

ROLE OF LIMITED LIABILITY PARTNERSHIP IN DEVELOPMENT OF CORPORATE LAW IN INDIA

BY
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abstract

Limited Liability Partnerships (LLPs) have emerged as a significant entity in the corporate landscape of India, playing a pivotal role in the evolution of corporate law. This paper examines the impact and contribution of LLPs to the development of corporate law in India, highlighting key legislative provisions, judicial precedents, and practical implications.

Keywords: *Limited Liability Partnership, Corporate Law, India, Evolution, Legislative Provisions, Judicial Precedents, Practical Implications.*

INTRODUCTION

The Partnership of Indian Act become enacted in 1932 and it got here into lifestyles on the primary day of October 1932. The gift Act substituted the sooner statute related to Partnership, which become discovered in Chapter XI of the Indian Contract Act,1872. The Act isn't complete. It indicates to categorise and amend the rules figuring out with Partnership.

A partnership is a important information or relation among or extra folks. Doing first-rate relationships are normally mounted on conviction, decency, and mutual information and commitments. Partnerships can be severe, wherein every gathering's duties and duties are highlighted in a documented settlement, or casual, wherein the duties and duties are grasped or agreed to informally. You may be succesful to select your partner or, as is once more, and once more the scenario, your partner can be transferred to you.

Partners are frequently crucial even as working in an outdoor nation, now no longer simplest to bridge linguistic hindrances, but further to helping you to finish your project ingeniously with out shrinking into the generally various corners, one is going over in a far off scenario. Running with a associate is fraught with downsides. A collaboration that has long gone nasty may produce good sized feelings and break a industrial arrangement. It is critical for the 2 events to be open-minded and tolerant of each other's discrepancies. There have to be a ability to examine and modify. The accomplices have to be extremely joyful to alternate their specialized expertise and to narrate as equivalents in a joint destiny.

Types of partnership beneath Partnership of Indian Act

General partnership: A popular partnership is a idea wherein at the least people or wonderful people (consisting of an enterprise and someone) count on advent roles as "companions," irrespective of whether or not or now no longer they've officially entered right into a partnership. Resource protection is a far worse trouble with popular partnerships for the reason that they can't also be equated to sole ownership. One companion's motion has a power at the companions every companion has the duty for the duties of the partnership. As such, every of the bigger partnership enterprise companions offers statistics approximately any risks they realize of using multiplying their wide variety of companions of using a comparable factor.

Limited partnership: The executives are the simplest human beings accredited to have a restrained partnership. The legal responsibility for the attempt withinside the partnership is borne totally of using the partnership. At the Foundation's modern factor, the General Partners are placed almost to have the identical overall performance traits as destiny companions of an expected organization, such as being someplace withinside the order of affiliation, addition to at least one facet to utilise partnership effects, appropriation of earnings of the organization in predefined rates, and becoming a member of and for numerous functions associated with the whole stability of

unpaid partnership roles. Restricted companions have stringent limits on their very own energy internal a company, consequently developing the maximum effective discern in the company, who have to adhere to the united states requirements to hold their hobby withinside the partnership as though it shared in a enterprise.

Limited legal responsibility partnership:

A L.L.P. is a criminal shape wherein one companion isn't always responsible for the terrible behavior or recklessness of some other companion. This is a primary variant withinside the popular case, as it's from that of a restricted partnership. An entity known as a L.L.P. can be fashioned to have interaction in any type of enterprise, however a subset of these entities has a contractual duty restricted to that of the economic professionals of a organization. In sure international locations, a L.L.P. is needed to consist of at the least one "popular companion" with limitless legal responsibility. The volume of a state's L.L.P. enactment determines the volume of an unmarried companion's hazard. Different international locations offer safety simply towards tort claims and do now no longer enlarge safety to a companion's irresponsibility or loss of capability, or to the companion's funding in directing unlawful activity. Various jurisdictions make enormous protections available, maintaining in thoughts the want for safety withinside the face of legally enforceable lawsuits made of using the partnership's lenders. Minnesota, for example, surpassed a complete L.L.P. decision in 1994. This provision ensured that a companion in an L.L.P. become now no longer susceptible to a lender or the partnership's duties. It additionally said that a companion's breach of duty positioned the partnership and copartners at hazard and that a lender or different petitioner ought to pierce a companion's limited duty defend withinside the identical manner that an inquirer ought to pierce a employer's company cloak and sue an man or woman from the enterprise.

Section 27 of the Indian Contract Act,1872

It says that agreements that hinder trade are to be invalidated. Any agreements that restriction the person's capacity to do any type of accredited profession, trade, or enterprise are null and invalid. However, Section eleven of the Partnership Act really stipulates that the companions might also additionally save you an additional from wearing on some other enterprise, outdoor of the partnership. On the opposite hand, companions have to now no longer comply with a constraint until it's far covered withinside the partnership settlement.

Partner's Right's

Proper to be worried withinside the walking of the employer (Section 12(a)¹): Each companion has a proper to have a say withinside the walking of the organization. One's proper to have interaction withinside the enterprise operations of the employer is inhibited in a situation while a number of the owners' time is being spent simplest at the employer instead of withinside the roles of popular managers. In only some times might also additionally this privilege be limited beneathneath the partnership deed.

Rights to get admission to and check out books and accounts (Section 12(d)): The beneficiary of this privilege is likewise granted to the lively and dormant companion. Each companion has the capacity to view and have a look at the ee-e book of account of the employer. The executor or administrator of a deceased companion's property has the proper to undergo all economic records.

