behind the termination notice.

Level of difficulty or complication that one wishes to introduce into the termination process varies from case to case. While a quick instant divorce is not good, a long-drawn-out process running for years is also not desirable. One has to determine the optimum process and mention it in the agreement without any ambiguity.

Absence of termination clause in an agreement will generally be interpreted to mean that the parties to the agreement are free to terminate the agreement at any time. A termination clause imposes restrictions on each party's right to terminate the agreement. In the absence of a termination agreement, the relationship becomes like a live-in where either one can walk away without giving any notice.

E4. Post-termination

The most difficult part in any divorce is dividing the shared assets. Joint ventures are no different.

While it is practically impossible to imagine and decide all post-termination issues at the time of execution of the JV Agreement, it is worthwhile to try to put some thought into the subject at the time of preparing the JV Agreement.

E5. Dispute Resolution by Amicable Consultation

It is worthwhile to provide in a JV agreement some sort of procedure to enable the parties to meet and discuss their disputes with a view to resolving the same in a friendly manner. This can help save significant costs in arbitration and / or litigation.

For examples of pre-arbitration clauses, please refer to Part E of our **Guide for Arbitration Clauses in International Agreements in India** (available at <http://indialegalhelp.com/files/guidearbitrationclause.pdf>)

E6. Dispute Resolution

Dispute resolution involves the following aspects:

- a) Governing law
- b) Arbitration, appointment of arbitrators, number of arbitrators, language of arbitration, etc.
- c) Law governing arbitration
- d) Procedure of arbitration
- e) Jurisdiction of courts

We have discussed all aspects related to the above in our **Guide for Arbitration Clauses in International Agreements in India** (available at <http://indialegalhelp.com/files/guidearbitrationclause.pdf>). Please refer to the Guide for a detailed discussion on the subject.

E7. Confidentiality and Non-disclosure agreement

In some cases, the parties sign a Confidentiality and non-disclosure agreement (CNDA) before start of discussions regarding joint venture. Even if such a CNDA has been signed, it is worthwhile to include provisions related to confidentiality and non-disclosure in the JV Agreement.

Often parties like to provide that the provisions related to confidentiality and non-disclosure will survive the termination of the JV Agreement for a period of one / two / three years.

E8. Non-compete clause

Parties wish to stop each other from competing during the validity of the JV agreement and also after the termination of the JV Agreement. Level and types of restrictions imposed may vary from case to case depending on the negotiations between the parties.

E9. Indemnification

Who indemnifies whom and to what extent and against what – these issues are often complex.

Both parties may indemnify each other against negligence, carelessness and violation of the JV agreement.

If one party is in the lead or active role and the other is in a passive role, the passive party may demand a higher level of indemnification.

E10. Force majeure

Force Majeure relates to events that are beyond the control of both parties. Typically, fire, flood, tycoons, riots, political upheavals, acts of God, acts of government, acts by international organization etc. are covered by Force Majeure clause. In year 2020, Covid-19 pandemic upset many businesses. Immediately after the pandemic spread many corporate houses rushed to relook at their agreements to examine if the pandemic was covered by the Force Majeure clause.

As and when a Force Majeure event happens, either party to the Agreement is not bound to fulfill its commitments.

Under Indian law, there is no specific provision for Force Majeure. So, the Force Majeure clause in the Agreement is the only recourse to the party which faces difficulty in fulfilling its commitments. Hence, the clause needs to be drafted carefully. Key constituents of a Force Majeure clause are as follows:

- (a) **Definition** of what constitutes Force Majeure event
- (b) **Exclusions** from Force Majeure – what does not constitute Force Majeure? For example, the bank not sanctioning term loan to a party – will it constitute Force Majeure?
- (c) **Notice** of start of event of Force Majeure

- (d) **Period** for which the Force Majeure event continues – Will there be a maximum limit for Force Majeure period?
- (e) **Effect** of Force Majeure event – What liabilities and obligations will be suspended? What duties and responsibilities will remain unchanged even in case of Force Majeure event?
- (f) **Consultation** between parties for future course of action – If the Force Majeure event continues beyond some specified period, the Agreement may provide for mutual consultations to decide future steps.

Covid-19 pandemic has forced companies across the world to look at the Force Majeure clause in their agreements. Such events underline the importance of well-drafted Force Majeure clause in all agreements.

