STRUCTURING AND NEGOTIATING INTERNATIONAL JOINT VENTURES

MICHAEL E. HOOTON†

“No nation was ever ruined by trade.”*

I. INTRODUCTION

International joint ventures come in a multitude of sizes and shapes.¹ In certain cases, a joint venture is a partnership, in others it is a corporation. In various countries, it is even possible to have a joint venture.²

Far from being a negative, though, the flexibility of the joint venture concept is one of its principle virtues. In turn, flexibility is essential in developing a joint venture relationship. Flexibility is also a critical component in the professional work—whether business development, finance or legal—required to organize and initiate a joint venture. A flexible approach will almost always result in the best possible outcome—for all concerned.

Just as flexibility is critical to structuring and negotiating joint ventures, fairness to both parties is crucial to the implementation and operation of the enterprise. Driving too hard a bargain in joint venture negotiations will be self-defeating. The joint venture will fail if not negotiated with a view toward balancing the parties’ goals, especially when their goals may be in direct competition.³ Likewise, a

† Michael E. Hooton is a General Attorney at H. J. Heinz Company in Pittsburgh, Pennsylvania. Since 1980, he has been involved in international joint venture, acquisition, and finance transactions in various countries throughout the world.

* Benjamin Franklin (1705-1788), Thoughts on Commercial Subjects, as noted in J. Bartlett, Familiar Quotations (15th Edition, 1980) at 348:12.

¹ There are a number of general reference works dealing, at least in part, with international joint ventures. These are usually organized as compilations of articles (or chapters) by various authors. See James A. Dobkin & Jeffrey A. Burt, Joint Ventures with International Partners (1992) [hereinafter INTERNATIONAL PARTNERS]; Bernard L. Greer, Jr., et al. Transnational Strategic Business Alliances: Some Observations, in Private Investments Abroad—Problems and Solutions in International Business in 1991 (Carol J. Holgren ed., 1991) [hereinafter BUSINESS ALLIANCES]. The Law of Transnational Business Transactions (V. Nanda ed., 1993) [hereinafter TRANSNATIONAL BUSINESS]. In addition to these general reference works, the accounting firm of Price Waterhouse publishes a paperback series of information guides on doing business in various countries. Although not meant to be definitive, the Price Waterhouse Guides provide a general overview and are always a good place to start when entering into negotiations in a new country.


³ When a joint venture will be operating in a country that does not have hard (freely tradeable) currency, the partners will both want a share of the scarce hard cur-
joint venture must be conducted fairly with a mutual respect for the parties’ contributions, requirements and ambitions.4

Another critical component of the successful negotiation of joint ventures is patience. This is a special type of patience though — it must be active rather than passive. The parties must be willing and able to push the negotiations forward creatively and steadily. They must also be willing to consider the other side’s point of view and constraints. International joint ventures necessarily involve a meeting, and sometimes a clash, of two cultures. A willingness to participate happily in long negotiation sessions, in two languages, over a period of months, on concepts that in most United States-based transactions would be taken for granted is essential to success.5

A joint venture that grows out of patient negotiations where the parties have been flexible and fair to each other in reconciling their different perspectives will enter the marketplace ready to compete.6 A joint venture lacking these characteristics is unlikely to get off the ground, let alone succeed.

Flexibility, fairness, and patience all relate to the process. Nevertheless, it is important to understand that in international joint venture work, the process is an integral part of the product:

In contrast [to acquisitions and securities offerings], a strategic business venture involves a different set of factors. The negotiation period is generally much longer. The process in-

4. In the People’s Republic of China, the fairness concept is captured by the phrase “equality and mutual benefit.”

5. Although in United States based finance and acquisition transactions, the parties may disagree about the content of the representations, warranties, covenants and conditions, they usually agree that such matters should be included in a transaction agreement, and can often agree on the standard terms without undue difficulty. Outside of the United States, and especially in developing countries, it is best to assume that this will not be the case. As one commentator has noted “[u]nlike in a country possessing an established legal framework and body of precedent covering joint ventures, the parties to a joint venture in the Soviet Union must negotiate and document many seemingly ‘standard’ legal and business issues. As there is no Soviet equivalent of a Delaware Corporation Code, the partners must establish a basic corporate framework that provides for corporate governance.” Jeffrey A. Burt, Joint Venture Experience: Observations on the Business and Legal Challenges, 22 Int’l. L. & Pol. 435, 445 (1990).

6. A good example of flexibility, fairness and patience is the McDonald’s joint venture in Russia. As noted by Jeffrey Burt, supra, [t]he highly publicized McDonald’s joint venture took over twelve years to negotiate. . . . [A] very large farm was established outside Moscow to grow potatoes and other food products, primarily for McDonald’s use, although some products will be exported to Western Europe. Acquiring quality meat in the Soviet Union has likewise required aggressive initiatives. . . . Although the first McDonald’s is now selling its products for rubles only, additional McDonald’s outlets will sell products to Westerners for hard currency.

Burt, 22 Int’l. L. & Pol. at 439.
volves the development of an ongoing relationship between . . . independent parties. The transactional sequence has more (sometimes a great many more) facets which must be taken into account in structuring the venture. There is no “closing” in the traditional sense, i.e., when money changes hands and both buyer and seller walk away with something; the entry into a strategic partnership signifies the beginning of a relationship. Properly formulated, its constituent documents and instruments not only create the relationship, they also define the scope of its operation and the circumstances under which it will be terminated. . . . All of these factors dictate a different approach to the process.7

Recognizing the importance of the process, although a good place to start, is not enough. What should the product look like? This article will discuss the following:

(1) Various joint venture structures.
(2) Preliminary agreements.
(3) An outline of a typical joint venture agreement.
(4) The customary related agreements.
(5) Additional issues, such as government approvals, tax holidays, due diligence, expatriates and political risk insurance.

For purposes of this discussion, the working model will consist of two parent companies — the partners. One of the partners will be a Western (usually American) multinational, and the other will be a local company (often in a developing country). The parties will usually organize a joint venture company in the form of a corporation. Thus, the partners will incorporate!

II. VARIOUS STRUCTURES

At the outset of discussing alternative joint venture structures, it is important to note that the desired tax consequences will most likely be controlling. Because the tax results will vary greatly by jurisdiction and by the parent companies' tax situations, little can be provided in the way of general guidance.8 If possible though it is important to make sure that the taxes paid by the joint venture company can be credited against the partners' home country tax liability arising when the joint venture company's earnings are repatriated.9 The cardinal

---

8. "The choice of entity . . . will be based primarily on tax considerations." Business Alliances, supra note 1, at 2-15
9. Under United States federal income tax laws, dividends received by a United States parent company from a foreign subsidiary are fully taxed in the United States. The United States parent, however, is generally entitled to a tax credit against its United States tax liability on such dividends in an amount equal to the foreign income taxes paid with respect to such dividends, subject to certain limitations. See I.R.C.
rule however is that tax advisors, specializing in both the parent companies' home jurisdictions, and the joint venture's jurisdiction, should be involved from the beginning of any structuring discussions.

