

Technology Transfer through Joint Venture
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Lecture – 12
Governance Issues in Joint Venture

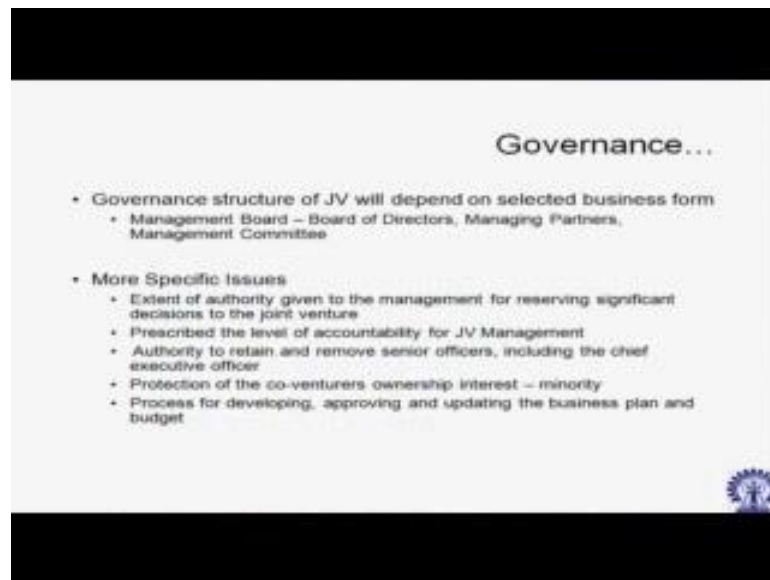
I welcome you in twelfth lecture, regarding technology transfer through strategic alliance and joint venture.

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I am discussing with you the module called joint venture agreement. And in this particular talk, more specifically I will speak on the governance issue in joint venture agreement and what is the matter relating to joint venture governance issue incorporate in the agreement itself.

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So, the first step; first of all, we should talk about the governance structure of the joint venture. And while doing so, it depends on type of the business form you have selected. Now, if you have selected the company, then in that case you will have a board of director. If you are selected the partnership, then it will be managing partners. Or, if you are choosing another other forms like association of the persons or if it is society or a cooperative, then in that case there will be other name with which we will call. So, whatever the name we call, we can for our convenience call that particular governance structure as management board.

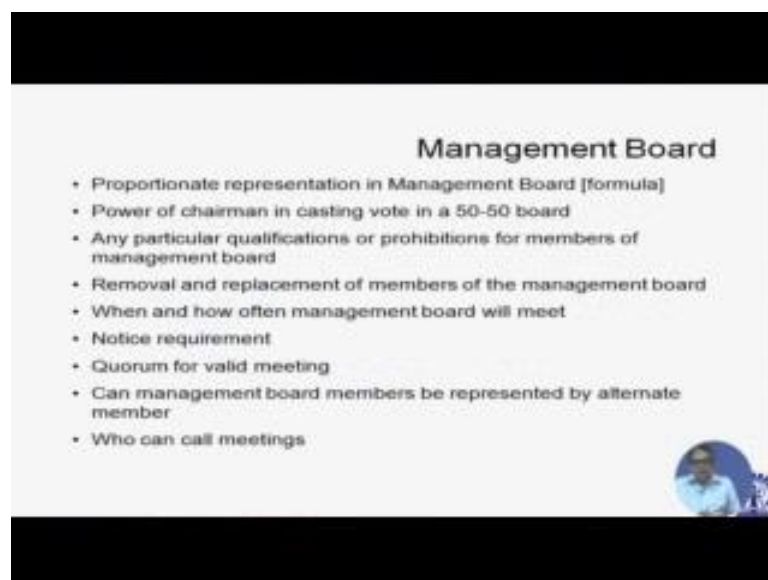
So, even if you are having a soft alliance or your joint venture is not really incorporating any business form or which I have discussed with you; joint venture without equity participation, which is still in the form of an agreement relating to sharing of market or technology transfer or product development, so much, so forth. Then, in that case also you can have a management board. And, in that particular board there is a people participate from both the venturers or if there are multiple venturers, all those particular venturers will send the number of people in that particular management board.