E11. Language versions and official version

Often a JV Agreement between a foreign company and an Indian company is executed in English and the language of the foreign company. In such cases it is important to mention that the official version is English version unless the parties decide otherwise. A confusion about which version is the official one can lead to severe complications when the relations turn sour.

E12. Copies of the agreement

It is usual to execute the agreement in a number of copies and let each party have a signed copy. For example, in an agreement among four parties the agreement was executed in four copies. In such a case, it is important to state, *“This Agreement is being executed in four (4) copies. Each Party will receive one copy. Each of the four (4) copies is original and carries equal weight”*.

E13. Procedure for execution

Signing of a JV agreement between a foreign company and an Indian company poses the logistics challenge of physically meeting to sign the agreement in front of each other. It is not worthwhile to spend time and money on travelling across continents to merely sign an agreement. It is suggested

that the JV Agreement has a clause similar to the following from an Indo-Russian JV agreement:

Each party has printed a copy on the date mentioned hereinabove. XXXXX has signed its copy at, Russia and YYYYY has signed its copy at, India. Both Parties will send by courier their respective signed copy to the other. After receiving the copy signed by the other Party, each Party will put its signature on the respective copy and retain it for future reference. Thus, each Party will retain one copy and each copy will be original.

It may be mentioned here that a JV agreement does not need signatures of witnesses. The JV agreement may be simultaneously (meaning on the same date) signed by the parties sitting in two different countries.

It may also be mentioned that the JV agreement does not need to be executed on a stamp paper or such other special legal paper. It must be stressed that an international JV agreement which is deemed to be signed in some place outside India must not be printed on Indian stamp paper since payment of Indian stamp duty will lend credence to the fact that the agreement was intended to be subject to Indian laws.

E14. Place of signing the agreement

An international joint venture agreement can be signed at any place in the world. As mentioned above, the agreement may be signed simultaneously at two different places.

Strictly speaking, it is not necessary to mention the place at which the agreement has been signed.

Let us consider an agreement between a company based in Paris, France and an Indian company based in Mumbai. The agreement states that the governing law will be French law. In such a case, mentioning the place of signing the agreement as Mumbai is avoidable. It is recommended that the

place of signing should either not be mentioned or should be mentioned as the place whose governing law is applicable to the agreement.

E15. Persons signing the agreement

Under the law applicable to companies in India, a company is managed by its Board of Directors. Power to sign an agreement on behalf of a company vests with Board of Directors of the company. Board of Directors must pass a resolution authorizing a Director or some other officer to sign the agreement.

It is in order for a foreign company signing a JV agreement with an Indian company to ask the Indian company to give a duly signed copy of resolution of Board of Directors authorizing the person concerned to sign the JV agreement. This might appear to be a matter of being overly cautious. It is not. This is extremely important, especially in case there are any internal differences within the Board of Directors of the Indian company. No foreign company will like to be holding a JV agreement which is not accepted by Board of Directors of their so-called Indian partner.

15. Articles of Association

Shareholders' Agreement (SHA) is a working document that defines relations between promoters who decide to come together and give birth to a new company. Legal status of SHA may vary from case to case. There is no law in India that determines the enforceability of SHA's in specific terms.

A company's Articles of Association are binding on the shareholders of the company. The enforceability of Articles of Association is in terms of the provisions of Companies Act, 2013. It is hence advisable to make sure that Articles of Association of the Joint Venture (JV) company are properly drafted to reflect the wishes of the promoters as articulated in the SHA.

Surely, there can be no general rules that apply to all possible situations. Some of the points that deserve attention in a JV Company's Articles are as follows:

- Method of decision in a meeting of Board of Directors – by consensus or majority, with or without casting vote.
- Method of decision in a General Meeting – by consensus or majority, with or without casting vote.
- Powers of the Board of Directors with regard to Notice for General Meeting, Special Resolution, Issue of Shares, Transfer of shares etc.

Articles of Association can be used by one or both promoters for “entrenchment”. The possibilities are indeed endless.

Unfortunately, not many company secretaries who routinely handle incorporation matters understand the ways that Articles of Association can be used as an extension of the SHA. It is hence advisable that Articles of Association are also drafted by the legal professional who is involved with preparation of the SHA.