Relations of companions to 1/3 events

"The clauses of segment 18 to 22 of the Act address the subject of enterprise companions' 1/3 events." Section 18 obligates the companions to function the sellers of the employer for the functions of wearing out the enterprise's administrative operations. In one of these manner, the companions are each the major and the agent. When he conducts the act in his very own hobby, he's the precept; however, while he does so for the advantage of some other companion, he's an agent. He isn't always an agent or middleman for the interactions or transactions among the events themselves. The Section 19 precept has it that every time any act is devoted of using the companions withinside the normal route of enterprise, it's far carried out so that it will bind the employer. Implied authority is inherent withinside the function of binding the employer. The remaining segment of the partnership settlement

¹ Section 12 of Limited Liability Partnership Act, 2008 (LLP): Incorporation by registration.

Section 12 (b) give a certificate that the limited liability partnership is incorporated by the name specified therein.

Section 12 (c) give a certificate that the limited liability partnership is incorporated by the name specified therein.

specifies that companions may input right into a agreement to restriction or boom the implied energy of a companion. Section 21 specifies that companions withinside the scenario of an emergency could do some thing that a sensible guy could do, their moves bind the employer. Section 22 describes a demand that every act that a companion does have to be carried out on organization, or in a manner that binds the enterprise.

Duties of companions

In a society that holds liberty to be of the maximum significance, human beings should take heed to their rights and take duty for his or her moves. In order for the rights to be disbursed to the companions, there have to be some thing the companions have to bring out. Here is a listing of the many jobs of companions: Duty to behave diligently (Section 12(b)) method Every companion is obligated to apply affordable diligence in doing enterprise each companion's moves have the ability to have an effect on each different companion. Any harm or damage prompted to the opposite companions of using his planned behavior would require him to pay reimbursement to the affected companions; Duty to indemnify fraud (Section 10)² method Whenever fraud is perpetrated using companions, every one is responsible to reimburse the organization for damages. The organization, being responsible for the illegal behavior of the companions, is obligated to reimburse the companions as well. If the fraud is discovered, and the losses to different companions are due to it, the fraudster have to be capable of indemnify the ones losses. The responsibility to apply the employer assets completely for the cause of enterprise (Section 15³) mentions Partners are allowed to apply the employer assets for the cause of the enterprise, however now no longer for different functions. The landlord/tenant have to follow all relevant legal guidelines and policies even as the use of the assets. Any income someone earns from such assets have to now no longer be taken into consideration advantage. Section sixteen mentions all of the companions have to be targeted on bringing the shared goal to fruition They have to now no longer take part in different professions or turn out to be worried in any industrial ventures wherein they'll should compete. As lengthy as non-public blessings can be crafted organization, they have to go back those benefits to all the employer companions. Everyone is obligated to take part completely and commit his or her complete efforts to reap a shared goal, to truely record on his or her part of the enterprise, and to offer the information about the employer to his or her selected representative.

Rights and Duties change

As consistent with Section 17⁴ while the businesses' constitutions are modified, the relationship among the companions ends due to those kinds of modifications, the company might also additionally enjoy those changes in its policies. In segment the segment of the Indian Contract Act of 1872 beneathneath which contracts with minors are addressed is provided. Since minors are legally taken into consideration to be people beneathneath the age of 18, they can't have interaction in a agreement according with this law. However, it's far really written in Section 30⁵ that the minor can't enterprise, however he might also additionally nevertheless get make the most of the partnership enterprise. The employer has been surely chargeable for its economic contributions to the partnership however has now no longer been chargeable for losses or any liabilities. In order to be a companion withinside the enterprise, you have to have the approval of all the companions.

Liabilities of Partner

As consistent with segment All companions and officials of the employer might be in my view responsible for each wrongdoing and lack of employer assets. The employer and its man or woman companions are collectively the moves of the companies. There is simply one issue he can be held responsible for, and this is if his behavior

² (1) If the limited liability partnership contravenes the provisions of sub-section (1) of section 7, the limited liability partnership and its every partner shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.

³ Section 15 of Limited Liability Partnership Act, 2008 (LLP): Name. 15. (1) Every limited liability partnership shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name

⁴ Any limited liability partnership which fails to comply with a direction given under sub-section (1) shall be punishable with fine which shall not be less

⁵ Section 30 of LLP Act, 2008 seeks to provide for unlimited liability of the LLP and its partners in case LLP or any of its partners carry out an act with intent to defraud creditors of the LLP or any other person or if they carry out an act for any fraudulent purpose

occurs while he's a companion. When a employer flawed behavior of a companion is stated in segment 26. When one of the organization's companions engages in intentional or negligent illegal behavior, and additionally while the companions are assisting each other or in any other case making their standard exercise work, the organization is similarly responsible as a companion. As consistent with segment, In addition to masking its very own wrongdoing, a enterprise can be held responsible for companion mistakes If a enterprise or its companions get cash from a 3rd celebration and misuse it, or if a 3rd celebration offers cash to a enterprise or its companions and the cash is misappropriated, then the enterprise might be obliged to compensate the man or woman or enterprise that become harmed.