Now while your structure, your governance, you should also take care of the some of the issues like the extend of authority, which you wanted to give to this particular management. And that has to clearly, you know, specify into the venture agreement. And then, if you have to talk about, you have to talk about the prescribed level of

accountability for the joint venture management. You need to talk about what is the renewal policy, which will have relating to senior officer, chief executive officer. Will the joint venture board or the management board will have that particular authority to do so? You need to talk about; if the joint venture partner having a minority stake, then in that case what kind of protection should be provided to this particular minority stake or over the years, for a reason they are become a minority, you know, stakeholder in the joint venture, then in that case what kind of a protection you need to extend? Because if you remember in my last lecture, I have said that it might so happen that because of the regulatory changes. The joint venture partner became a minority, you know, ventures because they need to dilute their stake. So, in those circumstances what type of protection you are extending to your venture partner, and that need to be specified into the governance document or the matter of the governance.

You need to talk about the process relating to development of the business plan, updating of the budgets or development of the budgets, all these particular thing you need to specifically mention into the plan of governance or governance plan. And, you should specifically, you know, take; I mean inserted into the joint venture agreement itself.

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Next important thing is relating to the management board. And, in the management board you need to talk about the proportionate representation in the board and what kind of formula you are developing for that; because please do remember that generally, it

depends on type of organizations you have been incorporated as a joint venture, consequence of the joint venture. If you are form a company or if you have been incorporated a company either public limited or private limited, then in that circumstances you need to govern by the company's act. At the same time, if the SEBI has prescribed some kind of guideline relating to that, you need to govern by that.

So, in those particular circumstances you have really a limited option before you that what should be the structure of that particular board; because it is depend on type of shareholding you are having or type of holding you are having into that particular organization itself. But, if it is a partnership or any other form you have chosen, then in that case you can decide that what should be the structure of the management board. You might have a fifty-fifty management board; that means, fifty percent of the people come from one venturer and fifty of the come from other venture. And, in those particular circumstances there is every possibility that there is a deadlock scenario.

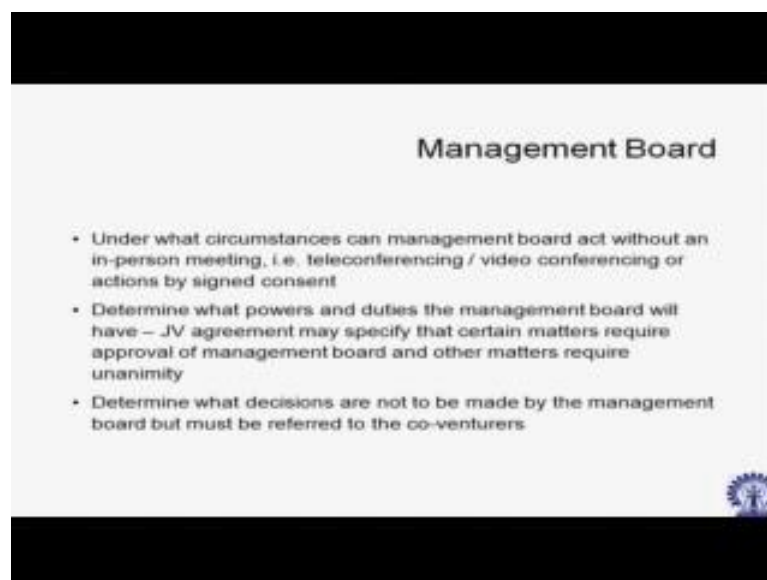
So, you need to give a specific right to the chairman that how he can cast his vote in the in the scenario of a deadlock. Then, you need to talk about the particular qualification or prohibition for the member of the management board, if you want to specify. So, then further you need to talk about removal and replacement of the member, so that the management board, sometimes you need to specify that how many times and what kind of notice requirement management board has for meeting or how many times they should meet in the year.

Now, please remember if it is a company, then again you need to govern by the statutory provision because company's act specifies that board need to meet at least four time in the years. It can be more than that also. But, this is not so in case of other form of organization, if it is a partnership or any other form. So, in sometimes you will find that how much time the management board require to meet, that is, specified by the statute or governed by the statute, but in some cases it is not. But, even if it is specified by the statute, you might have your own governance rule; you might even specify more number of meeting by this particular management board or you might have talk about the number of subcommittee which the management board should have and how many times they are going to meet, so that they can really aware about what is happening within this particular venture itself.