It is not uncommon for joint venture negotiators (the business people, not the lawyers) to be intrigued initially by the possibility of a joint venture in which both parties have equal interests. This is usually a terrible idea! Seldom, if ever, will the partners be a perfect match — in terms of corporate culture, financial wherewithal or skill capabilities.

For example, one partner may be more adventuresome or risk averse than the other. One partner may have marketing or technical skills while the other has local market contacts. Indeed, this is usually the reason Western multinationals enter into joint ventures with local partners in developing countries — to combine their respective and markedly different strengths. Therefore, it rarely makes sense to try to force these disparate characteristics and contributions into an equal partnership.

The fundamental question then is who gets control and how much. Usually, it is the party with the most money. When both partners have lots of money — which does not happen often — control may go to the partner contributing the scarcest resource. For example, if marketing or technical skills are critical, then control will follow the experienced marketer or high-technology contributor. If local marketing or distribution channels are more important, then control may vest in the local partner.

If a party is in the minority, then it will be critical for it to negotiate minority protection rights. For example, the minority partner would want to have a say in approving extraordinary transactions, such as a major capital expenditure, bank and other financing, the issuance of additional equity or call for additional capital, a major assets sale, development of a new line of business or territory, mergers, and amendment of the articles and bylaws.


10. Some of the following possible reasons for entering into a business alliance are shared funding, validation, risk sharing, access to technology and expertise, access to distribution channels and customer bases, access to or creation of manufacturing capacity, avoiding competition and as a prelude to a later acquisition. BUSINESS ALLIANCES, supra note 1, at 2-9 - 2-10.

11. In general, one party or the other should have the lead in the ordinary course of business by, for example, being able to appoint the joint venture's chief executive officer. But even a substantial majority (80%) held by a multinational will not confer absolute control because the local partner's active participation and cooperation will usually be essential. A recalcitrant local partner, no matter how small its share, is still a force to be reckoned with.
Also, if possible, the minority partner should try to negotiate an option to acquire an additional interest in the joint venture. It is often an important goal of the Western investor to consolidate the financial results of the joint venture company. And control is required to qualify for consolidation accounting.\(^\text{12}\)

The following discussion presents a representative — although by no means exhaustive — set of model joint venture structures.

**Traditional Model.** A multinational finds a local partner and the parties negotiate a joint venture or shareholders’ agreement. The agreement usually provides that the parties will organize a corporation to conduct the business. The agreement covers the establishment of the corporation, the parties’ investments, the appointment of the directors and officers, and the buyout and termination provisions.

**Hub and Spoke.** A core business relationship is identified, such as production or marketing. A company is organized for this purpose pursuant to a joint venture or shareholders’ agreement. The core company then contracts with the parent companies and others to provide it with goods and services.

**Network of Contracts.** The network of contracts form is used where it is essential to guarantee that third parties will supply goods and services to the joint venture. Thus, all of the contracts necessary to operate the business are identified and, if possible, negotiated before the joint venture is funded.\(^\text{13}\)

**Joint Bid.** An acquisition is identified, but the decision is made to include a partner to help buy and operate the business. The two parties form a joint venture company, which makes the acquisition. The partners then run the business together.

**Break-Up Venture.** An acquisition is identified, but the decision is made not to keep all of the business units. A partner is selected who wants the business units that the other partner does not want. The partners form a joint venture to accomplish the acquisition. In turn,

\(^{12}\) See Financial Accounting Standards Board Accounting Standards, Consolidation, § C51 (1993). In general, the method of accounting for investments is based on the amount of control that an entity has over its investments, which is often based on the percentage owned. Ownership of 0% to 20% of an investment is accounted for under the cost method, ownership of 21% to 50% of an investment is accounted for under the equity method, and ownership of over 50% of an investment is accounted for using consolidation accounting. It is important to note, however, that control is the controlling consideration in determining appropriate accounting treatment for investments.

\(^{13}\) “Procurement arrangements must likewise be included, since, when dealing with a centrally planned economy, one cannot assume ready access to required raw materials or products. Other areas to consider include: . . . safeguarding real and intellectual property rights[,] . . . distribution responsibilities[,] . . . accounting issues[,] trade unions and labor relations matters[,] and a variety of operational matters peculiar to economies still in the process of adopting free market principles.” Burt, 22 Int’l L. & Pol. at 445.
the acquired company's business units are divided between the partners.

**Building Block Model.** A business relationship is identified and negotiated, such as a technical assistance agreement, co-packing arrangement or distribution agreement. The multinational makes a toe-hold investment of between five and ten percent in the partner or a newly formed company and then negotiates an option agreement to take up to fifty-one percent. The original business relationship is developed and, if successful, the multinational exercises the option.

**Management Agreement.** A management agreement is negotiated whereby the multinational supplies various management services to an existing company. An option agreement is also negotiated so that the multinational will be able to invest in the company in the future.

In connection with most of the examples noted above, it may also be desirable to negotiate an option agreement providing for the multinational to increase its shareholding in the operating company. The option can be incorporated into either a majority-or minority-owned joint venture. The option price can be based on a formula (for example, a multiple of earnings) or on the original share price plus interest.

### III. PRELIMINARY AGREEMENTS

Finance transactions start with term sheets and acquisitions start with letters of intent. Likewise, international joint venture negotiations are often built on the foundation of a memorandum of understanding. It is possible, and sometimes even desirable, to dispense with these types of preliminary agreements in United States-based transactions because the parties and their lawyers are familiar with the usual forms of the definitive agreements and time may be limited. These types of agreements however are more important to joint venture practice because of the cross-cultural nature of joint ventures. Where the parties have less in common, it is more important to have a place to start.

---


Before structuring and drafting [the joint venture agreement] begin, the parties should . . . outline the principal business terms of the venture in order to make the process as efficient as possible. A well-structured letter of intent will go a long way toward ensuring that the negotiating and drafting process is given a proper frame of reference and should minimize misunderstandings. The letter of intent stage should also expose any differences in basic viewpoint of the parties in terms of strategic objectives and relative contribution of the parties. All issues need not be resolved at the letter of intent stage, but in general it is a worthwhile exercise because the process will isolate the "deal breaker" points.
One place to start is with a short (one page) business discussions letter. This letter would identify the parties, briefly describe the purpose of the proposed business, provide for confidentiality of the discussions and any preliminary information exchanged, and most importantly, provide for an exclusive period of discussions. This exclusivity period is usually between two and four months, with three months being the most common benchmark.

From the multinational's viewpoint, it is important to get a commitment (even a non-binding commitment) from the potential local partner that it will not deal with others. From the local partner's perspective, especially in developing countries, it is often important to have a piece of paper showing that negotiations have begun — that Western capital and business practices are on the way.