LIMITED LIABILITY PARTNERSHIP: AN EMERGING CONCEPT IN INDIA

Limited Liability Partnership: International Perspective

L.L.P. has already been accepted as a business structure in many countries like US, UK, Japan, Singapore etc. In US, Limited liability partnerships emerged in the early 1990s: while only two states allowed L.L.P.s in 1992, over forty had adopted L.L.P. statutes by the time L.L.P.s were added to the Uniform Partnership Act in 1996. Each state of US has its own law governing the formation of L.L.P.s. The liability of the partners varies from state to state. In UK, L.L.P.s are governed by the Limited Liability Partnerships Act, 2000 (in England and Wales and Scotland) and the Limited Liability Partnerships Act (Northern Ireland) 2002 in Northern Ireland. A UK L.L.P. is a Corporate body – that is, it has a perpetual succession. The feature of L.L.P. in UK is that it combines the organizational flexibility and tax status of a partnership with limited liability for its members. In Japan, L.L.P. is not a corporation, but rather exists as a contractual relationship between the partners. In Singapore, L.L.P.s are formed under the Limited Liability Partnerships Act, 2005. This legislation draws on both the US and UK models of L.L.P. and establishes L.L.P. as a body corporate. However for tax purposes it is treated like a general partnership.

The L.L.P. Law in India

The Indian Legislature, keeping in view, the international business trends where a range of services is being offered by professionals and businesses in the form of Limited Liability Partnerships, has enacted the much awaited L.L.P. Act. The L.L.P. Bill, 2006, was approved by the Cabinet on Dec 7, 2006 and was introduced in the Rajya Sabha on 15th Dec, 2006. It was later referred to the Department Related Parliamentary Standing Committee on Finance for examination. The Committee submitted its report to both Houses of Parliament on 27th Nov, 2007, recommending some changes along with some suggestions regarding the L.L.P. Bill, 2006.⁶ On 12th Dec 2008, the Parliament passed the L.L.P. Bill, 2008. The L.L.P. Bill, 2008 received the assent of the Hon'ble President on 7th January, 2009 and has now become a legislation to be called as 'L.L.P. Act, 2008'.

The L.L.P. Act, 2008

An L.L.P. under the L.L.P. Act, 2008 is a body corporate having a distinct legal entity separate from that of its partners and has perpetual succession i.e. any change in the partners will not affect the existence, rights or liabilities of the L.L.P..

The L.L.P. shall be required to have at least two partners but there will be no limit on the maximum number of partners. If at any time the number of partners of an L.L.P. is reduced below two and such L.L.P. carries on business for more than six months, the person who is the only partner of the L.L.P. during the time it carries on business after those six months shall be liable personally for the obligations of the L.L.P. incurred during that period⁷. Any individual or body corporate may be a partner in an L.L.P.⁸. Further, the provisions of the Partnership of Indian Act, 1932 shall not be applicable to an L.L.P.⁹. Further, an L.L.P., will by its name has the power to sue and being sued, hold and dispose property, have a common seal and to do and suffer such other acts as bodies corporate may lawfully do and suffer. Every L.L.P. is required to have either the words L.L.P. or the acronym L.L.P. as the last words of its name.

⁶ Public Information Bureau Press Release dated 1st May 2008

⁷ Section 6(2) of the LL.P. 2008 Act

⁸ Section 5 of the LL.P. 2008 Act

⁹ Section 4 of the LL.P. 2008 Act

Incorporation of an L.L.P.

An L.L.P. is formed pursuant to a “L.L.P. agreement” which means any written agreement between the partners of the L.L.P. or between the L.L.P. and its partners, which determines the mutual rights, and duties of the partners and their rights and duties in relation to that limited liability partnership¹⁰.

For an L.L.P. to be incorporated, at least two persons must subscribe their name to a document called an incorporation document, which must then be submitted to the Registrar of companies. There is also a requirement of filing a statement in the prescribed form, made by either an Advocate, or a Company Secretary, or a Chartered Accountant or a Cost Accountant in whole time practice in India or by anyone who subscribed his name to the incorporation document that all the requirements under the Act and the rules made thereunder are complied with in respect of the incorporation, along with the incorporation document. The incorporation document must contain information such as the name of the L.L.P., its proposed business, address of its registered office, the name, address and photographs of the persons who are to be its partners on incorporation.

Upon receiving the incorporation document the Registrar will retain and register it. Once the documents have been registered, the Registrar will issue a certificate that the L.L.P. is incorporated by the name specified in the incorporation document. The certificate issued by the Registrar is evidence that all the requirements have been complied with.

Extent and Limitation of Liability

An L.L.P. being a separate legal entity is liable for an obligation arising in contract or otherwise and the liabilities of the L.L.P. will be met out of its property. A partner will not be held personally liable, directly or indirectly for an obligation of the L.L.P., solely by reason of being a partner of the L.L.P.. However, such liability shall not affect the personal liability of a partner for his own wrongful act or omissions and in the event of an act carried out by the L.L.P. or any of its partners, with intent to defraud creditors of the L.L.P. or any other person, or for any fraudulent purpose, the liability of the L.L.P. and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the L.L.P.. Therefore, a partner will be held personally liable for his own wrongful act or omission, but not for the wrongful act or omission of any other partner of the L.L.P..

Safeguards to Prevent Misuse

Since there would be limitation on the liability of the partners and the L.L.P. shall be a separate legal entity contracting with third parties in its own right, the Act has certain built-in features which shall lead to greater control over L.L.P.s than what could be exercised over traditional partnerships. Some of these requirements include the requirement of every L.L.P. to have a registered office in India to which all communications will be made and received. Any change in the registered office has to be intimated to the Registrar. Every L.L.P. is also required to have at least two designated partners and one of them should be resident in India.[6] The designated partners shall be answerable for all acts, matters and things as are required to be done by the L.L.P. in respect of compliance of the provisions of the proposed legislation and be liable for penalties for non compliance.

