India – Law Firms

Doing Business In India: Mutual Benefits And Big Opportunities

The Editor interviews ***Shabbir S. Wakhariya,*** *a Partner in Kelley Drye & Warren LLP's India practice. Mr. Wakhariya advises clients on commercial litigation, arbitration, investment regulations, telecommunication laws and regulatory and corporate compliance.*

Editor: Why is India an attractive destination for setting up a joint venture? What is the benefit to each party when an Indian company partners with an American company? What are the advantages of the Indian market that make it attractive to U.S. companies and investors as compared with the other emerging nations?

Wakhariya: India is an attractive joint venture destination because:

- Its growth rate remains one of the highest in the world: over eight percent.
- India permits 100 percent foreign equity in most industries and allows automatic government approval for many sectors. This allows investors to make investments without the need to seek permission from the Foreign Investment Promotion Board or the Reserve Bank of India.
- There are no separate laws for joint ventures in India. Joint venture companies incorporated in India are treated as domestic companies and taxed at the same rate as domestic companies.
- Capital brought into India can be easily withdrawn and profits conveniently repatriated.
- Partnership with an American company is mutually beneficial. Indian companies need capital to expand and need updated technology. American companies provide capital and technology. American companies need easy access to new markets. India has a huge consumer market with a middle class of over 200 million people. This presents a substantial opportunity to almost all varieties of industries to market and sell their products in India. India is predominantly an English-speaking nation, a thriving democracy, whose laws are framed on English Common law principles. India's judiciary is robust and fiercely independent. These make investment in India more attractive than other nations in the region.

Editor: What are some of the key activities an American company should undertake before entering into a JV?

Wakhariya: The key activities are as follows:

- Careful due diligence to ascertain the credibility and net worth of a joint venture partner is important. An American company needs to understand the market in which it is trying to sell before it forms a joint venture. Indian regulations permit foreign businesses to open liaison and representative offices so that they can ascertain the level of business potential before making a more substantive investment in a subsidiary or a joint venture. The grass is not always greener on the other side. It may seem an attractive market from offshore, but there are local challenges, and not all partners may be the right fit. These issues need to be carefully evaluated before forming a joint venture.
- It is also important to have a thorough and transparent discussion with a potential partner on future expectations, including the time period for return on investment, the need for future capital investment, and the speed of growth desired. Often, joint venture partners have differing expectations of these factors and this leads to problems, which can be easily avoided if the parties have freely discussed their long-term expectations.

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- Exit provisions should be properly negotiated and agreed upon in writing with the potential JV partner because most of the problems in JVs occur at the time the foreign company desires to exit the JV and the Indian partner turns recalcitrant.

Editor: Despite India's positive outlook and regulatory reforms, which have made India an attractive market for foreign investors, are there some barriers that remain challenges for a foreign investor to do business in India?

Wakhariya: Yes, there are still a number of barriers. First, despite a significant "de-licensing" of various sectors, there are still national and local regulations that require various approvals. These significantly slow down the investment. For example, something as simple as appointing a new director of a company is a time-consuming process, although the stated objective of making the process electronic was to speed up the task. The Ministry of Company Affairs sought to streamline corporate governance by introducing a national directors' registry; however, its documentary requirement for registering a person is not easy. On average, it takes four to six weeks before a person is registered and made eligible to be appointed a director of an Indian company.

Second, corruption continues to be rampant in India. An American company is subject to compliance with the Foreign Corrupt Practices Act (FCPA). It needs to be careful how it deals with its JV partner and how its JV partner and its JV employees, agents, distributors and third-party vendors do business. Often, a foreign investor will hire consultants to advise and guide its business strategy. Effective due diligence must ensure that the consultation fee is not used to make an illegal payment in violation of FCPA. Unfortunately, the opportunity to bribe occurs in many creative ways. It is best to be vigilant and take advice from reputable local counsel before committing to a payment mechanism.

Editor: Please comment on the evolution of the regulatory environment in India and how it has changed over the past decade. How has it affected investment in the country?

Wakhariya: Historically, India's regulatory environment was geared to "police" businesses – meaning it always specified what you could not do. Since the early 1990s, India has moved its regulation toward a more liberal environment by specifying broad guidelines within which a business can freely operate. For the past few years, the government of India has liberalized its policies relating to foreign investment in India. Most of the sectors are on automatic route without the need for any approval from the Foreign Investment Promotion Board. In most cases, government departments and agencies require reporting for statistical purposes, not for pre-approval purposes. There are only a few "sensitive" sectors that have sectoral caps or require pre-approval from the government of India.