16. Procedures and Costs of Incorporation

As discussed earlier, the most convenient forms of equity based joint venture in India are a limited liability company and a limited liability partnership. This section gives in brief the procedure and costs involved in incorporation of company and LLP.

Note: Procedures of incorporation and related processes are in a state of flux in India. Government of India is constantly trying to simplify processes and procedures for improving the Ease of Doing Business in India. Hence, as and when you go for incorporation, the actual procedures, costs and processes may be drastically different from the ones given in this chapter. Kindly consult a Practicing Company Secretary or other professional for the correct relevant procedure, cost and process.

I. Digital Signature and DIN / DPIN

Each of the promoters of an Indian company must have a digital signature, which is to be purchased from a company in India.

Each of the first shareholders and directors / designated partners of the new company / LLP firm needs to get Director Identification Number (**DIN**) or Designated Partner Identification Number (**DPIN**). One person can have only one DIN /DPIN. It is an offence to get more than one DIN / DPIN.

In case of foreign shareholders and directors, key documents required for getting a digital signature are photo, scanned copy of proof of identity and proof of address. Relevant regulations read as follows:

2.6 eKYC for foreign applicants	
1.	This section is applicable only for foreign applicants who submit the KYC information to CA directly. An applicant is deemed as foreign applicant if the address (residential or organizational) provided in the DSC application form does not belong to India or identity document submitted is not issued by authorities under Government of India.
2.	For all categories of applicants, email id, mobile number, photo, scanned copy of proof of identity and scanned copy of proof of address are required to be submitted to CA.

4.	For Personal certificate <ol style="list-style-type: none">For identity proof, the scanned copy of Passport/Local Govt issued identity/PAN/OCI passport can be submitted.For the address proof the scanned copy of passport/OCI passport/local government issued id having address/bank details having address/any utility bills in the name of applicant issued within three months/ document issued from embassy with residential address can be provided
5.	The video verification shall be carried out by CA as per Annexure VI. All the originals shall be verified during the video verification. The telephonic verification shall be carried out by direct call to the applicant or SMS OTP verification and the proof of verification shall be recorded. Email shall also be verified by CA.
6.	For telephonic verification, CA can also verify over telephonic call, where CA originates to or receives the call from the mobile number under verification, and validates the number holder with at least 2 questions establishing relation to DSC application
7.	CA activates eKYC account after mobile, email, PAN (if submitted) and video verification. CA shall allow the usage of eKYC service only after having a digitally signed subscriber agreement with the eKYC applicant.

Acceptable documents for proof of identity and for proof of address are as follows (both for Indian and foreign applicants):

Each applicant for a personal digital signature certificate shall provide proof of Identity and proof of address as detailed below:

Document as proof of identity (Any one):

1. Aadhaar (eKYC Service)
2. Passport
3. Driving License
4. PAN Card
5. Post Office ID card
6. Bank Account Passbook/statement containing the photograph and signed by an individual with attestation by the concerned Bank official.
7. Photo ID card issued by the Ministry of Home Affairs of Centre/State Governments.
8. Any Government issued photo ID having Name & address.

Documents as proof of address (Any one):

1. Aadhaar (eKYC Service)
2. Telephone Bill
3. Electricity Bill
4. Water Bill
5. Gas connection
6. Bank Statements signed by the bank
7. Service Tax/VAT Tax/Sales Tax registration certificate.
8. Driving License (DL)/ Registration certificate (RC)
9. Voter ID Card
10. Passport
11. Property Tax/ Corporation/ Municipal Corporation Receipt
12. Any Government issued photo ID having Name & address

With the above documents the following conditions will apply.

1. ***Validity of the Address Proof:*** In case of any utility bills like electricity, water, gas, and telephone bill, in the name of the applicant, the recent proof, but not earlier than 3 months from the date of application shall be attached.
2. ***Using single document copy to be used for both Identity & Address proof:*** This may be considered. However, if the address in the Photo-id is different from the address given in the application then a separate address proof may be insisted for.
3. ***Digitally signed documents:*** For Digitally Signed photo id document by the issuer, it can be accepted in electronic format where CA can validate the Digital Signature. In such case, CA shall cross verify the photo with the video. The document shall be preserved along with its password (if any) for future references(Applicable for ePAN, Driving License etc being issued by respective issuers in digitally signed form)

Once the digital signature is obtained, the Indian professional involved with incorporation of the Indian company can help with getting the DIN / DPIN.