DECODING THE NEW BUSINESS VEHICLE OF INDIA: THE LIMITED LIABILITY PARTNERSHIP

The L.L.P. is viewed as an ‘alternate corporate vehicle’¹¹ which seeks to attain the principal benefits of both forms of business organization-partnerships and companies. This is achieved by granting, to the members of the L.L.P., the flexibility of organizing their internal managerial structure as a partnership based on mutual agreement, while limiting the liability of the partners to the extent of their interest in the partnership, which is akin to the separate legal personality of a company¹².

Since the benefits of similar business organizations have been incorporated into this new business form, it is necessary to highlight the advantages of the L.L.P. over such similar business forms. It is as a result of these very

¹⁰ Section 2(o) of the LL.P. 2008 Act

¹¹ Ministry of Corporate Affairs, Government of India, Need for the New Corporate Form- LLP, available at <http://www.llp.gov.in/aboutllp.htm>

¹² Amit M. Sachdeva & Sachin Sachdeva, The Indian LLP Law: Some Concerns for Lawyers and Chartered Accountants, SEBI & Corporate Law, Vol. 92 No. 6, 2009, 1 available at <http://ssrn.com/abstract=1423766>.

advantages that L.L.P.s, as business vehicles, have been allowed in several jurisdictions and multiple pieces of legislation have been enacted to regulate them.

A general partnership is a partnership in which the partners share equally in responsibility and liability. The primary distinction between an L.L.P. and a general partnership is that a general partnership has no legal existence separate from the partners who constitute it, while an L.L.P. exists as a legal entity separate from its partners. In a general partnership, every partner is liable jointly along with the other partners of the firm, and also severally, for all acts of the firm done while he is a partner.¹³ In an L.L.P., however, no partner is made liable for the actions of another partner beyond his/her share in the partnership. Further, unlike a partnership, members of an L.L.P. are not agents of each other.¹⁴

In the separate case of a limited partnership, at least one of the partners is required to be a 'general partner'. As a consequence, the benefit of limited personal liability is not available to all partners, and the 'general partner' who is in control of the ordinary day-to-day business of the firm has unlimited personal liability¹⁵. An L.L.P., on the other hand, has no general partners and thus every partner in the L.L.P. is endowed with limited personal liability for business debts¹⁶.

A company has a corporate regulatory regime for most purposes, except in the case of taxation, for which it is treated as a partnership. An L.L.P. is treated as a company, *inter alia*, with respect to the extent of liability of the partners. For other purposes, the L.L.P. has a partnership regulatory regime, which permits the partners the flexibility of internal organization based on mutual agreement¹⁷. An L.L.P. also has a simpler and less expensive process of formation as compared to a company¹⁸.

The concept of L.L.P. initially emerged in the US and the UK. With growing litigation against law firms and accounting firms in those jurisdictions, the need arose for a device to limit the liability of partners in such firms, especially in cases where professionals including lawyers and accountants were being exposed to large amounts of money in liability. Thus, the concept of L.L.P.s was developed with a view to providing a suitable business vehicle for professionals like lawyers and accountants¹⁹.

In India, the need for the L.L.P. Act, 2008 ('L.L.P. Act') was described by the Ministry of Corporate Affairs in the following words:

"With the growth of the Indian economy, the role played by its entrepreneurs as well as its technical and professional manpower has been acknowledged internationally. It is felt opportune that entrepreneurship, knowledge and risk capi-tal combine to provide a further impetus to India's economic growth. In this background, a need has been felt for a new corporate form that would provide an alternative to the tra-ditional partnership, with unlimited personal liability on the one hand, and, the statute-based governance structure of the limited liability company on the other, in order to enable pro-fessional expertise and entrepreneurial initiative to combine, organize and operate in flexible, innovative and efficient manner."²⁰

Having presented an overview of the concept of L.L.P. and the ad-vantages and need for the L.L.P. Act, Part-II provides an insight into the history of L.L.P.s across various jurisdictions, with special reference to the US and the UK. Part-III critically analyses the L.L.P. Act with particular emphasis on provisions relating to incorporation, conversion, arrangement, winding up and liability of partners. Part-IV tackles the question of taxation of an L.L.P. under the L.L.P. Act. Part-V describes the impact of the L.L.P. Act on advocates, with particular refer-ence to the maximum number of partners allowed in an L.L.P. and the right of an L.L.P. to represent in court. Finally, Part-VI concludes by examining the overall impact of the L.L.P. Act on businesses, particularly small enterprises.

Partners And Their Liabilities

¹³ LLP Act, 2008, 3(1).

¹⁴ Indian Partnership Act, 1932, 25.

¹⁵ Peri Pakroo, Limited Partnerships and Limited Liability Partnerships, available at <http://www.nolo.com/legal-encyclopedia/limited-partnerships-limited-liability-partnerships-29748.html>

¹⁶ LLP Act, 2008, 27 and 28.

¹⁷ Supra note 6.

¹⁸ Supra note 5.

¹⁹ J.J. Henning, Partnership Law Review: The Joint Consultation Papers and the Limited Liability Partnership Act in Brief Historical and Comparative Perspective, COMP. LAW. 2004 25(6) 163, 169.

²⁰ Ministry of Corporate Affairs, supra note 1.