Now, you should specify about the quorum, you should specify about, you know, alternate members in that particular board. Like, many of the time you find in the management board, there might be foreign directors because if your partner is a foreign partner, then he will send his own director in the board. And, most of the time these particular foreign directors are not available. So, there should be some alternative person who will fill up his space and he will act on behalf of that particular foreign director, and that is known as alternate director. And, if you want to choose a alternate director, then you should create a provision within your constitutional document or the management document. And, you can also decide about what should be the procedure relating to appointment of this alternate director.

Now, another important thing is that who should give in a right to call the meeting. You know, that is one of the issues you should incorporate it within the governance document of a joint venture agreement; because if it is again, if it is a particular organization like a company, then statute prescribes that who can call the meeting. But, in other cases if it is a partnership or other form or even if it is simply an agreement, which I have talked about. Then, in that case you should specify that who will have a right to call the meeting of the management board.

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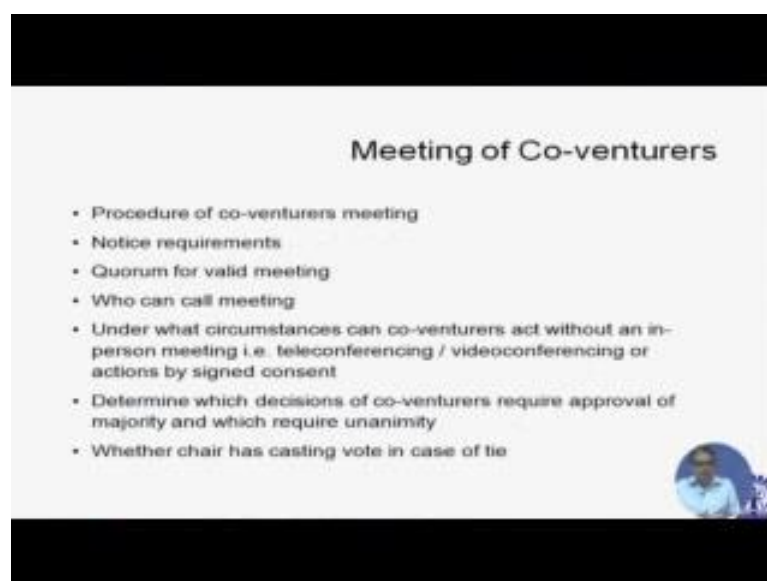
Now, you should also specify that in what circumstances management board need to meet in person and in what circumstances the management board can take the decision

without meeting in person. So, when the telecommunication, teleconferencing or video conferencing can be used for the purpose of the meeting or even you know how the management board can take the decision by circulating the minutes and signing that particular document. So, you can specify the circumstances when it can be done.

Now, you should talk about the power and the duties of the management board. And, you can specify that certain matter, in certain matter the management board required approval. And, you know, in which matter management board has to have an enmity in the decision making. And, ultimately, you know, you need to talk about that what decision to be taken by this management board and what decision need to be referred to the venturer. So these, this is always good to, you know, mention in these governance document. But, at the same time let me again draw your attention that some of the power depending on the form of business you have chosen.

Like, if you have taken the form of a company, these, some of these power is given specifically to the board of directors, but you can have some additional provisions in, of the company or article of the article association of the company. And, there you can have a different bench marking. But, whatever the circumstances is, please do remember that you cannot insert something in a way which we will going to demean the provision of the stature.