II. PAN for Indian Citizens

Foreign shareholders and directors do not need a PAN from Income Tax Department of Government of India.

Each of the first shareholders / directors / designated partners, who are Indian citizens (including non-residents) of the new company / LLP Firm needs to get a Permanent Identification Number (PAN) from Income Tax Department of Government of India.

We suggest that an Indian citizen (who wishes to set up a company / LLP in India) should first get either an AADHAR (most Indians already have one) or a digital signature. Once AADHAR or digital signature is obtained, application for PAN becomes a simple online process.

There are only two agencies for issue of PAN:

- ✓ Tax Information Network of Income Tax Department
<https://tin.tin.nsdl.com/pan/form49Adsc.html>
- ✓ UTI infrastructure Technology and Services Ltd.
<https://www.pan.utiitsl.com/PAN/newA.html>

Please remember that no other person or agency can issue PAN. Any website or person who claims to provide PAN may be a fraud.

III. Steps for forming a limited liability company

- Decide the state in which the registered office of the company will be located. While it is easy for a company to change the registered office within a state, it is cumbersome and expensive to shift from one state to another.
- Decide the Authorized Capital of the proposed company. There is no minimum or maximum prescribed capital for a company.
- Decide whether the company will be a private limited company or public limited company.
- Decide the main objects of the company.
- Select, in order of preference, at least one suitable name up to a maximum of six names, indicative of the main objects of the company.

Once the above decisions have been made, further procedure for registration of a company need the services of a Practicing Company Secretary. It is advisable to tell the Company Secretary the proposed authorized share capital, the state in which the company is proposed to be incorporated,

number of first shareholders / directors and whether the proposed company will be a private limited or public limited. Based on this information, the Company Secretary will be in a position to give an offer for the total costs including fees payable to the Government, stamp duty, other expenses and his / her fees.

The above steps do not include the formalities that one needs to complete with Reserve Bank of India even when the investment is under 100% Automatic Approval Route.

IV. Quick Easy Approach for Foreign Companies And Citizens

Often a foreign company / citizen or Non-Resident Indian wishes to start operations in India very quickly. Delays in getting digital signature and DIN lead to the company incorporation process getting delayed. During such times, it may be a good option to follow the following steps:

- Two Indian resident-citizens (A and B) who already have PAN and DIN incorporate an Indian company with the name, objects and authorized capital as required by the promoter based abroad.
- A and B are the initial directors of the new Indian company.
- As and when the foreign promoter has completed all the formalities related to DIN etc., A and B transfer all shares held by them in the new company to the foreign promoter.
- After transfer of shares, new directors are appointed. Immediately thereafter, both A and B resign as directors.
- In case it is so required, either A or B can continue as a Director to comply with the requirements of resident director.
- Either A or B or both can continue to hold one share each of Rs. 10 as long as so required by the foreign promoter. This can make it easy to hold Annual General Meetings without incurring travel costs.

- The new company can apply for PAN immediately after it is incorporated.

Foreign promoter does not have to travel to India for completing the above formalities. By following the above procedure, it is possible to create and own a company in India without ever stepping on Indian soil.

The above easy approach is of particular relevance in case of joint ventures. A foreign company may ask their Indian partners to incorporate the company and join in later.

V. Cost of Incorporating a Limited Liability Company

Cost of incorporating a company is related to the authorized capital of the company and the state in which the registered office of the company is located. Indicative costs for incorporating a private limited company are given below.

Authorized Share Capital	Cost Of Incorporation of Private Limited Company			
	Delhi	Maharashtra	Gujarat	Madhya Pradesh
	Rupees			
Rs. One Million	76,810	77,400	80,220	82,610
Rs. Ten Million	2,25,410	2,30,500	2,60,320	2,25,710
Rs. Hundred Million	8,35,410	8,85,500	11,85,320	8,35,710
Rs. One Billion	67,60,410	72,60,500	57,60,320	57,60,710

The cost of incorporating a public limited company will be nominally higher than a private limited company (Difference in cost is likely to be more than Rs. 5,000).

