Doing Business in India: sector-specific challenges and takeaways

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Investing and operating in an exciting and developing market such as India makes it advisable to future proof your business against some unique market risks. To aid your decision-making process, we have distilled a few takeaways in some key sectors where India is seeing increased foreign investment.

Our assessment is intended to act as a broad legal guide, and should not be construed as specific legal advice.

1|Industrials and engineering

(i) Entry: Commencing operations does not always necessitate incorporating an Indian company. It can also be achieved through a project office, branch office, liaison office or joint venture (JV) with an Indian partner, based on the scope of operations.

Tip: Each entity is subject to different laws (particularly tax). Project, branch and liaison offices have limited operational capability, and capitalised entry modes are generally preferred.

(ii) Regulatory approvals: In the absence of a single window approval process, clearances are needed from multiple authorities to set up operations (especially an industrial unit). The more local approvals require granular analysis and planning as the potential impact (of getting them wrong) can be high.

Tip: Meticulous planning and dedicated (in-house/third party) resources are needed to obtain regulatory approvals. The time required for these should be factored into the project planning.

(iii) Land acquisition: Manufacturing units require significant land which may involve procuring agricultural land that needs to be converted for non agricultural use. This can be a complicated and costly process. Land holdings in India are often fragmented, leading to multiple ownership claims even after acquisition.

Tip: Long term leases from industrial development corporations can be procured, and land aggregators can help gain access to land banks. However, these relationships must be carefully structured.

(iv) Financing: Setting up a manufacturing unit can be capital intensive, requiring financing at different stages. The procedure for an overseas parent company to fund an Indian entity is restricted and needs to be carefully analysed. Outward remittances of profits, fees or royalty payments by the Indian company to the foreign parent also depend on the manner in which the initial funds were deployed into the Indian company.

Tip: Examine regulations relating to foreign equity financing and repatriation routes before finalising the mode or channels of investment.

(v) Internet of Things (IoT): IoT is poised to fundamentally alter the way traditional industries approach business. Manufacturers will need to account for an expansion of the regulatory regime applicable to their processes and products. Additional compliances could stem from the threat of cyber intrusions, IP ownership issues, success of IoT devices being linked to net neutrality and the application of privacy and data protection laws where personal information is collected by IoT devices.

(vi) Labour management: Labour in manufacturing entities is usually unionised and needs careful management. Labour managers who know the various undercurrents in the local area are invaluable.

Tip: Prepare labour policies keeping in mind local undercurrents and ensure that they are up to date with the latest judicial precedents on the various applicable labour laws.

2|Digital business and technology

(i) Barriers to entry: Not all digital business ventures can be set up by foreign owners. Some products and services are prohibited (eg., Cryptocurrency), some are heavily regulated (eg., e-commerce) and some require licenses (eg., operating payment systems). Given the interconnected nature of digital business, your product or service may impinge on one or more regulated sector.

Tip: Review your offering to make sure it (or any part thereof) is not prohibited, requires a license, or is subject to operational restrictions.

(ii) Data protection and privacy: Indian privacy laws are undergoing a major overhaul. The Personal Data Protection Bill, 2018, is similar to the EU GDPR, and envisages *inter alia* a data protection authority and also specifies provisions for data collection and storage, mandating data localisation.

Tip: Be prepared to amend your privacy policies, contract terms, procedures and terms of use if necessary to comply with changes to the law.

(iii) IoT-focused M&A: As IoT becomes an increasingly critical product function and integral to the manufacturing supply chain, it will become necessary for manufacturers to bring this capability in-house, particularly given the constant innovation in the IoT space. To this end, traditional manufacturers will find value in the acquisition of IoT-focused tech companies, or collaboration with them.

Tip: Given India's IT and tech start-up ecosystem, Indian IT and tech companies are likely to be the focus of such investment and acquisition going forward. If you are considering this route, be aware of the intricacies of acquiring technology companies in India.

(iv) FinTech regulation - progressive but restrictive: A number of regulatory changes impacting FinTech and payments have been in the pipeline for some time. The Reserve Bank of India's (RBI) focus is on 'deepening' digital payments, and may see regulations allowing more interoperability, faster cross-border payments, a regulatory sandbox, and other innovative features. At the same time, the RBI keeps a tight rein on licenses, etc., in furtherance of its aim of consumer safety and benefit.

Tip: Regulations, when issued, are usually very restrictive, mandating substantial prudential, governance and reporting requirements. Relaxations are rarely granted, and usually only given for good consumer-benefit reasons.

(v) Unsolicited communications: Commercial communications sent using telecom resources (via phone calls and SMS) for the purposes of information, solicitation or promotion of commercial transactions are subject to a number of restrictions including prior consent of the recipient and anti-spamming regulations.

Tip: These restrictions do not currently apply to emails or internet-based (ie. OTT) messaging services.

(vi) Access to encrypted content: The Government's concern over inaccessibility of encrypted data may result in service providers being approached to provide access to encrypted content over their networks.