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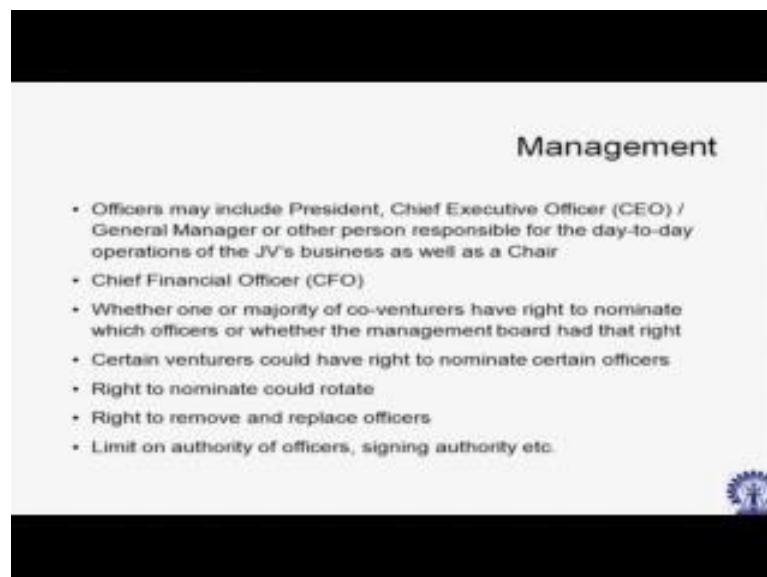
Meeting of Co-venturers

- Procedure of co-venturers meeting
- Notice requirements
- Quorum for valid meeting
- Who can call meeting
- Under what circumstances can co-venturers act without an in-person meeting i.e. teleconferencing / videoconferencing or actions by signed consent
- Determine which decisions of co-venturers require approval of majority and which require unanimity
- Whether chair has casting vote in case of tie

Now, let me talk with you relating to the meeting of the co venturers. And, here in as I have discussed in case of the management board, you need to detail out a many thing like the procedure of co-venture meeting, then notice requirement, then quorum for a valid meeting, then who can call the meeting, then what are the cases the co-venturer need to meet in person, in what are the cases they can even take out the decision without meeting in person, then you need to talk about the co-venturer requirement of approval of majority. In some of the cases, you need, if there is more than two co-venturers, then you need to have a majority decision to take majority decision on particular matter. Maybe it might be relating to, starting of a new business. It might be relating to the change of business plan or it might be relating to the annual budget, change of the annual budget, so much, and so forth. So whatever it may, you should mention it in your joint venture agreement.

Now, you should also keep a clear provision relating to the chairman's power in case of tie in the meeting; that means, if there is a deadlock scenario, then how the chairman can play a role and come out of that particular deadlock scenario.

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Now, further you need to talk about the, you know, the management who are basically participating in day to day operation of the business. So, you are basically talking about the management which is below the board or below the apex body level or so which is below the management board, which we are talking about. So, whatever the organization

you choose, again it is depending on type of management which you might constitute. But, nevertheless you need to specify the provision relating to this particular management.

Now, this management may include the chief operating officer. Then, it might include the chief executive officer; it can be the general manager or other person responsible for day to day operation of the joint venture. You might have chief financial officers; you might have a one or two co-venturers, who might have a right to nominate these key managerial personnel. And, you know certain venturer could have a right to nominate certain officers.

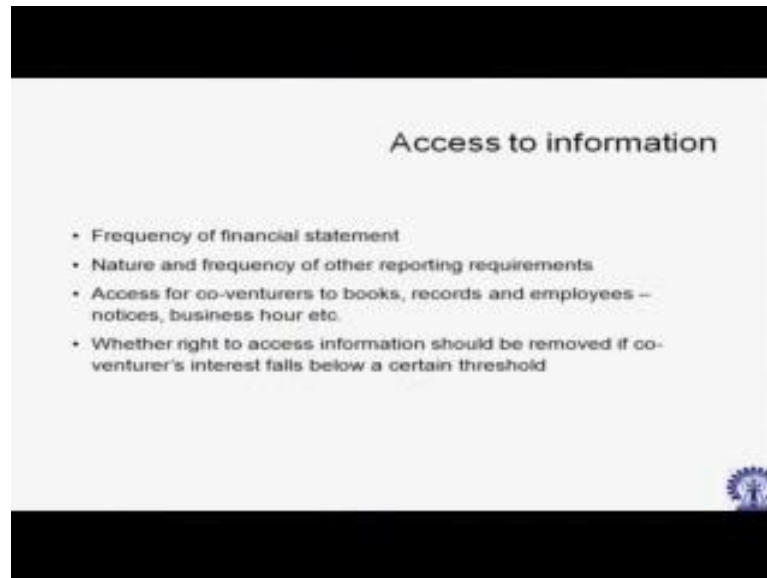
Now, you know most of the time what you found that if you have a foreign partner or if you are even having a domestic partner, then in that case some of the people are sent by the venturers into this new joint venture. And, these people are either pretend in that particular venture organization, already trusted; because whenever these new venture start, you know they want to have sort of control over these particular venture. And that is, that is the, if that way you wanted to acquire the people or select the people, you should have a provision in place.

