

U.S.-INDIA

NEWSLETTER, Vol. 2016, Issue 2

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Editors' Notes

Welcome to the second issue of our newsletter, which features news and articles of interest from Pepper's U.S.-India Practice.

In the first quarter of 2016, we saw a lot of activity in the international data privacy space, as well as a number of developments in India's technology industry, including the launch of Startup India. To address some of these topics, we held a joint webinar with Khaitan & Co., where we discussed recent trends affecting IT services and e-commerce companies in the United States and India.

Our lawyers saw many of these trends firsthand when they visited Delhi, Bangalore and Mumbai in February 2016 to meet with clients and Indian law firm partners about current and prospective matters. An article about their trip is included in this newsletter.

Also included are articles about a number of hot topics, such as international joint venture risk, the U.S. Foreign Corrupt Practices Act, blockchain technology and corporate inversions for tax purposes. These issues affect both companies in India and the United States, as well as those with cross-border operations.

Visit Pepper's Insight Center on pepper.law to receive up-to-date information on events, webinars, news and articles.



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How to Reduce International Joint Venture Risk



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JOINT VENTURES WITH LOCAL PARTNERS OVERSEAS OFTEN DON'T WORK OUT AS PLANNED. HERE'S WHAT YOU NEED TO KNOW TO HELP SUCH ARRANGEMENTS SUCCEED.

This article first appeared on www.cfo.com on March 28, 2016.

International joint ventures remain one of the principal means for multinational companies to enter a foreign market. According to a recent PricewaterhouseCoopers survey of 1,409 global CEOs in 83 countries, 49 percent plan to enter into a new joint venture or strategic alliance in 2016.

Some of the advantages of entering a joint venture with an established local partner include gaining local knowledge, political connections, risk sharing, immediate access to a built-out infrastructure, market share, and brand recognition. Pooling the positive attributes of each party is expected to generate monetary gains for both parties for a long time.

In reality, though, many international joint ventures never realize the parties' vision. Of those that do, many have a relatively short life span before they are dissolved or end up in litigation.

Danone's joint ventures in China serve as a notable illustration of failed international joint venture attempts. In 1996, Danone launched a venture with the Wahaha group to manufacture yogurt in China. Hailed as a "showcase" joint venture by *Forbes*, the business grew into 39 joint venture entities by 2007.

But in 2009, Danone exited all of those ventures following legal battles with Wahaha. Cultural issues coupled with differences in marketing strategy, investment issues, and conflicts of interest were cited as the dominant reasons for the breakdown.

Before that failure was complete, in 2006, Danone had made another attempt to penetrate China's yogurt business with a different group, Mengniu. However, that new venture failed the following year. In 2013, Danone once again entered into a joint venture arrangement with Mengniu. This time, Danone owns 20 percent of the venture and Mengniu 80 percent. Time will tell whether the third time is a charm for Danone in China.

Stories similar to Danone's saga are occurring around the world.

What Causes Joint Ventures to Fail?

A majority of joint ventures fail simply because the partners are not the "right fit" for each other. They may have different visions of purpose and their roles. The international partner often visualizes itself as a strategic ally, active in making major decisions, while the local partner is unwilling to give up control and management and expects the other to be a passive investor.

Another pitfall is a lack of common vision on the exit strategy from the investment. This becomes acute when one of the partners is a private equity fund looking to monetize its investment in the medium-to-long term. The need to exit and monetize often conflicts with the local partner's longer-term view of the venture, resulting in deadlock or litigation.

Cultural differences have also severely undermined joint efforts within a joint venture. For example, the scaling back of Beverage Partners Worldwide (BPW), a joint venture between Coca-Cola and Nestlé, from certain geographic markets including the United States, is attributed in part to the incompatibility of their respective organizational cultures.

In other cases, complex regulation around foreign investment has seriously threatened the functionality and enforceability of joint ventures. In response, international parties and their local partners devise structures which on their face keep control in the hands of the local partners to comply with local restrictions, but are designed in effect to shift the control or economics to the international partner. This only makes the foreign partner more vulnerable in case of breach.