At the same time, the Reserve Bank of India and the Securities and Exchange Board of India have been more proactive in regulating the business environment and the market. This is the main reason India has survived the global economic meltdown and continued to attract investment in the region.

Editor: Which industries still preclude foreign ownership or limit it to minority status?

Wakhariya: The following sectors still preclude foreign ownership in India: agriculture, atomic energy, railways, real estate (except townships and industrial parks), lottery businesses, gambling and betting. The following sectors limit foreign ownership and require specific approval of the government of India: telecommunications, media, airlines and the small-scale industries.

Editor: Are arbitration clauses important in a deal with Indian companies?

Wakhariya: Yes, arbitration clauses are important because India's judiciary is very slow and backlogged. International arbitration provides speedy resolution of disputes. India is a signatory to almost all the major international arbitration and enforcement treaties for recognition of foreign awards.

However, the actual results of arbitration with Indian companies are a mixed bag. Arbitrating in India is a challenge because Indian companies take recourse to the judicial system very often to defeat and delay a legitimate arbitration agreement. It takes years to decide enforcement cases that, often from the start, should not have been before the courts.

India's Civil Procedure Code allows interlocutory appeals. This allows multiple appeals all the way up to the Supreme Court of India, even before the merits of an issue are decided. It is quite common to find a foreign company holding a validly rendered arbitration award against an Indian company unable to enforce it for years because the Indian company has challenged the award in an Indian court on some specious ground, and a decision or hearing is awaited.

More recently, there have been instances of judges hearing arguments but not rendering a decision for months and then suddenly without reason, "de-part hearding" a matter – meaning, treating it as if it were never argued and asking that it be placed before a different judge for hearing *de novo*. This is really unfair to the litigants who have spent hundreds of thousands of dollars engaging senior barristers and lawyers to argue their case. Obviously, these fees are not refundable, so now the unfortunate litigant has to spend new money to reargue the same case. Instances like these and others over the years by the Indian judiciary have made a mockery of India's international obligations in the enforcement of international awards.

Recent decisions of the Supreme Court of India have significantly watered down some of the protections of the Indian Arbitration Act with respect to international arbitrations and international awards. Some of these risks can be mitigated with proper language in the arbitration clauses. Others are just the risk of doing business with India.

Editor: Are there special considerations for in-house counsel when working with outside Indian counsel?

Wakhariya: No more so than when working with outside counsel in the U.S. or any other jurisdiction. There may be a bit of a language barrier, even though both communicate in English. Indian law schools historically did not emphasize legal writing; therefore, the Indian legal work product was not always easy to read and understand. This has changed in the last 10 years, although more still needs to be done in this area.

I would suggest that in-house counsel be proactive in selecting local counsel. An engagement letter or a letter of instructions should be sought and agreed upon in advance of an engagement. Indian lawyers are quite familiar with international billing practices, and many of them are adopting them. One important difference is that contingency fee arrangements are not permitted by Indian law; therefore, Indian lawyers will not offer contingency fee arrangements.

Local Indian counsel are important in any deal because they have a unique understanding of local laws, nuances and cultural differences, which are important in any cross-border negotiation. India still restricts access to its courts only to Indian lawyers. Thus, in case of litigation, only a local Indian counsel can appear before Indian courts.

Editor: Finally, overall what are some of the similarities between the judicial systems of India and the U.S.? How do these impact foreign investors?

Wakhariya: Indian laws are based on English common law. Similar and comparable to the U.S. or UK, common law remedies and jurisprudence apply. Almost all Indian laws are written in the English language, and our higher courts at the state level as well as the Supreme Court of India use English for all pleadings and communications. The rule of law is recognized, followed and routinely upheld, even when the government is a litigant. Indian judges, particularly in our higher judiciary, are comparable to federal judges in the U.S.

This is an important factor in doing business in any jurisdiction because a foreign investor wants to know that his or her rights will be protected and the rule of law upheld. The reality is that India's judiciary is slow due to the tremendous backlog of cases, but this has not slowed down business investments into India. Businesses have a way of finding creative solutions to meet their long-term business needs.

Please email the interviewee at swakhariya@kelleydrye.com with questions about this interview.