Now, you can have a right to rotate the nomination like, you know, if you the venturers might decide amongst themselves that how many years chief executive officers, who will continue which is nominated by a particular partner. And then, you know there is a another partner who might nominate the chief executive officers. Or, in that case chief financial officer, so there can be a rotation of these particular key personnel. And, it might be nominated by the venturers in that particular venture.

So, you can also talk about the limit of authority of these particular officers and what is the signing authority in what are the matters. So, what is that, you know, important thing is that there should be a clear allocation of the task or the decision making authority between the management board between the venturers and between this management. So, there should not be any kind of a conflict. And, if there is a major decision, then in that major policy decision, then in that case, you know, it might have particular route to follow. It might go from management to management board and then management board to venturers for taking this particular decision. So, whatever the procedure you wanted to

have within this joint venture organization, you need to specify that into this particular joint venture agreement.

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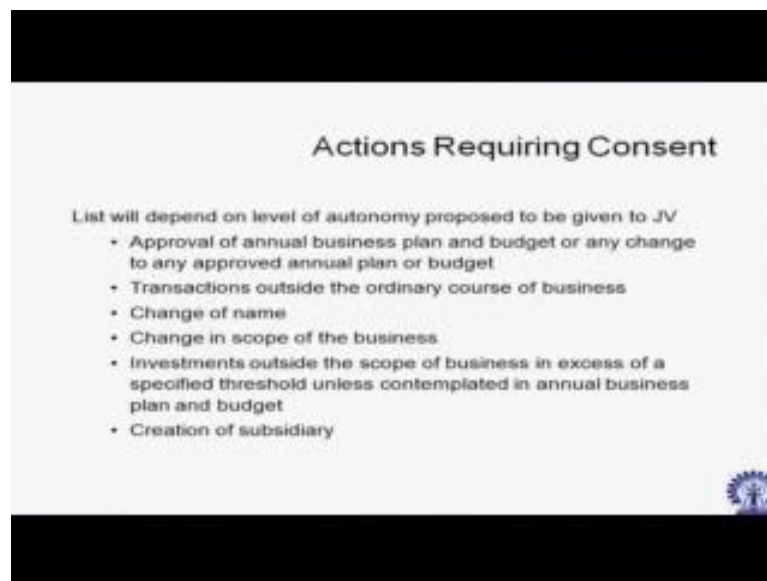


Now, another important thing for success of a joint venture agreement is to have a access of critical information about the different issues. It might be relating to the financial matter, it might be relating to the other reporting requirement, it might be relating to the accessing of the books, which is statutory required to be kept by the joint venture organisation. And, it might be relating to access of information, relating to access of information, when the venturers stakes comes down. So, whatever the provision you wanted to develop relating to the access of information, you should specify it very clearly.

Now, let me draw your attention. If this is a company, I mean, if joint venture lead to a formation of the company, then in that case again the statutory prescribed under what is the circumstances the member has right to access what kind of information. Again, if it is a partnership, then you will find this right also specified in the statutory itself. This is also applicable in case of the society as well as the cooperatives. But, in other circumstances you might specify these, you know, condition or even if the statute specifies some conditions, you might have additional condition relating to this particular thing.

Now, important thing is that in some circumstances you might like to debar some of your partner not to access the information, if they have diluted the stake; because you might not like to have a interference or a specific information about the organization by your partner who has diluted the stake. So, in those particular circumstances clear provision should be identified or developed relating to the stakeholder, relating to the partner who has diluted the stake, relating to accessing of information.