In the Danone-Wahaha venture, for example, the parties entered into an IP licensing agreement to facilitate the joint venture's exclusive use of the Wahaha trademark, which was not compatible with Chinese law. Between 2005 and 2007, Danone discovered that the local partner had set up competing businesses using the Wahaha name, in violation of the license.

To further complicate things, Wahaha publicly expressed its bitterness toward Danone, portraying the latter as a foreign imperialist and itself as the Chinese victim/hero. Danone, meanwhile, alleged flagrant contractual violations.

Given the profitability of its relationship with Wahaha, Danone offered to buy a stake in the Chinese company's parallel businesses but was thwarted. Ultimately, after years of weak reconciliation attempts, Danone sold its 51 percent stake in the joint venture to Wahaha in 2009.

In some of the more egregious cases, local partners have used the joint venture to effectively lock in the foreign partner through exclusivity provisions in the contract, or to "steal" the international partner's intellectual property by siphoning off the joint venture's business through affiliates.

What Can Be Done?

Due Diligence: In addition to the standard due diligence of the business (legal, accounting, regulatory, and otherwise), extensive due diligence must be performed on the joint venture partner, its family members, other businesses, political affiliations, and business relationships. A comprehensive diligence will enable the foreign partner to assess whether the local partner is the right "fit" with the right ethical and governance background.

This screening also confirms the partner's ability to deliver what is expected for the joint venture (whether political connectivity, know-how, market knowledge, distribution channels, or otherwise). In emerging markets where the enforceability of contracts and rule of

law could be challenging, the only real protection is the absolute trustworthiness, alignment of interests, and shared values of the partners.

Governance and Management of the Joint Venture: Keys to setting the tone are having a clear business model, aligning objectives, structuring the governance, and staffing the joint venture. A well-drafted joint venture contract encapsulating the governance structure, rights, roles, and responsibilities of each party can help bridge the gap and bring parties on the same page. It also helps identify and address areas of conflict early, so that there are no unfortunate surprises later.

Planning for the Exit: An exit strategy must be developed from the outset. Certain contractual rights are important in this regard:

1. Put/call rights: The foreign partner should have a mechanism to exit the joint venture entirely and start afresh. In structuring put/call rights, however, the focus is on:
 - Enforceability — in jurisdictions with foreign investment restrictions, put/call rights may not be enforceable or available.
 - Valuation — if put/call rights are exercised in the midst of an acrimonious dispute between partners in a failed venture, determining fair market value can be a tall order.
 - Events triggering the rights — put/call rights should not be so easily triggered that the joint venture becomes a loose agreement that can be ignored as soon as it is signed. Because the international partner's key contribution is often technology and know-how, care must be taken so that the put/call right does not become a mechanism for the local partner to seize control of the joint venture after the technology and know-how have been transmitted and before the joint venture scales up production.
2. Exclusivity and Non-Compete Provisions: While appealing to the foreign partner, these provisions can backfire if the joint venture fails by effectively preventing the foreign partner from starting again in the local country. A release from these restrictions may become a bargaining tool in a settlement with the foreign partner.
3. Dispute Resolution: In most cases of disputes between joint venture partners, international arbitration is the preferred dispute-resolution mechanism. However, these

arbitration provisions should not preclude the parties from being able to go before the courts to seek injunctive relief, especially where technology or intellectual property are concerned. At the same time, the dispute resolution procedures should be carefully crafted to eliminate instances where local courts can interfere or stay the arbitration proceedings. Mechanisms for enforcement of the arbitration award also need to be carefully analyzed.

Joint ventures are complex and risky. Failure to identify and address the risks and challenges early on can adversely impact the venture's success. Given that joint ventures are here to stay, it is worthwhile to get the right team of professionals and take certain necessary precautions at the outset to ensure success.



