INDIA (COMMERCIAL)

Dimpy Mohanty

Founding Partner,
Lex Counsel

+91 11 4166 2861
dmohanty@lexcounsel.in
lexcounsel.in

Dimpy Mohanty, is a founding partner of Lex-Counsel and has 20 years of experience in corporate and commercial matters. She also has a special focus on labour and employment, biotechnology and regulatory matters and speaks on effective implementation of sexual harassment policies, anti-corruption compliance programs and issues connected to international workers. Dimpy has written the 'India Chapter' of the book 'International Food Law and Policy' published by Springer.

Seema Jhingan

Founding Partner,
Lex Counsel

+91 11 4166 2861
sjhingan@lexcounsel.in
lexcounsel.in
irglobal.com/advisor/seema-jhingan

Seema Jhingan, founding partner of Lex-Counsel, has over twenty-five years of experience. She advises in areas including M&A, Education, Defence and Aviation, Private Equity, Franchising, Media & IT, General Corporate and Commercial matters. Seema has substantial expertise in representing commercial and collaborative alliances, brand and technology licenses, corporate structuring and divestment. She has been recognised as one of India's Trusted Corporate Lawyers by ICCA.

LexCounsel is an Indian law firm, with its head office in New Delhi and associate offices across India (Mumbai, Bengaluru, Kolkata, Hyderabad, Chennai, Pune and Goa). LexCounsel provides comprehensive legal services to both domestic and foreign clients and is recognised as a leading Indian law firm for its work in Corporate and M&A, private equity & venture capital, labour & employment, telecommunication & IT, education, life sciences and IP, food & health, real estate, tax, dispute resolution etc. Many partners of LexCounsel have been voted leading lawyers in areas such as IT, telecommunications & media, venture capital & private equity, and labour & employment, in recognition of their excellent work.

TOP TIPS FOR

Successful negotiations

Preparation

No matter how experienced one is, an advanced knowledge of the key contract terms and the end objective, alongside a well thought out negotiation strategy is imperative.

Trade-Offs

Beware of the 'my way or the highway' approach. Making 'concessions' to find a place of mutual agreement is essential for successful negotiations.

Understand the non-negotiables

While negotiating is all about finding the middle ground, understanding the non-negotiables is equally important. Get an agreement on those first, and then move on to the rest.

Familiarise and Compartmentalise

Understand your counterparties, assess their pain points and then prioritise your negotiations on the key issues.

Don't sweat the small stuff

Be conscious of the key requirements of your client. Don't labour on minor issues and mere contractual language which takes you away from the main goal of closing the negotiations.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Sensitivity to the cultural nuances/ethos of the jurisdiction of the counterparties is one of the most essential techniques for effective negotiation in an international transaction. Being aware and considerate of the negotiating culture/work practices of the country is imperative for building a positive negotiation environment. Techniques that help to close a transaction in the USA may not work in Japan and would be fraught with hurdles.

Another negotiation strategy, peculiar to international negotiations, is that lawyers often seek to justify a condition by adopting a 'these are standard contractual clauses in our country' approach. Using a local jurisdiction advisor is always helpful and enable the parties to move past the veracity of this standard clauses claim.

It is always helpful if counterparties are able to lead the negotiations from the front with the support of their advisors. This minimises the scope of miscommunication/misunderstanding and keeps the negotiation focused on the end objective.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Under the (Indian) Contract Act, 1872, an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is considered void. An exception is provided in case of non-compete arrangements involving sale of goodwill of a business where the seller is restrained from carrying on similar business. Despite this, non-compete covenants operating beyond the tenure of the contracts, particularly in employment contracts, are generally held unenforceable by Indian courts.

Further, 'reasonability' of such non-compete arrangements is another key consideration for its enforceability. Therefore, contracts containing non-compete arrangements need to be carefully drafted to stand the test of enforceability in Indian Courts.

Similarly, in M&A transactions, contractual clauses on exit mechanisms in the form of put options for foreign investors can come under the scrutiny of the Reserve Bank of India (RBI). This is because the RBI only allows issuance of shares to foreign investors with optionality clauses subject to certain conditions, including a restriction on 'an exit at assured return' and compliance with pricing guidelines. Therefore, having multiple exit options, including the right to assign the option rights in favour of Indian nominees/affiliates, allows investors with a greater flexibility to exit in compliance with Indian laws.

M&A transactions involving listed Indian companies can be impacted by certain additional laws, such as the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. These requires a mandatory open offer to be made by an acquirer in case of acquisition of voting rights above a specified threshold.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Shareholders agreements are private contracts between shareholders dealing with the rights and obligations of shareholders and management and control of the company. This is unlike the articles of association which is a public document regulating a company.

So, what happens if there is a conflict between the articles of association and shareholders' agreements?

Indian Courts have held that, in case of any such a conflict, the articles of association will prevail. For instance, the Supreme Court of India in Vodafone International Holdings BV Versus Union of India & Anr [(2012)6SC C 613] clearly stated that in the event that the provisions of a shareholders' agreement are contrary to the articles of association, the articles of association govern and not the shareholders' agreement.

Some Indian courts have also gone a step further and stated that the rights of a shareholder vis-à-vis the company (such as affirmative voting rights) cannot be enforced if such rights are not incorporated in the articles of association. As such, it is critical that the relevant provisions of the shareholders' agreement are incorporated in the articles of association of the company, to ensure their enforceability.

Remuneration of executive employees or key managerial personnel of public companies is regulated under CA 2013. Additionally, in the case of listed companies, adherence to the listing regulations issued by the Securities Exchange Board of India (SEBI) is also necessary. Quite often, investors (especially private equity investors) enter into profit sharing/compensation agreements with executive employees of listed investee companies, based on the achievement of performance targets by such companies. In recent years, SEBI has expressed concerns regarding potential corporate governance issues and unfair practices arising, as a result of such agreements (which are typically entered into without shareholders' approval).

Accordingly, certain amendments in the listing regulations were introduced in 2017 which regulate these arrangements inter alia mandating prior approval of the shareholders and the board of directors of the listed company before entering into such agreements. Interestingly, the scope of these amendments seems to have been extended to cover employees of unlisted subsidiaries of listed companies. For instance, SEBI, in an informal guidance issued to Mphasis Limited (a listed company, with respect to proposed payments to certain employees of its unlisted subsidiaries) took the view that such employees would also be covered under these new amendments.