For example, in the former Soviet Union and now in Russia, the local partners invariably want to have a protocol prepared and signed. The protocol can range from the minutes or an outline of the meetings to a more elaborate memorandum of understanding. But almost without reference to the content of the protocol, it is often extremely important to Russian negotiators to be able to produce a document that shows progress. At least with respect to the early discussions, it is usually in the Western partners' best interest to avoid, or at least limit, the scope and commitment of a protocol or other signed document.

Once the discussions have gotten beyond the preliminary stage, it is helpful to have an outline of the transaction to provide a focus for the discussions and an agenda for the meetings. This document can be labeled simply a transaction outline. Although the outline can be signed or initialed, usually it is best to leave it unsigned. A confirming cover letter is possible where the local partner is anxious to have something signed.

The transaction outline would typically cover the business purpose of the joint venture, partners' contributions, composition of the board of directors, appointment of officers, negotiation exclusivity, mi-

17. Although it is usually desirable at this stage to keep the terms short (the parties agree to maintain the confidentiality of their discussions and to discuss information relating to their discussions only on a need-to-know basis and that any proprietary information exchanged between them will remain confidential), it will usually become necessary as the negotiations progress to enter into a detailed mutual confidentiality agreement.

18. In the past few years, the political and legal systems in the Soviet Union, and now Russia, have been in such a dramatic state of change that signing preliminary documents does not have much appeal to the Western multinational (especially its lawyers).
nority protections, and various other matters that will be covered in
greater detail in the definitive joint venture agreement.\(^\text{19}\)

As the negotiations progress, it is possible to keep expanding and
revising the transaction outline or shift to a memorandum of under-
standing. The memorandum of understanding, or letter of intent as it
is sometimes called, is simply a more elaborate and detailed outline of
the critical components of the joint venture. For example, in addition
to the matters noted above to be included in the transaction outline,
the parties may want to include a proposed schedule for signing and
closing, a discussion of additional products or projects, the dividend
policy of the joint venture, and a list of the related agreements, such
as a technology license or employment agreements.

These preliminary agreements can be signed or unsigned depend-
ing on the parties' desire to formalize the negotiations. In general,
business people like to have these types of agreements signed in the
hope that the other party will, or believe it will, be committed to the
transaction.\(^\text{20}\) In general, the lawyers for the parties, especially the
multinational's lawyer, will prefer that these types of documents re-
main unsigned to avoid a commitment until all of the details can be
negotiated into the definitive agreement.

Obviously, whether a signed or unsigned preliminary document is
binding is a matter of local law.\(^\text{21}\) A local lawyer must provide this
advice. But if the negotiations are going well, the parties are dying to
sign something, and local counsel advises that a preliminary docu-
ment will not be treated as a binding contract (if indeed that is the
intention), then it is acceptable to sign the memorandum. In such a case,
the parties should consider including a disclaimer before the
signatures:

The transactions noted above will require the approval of the
boards of directors of the multinational and the local partner
and all necessary government approvals. The purpose of this

\(^{19}\) See infra notes 22-50 and accompanying text (providing a detailed discussion of
the matters to be covered in the joint venture agreement).

\(^{20}\) The parties should clearly identify preliminary letters as letters of intent
and include a provision denying the enforceability of the obligations unless, of
course, one is trying to "have his cake and eat it too." Such a party would
undoubtedly adopt with enthusiasm the definition of a "gentleman's agree-
ment" attributed by Professor Waddams to the English judge, Mr. Justice
Vaisey: "A gentleman's agreement is an agreement which is not an agree-
ment[,] entered into between two persons, neither of whom is a gentleman,
with each expecting the other to be strictly bound, while he himself has no
intention of being bound at all.

Richard B. Potter, The Drafting and Enforcement of Canada/United States Contracts:
A Canadian Lawyer's Perspective, 20 INT'L LAW. 3, 6 (1986).

\(^{21}\) See Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987); Keely v.
Price, 103 Cal. Rptr. 531 (1972); Zimmerman v. Bank of Am. Nat'l Trust & Sav. Ass'n,
memorandum is to confirm the parties' discussions to date regarding the transactions noted above. This memorandum is not binding on either party, and creates no rights or duties in either of the parties. Binding rights and duties will only be created or imposed pursuant to the joint venture agreement and the technology license agreement. Any precontractual liability for any act or omission, or any express or implied business combination, partnership or venture of the parties under the principles set forth in this memorandum, is expressly excluded.

IV. JOINT VENTURE AGREEMENT

Just as there are an unlimited number of possible joint venture structures, there is no limit to the matters that can be covered in a joint venture agreement. The following discussion will provide an outline of a typical joint venture agreement.

There is no particularly right way to order the agreement. The order followed in this discussion is fairly standard. If, however, the joint venture agreement is being prepared pursuant to a specific joint venture law, then it is best to follow the order of the topics in the applicable law or regulations. This will make it easier for the local joint venture partner (or the government officials who will review the agreement) to make sure everything that is supposed to be covered is there. As with all agreement forms and models, this outline only provides a beginning and not an end.

Definitions. It is customary for American style transaction documents to lead off with the definitions. For people unaccustomed to working with such documents however this can be confusing and even irritating. It may therefore be advisable to include the definitions at the end of the agreement in a section covering miscellaneous items or even in an exhibit.

The definitions will cover the parties, the joint venture itself, perhaps accounting terms, and the definitions that may be necessary for the termination provisions, such as “defaulting party” and “nondefaulting party.” Usually however the definitions in a joint venture agreement...
agreement serve as a cross reference to the sections of the agreement covering the substance of the defined terms.

Purpose. It is generally a good idea to include a section in the early part of the agreement covering the purpose of the joint venture. Not only is this sometimes a matter of local law, but it is often essential to make sure both parties are clear on the scope and scale of the joint venture's operations. It is not uncommon for the parties, especially the local partner, to have extremely ambitious plans for the business. It may therefore be appropriate for the multinational to attempt to get the specific purposes of the joint venture listed clearly and concisely.

In addition to these primary goals of the purpose section, it would also be desirable, if local law permits, to include a general purpose section covering "any and all acts, things, business and activities that are related, incidental or conducive directly or indirectly to the attainment of the business objectives set forth above, as permitted under the applicable laws of the host country".

Joint Venture Company. This section would typically deal with the type of joint venture company to be formed. For example, a joint stock company or other limited liability company under local law.24 As noted above, the appropriate company type is often determined with reference to the desired tax consequences.

This section might also cover the name and address of the joint venture. Although naming the joint venture seems a simple task, it will usually have to be done in two languages and after a surprisingly lengthy discussion. It is critical, though, to make sure that the translation of a Western name into the local language will not be offensive and, if possible, even appealing.