It is not difficult to increase the authorized share capital by paying the difference in fees. However, if share capital is coming by way of foreign

investment and is subject to government approval (as against automatic approval by Reserve Bank of India), significant time may be consumed for getting approval of government for increase of authorized share capital.

VI. Steps for forming a Limited Liability Partnership

Every LLP Firm must have at least two Partners and two Designated Partners. The Partners can be Designated Partners.

- Decide the state in which the registered office of the LLP Firm will be located. It is easy for a LLP Firm to change the registered office within a state. It is not very difficult to change the location of office of an LLP Firm even when the change involves moving from one state to another. The procedure for change in location of office will be as provided in the LLP Agreement.
- Decide the Contribution (capital) to be contributed by each of the partners.
- Decide the main objects of the LLP Firm.
- Select, in order of preference, at least one suitable name up to a maximum of six names, indicative of the main objects of the LLP Firm.

As in the case of incorporating a company, once the above decisions have been made, further procedures for registration of a LLP firm need the services of a Practicing Company Secretary. It is advisable to tell the Company Secretary the information mentioned above. Based on this information, the Company Secretary will be in a position to give an offer for the total costs including fees payable to the Government, stamp duty, other expenses and his / her fees.

VII. Cost of Incorporating an LLP

Cost of incorporating a LLP Firm is related to the capital of the LLP Firm and the state in which the registered office of the LLP Firm is located. Indicative costs for incorporating a LLP Firm are given below.

Capital	Cost Of Incorporation of Limited Liability Partnership			
	Delhi	Maharashtra	Gujarat	Madhya Pradesh
	Rupees			
Rs. 10,000-	18,900	19,300	18,900	20,800
Rs. One Million	37,400	42,400	42,400	42,400
Rs. Ten Million	48,450	58,450	53,450	53,450
Rs. Hundred Million	53,450	63,450	58,450	58,450
Rs. One Billion	87,650	97,650	92,650	92,650

Note: The above figures give an indicative estimate. Actual costs may vary.

Schedule A – Examples of Tender Conditions for JV

The following are extracts from Instruction to Bidders, Model Contract & General Contract Conditions for Service Contract issued by **Oil & Natural Gas Commission** in March 2017:

1.1(b) The bidder should meet the experience criteria detailed above.

In case the bidder is an Incorporated Indian Joint Venture Company, registered in India and incorporated under the Companies Act 1956 and any amendments thereunder, then the technical experience criteria laid down in the Technical BEC should be met as under:

- (i) the Joint Venture Company by itself should meet the experience criteria **or**
- (ii) the Joint Venture Partner (who can be either a Indian or a foreign company) having a stake of at least 26% in the Joint Venture Company should meet the technical experience criteria stipulated in

the tender on its own and cannot rely on any other arrangement such as Consortium or Supporting Company of the JV Partner for meeting the technical experience criteria. Documentary evidence in support of the above should be submitted along with the techno-commercial bid.

- (iii) An undertaking from the Joint Venture partner, based on whose experience the JV has qualified, shall be submitted with the techno commercial bid stating the they shall maintain minimum 26% shareholding in the JV till the execution of the contract.

1.3 In case the bidder is a consortium of companies, the following requirement should be satisfied by the bidder:

1.3.1 Where consortium bids are allowed, leader of consortium should himself meet the major portion of the experience criteria covering the activities of work to be performed by him in term of bid value in comparison to other members of the consortium, on its own and not through any other arrangement like through Supporting Company, Parent / Subsidiary / Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub-contracting,. (e.g. in case of a Consortium bid having two members, the consortium member who has more than 50% stake (in terms of the bid value) shall be the leader of the Consortium and in case of a Consortium bid having three members, the leader of the Consortium should have more than 33.33% stake (in terms of bid value) in the Consortium). Necessary documentary evidence to this effect should be submitted with techno-commercial bid.

For this purpose the role and scope of work of each consortium member including the percentage of work to be performed by the respective consortium members should be attached/annexed with the Memorandum of Understanding in the un-priced bid.

Other consortium partner(s) shall have relevant experience pertaining to the activities of work to be performed by them on their own and not through any other arrangement like through Supporting Company, Parent / Subsidiary / Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub-contracting, (other than the activity to be performed by leader of consortium). Necessary documentary evidence to this effect should be submitted with techno-commercial bid.