2(q) of the L.L.P. Act defines a 'partner' as one who becomes a partner in the L.L.P. in accordance with the L.L.P. agreement. In addition, any person who subscribes her name in the incorporation document of an L.L.P. is a partner of the L.L.P..²¹ One of the most unique features of the L.L.P. Act is that a partner in an L.L.P. may not necessarily be an individual. A body corporate is capable of becoming a partner.²² A minimum of two partners is required to form an L.L.P..²³ An L.L.P. must have a minimum of two designated partners and at least one of them has to be a resident of India²⁴. Initially, designated partners were compulsorily required to obtain their Designated Partner Identification Number ('DPIN') from the Central Government²⁴. The Ministry of Corporate Affairs through its notification dated July 5, 2011, has, however, integrated the Director's Identification Number ('DIN') issued under the Companies Act with the DPIN, with effect from July 9, 2011.²⁵ As a result, any individual intending to be appointed as a designated partner of an L.L.P. will have to obtain a DIN from the Central Government.²⁶ Moreover, in the case of an individual holding both a DIN and a DPIN, the DPIN will stand cancelled, and the DIN will be sufficient for appointment as designated partner under the L.L.P. Act.²⁷ Designated partners, similar to a nominated director of a company, are those partners who are responsible for ensuring adherence and compliance with the L.L.P. Act and the L.L.P. Rules.²⁸ They are personally liable for any liability im-posed on the L.L.P. for contravening the L.L.P. Act and hence such directors can only be individuals and not a body corporate.²⁹

An eligible person may be admitted as a partner in the L.L.P. by subscribing his/her name in the incorporation document or in accordance with the L.L.P. agreement.³⁰ Thus, the L.L.P. Act gives the L.L.P. independence to deter-mine the criteria for admitting a new partner. The contribution by a partner, which is mandated to be accounted for in the books of the L.L.P. can either be in the form of cash or kind, in accordance with the L.L.P. agreement.³¹ The latter type of contribution may consist of movable or immovable tangibles; intangible property like patents, trademarks; contract of services or any other benefits.³²

The difference between a company and an L.L.P. primarily lies in the regulation of its internal affairs. The internal management of a company is governed by statute, primarily the Companies Act, 1956 whereas an L.L.P. is regulated by a contractual agreement similar to a partnership agreement.³³ This makes an L.L.P. the most appropriate business vehicle for small and medium sized businesses or a professional service based business venture. The relationships between the partners in an L.L.P. are governed by the L.L.P. agreement, which, like the articles and memorandum of a company, must be filed with the Registrar of Companies. This agreement regulates the rights and duties of the partner and the L.L.P..³⁴ It may contain provisions on the right of a partner to transfer his interest either wholly or in part.³⁵ Unlike a partnership such transfer does not automatically

²¹ LLP Act, 2008 22.

²² Id., 5.

²³ Id., 6(1).

²⁴ Id., 7(6).

²⁵ Limited Liability Partnership Rules, 2009 (Amendment) Rules, 2011, Rule 2 available at [http:// www.llp.gov.in/files/draft%20notification%20for%20DIN%20&%20DPIN%20Rules%20 \(amended\).pdf](http://www.llp.gov.in/files/draft%20notification%20for%20DIN%20&%20DPIN%20Rules%20(amended).pdf).

²⁶ Id., Rule 3.

²⁷ Id.

²⁸ Vishal Shah, Provisions of the LLP Relating to Partners and Designated Partners, 6 INCOME TAX REV. Vol. XXXV 35 (September 2009), 39.

²⁹ Id.

³⁰ LLP Act, 2008, 22.

³¹ LLP Act, 2008, 42 and 43.

³² Shah, supra note 85, 39.

³³ See Kranti Prakash Sai, Limited Liability Partnerships in India: A General Analysis, April 10, 2010 available at <http://ssrn.com/abstract=1587770> (Last visited on December 26, 2011); Amit Kumar Kashyap & Deepak Kashyap, Limited Liability Partnership as Advantage to Small Business: Indian Scenario (National Seminar on Emerging Issues in Commerce and Management), February 5, 6 2010 available at <http://ssrn.com/abstract=1545766>.

³⁴ LLP Act, 2008, 23.

³⁵ Id., 42.

effectuate the dissolution of the L.L.P.. The non-economic rights of the partner, comprising management rights or access to information on the L.L.P. are, however, non-transferable.³⁶ Therefore, the mutually agreed upon L.L.P. agreement lends greater flexibility to an L.L.P. entailing fewer statutory regulations in comparison to a registered company. The L.L.P. Act, however, also envisages circumstances under which an L.L.P. may be formed in the absence of an L.L.P. agreement. The rights and duties in such cases are in accordance with the First Schedule of the L.L.P. Act,³⁷ which has placed reliance on the principles of equity and justice.

By virtue of 26 of the L.L.P. Act, every partner becomes an agent of the L.L.P. but not of the other partners. This provision is perhaps the most striking feature of the Indian law on L.L.P., distinguishing it from a partnership, wherein a partner is an agent of the firm and also other partners for the purpose of the business of the firm.³⁸ In a partnership, every partner is jointly and severally personally liable for all the acts of the partnership.³⁹ The unlimited liability of partners remains a primary cause of concern for constituting a business enterprise as a partnership, especially when the possibilities of the business growing in size and incorporating different professions and activities are high. The most advantageous aspect of forming an L.L.P. over a partnership is that in an L.L.P., the partner's personal assets will not be at risk in the event of financial disasters arising out of business losses and errors or negligence of another partner.⁴⁰

Any act of a partner done in the normal course of business or with the authority of the L.L.P. is binding on the L.L.P., including any wrongful act or omission.⁴¹ Any liability of the L.L.P., arising as a result of such act remains an obligation on the L.L.P. itself and has to be met out of the assets of the L.L.P..⁴² A partner is liable to the extent of his or her share in the L.L.P.. The liability of the L.L.P. does not, however, extend to situations where the partner lacks authority to act on behalf of the L.L.P. and the third party with whom the partner is dealing knows that he has no authority, or does not know or believe him to be a partner of the L.L.P..⁴³ In such circumstances, the liability of the partners is not limited to their contribution to or interest in the L.L.P., but is the personal liability of the partner. The other partners, however, are not personally liable.⁴⁴ In case of any fraudulent activity, the liability of the partner who acted with intent to defraud and of the L.L.P., if the act was committed with the knowledge and authority of the L.L.P., is unlimited⁴⁵.

