India Business Law Journal

Your partner in legal intelligence

September 2012
Volume 6, Issue 3

Beating a retreat?

Foreign law firms rethink their India strategies

Unlocking the retail market

Antitrust laws raise directors' liabilities

The changing pace of outbound investment

Corporate counsel's environmental concerns

VANTAGE ASIA

www.indilaw.com

> The challenge of structuring deals to comply with the black economic empowerment ... is also one that is faced by potential investors from India
>
> Robert Appelbaum
> Senior Partner
> Webber Wentzel

The challenge of financing

Every country has its own legal and regulatory challenges. In Europe, labour management and employment liabilities can be a challenge, making any kind of restructuring difficult. "Any proposed restructuring post-acquisition should be analysed threadbare before the acquisition," says Mara at Osborne Clarke. "The acquiring management gives assurances as part of the deal that it will inject sufficient cash for the ailing company to be able to function post-acquisition. But funding can be an issue as there is a funding crunch in Europe and India, and the cost of finance in India is high."

In addition, when Indian companies take loans from Indian banks to fund acquisition of assets across multiple jurisdictions, they give assurances to the lenders that they will pledge the target's assets worldwide, including in the country where the target's holding company is situated. If the holding company is in the UK, a problem may arise in France, which allows assets to be pledged only if a part of

Practitioner's perspective

A growing attraction

Indian investors have been attracted to the booming economies and untapped natural resources of the Mekong region, says Vinay Ahuja at DFDL

Indian investment in the emerging economies of the Mekong region has been rising since 2000, influenced by recent policy changes in Cambodia, Laos, Myanmar, Thailand and Vietnam. The existence of untapped natural resources and improving investor confidence in these countries has contributed to the upward trend.

Indian entrepreneurs and the government of India (GoI) have invested in several joint ventures and wholly owned subsidiaries, through debt and equity transactions. The GoI has also provided financial support to promote exports including projects from India.

The Mekong-Ganga Commission, established in November 2000 in Vientiane, Laos, has strengthened India's relations with the Mekong region. The commission comprises six countries – India, Cambodia, Laos, Myanmar, Thailand and Vietnam – and emphasizes four areas of cooperation: tourism, culture, education, and transportation linkage.

Small sisters: Cambodia, Laos, Myanmar

Cambodia: 60% of Indian investment goes into the pharmaceutical sector with the remainder going to the fast moving consumer goods and food and beverage sectors. Recently Indian investors have started venturing into agriculture and mining.

The GoI provides bilateral financial assistance to Cambodia through grants and lines of credit. Several projects that have used these lines of credit are currently being implemented in the areas of electric transmission lines (US$100 million), irrigation (US$30 million) and water pump installation (US$8.5 million).

Laos: Four "grandfathers" of India Inc – the Tata Group, Aditya Birla Group, Apollo Tyres and Kirloskar Brothers – have set up shop in Laos. The Aditya Birla Group has committed to invest US$400 million in a eucalyptus pulp and plantation project.

Other major Indian investors include WAPCOS (a GoI undertaking), Angelique International and the HSMM Group.

Indian investment in Laos is focused on the plantation, hydropower and mining sectors. The GoI has extended lines of credit – to the tune of US$133 from 2004 to 2011 – to several projects.

Recent projects that used this credit include a US$10 million 115-kilovolt transmission line; a US$4 million project for the supply of equipment for rural electrification; the US$18 million Paksong-Jiangxai-Bangyo transmission line project; the US$11 million Nam Song 7.5-megawatt hydropower project; and a US$17.3 million loan for the development of irrigation schemes in Laos.

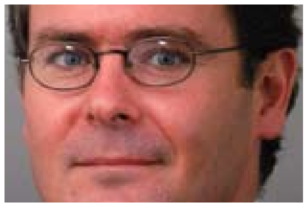
the loan is shown to come into a French company. If a loan goes to the UK, "assets in France cannot be pledged and the facility agreement with the bank lenders is breached," explains Mara. "The options then are either for the borrower to pay off that part of the loan to the bank or for the bank to invoke a breach clause – both of which are messy."