It may be appropriate in this section to include a reference to the government approvals necessary before the company can be formed. This section would also provide a reference to the joint venture company's articles of incorporation, which are usually included as an exhibit to the joint venture agreement.

It would also be appropriate to include a reference to the duration of the joint venture company. In general, multinationals prefer to incorporate the company for a perpetual term, although this can be a

24. In general, a corporation is a corporation in the United States although certain states have special provisions for close corporations. See Ala. Code §§ 10-2A-300-13 (1975); Del. Code Ann. tit. 8, §§ 341-56 (1974); Md. Corps. & Ass'ns Code Ann., §§ 4-101-603 (1975); S.C. Code Ann. §§ 33-18-101-500 (Law. Co-op. 1990). But in countries around the world, there are often more choices. For example, in France the choices of company include: a corporation — société anonyme (SA), a limited liability company — société à responsabilité limitée (SARL) and a single shareholder limited liability company — entreprise unipersonelle à responsabilité limitée (EURL). Obviously, the last choice is of little use to joint venturers.
matter of local legal restrictions. This section may also include the concept that once the joint venture company is formed it will be required to also sign the agreement as a party, because various obligations in the joint venture agreement are obligations of the joint venture company itself.

Funding and Capital. This section of the agreement should cover the parties' initial capital contributions, as well as the amount and responsibility for obtaining any debt financing for the joint venture. It may also be appropriate to indicate the timing of the partners' contributions, because it is usually not required that the entire investment be made at the beginning. Because it is often difficult to determine at the outset of the joint venture the exact timing of the parties' contributions, it may be necessary simply to reference a funding agreement that the parties will enter into as the funding plans become more concrete. Of course, this has the disadvantage of leaving the timing of the contributions in the form of an agreement to agree. If, however, the joint venture contemplates a major construction project, then that may be inevitable. No one is served by having the contributions made too early. The solution may be to include a final contribution date in the joint venture agreement or funding agreement.

To the extent the parties contemplate contributions in-kind (land, equipment, site preparation, utilities), it is important to provide for a valuation method. Ideally, the in-kind contributions would be listed, along with their values, in an exhibit to the agreement.

It is usually desirable to include a provision requiring the parties to maintain their relative investment in the joint venture. This should be coupled with a provision governing the rights of the parties in the event one party fails to make proportionate contributions in the future.

Stock. The agreement should cover issues relating to stock in the joint venture company. For example, this section would cover the classes of stock. In most cases, common stock should be sufficient, although it may be helpful to have two classes of stock in order to differentiate between the partners' voting rights, dividend rights, or responsibilities to the joint venture. The joint venture agreement could also provide that stock certificates would not be issued unless requested by a party, and then only after notice to the other party and its agreement to the issuance of stock certificates. This limitation would help to reduce the risk of a party transferring its interest in the

26. See infra notes 39-40 and accompanying text (providing a discussion of balancing additional contributions).
joint venture to a third party without the consent of the other party. This section might also provide for a legend on the stock certificates as well as the limits, if any, on the transferability of the parties' interests in the joint venture.

In most joint ventures the parties grant each other a right of first refusal with respect to the sale of their interests. Because most joint ventures are based on the parties carefully selecting each other, it would usually not be their intent that the other party could select a new partner for them without their consent. Usually, the rights of first refusal provide for certain exceptions, such as the transfer to affiliated companies within one partner's group of companies.

The agreement would typically provide that no pledge or other transfer of a party's shares or interests in the joint venture could be made without the consent of the other party. This section would also be an appropriate place to include the joint venture's dividend and distribution policies.

*Other Responsibilities.* In addition to making capital contributions to the joint venture, each of the partners may want to commit in the agreement to undertake certain other responsibilities. For example, the multinational may want to take the lead on construction planning, bank financing and developing marketing campaigns. Meanwhile, the local partner may want to focus on government approvals, site preparation and utility connections.

*Shareholders.* The joint venture agreement should include provisions covering the procedures for convening shareholders' meetings, including the notice provisions and the voting requirements. It is also appropriate to include a list of items that require a shareholder vote. These items would usually be extraordinary events, such as amending the articles, a merger or sale of substantially all of the assets of the company, or other major transactions. Because it may be cumbersome to arrange for shareholders' meetings on a regular basis, it may be appropriate to leave more detailed restrictions regarding operation of the joint venture up to a list of matters to be considered by the board of directors.

*Directors and Officers.* The joint venture agreement would include provisions granting each party the right to appoint a certain number of the directors of the joint venture company. Two or three directors for each party should be sufficient. For example, if the multinational is the majority shareholder, it would appoint three directors, and the local partner would appoint two directors. If the parties have agreed to appoint an equal number of directors, then it is possible to give the chairman (assuming he is nominated by the majority
INTERNATIONAL JOINT VENTURES

partner) a tie-breaking (casting) vote in case of a tie vote. Because under certain corporate laws it is not possible for shareholders to appoint directors, the parties would have the right to nominate directors and there would be a provision in the joint venture agreement requiring each party to vote as a shareholder of the joint venture company for the other party’s nominees.

The agreement would also provide for the frequency of the meetings of the board and the procedures for convening a meeting. If the local corporate law permits, it is often advisable to provide for the directors to vote by proxy. This may save a lot of long distance travel. Another helpful practice is to permit directors to take action by written consent, either unanimously or by a majority depending on local law and the intentions of the parties. It is also usually appropriate to provide that notice of the board meetings can be waived either before or after the meeting.

This section of the agreement should also specify the senior officers of the joint venture company, and the party responsible for nominating them. For example, one party might be entitled to nominate the chairman while the other party is entitled to nominate the chief executive officer. The parties might then agree to the joint nomination of the chief financial officer. Obviously, the list of officers can be as long or as short as the parties decide is appropriate.

The critical control mechanism for the joint venture would also be included in this section if it is not already covered in the shareholder voting section. It would be appropriate here to provide a list of matters that must be approved by a majority vote of the directors of the joint venture. If the parties intend that decisions on these matters would be made by joint agreement, this result is most easily and

27. See Ballantine’s Law Dictionary 179 (3d Ed. 1969). “[C]asting vote ... in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. People v. Rector, etc., of Church of the Atonement 48 Barb 603, 606 (N.Y.).

28. For a brief discussion of the practice of permitting directors to vote by proxy or power of attorney pursuant to the corporate laws of certain countries, see Roberta S. Karemal, Is it Time for a Federal Corporation Law?, 57 Brook. L. Rev. 55, 88-91 (1991). The rule in the United States is to the contrary: “The directors of a corporation generally cannot vote at directors’ meetings by proxy, but must be personally present and act themselves. Their personal judgment is necessary, and they cannot delegate their duties, or assign their powers.” 2 Fletcher Cyclopaedia Corporations § 427 (Perm. Ed. 1990) [hereinafter Fletcher]. See id. at § 392.