WEBINAR

Recent Trends and Developments Affecting the IT Services and E-Commerce Sector Between the U.S. and India

Leading law firms Pepper Hamilton and Khaitan & Co. joined together on this webinar to discuss:

- Start-Up India - India's newly adopted regime for start-ups and what it means for foreign investors and IT and e-commerce providers in India
- Latest trends in the IT services and E-commerce sectors, including industry consolidation trends and valuation issues
- Latest trends and developments affecting Venture Capital and Private Equity funding in the IT services and E-commerce sectors in India
- Tax developments affecting start-ups and
- Latest trends in transfer pricing and permanent establishment issues.

To download the webinar or slides, visit <http://www.pepperlaw.com/events/webinars/recent-trends-and-developments-affecting-the-it-services-and-e-commerce-sector-between-the-us-and-india-2016-04-18/>.

FCPA Enforcement in 2016: Trends and Best Practices for Internal Investigations



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The year 2015 was unusual for Foreign Corrupt Practices Act (FCPA) enforcement. Two agencies responsible for enforcing the FCPA, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), had markedly different outcomes for FCPA investigations. The SEC had a busy enforcement year: it filed 14 actions for FCPA violations against both corporate entities and individuals and obtained more than \$215 million in financial remedies for FCPA violations. The DOJ, on the other hand, had its lowest enforcement numbers in years, following the 2014 departures of the FCPA unit chief and several veteran attorneys who worked on foreign corruption cases.

Although the DOJ settled fewer cases and collected only a small fraction of the corporate penalties it collected in prior years, it also increased its enforcement capabilities. The FBI added three new operational squads focused on FCPA and kleptocracy (involving corruption by government officials) to its International Corruption Unit, tripling the number of federal agents focused on overseas bribery from around 10 to more than 30, while the DOJ's Fraud Section planned to add 10 more prosecutors to the FCPA unit. Integrating new resources takes time – 2015 might have been an anomaly as the DOJ and the FBI operationalized their new staff. If that is the case, expect enforcement to ramp back up in 2016 as the DOJ and the SEC pursue “higher impact” cases and focus more heavily on individual accountability in 2016.

The DOJ did not issue an FCPA opinion regarding its approach to investigations in 2015, unlike in most recent years. Throughout the year, however, government officials gave a series of speeches that outlined the importance the government places on internal investigations and self-reporting FCPA violations. This article will provide an overview of the basics of FCPA government enforcement actions as described by SEC and DOJ officials this year and discuss investigation best practices for companies that suspect violations.

Continue reading this article at <http://www.pepperlaw.com/publications/fcpa-enforcement-in-2016-trends-and-best-practices-for-internal-investigations-2016-03-18/>.



PEPPER MINUTE *with Howard S. Goldberg* **Corporate Inversions**

An inversion may offer significant tax benefits. Pepper partner Howard Goldberg shares his thoughts on inversions - why undertake an inversion and the tax law addressing inversion transactions.

To view this short video, visit <http://www.pepperlaw.com/news/the-pepper-minute-corporate-inversions-2016-03-10/>.

Blockchain Technology: Preparing for Disruption Like It's the 1990s



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IF BLOCKCHAIN TECHNOLOGY LIVES UP TO ITS PROMISE, IT MAY HAVE A REVOLUTIONARY IMPACT ON BUSINESSES ACROSS EVERY MAJOR INDUSTRY, GOVERNMENTS AND EVEN THE LEGAL PROFESSION.

The conversation about blockchain technology has shifted over the last few years. Stakeholders have increasingly recognized that this peer-to-peer distributed ledger technology underlying the cryptocurrency Bitcoin has utility beyond Bitcoin, and lawyers should be paying attention.

Think of blockchain technology and other variants of peer-to-peer distributed ledger technology (collectively referred to as “blockchain technology” in this article) like operating systems for transactions over the Internet. Broadly speaking, a blockchain is a database of digital transactions that are recorded in chronological and linear order. Before a block of transactions is added to a blockchain, participants in that blockchain’s network must verify the authenticity of the transactions. Once a block is added to a blockchain, the block cannot be modified or removed.

