Joint Venture Agreements: Definition, Disputes & Resolution

Presentation by:

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Agenda

- What is a joint venture and what are its characteristics?
- Competition aspect as applicable to joint ventures.

PART 1:

JV and its characteristics

What is a JV

- Two or more parties agree to pool their resources for the purpose of accomplishing a specific task.

- Each participant responsible for profits, losses and costs associated with it.

- An entity on its own, separate and apart from the participants' other business interests.

Forms of JV

- JV may take on any legal structure

- JVs can be classified into four categories
  - joint production of goods and services;
  - joint distribution or marketing;
  - joint purchasing; and
  - joint research and development

JV Agreement

- Most important document

- Sets out all of partners' rights and obligations.
  - Objectives
  - initial contributions
  - day-to-day operations
  - right to profits (and also responsibility for losses)

Benefits of a JV

- Partnering with local business to enter a foreign market.

- Allows companies to gain competitive advantage
  - lower costs
  - gain access to another company's technology
  - increase revenues and customer base
  - expand product distribution

JV Vs M&A

- JVs are different from a merger / acquisition
- Merger is when two similar-sized companies integrate their businesses to operate as a unified entity
- Acquisition is when one company (generally the larger one) buys another company (generally the smaller one)

Unlike a merger or acquisition, a strategic joint venture does not have to be permanent

PART 2:
Competition and JVs

Competition

- **“What is competition?”**

  sellers strive to increase or protect their market share

- **“What are the benefits of competition”**

  (i) Reduce slack in production process;

  (ii) Incentives for efficient production;

  (iii) Faster pace of invention / innovation;

  (iv) Lower prices for consumers / quality improvements;

  (v) Opportunity to new firms to enter and compete

Mandate of CCI

An Act … to provide, keeping in view of the economic development of the country, for the establishment of a Commission to :

- ✓***prevent practices having adverse effect on competition;***
- ✓***promote and sustain competition in markets;***
- ✓***protect the interests of consumers; and***
- ✓***ensure freedom of trade.***

Role of CCI

Enforcement

- ➢Prohibits Anti-Competitive Agreements (Sec 3)
- ➢Prohibits Abuse of Dominant Position (Sec 4)

Regulation

- ➢Combinations / Mergers / Acquisition (Sec 5 & 6)

Advocacy

- ➢Mandates Competition Advocacy (Sec 49)

Analysis of JV

- economic perspective:
  - whether consumer welfare is best enhanced by collective performance of competitors or by their individual performances in full competition.

- legal perspective:
  - when antitrust intervention is necessary and desirable and when not
  - choosing appropriate instruments and methodology for doing so.

Risk of JV

- Any cooperation between competitors is an exception to the market principle
- Contemporary economic complexities demands industrial cooperation: enables partners to produce that may be beyond the productive capacity of its individual members
- JVs threaten to reduce actual or potential competition between rivals

Flipside of JV

- Ability and incentive to compete against one another may be compromised
  - parties to a joint venture are uniquely able to raise prices or limit output, quality, service or innovation
  - limit participants' independent decision-making

Determining lawfulness of JV

- Two approaches:
  - per se approach - such agreements are deemed anti-competitive;
  - rule of reason approach - involves a factual inquiry into an agreement's overall competitive effect

Section 3, Competition Act

- No **enterprise** or **association of enterprises** or **person** or **association of persons** shall enter into **any agreement** in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which **causes** or is **likely to cause** an **appreciable adverse effect on competition within India**.

- Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

Section 4, Competition Act

No enterprise or group shall abuse its dominant (AoD) position

– directly or indirectly, **imposes unfair or discriminatory**: (i) **condition** in purchase or sale of goods or service; or (ii) **price in purchase or sale** (including predatory price) of goods or service.
– **limits or restricts**: (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers;
– indulges in practice or practices resulting in **denial of market access** in any manner;
– makes conclusion of contracts subject to acceptance by other parties of **supplementary obligations** which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
– uses its dominant position in one relevant market to **enter into, or protect**, other relevant market.

Section 5&6, Competition Act

CCI regulates **combinations** (acquisitions, control / mergers) if jurisdictional thresholds are met.

- No persons or enterprise shall enter into a combination which causes or likely to cause AAEC within the relevant market in India and such a combination shall be void
- If the combinations are causing or likely to cause an AAEC, the proposed transaction may be blocked by CCI or approved with some remedies.

Regulating combination: raison d'être

- Unilateral effects – Enhancing market power by eliminating competition between merging parties
- Coordinated effects – Increased risk of coordinated or inter-dependent behavior among rivals
- Post-combination, unscrambling a merger may also involve high socio-economic costs
- Provides legal certainty to business, avoids compliance and reputational cost

Mergers should not be permitted to create, enhance or entrench market power – raise price, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives

Non-compete clause

- May fall foul of Article 19 of the Constitution, the Contract Act or the Competition Act, among others.
- From competition perspective, non-compete restriction is allowed only if ancillary to the transaction
- May be looked upon appropriately whether in consonance with all other applicable laws

Thank you