29. For example, Delaware corporate law permits action by written consent of a majority, whereas other corporate law requires written consents to be unanimous. See Elliott J. Weiss & Lawrence J. White, Of Econometrics and Indeterminacy: A Study of Investors’ Reactions to “Changes” in Corporate Law, 75 Cal. L. Rev. 551, 561 & n.37 (1987).

surely accomplished by providing that certain matters can only be undertaken if approved by a majority of the directors with at least one director designated by each of the parties voting in the affirmative. Otherwise, it is often difficult to make sure that meetings can be conducted with a small quorum. Moreover, it is essential that one party cannot outvote the other because of the unexpected absence of one or more of the directors.\textsuperscript{31} An alternative would be to require unanimity. However, it is often difficult to obtain one hundred percent attendance.

Generally, if one party is clearly to have the lead in the control of the joint venture, then it is appropriate to provide a relatively short list of extraordinary items that require this type of vote, leaving all other matters to be decided by a majority vote of the directors. If the local jurisdiction requires a statutory auditor, then it would be appropriate to provide for the appointment of the statutory auditor in this section as well.\textsuperscript{32}

\textit{Corporate and Operating Procedures.} This section of the agreement would provide for the accounting standards to be used for the joint venture and for audits by the company's regular auditors or a statutory auditor if required by local law. Depending on the level of sophistication of local accounting, the accounting provisions may range from a brief reference to generally accepted accounting principles in the local jurisdiction all the way up to a complete accounting system set forth in a three-ring binder. The agreement might also provide that either of the partners, at its own expense, will be permitted to conduct an independent owner's audit of the joint venture company. The accounting sections may also appropriately cover the requirements of the partners with respect to additional auditing statements so that the respective partners will be able to incorporate the joint venture company's accounts into the parent company's accounts.

This section of the agreement would also provide for the fiscal year of the joint venture company, with an indication as to whether the first year will be a short year (less than twelve months) or a long year (more than twelve months). The decision for a short or long year will depend on local law and tax policy.\textsuperscript{33} In general, if losses are ex-

\textsuperscript{31} For example, on a 3/3 board if only one director is missing, presumably a quorum (5 of 6) would be present, and the party with three directors present would outvote the party with only two directors present.

\textsuperscript{32} The concept of a statutory auditor is that an independent auditor should be appointed for each corporation, and that this auditor should have a fiduciary duty to protect the minority shareholders, the creditors and the public, not just to audit the books.

\textsuperscript{33} Once again, this will be a matter of local law. Indeed, local law and custom may require that the fiscal year be the calendar year, with the first year running from the start of the joint venture until the next December 31.
pected in the early years it is best to have a long first year to take full advantage of tax loss carry forwards.34

The standards for approving debt financing of the joint venture company are often included in this section of the agreement. It would be customary to permit local management to enter into debt financing in the ordinary course of business up to certain limits without the approval of the partners. To the extent that the debt financing is in substantial amounts or is secured by the assets of the joint venture, it may be appropriate to require that it be approved in advance by the partners.

**Related Agreements.** Usually a joint venture relationship will involve more than just the joint venture agreement. For example, it may be appropriate to have technology licenses, employment agreements, and various other agreements between one of the partners and the joint venture company itself.35 It would, of course, be important to the partner that is not a party to a related agreement to have the right to approve the agreement’s terms so that it can determine that the agreement will be fair to the joint venture company and to itself as a shareholder of the joint venture company.

**Confidentiality.** The parties would also typically cover the confidential treatment of the information they disclose to each other and to the joint venture company. Moreover, it will normally be critical to provide that the joint venture company cannot use the confidential information of one of the contributing parties to the detriment of the disclosing party. The agreement may also establish an obligation on the joint venture company to obtain individual confidentiality agreements from certain employees of the joint venture company.

**Payments.** A joint venture agreement may also include provisions for the priority of rights with respect to foreign currency. Typically, a multinational will require that the joint venture pay dividends and other distributions to the multinational in either its currency or another freely tradeable currency. The local partner may also have a desire for freely tradeable currency if the home country of the joint venture does not have hard currency.36

---


35. See infra notes 48-50 and accompanying text (providing a more detailed discussion of related agreements).

36. For example, a priority of the allocation of hard currency might provide: (1) payments to third party creditors, (2) compensation of expatriate employees; (3) technology royalty; (4) dividends payable to the multinational; (5) incentives payments to local suppliers, employees and specialists; and (6) dividends payable to the local partner.
**Deadlock.** Although parties to joint venture negotiations are not eager to confront the possibility of deadlock, it is always a good idea to include provisions governing what happens when the parties cannot agree. Typically, the agreement would include a provision calling for the parties to use their best efforts to resolve all disputes by mutual agreement. If this fails, then the parties may want to turn to mediation, arbitration, and ultimately termination of the joint venture. One technique is to provide a system whereby disagreements are referred to specific senior officers of the respective partners. For example, the agreement might provide for the dispute to be submitted to the chief executive officers of each of the partners for a certain period before the other dispute resolution mechanisms can be implemented.\(^{37}\)

**Termination.** The termination provisions for a joint venture are probably the most important terms of the entire document.\(^{38}\) The agreement would typically provide for termination on breach of the agreement by the other party, or if one of the parties goes into bankruptcy, or if there is a change of control of one of the partners. The termination provisions might also cover the termination of the joint venture in the event of expropriation of the joint venture's assets. It may also be appropriate to provide for termination of the joint venture if certain business objectives or goals are not reached or if subsequent governmental action (change in law or expropriation) materially diminishes the partners' expectations for the joint venture.

On termination of the joint venture, it would be customary to provide a mechanism for one party to buy the other's interest, or for both parties to sell their interest to a third party, or for the joint venture to liquidate and distribute any proceeds to the partners in proportion to their interests. It is also possible for a defined "nondefaulting party" to have greater rights than a defined "defaulting party." For example, if a party becomes a defaulting party because it has gone into bankruptcy or has materially breached its covenants, then the nondefaulting party might have an option to purchase the defaulting party's shares at a formula price, perhaps based on the original price of the shares, plus interest. The agreement could also provide that if there

---

37. See Business Alliances, supra note 1, at 2-34 - 2-36 for a discussion of various dispute resolution mechanisms.

38. One of the most important provisions of a joint venture agreement is that which sets forth the procedure for terminating the venture and distributing the assets, leaving the venturers free to go their separate ways upon the occurrence of any number of events, including deadlock, lack of money, bankruptcy of one venturer, and any other matter that may disrupt the fundamentals of the venture relationship. This article also provides a discussion of various options on termination. Business Alliances, supra note 1, at 2-36.
is not a defaulting party, then the parties would submit bids to each other until one party ends up being the highest bidder.

Another alternative to the bidding procedure, especially where the joint venture is being terminated because the parties are in deadlock, would be what is called a shotgun buyout. This buyout method provides that either party can specify a price at which it will buy the other parties' shares or sell its share to the other party. The second party must either sell its shares to the first party, or buy the first party's shares at the specified price. This remedy is often so uncertain that the parties generally try to renegotiate the terms rather than start shooting.