1.3.2 The leader of the consortium should confirm unconditional acceptance of full responsibility of executing the 'Scope of work' of this tender. This confirmation should be submitted along with the techno-commercial bid.

1.3.3 The Leader of the Consortium can submit the bid on behalf of the Consortium. Memorandum of Understanding (MoU) between the Consortium members duly signed by the Chief Executives of the Consortium members must accompany the techno-commercial bid. The MoU should clearly define the role / scope of work to be performed by each constituent and should clearly define the leader of the Consortium. All the members of the Consortium must resolve and affirm in the MoU that each party shall be jointly and severally liable to ONGC for any and all obligations and responsibility arising out of the Contract and for discharging all obligations under the Contract. MoU signed between the members of the Consortium shall form part of the contract. In case of award of contract, the MoU shall be kept valid through the entire contract period, including extensions, if any. After award of contract, no alterations / modifications would be permitted in the MoU.

1.3.4 Only that consortium member who has undertaken a particular activity in execution of a contract shall be considered as having technical experience of that particular activity.

1.4(a) Indian companies/ Joint Venture companies(Incorporated JV):- Indian bidders whose proposal for Joint Venture involves foreign equity participation or payment of royalty and / or lumpsum for technical know-how and wherever Govt. approval is necessary, are required to submit copy of Govt. approval, on their application submitted to SIA, prior to the date price bid opening

(b) In the event that the successful bidders is a joint venture formed of two or more companies, the Company requires that the parties to the joint venture accept joint and several liability for discharging all obligations under the Contract.

(l) A constituent of the Consortium shall not be permitted to participate either in an individual capacity as a bidder or as a member of another Consortium in the same tender.

(j) No alteration or modification in the constituents or composition of a Consortium shall be permitted after submission of bid and also after award of the Contract during currency of the contract. A constituent of the Consortium shall be allowed to undertake and carry out only that activity for which that constituent has been evaluated and qualified technically.

Other members of the Consortium may participate in techno-contractual discussions and also sign the minutes of such discussions / meetings along with the Leader of the Consortium. However, Integrity Pact should be signed by all the constituents of the Consortium

(h) In the event of award of contract to the Consortium, the contract shall be signed by each constituent of the Consortium. Alternatively, the Leader of the Consortium may sign the contract subject to submission of a Power of Attorney (duly notarized) from each constituent authorizing the Leader of the Consortium to sign the contract on behalf of the individual member of the Consortium. Irrespective of whether the Contract is signed by all the constituents of the Consortium or by the Leader of the Consortium, all the constituents of the Consortium shall be jointly and severally responsible for satisfactory execution of the contract.

It is interesting to also read the conditions prescribed under a Tender Document issued by **National Highway Authority of India** in November 2016 for widening and strengthening of a national highway. Relevant extracts are as follows:

a) There shall be a Joint Venture Agreement between the constituent firms specific for the contract package for which the bids are submitted. The JV Agreement shall include among other things, the joint venture's objectives, the proposed management structure, the proposed distribution of responsibilities both financial as well as technical for execution of the work, the contribution of each partner to the joint venture operation, the commitment of the partners to the joint and several liability for due performance, recourse/sanctions within the joint venture in the event of default or withdrawal of any partner and arrangements for providing the required indemnities.

- b) The most experienced partner will be the Lead Partner and nominated as the partner-in-charge; and this authorization shall be evidenced by submitting a power of attorney signed by the legally authorized signatories of all the partners in the format of Power of Attorney for Lead Partner of Joint Venture provided at Qualification Form No. 12A of Section IX of Volume III.

The most experienced partner(Lead Partner) of the Joint Venture will provide suitable experienced personnel for at least 3 (three) positions at site for the purpose of general planning, site management and plant operations, during the whole period of contract execution and a statement to this effect should be included in the Joint Venture Agreement.