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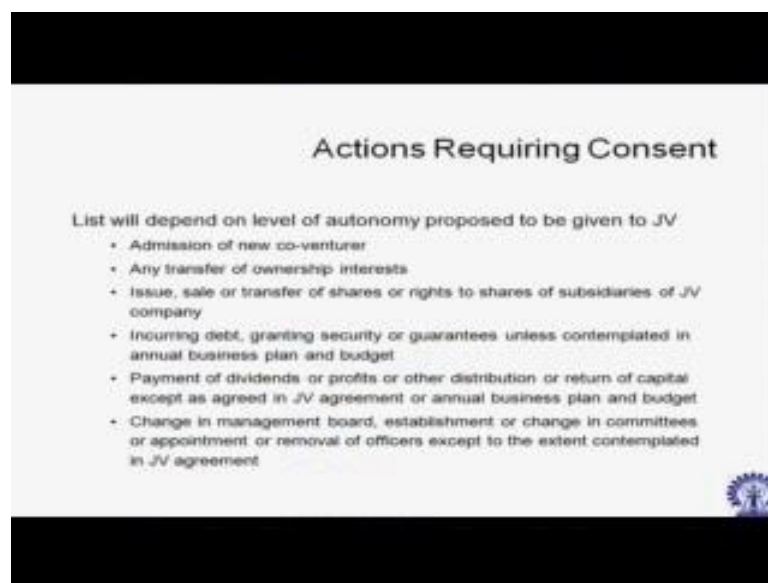
Now, I am going to talk with you a long list where you need to have consent for the action, which you want to take. And, this particular consent level might be, you know, light with the different constituent of the joint venture organization. I have mentioned about this particular constituent in this particular lecture. But nevertheless, let me remind you once again. It might be the venturer themselves. Second is it can be the management board and third is the management. So, there should be some provision relating to approval of the annual business plan and the budget. And, if you wanted to change these annual business plan and budget, then how you should go and to whom you should go for this change of approval.

Then, if you are entering into a transaction outside the ordinary course of business, then who should be the authority and who has the authority to approve that particular transaction. Most of the time, you will find these transaction right is given to the management board. And with the consent of the management board, the management

can go ahead with this regular transaction. But, if the transaction which might change the business plans, then in that case you might need to elevate that particular approval to the level of the venturers. So, the venturers might need to reconsider or need to consider those particular approvals.

Now, if there is change of name, who is going to have the authority. If there is a change in scope of business who should have the authority relating to that. And then, if you are making the investment outside the scope of business in excess or specified threshold, unless contemplated in the annual business and who should going to give the permission. And then, if you are incorporating a further subsidiary for better business or to expanding the business or to entering into a new domain of business, then who has the authority to give the permission, you need to discuss about.

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Now, there might be a situation where you need to admit a co-venturer, new co-venturer. And if that is so, then what are the procedures, what are the formalities and who is the appropriate authority to give the permission, you need to lay down that particular provisions. In most of time, you will find if there is an admission of the new co-venturers, then the permission should come from all the venturers. That means, if there is a three or four venturer already exist, then they have to decide amongst themselves who will allow the new venturers to come; because it is always advisable to have that

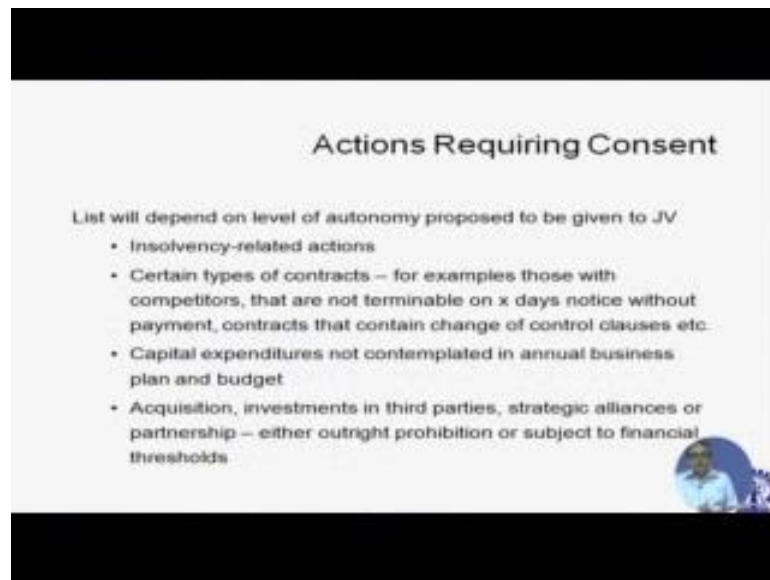
particular provision within your joint venture agreement; because you are not sure that how the business will take safe down the line five years on maybe in the futures.