It is also desirable to include in the termination section of the joint venture agreement the parties' understandings with respect to a return of certain assets. For example, if one party has licensed technology or trademarks to the joint venture, it would usually be appropriate for the trademark or technology license to terminate on termination of the joint venture.

**Additional Contributions.** If one of the partners must make an additional contribution to the joint venture company to keep it going, or because local law requires that the partners must satisfy the joint ventures debts (for example, unpaid taxes), and the other party fails to make a corresponding contribution, the agreement should provide an adjustment mechanism. For example, if the noncontributing partner does not make its relative contribution within a certain period of time or reimburse the contributing partner, the equity ownership of the joint venture should be adjusted to take into account the contributing party's additional investment.

**Noncompetition.** If permissible, the joint venture partners may often want to provide that the joint venture will not compete against them or that the joint venture will limit its activities to a specified territory. Noncompetition provisions are generally difficult to negoti-

---

39. For example, in Korea the joint venture partners may be liable for the joint venture's unpaid taxes.

40. Although advocating a more aggressive approach than may be possible to negotiate, the following discussion highlights the issues:

[test the remedy for failure of a venturer to contribute additional funds required of that venturer must be carefully crafted. The first and most critical remedy should be to divest the defaulting venturer of its control or vote with respect to the venture for some or all matters so that the other venturers can take action to enforce the remedy. The second remedy should be to deal with the monetary obligation. Those remedies could include the right to dilute the ownership of the defaulting venturer, the right of the nondefaulting venturers to make loans to the venture at penalty interest rates, the right to sue the defaulting venturer for his failed contribution, and the right to buy its interest at some specified formula price. Adjustments to capital accounts and future rights to profits and distributions should also be addressed.

Business Alliances, supra note 1, at 2-32.
ate and, even assuming successful negotiation, may be unenforceable.\textsuperscript{41} In addition, in certain jurisdictions, noncompetition provisions may be illegal. Similarly, due to local legal constraints, it may not be permissible to include provisions indicating that the joint venture will be the exclusive business operation of the partners in a certain country or area.

Where it is impossible to negotiate noncompetition provisions because each of the partners wants to be completely free to do as it will, or it is illegal to include noncompetition provisions in the agreement, the parties will have to rely on their participation in the management of the joint venture to reach the intended result. For example, so long as the partners must agree on the annual budget, capital expenditures and business plans of the joint venture, it is unlikely that the joint venture will compete against them in other markets.

\textit{Dispute Resolution, Governing Law.}\textsuperscript{42} Typically, a joint venture agreement for an international joint venture will include provisions requiring resolution of disputes through good faith negotiations for a period of time, such as thirty days. As noted above, it is also possible to require that disputes between the partners be referred to senior officers of each partner for resolution. Mediation is another possibility. It is customary to include arbitration provisions in joint venture agreements because it would most likely be difficult for a joint venture to survive litigation of a dispute between the partners.\textsuperscript{43} If the local

\begin{footnote}{41}{Just as in the United States, noncompetition (restraint of trade) contract provisions are disfavored in many other countries.} 
\end{footnote}

\begin{footnote}{42}{The importance of including dispute resolution procedures in the agreement can be summarized as follows:}

If the venture arrangements do not provide clearly for the resolution of . . . disputes, then what would probably end in an unhappy divorce in any event will become a messy and expensive divorce with much agonizing over property and custody. Thus it is imperative to prescribe clear dispute resolution mechanisms with clear, mandatory choice of law and choice of forum clauses and agreement on the language in which any dispute resolution proceeding will be conducted.\textit{Business Alliances, supra note 1, at 2-16.}

\begin{footnote}{43}{Arbitration of disputes between international companies has been a fertile area for discussion in law reviews and treatises. See Jay Lawrence Westbrook, The Coming Encounter: International Arbitration and Bankruptcy, 67 Minn. L. Rev. 595 (1983); Roger R. Blanpain, The Kenneth M. Piper Lecture: Transnational Regulation of the Labor Relations of Multinational Enterprises, 58 Chi.-Kent L. Rev. 909 (1982). In general, it is best to provide for arbitration in a neutral country according to well-accepted rules. The acceptability of the site and rules often depends on the experience of the negotiators for the local partner. For example, the parties to a joint venture in China may prefer to designate that disputes will be referred to the Arbitration Institute of the Stockholm Chamber of Commerce for Arbitration for resolution under the Arbitration Rules of the United Nations Commission on International Trade Law. Likewise, "[t]raditionally, the resolution of disputes arising in the context of foreign trade and investment transactions with parties in the former Soviet Union was a relatively straightforward matter. Virtually all contracts between Soviet and foreign parties contained an arbitration clause, usually providing for arbitration in Sweden, but occasionally providing for arbi-}

\end{footnote}
partner is a governmental agency or state company, then it may be appropriate to have it waive sovereign immunity in the agreement.

In most cases, the governing law will be the law of the country where the joint venture company is located. This may be inadvisable, however, where the host country's laws are undeveloped or are being over-hauled. Thus, for joint ventures in Eastern Europe and the countries of the former Soviet Union it may be appropriate to select another country's law as the governing law. It may also be desirable to exclude from local jurisdiction disputes involving the intellectual property component of a joint venture (patents, trademarks or technology) where it is important to the contributing party (for example, the multinational) to make sure that disputes involving these assets are settled in its home jurisdiction.

Foreign Exchange. In negotiating a joint venture in a country without hard (freely tradeable) currency, it will be critical to include provisions in the agreement covering foreign exchange matters. Foreign exchange rates (for contributions and distributions), sources of foreign exchange (exports, countertrade, government guarantees) and the intended priorities for foreign exchange distributions (foreign suppliers, expatriates), may give rise to substantial negotiation between the parties. Indeed, in a country without hard currency, the joint venture partners are likely to spend the majority of their time figuring out how to get it and how to spend it.

Change in Law. In countries where the law is rapidly changing, it may be desirable to include provisions in the agreement permitting responsive amendments. For example, if the law is liberalized to permit joint ventures greater flexibility or to take advantage of new opportunities, then the parties would want to be able to revise their arrangement accordingly. To illustrate, if the joint venture is being negotiated when the law permits only a thirty year term, the parties may want to provide for a thirty year term or the longest term permitted by any subsequent amendment to the term law.

[tration at the Arbitration Court of the Chamber of Commerce and Industry of the USSR." John I. Huhs & Ramaz A. Beridze, Dispute Resolution in Russia, The AM. LAW., Nov. 1992 (Special Supp.) at 33. Now in Russia, third-country arbitration is still preferred, and arbitration in Paris under the Rules of Arbitration and Conciliation of the International Chamber of Commerce is becoming more common. For purely domestic transactions between a foreign-owned Russian company and a domestic party, arbitration in Russia ... may be more practical, particularly if the Russian party is remotely located, far from Western forums.]