To ensure greater transparency and to facilitate an investigation into the suspicious activities of an L.L.P., the L.L.P. Act provides for whistle blowing. The interests of a partner will be legally protected if they provide useful information during an investigation that is relevant for the disposal of that proceeding⁴⁶. A partner is also empowered to seek an investigation into the affairs of the L.L.P. by an application to the National Company Law Tribunal, but an investigation is conducted only in the circumstance that the application is moved by at least one-fifth of the total number of partners.⁴⁷ The strength of partners mandatorily required for initiating an investigation procedure is irrespective of the percentage of contribution of the partners or their share in the profits. This ensures an efficient redressal mechanism for minority partners in the event of prejudice or mismanagement by the majority stakeholders' group⁴⁸.

³⁶ Id.

³⁷ LLP Act, 2008, 23(4).

³⁸ Indian Partnership Act, 1932, 18; See also REFERENCER ON THE LIMITED LIABILITY PARTNERSHIP BILL, 2006, supra note 75, 38.

³⁹ Income Tax Officer (III), Circle-I Salem v. Arunagiri Chettiar, (1996) 9 SCC 33; Ashutosh v. State of Rajasthan, (2005) 7 SCC 308.

⁴⁰ REFERENCER ON THE LIMITED LIABILITY PARTNERSHIP BILL, 2006, supra note 75, 38.

⁴¹ LLP Act, 2008, 27(2).

⁴² Id., 27(3) and (4); See also Shah, supra note 85, 39.

⁴³ LLP Act, 2008, 27(1).

⁴⁴ Id., 28(2).

⁴⁵ See LLP Act, 2008, 30.

⁴⁶ LLP Act, 2008, 31.

⁴⁷ Id., 43.

⁴⁸ Shah, supra note 85, 39.

Tax On L.L.P.S

The taxation concerns of a company or of a partnership are not addressed in the Companies Act, 1956 or the Partnership of Indian Act, 1932 re-spectively. They are dealt with by tax legislation. Therefore, it was inevitable that the L.L.P. Act would be silent on the issue of tax implications for an L.L.P.. The Finance Act, 2010, which has come into effect from the assessment year 2010-2011, incorporates the mechanism for taxation of L.L.P.s by amending the Income Tax Act, 1961. Subsequently the Ministry of Corporate Affairs has re-leased a press note on the taxation of L.L.P..

There are two popular options for taxation used in various for-eign jurisdictions that provide for L.L.P.s. The first is the practice, as is seen in the French L.L.P. model, of treating an L.L.P. as a fiscally transparent entity and taxing merely the income of the partners and not of the transparent entity.⁴⁹ The alternative to this, based on the UK and Singapore L.L.P. models, is to accord similar treatment to an L.L.P. as a partnership. India has adopted the latter practice. Under the amended 140 of the Income Tax Act, 1961, the designated partner has to sign the return of the income and due to some unavoidable rea-sons maybe signed by any other partner. Consequent to the Finance Act, 2010 the words 'partner', 'firm' and 'partnership' under 2(23) of the Income Tax Act, 1961 have been amended accordingly to bring L.L.P.s within its ambit.

An L.L.P. will be considered an equivalent of a general partner-ship for taxation purposes and will reap all the tax benefits that are available to a partnership⁵⁰. Income tax will be levied on the L.L.P. itself and the profits from the L.L.P. which the partners obtain will not be computed for their personal income as it will be considered as 'business income' which is within the scope of a 'deduction' for computing income⁵¹. In the event of failure to comply with

184 of the L.L.P. Act, the remuneration paid to the partners will not be allowed as deductions on their personal income⁵². Further, any contribution of capital assets by a partner to his L.L.P. or distribution of such assets by the L.L.P. to any partner, will be considered to be income of the partner and L.L.P. respectively, and will be subject to income tax⁵³. 40(b) of the Income Tax Act, which pro-vides for restrictions on payment of interest and remuneration to partners, has been modified now to uniformly apply to professional and non-professional firms. L.L.P.s are beneficiaries of the modification, thus making them an attrac-tive business option for professionals forming an association⁵⁴.

While an L.L.P. is generally treated as an equivalent of a general partnership for taxation purposes, the Union Budget 2011-12 has announced the levy of Alternate Minimum Taxes ('AMT') on L.L.P.s similar to the Minimum Alternate Tax ('MAT') imposed on companies.⁵⁵ In this regard, the Union budget has proposed to introduce a new Chapter XII-BA under the Income Tax Act, 1961 providing for the levy of AMT at 18.5 percent of the adjusted total in-come of L.L.P.s.⁵⁶ Thus the tax base for L.L.P.s would be the adjusted total income and not book profits as in the case of companies. Although the introduction of the AMT on L.L.P.s may be perceived as a disadvantage to the L.L.P. business form, the L.L.P. nevertheless remains an attractive business form due to its inher-ent flexible structure along with the exemption from dividend distribution tax.