Tip: Be prepared with an internal access policy to deal with any such decryption/access requests.

(vii) Net neutrality: Telecom Regulatory Authority of India (TRAI) issued the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, which bar service providers from offering discriminatory tariffs for data services on the basis of content (but do not prohibit other forms of tariff differentiation that are entirely independent of content).

Tip: Businesses seeking to set up internet related services in India should keep these restrictions in mind. However, no overarching policy or regulation has been formulated by TRAI as yet.

3|Defence and Aerospace

(i) Anti-bribery and corruption (ABC): Corruption under Indian laws is benchmarked against the concept of "undue influence", which is interpreted widely and includes monetary and non-monetary bribes/influence (and even mere planning such "undue influence"). Corruption investigations are intrusive and protracted processes, involving multiple enforcement authorities for different offences. Companies and senior management are at risk of prosecution. Your domestic ABC regulations may also be triggered by an infraction in India.

Tip: Adopt a proactive approach to mitigating potential corruption risks in defence dealings by *inter alia* formulating specific whistleblower programmes and employee training for India-specific projects, auditing high risk transactions and developing an incident response protocol to deal with any investigations.

(ii) Agency compliance: Foreign suppliers can only hire Indian agents who are registered with the Ministry of Defence (MoD), and details of engagement (including commissions/fees) must be disclosed. Integrity pacts in procurement contracts typically contain conditions, and outline the scope of involvement of agents. These conditions are non-negotiable and contraventions include contract termination and backlisting. The nature of functions undertaken dictates the legality of their role:

Back end support

- Assisting the bidder in understanding the process
- Internal support in answering queries
- Internal support in approaching the right departments for clarifications etc.

Legal

Agency functions

- Front-ending bid submissions
- Participating in contract negotiations etc.

Legal, subject to certain conditions and compliances

Influence peddling

- Influencing the procurement process in any manner

Illegal

Tip: Use your agents as consultants and advisors so they can offer valuable background assistance to you in responding to SQRs, internally clarifying MoD communication, internally formulating responses to tender documentation etc. If they are performing agency functions, disclose all payments to the MoD, and ensure payments are compliant with defence procurement, tax and foreign exchange laws. Periodically audit agents to ensure such compliance.

(iii) Technology transfer: While offsets and foreign investment rules encourage JVs and licensed production, finding a local partner with the necessary technical capability is a challenge. Licensed production may make the Indian manufacturer (and the end customer) overly dependent on the licensor for updates and upgrades. Control of the JV and of the technology/production quality are inter-connected, but need to be structured to meet both parties' interests.

Tip: Dispute resolution in case of any conflict between the partners can be a long drawn out process, thereby diluting the value of the JV and affecting production. Protection of the technology itself and its IP is key in any tech transfer scenario, including JVs. Formulate robust agreements and IP policies to prevent dilution in the IP value.

4 | Renewable Energy

(i) Regulatory framework and tariffs: Each state in India has its own solar policy. This leads to a lack of uniformity in the Power Purchase Agreements (PPAs) issued by various distribution companies (DISCOMS). Standard PPAs mostly have no provisions for developers to renegotiate tariffs in case of delays. They also do not provide for security against payment defaults. Hence, negotiations can become a long drawn out process, involving the state electricity regulatory commission.

Tip: Note that some states have better structured PPAs. Seek clarifications for deviations during the bidding process.

(ii) Asset management: Turnkey asset management is still at a very nascent stage with disclosures and governance based models still few and far between. Exercise close oversight and control over the asset manager.

Tip: Having a robust asset management agreement is not sufficient. Close oversight is preferable and board control over the asset SPV is crucial.

(iii) EPC contracts: EPC contracts need to clearly communicate obligations, responsibilities and risks. The EPC cost might vary based on tax efficiency, so contracts need to be structured well.

Tip: Forget about the Silver Book (or any other standard) when you carry out EPC contracting in India.

(iv) Financing: Contrary to the global trend of limited recourse/non recourse financing, lenders in India demand promoter support during the project tenure. For foreign promoters, this is exceptionally tough due to stringent investment and borrowing regulations.

Tip: Be ready for tough negotiations and documentation if you want to borrow in India.

(v) Dispute resolution: The PPAs generally provide for the state electricity regulatory commission as a forum for adjudicating disputes and not an independent forum such as SIAC/LCIA.

Tip: Segregation of tariff disputes to the commission and non-tariff related disputes to an independent forum (arbitration) has better chance of succeeding during negotiations with a DISCOM.

(vi) Sale of projects: Approvals for stake sale are needed from multiple agencies like DISCOMs, lenders, nodal agencies etc. The buyer will have to re-apply for a permit (as these are mostly not transferable), leading to a tedious, inefficient process.

Tip: Plan and communicate well. Stay in constant touch with the lender.

Queries? The Indian regulatory environment is constantly evolving, and we recommend that you contact us at practicemanager@btg-legal.com for specific advice on investments/expansion.