Id. at 34. See William E. Holland, Getting Into Business in Russia, AM. LAW., Nov. 1992 (Special Supp.), at 12.

44. Huhs & Beridze, AM. LAW., Nov. 1992 (Special Supp.), at 36 (citing Swedish law as the traditional choice, with examples of United States law for intellectual property matters and United Kingdom legislation as controlling for hydrocarbon disputes).
In contrast, if the law is changed to undercut the joint venture's operations, or the partners' original expectations, it may be necessary to renegotiate, or even terminate, the joint venture. The ultimate example of a negative change would be expropriation. There are, however, numerous less drastic events that could occur (increased taxes, for example) that would make a stake in the joint venture significantly less valuable.

**Compliance with Law.** It is a good idea to include a provision in the agreement requiring the parties to conduct the joint venture, and the joint venture to conduct its operations, in compliance with local law and so as not to put the American multinational in violation of the Foreign Corrupt Practices Act.\(^{(45)}\)

**Representations and Warranties.** Standard, and possibly special, representations and warranties for each of the partners should be included in the agreement. For example, it is generally appropriate to provide for both parties to represent and warrant their corporate standing and authority. It would also be customary for each party to represent that the agreement will be valid, binding, and enforceable and that the agreement has been duly authorized and does not conflict with the parties' articles, by-laws, material agreements, or applicable orders or decrees.

**Miscellaneous.** Provisions regarding the sharing of expenses for the preparation of the agreements should be included because it may not be permissible for the joint venture to pay for preincorporation expenses.\(^{(46)}\) The governing language of the agreement should also be specified. For example, if the multinational is based in the United States or the United Kingdom, it would want to provide that the English language will govern and that the English language text of the agreement will prevail over any translations.\(^{(47)}\) Typical provisions regarding execution in counterparts, an integration clause, no assignments (except possibly to subsidiaries) without consent, amendments required to be in writing, as well as notices should also be included in the agreement.

---

\(^{(45)}\) See Foreign Corrupt Practices Act, Pub. L. No. 95-213, §§ 101-04, 91 Stat. 1994 (1977) (codified as amended at 15 U.S.C. §§ 78n(b), (d)(1), (a)-(h), 78dd-(1) & (2), 78ff (a)(c) (1988)). This issue has received heightened concern recently in Russia, although the problem is not limited to any one country — either East or West. See Marc J. Halsema et al., New Challenges in the New Russia, Am. Law., Nov. 1992 (Special Supp.), at 55-56.

\(^{(46)}\) For example, in Korea it is generally not permitted to provide for the joint venture company to pay preincorporation expenses.

\(^{(47)}\) In the author's experience, English is often accepted as the controlling language (Korea, Thailand, Russia, Hungary) although in other countries English and the host countries language are to be equally controlling (China and France). In Germany, the preference is to have German be the controlling language.
Exhibits. It is also standard practice to include as exhibits to the agreement the articles of incorporation or the charter of the joint venture company, as well as the by-laws or regulations governing the conduct of its affairs. It may also be desirable to include drafts of some of the related agreements as exhibits to the main agreement, although this practice may result in undue duplication of effort. With respect to the exhibits, it is generally good practice to include in the articles of incorporation, rather than the joint venture agreement, the items that would normally be found in the articles. For example, it is wasteful (and awkward when they do not match) to include lists of matters requiring the affirmative vote of the parties' representatives in both the joint venture agreement and in the articles of incorporation.

V. RELATED AGREEMENTS

Even the most comprehensive joint venture agreement will leave room for related agreements. Typically, these agreements include technology licenses, trademark licenses or assignments, employment agreements, real estate purchase or lease agreements, construction contracts, finance documents, and operating agreements, such as supplier and distribution contracts. The related agreements are particularly important when organizing a hub and spoke or network of contracts type joint venture. In these types of joint ventures, the related agreements are the heart of the transaction.

Although standard form agreements can provide a starting place for the negotiation of the related agreements, it is usually essential to consider local legal forms as well. Indeed, the most efficient course may be to start with a local form and then check it against the standard forms used in prior transactions or form books. For example, it is critical in preparing employment agreements to take local law and custom into account.

In contrast, trademark and technology licenses are more often than not best based on the multinational's standard — at least at the outset. In many international joint ventures, the greatest contribution the multinational can make to the long term success of the joint venture is in the area of advanced technology, business practices and trademarks.\textsuperscript{48} Also, the multinational partner may have proprietary rights in intellectual property that is extremely valuable. Thus, the

\textsuperscript{48} There may be considerable debate regarding the value of a multinational's trademarks in developing countries because consumers in those countries may never have seen the trademark. Much depends on the trademark. For example, Coca-Cola, Marlboro and Heinz are recognized throughout the world. Also, part of the appeal, and consequent value, of such a trademark is in its overall look or presentation as a Western trademark in the English language and with a correspondingly stylized symbol, logo, and layout.
license agreements should be conformed to the same standards it would use if the multinational were negotiating the agreement across the street rather than around the world.

If the technology (or business expertise in operations, marketing, and distribution) is not high tech, then it may be advisable to combine the trademark and technology licenses into one agreement. This is because these assets are usually intangible and difficult to value. Therefore, coupling this type of technology (management expertise) with the corresponding trademarks may help justify the royalty.49 If however the technology is extensive and sophisticated, then the technology license should probably stand alone. A separate trademark agreement, if applicable, can be negotiated without the confusion that might result from trying to combine the two.

VI. ADDITIONAL MATTERS

There are a number of special issues that should also be noted in discussing the implementation of international joint ventures. Almost by definition, these joint ventures will involve the foreign investment laws of the host countries.50 The government approval process varies greatly from one country to another. Even where foreign investment laws are relatively easily satisfied, the country may restrict or prohibit foreign ownership of land or participation in certain businesses. At the outset, therefore, it is essential to determine the government’s requirements and role in the process. Moreover, an evaluation of the time involved in obtaining the necessary approvals should be made at the outset so that a realistic transaction schedule can be prepared.

A related issue involves antitrust (merger control) notification procedures. These may involve filings in the host country or at a central location if the host country is in an international trading arrangement; such as the European Union (formerly, the European Community). Thus, a proposed joint venture in France that meets the criteria for review (type of transaction, size of parties, volume and location of sales) may have to be reviewed in either Paris or Brussels.51

49. A trademark and technology royalty will often be based on a percentage of the net sales value of the joint venture over a period of time or for as long as the joint venture is in operation. It is also possible to have the joint venture pay an up-front technology fee, either as the sole payment or in addition to the continuing royalty.

50. Each of the Price Waterhouse Guides provides an overview of the government approval requirements for the country covered in the guide.