- c) The bid, and in the case of the successful bidder, the Form of Agreement, shall be signed and / or executed in such a manner as may be required for making it legally binding on all partners (including operative parts of the ensuing Contract in respect of Arbitration Agreement etc.).
- d) The partner-in-charge shall be authorized to incur liabilities and to receive instructions for and on behalf of all partners of the Joint Venture and the entire execution of the Contract including payment shall be carried out exclusively through the partner-in-charge. A statement to this effect should be included in the Joint Venture Agreement.
- e) All partners of the Joint Venture shall be liable jointly and severally liable for the execution of the Contract in accordance with the Contract terms, and a statement to this effect shall be included in the Joint Venture Agreement.
- f) Bid Security as required can be furnished by any partner but it shall be in the name of Joint Venture.
- g) Performance guarantee, as required, will be furnished by all partner(s), out of their accounts, in proportion to their participation in Joint Venture.
- h) Joint Venture Agreement shall contain a clause to the effect that there shall be a separate JV Bank Account (distinct from the Bank Accounts of the individual partners) to which the individual partners shall contribute their share capital and/or working capital.
- i) Joint Venture Agreement shall also contain a clause to the effect that the financial obligations of the JV shall be discharged through the said JV Bank Account only and also all the payments received by the JV from the Employer shall be through that account alone.
- j) In the event of default by the most experienced partner (Lead Partner), it shall be construed as default of the Contractor; and Employer will take action under Clause 63 of the Conditions of Contract.

- k) In the event of any other partner leaving the JV, it shall be intimated to the Employer within 30 days by the other partner(s). Failure to do so shall be construed as default of the Contractor and the Employer may take action under Clause 63 of the Conditions of Contract.
- l) In case the Joint Venture Agreement is not acceptable to the Employer, the Joint Venture will modify the agreement so as to be acceptable to the Employer.

The following extracts from a tender issued by an **agency of a state government** show the conditions prescribed for a joint venture:

Ⓢ J.V. is allowed following conditions and requirements must be fulfilled –

- 1. Bids submitted by a joint venture of two or more firms as partners shall comply with the following requirements:**
 - a. One of the partners shall be nominated as being Lead Partner, and this authorization shall be evidenced by submitting a power of attorney signed by legally authorized signatories of all the partners;**
 - b. The bid and, in case of a successful bid, the Agreement, shall be signed so as to be legally binding on all partners;**
 - c. The partner in charge shall be authorized to incur liabilities and receive instructions for and on behalf of any and all partners of the joint venture and the entire execution of the contract, including payment, shall be done exclusively with the partner in charge;**
 - d. All partners of the joint venture shall be liable jointly and severally for the execution of the contract in accordance with the contract terms, and a statement to this effect shall be included in the authorization mentioned under © above, as well as in the bid and in the Agreement (in case of a successful bid);**
 - e. The joint venture agreement should indicate precisely the role of all members of JV in respect of planning, design, construction equipment, key personnel, work execution, and financing of the project. All members of JV should have active participation in execution during the currency of the contract. This should not be varied/modified subsequently without prior approval of the employer;**
 - f. The joint venture agreement should be registered, so as to be legally valid and binding on all partners; and**
 - g. A copy of the Joint Venture Agreement entered into by the partners shall be submitted with the bid.**

2. The figures for each of the partners of a joint venture shall be added together to determine the Bidder's compliance with the minimum qualifying criteria required for the bid. All the partners collectively must meet the criteria specified in full. Failure to comply with this requirement will result in rejection of the joint venture's bid.
3. The performance security of a Joint Venture shall be in the name of the partner Lead Partner/joint venture.
4. Attach the power of attorney of the partners authorizing the Bid signatory (ies) on behalf of the joint venture.
5. Attach the agreement among all partners of the joint venture (and which is legally binding on all partners), which shows the requirements as indicated in the instructions to Bidders'.

Extracts from another tender document issued by a **department of the same state government** reads as follows:

- Copy of the power of attorney
- Tenders submitted by a joint venture of two or more firms as partners shall comply with the following requirements
- a. the TENDER and in case of successful TENDER, the Contract Agreement shall be signed so as to be legally binding on all partners.
 - b. one of the partners shall be nominated as being in charge and this authorisation shall be evidenced by submitting a power of attorney signed by legally authorised signatories of all the partners.
 - c. the partner in charge shall be authorised to incur liabilities and receive instructions for and on behalf of any and all, partners of the joint venture and the entire execution of the Contract including the payments shall be done exclusively with the partner in charge;
 - d. a copy of registered joint venture agreement confirming above aspects, duly signed by legally authorised signatories of all the partners in the presence of a magistrate of an Indian Court of Law/Notary Public, on a stamp paper shall be submitted with the TENDER.

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