An investment in Italy requires careful due diligence on the target, focusing on the level of banking indebtedness, including the value of any derivatives transactions; litigation, tax liability and labour litigation, advises Carmelo Raimondo, the partner-in-charge of the India practice at Chiomenti Studio Legale in Milan. Additional issues include social security bilateral agreements, heavy taxation and labour costs. Investors may also have to contend with lengthy litigation in Italy.

All these challenges notwithstanding, lawyers say that Indian investments are much sought after. Says Ernst & Young's Shah: "The capability of the Indians has been established. They are not going and buying for name's sake but for business sense." ■

OHADA [Organisation pour l'Harmonisation en Afrique du Droit des Affaires] enables legal recourse in commercial affairs over a wide range of potential business disputes

John Ffooks
Senior Partner
John W Ffooks



Myanmar: Both the GoI and private companies have been active in Myanmar in infrastructural and other areas.

Major projects include upgrading and resurfacing of the 160-kilometre Tamu-Kalewa-Kalemyo road; construction and upgrading of the Rhi-Tiddim road; and the Kaladan multimodal transport project.

Companies involved include: Telecommunication Consultants India, which set up high-speed data links in 32 cities across Myanmar; ONGC Videsh, GAIL (India) and the Essar Group, with projects in the energy sector; RITES, which is involved in rail transportation systems and the supply of railcars, locomotives and parts; and Tata Motors, which set up an assembly plant for heavy turbo trucks with financial assistance from the GoI. Recently, the government of Myanmar and NHPC signed an agreement to develop the Tamanthi and Shwezaye hydroelectric power project.

Although the legal systems of Cambodia, Laos and Myanmar are still being developed, remarkable economic growth over the past decade has made these countries an attractive destination for Indian companies.

Issues such as unpredictable legal implementation and enforcement add to the costs of business. In addition, a small domestic market, weak intellectual property protection and a lack of investment financing have discouraged Indian investors from investing in bigger projects.

Big brothers: Thailand and Vietnam

Thailand: The past few years have seen rapid growth in economic and commercial links between India and Thailand. Indian investments in Thailand are estimated to total around US$2 billion since the 1980s. From 2010 until April 2012, 34 new investment proposals from India valued at approximately US$140 million were approved.

Indian groups doing business in Thailand include: Tata Group, Aditya Birla Group, Indo Rama Group, Ranbaxy, Dabur, Lupin, Bharti Airtel, NIIT, Punj-Lloyd, Kirloskar Brothers and Mahindra-Satyam. Public-sector entities such as Indian Overseas Bank, Bank of Baroda, Air India and New India Assurance are also present.


Vinay Ahuja

Vietnam: Indian companies have invested approximately US$790.5 million, in sectors as diverse as oil and gas, steel, minerals, tea, coffee, sugar and food processing. The companies include ONGC Videsh, Essar Group, Nagarjuna, Venkateswara Hatcheries, Philips Carbon and McLeod Russell.

In addition, Tata Steel plans to invest more than US$5 billion in a steel plant in Vietnam, and NIIT, Aptech and Tata Infotech have so far opened more than 50 franchised centres for IT training.

Both Thailand and Vietnam have been successful in attracting Indian investment, despite typical problems that occur in emerging economies.

As Indian companies continue to look for global opportunities, they should consider investments related to acquisition of strategic resources, expansion of market base and use of new technologies for local markets, which facilitate long-term growth in India.

Such overseas investments will also help Indian companies in playing a critical role in other developing countries.

Vinay Ahuja is a senior adviser in the regional M&A practice group and the head of the India desk at DFDL. He can be contacted at vinay.ahuja@dfdl.com. DFDL specializes in emerging markets and has 11 offices across eight countries: Bangladesh, Cambodia, Indonesia, Myanmar, Laos, Singapore, Thailand and Vietnam.