51. Antitrust law is beyond the scope of this article. Nevertheless, it is important in negotiating joint ventures to make sure that the antitrust issues are reviewed. "[A]n in-depth review of applicable local and foreign antitrust concerns should be undertaken." BUSINESS ALLIANCES, supra note 1, at 2-33. For example, proposed joint ventures involving companies with sales in the countries of the European Union may be
In considering government review procedures, it is also appropriate to consider the possibility of obtaining government grants or tax holidays for the newly created joint venture. These types of arrangements are more likely to be available in developing countries, but it never hurts to ask. In developing countries, there may be an array of incentives, including free enterprise zones, relief from custom duties for imported equipment, a tax holiday for the joint venture, or an exemption from withholding tax for technology royalties.\(^5\)

One area of international joint venture practice that should usually receive greater attention is the due diligence investigation process. No sophisticated company would undertake an acquisition without performing such an investigation.\(^5\) Even for public tender offers, the acquiring company will investigate the public records relat-

subject to premerger notification at the European Commission or may be subject to review at the local level:

On December 21st, 1989, the EEC Council of Ministers adopted a Regulation on the control of concentrations between undertakings.

The Regulation requires concentrations that have a community dimension to be pre-notified to the Commission, which may prevent the merger if it finds that the concentration is incompatible with the Common Market (because it significantly impedes effective competition in the Common Market)

... The Regulation is intended to catch very large mergers taking place at a Community-wide level that might jeopardise the Community if left to be regulated by national legislation of individual Member States. The principle behind the Regulation is that these types of mergers, which the Regulation refers to as those with a Community dimension, should be regulated at a Community level, while smaller mergers or mergers largely confined to one State should continue to be dealt with at a national level.


52. Tax exemptions, holidays and incentives are, of course, country specific. A good place to start in considering these matters for a specific project would be with the Price Waterhouse Guides. For example, in the former Soviet Union, "[u]nlike many jurisdictions where the basic tax regime is in place and non-negotiable, the parties can request the Ministry of Finance to provide special tax concessions." Burt, 22 INT'L L. POL. at 445. With respect to Russia:

Under the USSR tax law, certain companies with more than 30 percent foreign investment were entitled to a two-year tax holiday from the date of first profit. Russian law did not contain such a provision, and after the dissolution of the USSR the Russian tax authorities felt they were not authorized to recognize the USSR provision. But after protest from foreign investors the Russian Supreme Soviet recently passed a resolution recognizing tax holidays previously granted.

Holland, AM. LAW., Nov. 1992 (Special Supp.), at 12-14. In time, these types of grants or tax holidays may become available again in Russia as the government's foreign investment policies emerge.

ing to the target company, such as Securities and Exchange Commission filings, real estate records, court dockets and intellectual property registers.

In contrast, prospective joint venture partners may be reluctant to investigate each other. After all, the partners are entering into a marriage of sorts and the thrill of the courtship may have overtaken the appropriate level of skepticism. Nevertheless, the parties should conduct a business, financial and legal investigation of each other — to the extent possible under the circumstances. In addition, if the joint venture will involve land, then the parties should undertake appropriate real estate title and environmental investigations. The same is true for other assets, whether tangible or intangible, that are to be contributed or licensed to the joint venture.

Political risk insurance is often available to Western investors in joint ventures in developing countries. This type of insurance would provide coverage in case of loss through war (and certain other calamities such as insurrection and civil disturbances), expropriation, or currency inconvertibility or nontransferability. Political risk insurance is available from the United States Overseas Private Investment Corporation (OPIC) and from private insurance carriers. Of course, like all insurance, this type of coverage is subject to exclusions and exceptions. It can also be fairly expensive.

With respect to OPIC insurance, it is important to note that a company's intention to apply for the insurance must be registered before it makes an investment commitment. Since OPIC insurance is intended to be an incentive, permitting companies to agree first and apply later would be contrary to the fundamental purpose of the program.\(^\text{54}\)

An issue of recurring difficulty involves the number of expatriates to be engaged in managing the joint venture.\(^\text{55}\) Moreover, their compensation is frequently a controversial matter. This is often an awk-

\(^{54}\) Transnational Business, supra note 1, at 1-8

The key requirement for U.S. lawyers to keep in mind is that OPIC insurance cannot be applied for after the investment has been committed. It is authorized by Congress as an incentive to the covered forms of investment, and if the investment is committed before the application for insurance is registered, it would be very hard to say that the availability of the insurance contributed to the investment decision.

\(^{55}\) The legal work with respect to expatriates will usually involve negotiating employment agreements and making sure local employment laws are observed. In addition, immigration laws must be consulted and usually a comparative tax study will be performed. Overriding these specific tasks, however, is the perceived unfairness problem. Thus, if this is not handled properly, it can lead to subsequent legal and operational problems, such as the local partner refusing to permit the hard currency of the joint venture to be used to pay expatriate salaries or even the refusal of a local partner to attend board of director meetings and thereby prevent a quorum.
ward subject for the multinational because it does not want to imply that local personnel will need expatriate help. This situation is made even more difficult by the disparity in compensation between the expatriate and local personnel.

Usually, the expatriates involved in the operations of a newly formed joint venture are experienced management or technical personnel and they are being asked to relocate — often to a challenging environment. These factors though may have little appeal to the local partner and its people who are now being asked to work for the joint venture for substantially less compensation.

It is best, therefore, to limit the number of expatriates if possible. Training and development programs should also be an integral part of operating an international joint venture in a developing country — not only so that the business will run better, but so that the number of expatriates can be reduced or eliminated as soon as possible. The negotiations — at the right time — must also include a straightforward discussion of expatriate matters. Like in many things the timing of these discussions can be crucial. Simply put, this matter is seldom raised at the beginning and should never be postponed until the end. The closing dinner is too late!

VII. CONCLUSION

As should be clear from the preceding discussion, structuring and negotiating international joint ventures is not a science. Of course, the process seldom resembles art either. But if the guideposts noted at the outset — flexibility, fairness and patience — are followed, then the likelihood of success will be increased substantially.

A final thought on making these suggestions work in practice. There is no substitute for a genuine interest in the local people and a basic knowledge of their country. Before entering the negotiations, it is helpful to read up on the local customs, history, arts, sports, economy and politics. It may be just as important to know which topics of conversation and Western practices to avoid.

During the negotiations, it is also a good idea to find time to see something other than the interior of conference rooms and Western-style hotels, restaurants and shops. An appreciative sense of the people and their culture will not only improve the professional work product, it will also make the experience personally worthwhile and enjoyable.

56. As stated by Sir Walter Scott (1771-1832) in Guy Mannering (1816), "[a] lawyer without history or literature is a mechanic, a mere working mason; [but] if he possesses some knowledge of these, he may venture to call himself an architect." JOHN BARTLETT, FAMILIAR QUOTATIONS 520b (14th Ed. 1968).