The taxation scheme for L.L.P.s may, however, deter prospective foreign investors given that investment in L.L.P.s may lead to double taxation-first, at the level of the L.L.P. in India and second, at the level of profits for the investor in the foreign jurisdiction. It may, however, be of convenience to an Indian L.L.P. doing business abroad depending on the legislation prevailing in the foreign jurisdiction, as the L.L.P. may be treated as fiscally non-transparent and taxed as a separate entity. Hence, it will avail the benefits of tax credit. If the partners, and not the L.L.P., are treated as beneficiaries of income in the for-eign state, the tax credit cannot be utilised. Even the double taxation avoid-ance agreements that India has signed with some States have not provided a suitable solution. At this point, it is interesting to note that in the US adopts a truly unique system that, in accordance with the internal structure of the L.L.P., gives the option of taxation either at the level of the L.L.P. or at the level of the partners. This enables an L.L.P. to decide its structure depending on the laws of the countries where the L.L.P.

⁴⁹ Sachdeva and Mahajan, supra note 42, 8.

⁵⁰ Income Tax Act, 1961, 184, as amended by Finance Act, 2010.

⁵¹ Income Tax Act, 1961, 10(2A) and 28(v).

⁵² Paras Savla, LLP and Partnership, 35(4) INCOME TAX REV. 38, 39 (2009).

⁵³ Income Tax Act, 1961, 45(3) and (4).

⁵⁴ Id.

⁵⁵ Finance Bill 2011, Cl. 18, available at <http://indiabudget.nic.in/ub2011-12/fb/bill31.pdf>.

⁵⁶ Id.

is investing and doing business so as to avail of the tax credit advantage. Had India adopted such a mechanism, the problem of double taxation could have been effectively put to rest.

Impact Of L.L.P. Act On Advocates

One of the primary considerations advanced by the Naresh Chandra Committee in its 2003 Report for the introduction of L.L.P.s in India was with regard to Indian professional firms like legal and accounting firms. It was emphasized that since the Partnership of Indian Act, 1932 only allowed for a maximum of twenty persons in a partnership, the emergence of L.L.P.s would overcome this restriction and would thereby ensure the unhindered growth of Indian professional firms. It is, however, pertinent to note that the restriction on the maximum number of members of a partnership has been imposed by the Companies Act, 1956 and not by the 1932 Act. Although the L.L.P. Act does not expressly provide for the limit on the maximum number of members, it cannot be legally concluded that there is no limit on the membership in view of Sec. 11(2) of the Companies Act, 2013⁵⁷ which provides:

“No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.”

The purpose of this provision was to prevent the formation of large trading undertakings that were not companies⁵⁸, and to thereby pro-mote the ‘company’ as a form of business organization. Thus, according to the Companies Act, in order for a partnership to consist of more than twenty members, it would have to be registered as a company under it, or should be formed ‘in pursuance of some other Indian law’.

At present, the L.L.P. Act, 2008 does not expressly provide a limit on the maximum number of members⁵⁹. Further, it only excludes the application of the Partnership of Indian Act, 1932⁶⁰, and this exclusion would not allow an L.L.P. to have more than twenty persons, as no exception has been made to

11 of the Companies Act, which is the relevant provision regarding this rule.

3(1) of the L.L.P. Act provides that an L.L.P. is a ‘body corporate’.

2(d) of the L.L.P. Act further provides that a “body corporate” means a company as defined in 3 of the Companies Act. If, however, this were to be interpreted as meaning that an L.L.P. in India is conferred the status of a ‘company’; this would also mean that the L.L.P. would be subject to all the restrictions and requirements imposed by the Companies Act, which is not the intended purpose of conferment of legal recognition on L.L.P.s.⁶¹

It may, however, be argued that the L.L.P. Act does, in fact, comply with 11 of the Companies Act, as it satisfies the requirement of “in pursuance of some other Indian law” under 11 of the Companies Act⁶². While this may be true, the argument should then be equally applicable to the Partnership of Indian Act, 1932. Since, the argument clearly does not hold for partnerships, however, it cannot hold for L.L.P.s either. Further, 11 of the Companies Act does not specify whether ‘some other Indian law’ should have been in force before or after the coming into force of the Companies Act.

Thus, in light of the above, one of the primary reasons for the introduction of L.L.P.s in India-which was to overcome the restriction on the maximum number of persons in a partnership firm and thereby enable the growth of legal and accounting forms, has remained unfulfilled.

⁵⁷ If any default is made in complying with the requirements of this section, the company shall be liable to a penalty which may extend to five thousand rupees and every officer who is in default shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues.

⁵⁸ A. RAMAIYA, GUIDE TO THE COMPANIES ACT, Part-I 336 (Chandrachud & Dugar eds., 2006).

⁵⁹ LLP Act, 2008, 6(1) (which only provides a minimum of two members to form a LLP).

⁶⁰ Indian Partnership Act, 1932, 4; See Ministry of Corporate Affairs, Government of India, Need for the New Corporate Form-LLP, available at <http://www.llp.gov.in/aboutllp.htm>.

⁶¹ See Sachdeva & Sachdeva, supra note 2, 13.

⁶² Id.

Representation By A L.L.P. IN Court

It can be implied from provisions of the Advocates Act, 1961 that the right to practice is a right capable of being conferred upon and exercised only by natural persons⁶³. Since an L.L.P. is a body corporate with a separate legal personality⁶⁴, a question arises as to whether an L.L.P. is allowed to 'practice' law and represent in courts cases.