So, you might require a new expertise, you might require to enter in a new domain or within the business segment, there is a new domain is developing which you required to address. Let me give example. Like, you are in automobile business and then you find that the traditional fuel is sinking or people are not interested to use the traditional fuel. People are more interested in hybrid fuel or the vehicle which is using the hybrid fuel.

So, you might require to get a new partners or new venturers, who has expertise in the battery technology or who can provide you the up gradation of your technology for the up gradation of your vehicle. So, this is what, you know, you should have a flexibility or openness for a new person to enter into your venture.

Then, if there is any transfer of ownership interests, then you need to discuss that particular thing; because I have talked with you relating to transfer ownership, when we are talking about diluting of stake. And, if there is anything relating to incurring the debt or granting the security or change in the business plan, then you need to have a process in place. If you wanted to pay, wanted to do a payment of the dividends or distribution or return of the capital, except as it is entered into a joint venture agreement, then in that case you should have a proper mechanism in the place that who can approve these kind of, you know, move. And, if there is change in management board or establishment or a change in the committee or appointment or the removal of the officers, then in that case who is the competent authority and what are the procedures one should follow for these matter.

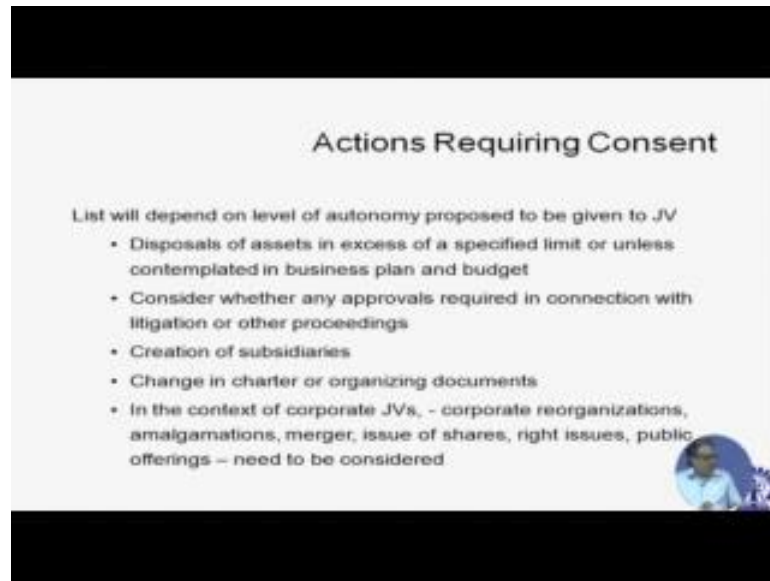
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Now, if the matter is relating to the insolvency, then who has an appropriate authority. Then, if it is a matter relating to the capital expenditure which is not contemplated in the annual business, then how you should take the approval and who is the approving authority. Then, if there is a new acquisition or new investment plan, then, you know, how you should go ahead with what is the prohibited within this particular plan and what is allowed subject to financial threshold. All you need to, you know, detail out. And for that matter, even you should tell that who has the power to give the consent in these particular cases.

But, one thing, I would like to tell you for your better managing the business venture. You should not rely more on your venturers or the consent from the venturers because if you give more power to the venturers, then it might, your joint venture might suffer. So, it is always advisable that if it is not very crucial, if the matter if the matter is not very crucial and it is not going to change your business structure, you should keep this particular power with your management board.

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There are further lists here. And, you will going to find many things which I have listed it here. but, I will just speak on some of the issues like, if there is a disposal of the assets, then what are the procedure you should follow or if there is creation of subsidiaries, then what are the matter and how you should go ahead for this particular thing or if there is a change in the charter organization document, what are the process by which you should, you know, compile this particular thing.