Proponents of blockchain technology believe its main promise is that it offers a more efficient, secure and transparent mechanism for storing, tracking, trading and verifying assets and information — a mechanism that does not require the involvement of central authorities or other trusted third parties. If blockchain technology lives up to its promise, it may have a revolutionary impact on businesses across every major industry, governments and even the legal profession.

Continue reading this article at <http://www.pepperlaw.com/publications/blockchain-technology-preparing-for-disruption-like-its-the-1990s-2016-03-14/>.

Building Relationships on the Road



Recently, partners James Rosener and Valérie Demont made their sixth annual trip to India, during which they visited Delhi, Bangalore and Mumbai. The trips have evolved over the years as Jim and Valérie have made new contacts and gained new clients for Pepper. Today, their India trips not only include introductory meetings, but also meetings with current clients and Indian law firm partners to discuss active matters.

One of the clients they met with on their most recent trip was Majesco, a provider of core insurance technology software and IT services to insurance carriers worldwide. In 2015, Jim and Valérie advised the company on its merger with Cover-All Technologies

and listing on the NYSE MKT. Valérie said that Pepper’s relationship with Majesco is a perfect example of how valuable the annual India trips are.

“The Majesco connection began with a meeting in Mumbai several years ago. I met the company’s CFO while he was controller at another firm and developed a personal relationship with him. He moved to Majesco, and Jim and I met with him on our first trip to India. Not long after that meeting, Majesco gave us our first M&A mandate” she said.



Valérie and Jim met with former Pepper intern Priyanka Khimani (center) during their trip to India.

Valérie and Jim also met with many prospective clients during their recent trip, and also met with existing clients such as Birlasoft, an IT outsourcing company, and CK Birla, a family-owned conglomerate.

Perhaps the most rewarding aspect of the trip, however, is the chance to reconnect with local counsel, many of whom, such as Khaitan & Co. and Saikrishna & Associates, have longstanding relationships with Pepper. These discussions often result in new business leads, but they also provide a firsthand look into the biggest issues in India at the moment. Jim and Valérie noted that the hot topics of discussion this year ranged from the national budget to Prime Minister Modi’s “Make in India” initiative. Relationships with local counsel are critical in the international setting, especially in India. An example of the kinds of relationships the firm has established there was a dinner hosted by a senior partner of one of India’s largest corporate firms. Seventy friends attended the event at the partner’s home to meet Jim and Valérie.

The India visit also allowed Valérie and Jim to reunite with alumni from Pepper’s intern program for Indian lawyers, which the firm has sponsored for the last four years. One former Pepper intern, Priyanka Khimani, now leads a 15-lawyer firm in Mumbai that focuses on Indian entertainment and media matters. They also connected Priyanka and her firm with another Pepper alum, Apoorv Tripathi, as he pursues a successful litigation career in Delhi.

Reinforcing these personal connections is at the heart of the annual India trip. Although it's easier than ever to communicate across borders thanks to modern technology, Jim and Valérie say that face-to-face meetings are still incredibly important.

"If all you are is an email address — if you don't have a personal connection — you're fungible. Having a personal relationship allows the long-distance communication to work," Jim said.

"Meeting with the partners in person and talking about current issues allows us to learn more about them and their expertise. That's hard to determine online," Valérie added.

After years of visiting India, Valérie and Jim have learned a lot about the country. They agree that the culture is more formal and that there is a greater sense of hospitality. "People generally won't cancel meetings," Valérie said. They also say that India still has room for improvement — Jim identifies traffic as a worsening problem — but they see advancements with each subsequent visit.

"The infrastructure gets better every year. Progress is made every time we go — though probably not as fast as people would like it. But there is a growing middle class and greater economic development," Valérie said.