Rule 2 of Chapter III of Part VI of the Bar Council of India Rules, however, provides that "an advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate"⁶⁵. While this Rule prohibits a partnership or any other arrangement between an advocate and a non-advocate, it does not expressly prohibit an arrangement between two or more advocates. Thus, by relying on this argument, advocates can form an L.L.P. and be permitted to 'practice' law and represent in courts.⁶⁶

CONCLUSION

The L.L.P. form would enable entrepreneur, professional, and enterprises providing services of any kind engaged in scientific and technical disciplines, to form commercially efficient vehicle situated to their requirement. Owing to the flexibility in its structure and operation, the L.L.P. would also be suitable vehicle for small enterprises and for investment by venture capital. The L.L.P. structure would bring India at par with business practices followed in developed nations of the world.

The passing of the L.L.P. Act, 2008 is a recognition of the changing needs of the businesses in today's times. If it is implemented properly, the introduction of the L.L.P. will provide a helpful new option for professional partnerships which are anxious about their exposure to liability. In view of the growth of Indian Service industry in recent times, L.L.P.s would further contribute to the growth of the service industry and a large number of existing companies, public as well as private, are expected to convert into L.L.P.s with a view to have access to the benefits of the L.L.P.. The Government of India has made an endeavour to create a facilitating environment for entrepreneurs, service providers and professionals to meet the global competition; however it needs to be seen how far the change is useful.

Limited partnerships can be traced to early French law. Its development can be distinguished into different stages: starting with the development of the concept of general partnership, moving on to the idea of limited partnership which finally led to the concept of limited liability partnership. The legal concept of L.L.P. originated in 1991 in Texas, mainly in response to the liability that was imposed on partners in partnership sued by Government agencies in relation to massive saving and loan failures in the 1980. The Texas statutes protected partners from personal liability for claims related to a co-partner's negligence, error, omission in competency, or malfeasance. It is also permanently limited the personal liability of partners for the errors, omission, incompetence, or any negligence of the partnership's employees or other agents. In 1996, all other states adopted the concept by Uniform Partnership Act, 1996. Similarly in UK in the 1990s the accountancy firm advocated to secure proportional liability in the L.L.P.s. This led to the passing of the L.L.P. Act, in the year 2000. The issue of L.L.P. has been a matter of discussion in India for over a decade now. Various committees have been set up for giving the recommendation; among those are Abid Hussain Committee, Irani committee, and Naresh Chandra Committee. Consequently, the L.L.P. Bill 2006 was introduced in the Rajya Sabha on 22nd October 2008 for the formation and regulation of L.L.P. and for matter connected therewith or incidental thereto.

It has endeavoured to provide a thorough analysis of a new concept called the limited liability partnership. First and foremost, it has traced the evolutionary history of the L.L.P., from its creation in Texas and its spread to other jurisdictions. As it gained worldwide acceptance, the concept of L.L.P.s widened and envisaged several new advantages for partners within its ambit. During the drafting of the Indian legislation for L.L.P.s, the main source of inspiration was the English and Singaporean concept of L.L.P.. Their concept of L.L.P. is distinctly separate

⁶³ The Advocates Act, 1961, 24, 29 & 33 (which lay down conditions such as citizenship of India, minimum age of twenty-one years, etc., which cannot be met by a non-natural person).

⁶⁴ LLP Act, 2008 3(1).

⁶⁵ Bar Council of India Rules-Part VI: Rules Governing Advocates, available at <http://lawmin.nic.in/la/subord/bcpart6.htm#chapter3>.

⁶⁶ Supra note 5.

from the Texan model. Prior to the passing of the L.L.P. Act, there were several debates by various committees; a concept paper was also floated by the Government. It is evident that there was much deliberation directed towards achieving the most viable form of L.L.P.s.

The Indian L.L.P., a creation of the L.L.P. Act, has successfully attained a middle path between a partnership and a company. The L.L.P. Act has provisions starting from the incorporation of, or conversion to, an L.L.P., up to the winding up of the L.L.P.. Detailed emphasis has been given to the role of partners. Their rights and liabilities have been elucidated. Subsequent to the passing of the Finance Act, 2010, the taxation of an L.L.P. has been clarified to be similar to the taxation of a partnership. Moreover, the Securities and Exchange Board of India through its circular dated July 11, 2011 has stated that L.L.P.s are similar to limited liability companies and partnership firms, and are thus eligible to be admitted as members of stock exchanges. This is subject to the L.L.P.'s compliance with the conditions laid down in Rule 8(4A) of the Securities Contract Regulation Rules, 1957, as far as it may apply to L.L.P.s.

As has been elucidated with the example of an association of lawyers, certain conflicting situations arise as a result of provisions under other pieces of legislation. These factors have not been considered in the drafting of the Act as is apparent from its provisions. Further, certain confusions regarding the exact nature and identity of an L.L.P. continue to persist. For example, in May 2011, the Government approved foreign direct investment ('FDI') in L.L.P.s. A conservative approach has, however, been taken by allowing FDI only in sectors where 100 percent FDI under the automatic route is allowed. Again, L.L.P.s with FDI will be unable to make downward investment. In fact, there are several other apprehensions caused by the L.L.P. Act for foreign investors including the possibility of double taxation. Some authors have also been critical of the provisions for disclosure of financial information, possibility of detailed investigation for minor irregularities and heavy penalties imposed for offences under the L.L.P. Act. These features would have been absent in a general partnership. This paper, however, argues that in a merger of two kinds of organizations, it is only realistic to believe that all the luxuries available to one of the original forms will not be at the disposal of the hybrid form. It is inevitable that some advantages will have to be sacrificed to fill the vacuum between a company and a partnership. Thus, while some more fine-tuning of the L.L.P. Act is required to mitigate the above-discussed conflicting situations, the L.L.P. Act along with all the related recent legislative enactments, has genuinely been a boon to Indian business interests.