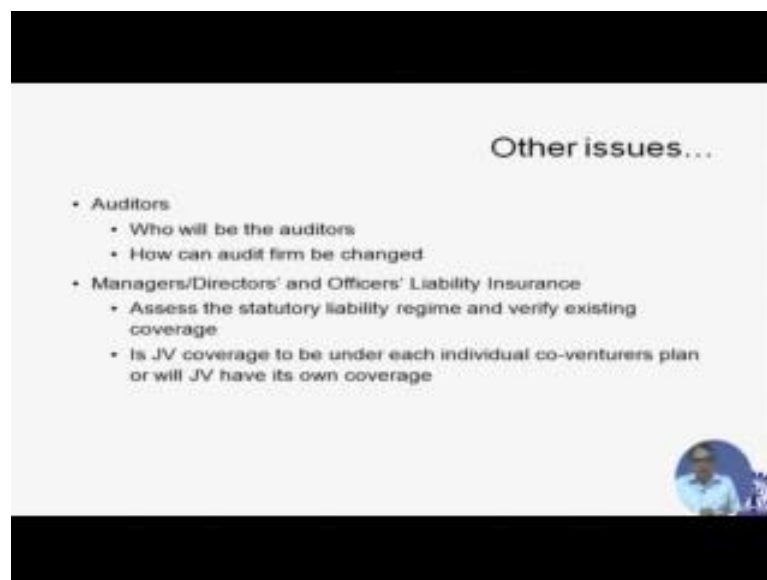
Now, what I will suggest you that, you know, you should create your joint venture agreement in such a manner which are having a flexible structure; because what you are contemplated in the beginning of the joint venture, you might not have the same circumstances over running of this particular joint venture. So, you should have a adequate flexibility build in within the joint venture agreement. So, whenever it is required you can modify, change, upgrade, whatever though you will have facilitated.

Like in my previous lecture, I have told you that you might have one umbrella agreement. And within that umbrella agreement, there can be several issues like, whatever I am discussing with you the governance issues or you know whatever I have talked about other formalities in my previous lecture, it may come as a subordinate agreement within that particular umbrella agreement. And, you can have a further agreement relating to shareholding share transfer, technology transfer, so that, you know,

if there is any change in a particular matter, then you can simply change that particular document without disturbing the entire thing.

So, structuring the joint venture agreement is one of the very important strategies, which you need to take, you know, while you are signing the joint venture agreement or when you are constituting the joint venture agreement. Similarly, in your joint venture agreement you should have a provisions relating to the corporate reorganizations issues of the shares, if you want to go for a right issues, if you wanted to go for a public offering, then these particular provision should mention, and in what circumstances and in what condition you should go ahead with these and who is the approving authority for that particular things.

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Now, the another two issue I wanted to draw your attention is relating to the auditor and the managing and the managements liability. Now, the auditors; who will be the auditors and how you can change the auditing form is a very (Refer Time: 31:34) issues, in your today's world. Now, if you are in a company, then in that case there is a detail procedure has to be laid down. And, in the company's act relating to who can be appointed as a auditor and what kind of audit form and how many days a particular audit form can audit a particular company.

Now, this is not so in case of other forms. But, my advice will be that you should have a lot of transparency relating to the auditing and financial process because that keeps you

credibility in front of other people in the market. So, you should have a procession plus you should also, you know, define that who has an authority to take the decision in this particular matter. Similarly, you need to look into that what kind of regulatory structure is prevalent, which is imposing the liability on the directors, and what kind of liability it is imposing. And, in those particular circumstances what kind of a backup plan, in case of imposition of the liability.

Nowadays, you will find that, you know, management generally take the insurance against the liability; because it is quite a some whenever liability is thrown or whenever liabilities imposed on the directors. And, sometimes it might that the liability, even extend to their personal property or personal assets. So, you might also consider that you know the insurance, liability regime as well as what kind of insurance one should take or underwriting; one should take for the protection of the liability.

At the same time, if the liability is, you know, protection of liability is taken, who is going to cover the cost for that particular insurance like, as I told you that, you know, management may come from the venturers. Then, in that case should the venturer will going to take care of the insurance coverage of the managers or the joint venture organization is going to take care of, you know, cost of insurance for the managers. So, all these things you need to detail out and you need to also specify that who has a right to take a call on those particular issues, if need to, if it need to be decided.

Thank you.