

BAKER & MCKENZIE

International Joint Ventures Handbook



International Joint Ventures Handbook

Baker & McKenzie

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions.
Prior results do not guarantee a similar outcome.

©Baker & McKenzie
All rights reserved.

DISCLAIMER: The material in this book is designed to provide general information only. It is not offered as advice on any particular matter, whether it be legal, procedural or other, and it should not be taken as such. The precedent documents included in this book have not been prepared with any particular transaction in mind. Baker & McKenzie, the editors and the contributing authors expressly disclaim all liability to any person in respect of the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or part of the contents of this book. No reader should act or refrain from acting on the basis of any matter contained in this book without seeking specific professional advice on the particular facts and circumstances at issue. References in this book to "Baker & McKenzie" include Baker & McKenzie International and its member law firms, including Baker & McKenzie, LLP.

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

EDITORS' NOTE

Baker & McKenzie was founded in 1949. For more than 60 years, Baker & McKenzie has provided sophisticated advice and legal services to many of the world's most dynamic and successful organizations. With a network of 4,000 locally qualified, internationally experienced lawyers in 42 countries, Baker & McKenzie has expertise in all of the disciplines that are typically relevant to a joint venture transaction. Working in experienced inter-disciplinary teams to advise on corporate, securities, tax, antitrust/competition, commercial, intellectual property, finance, employment, employee benefits, IT, environmental, real property, trade and other compliance and regulatory matters, Baker & McKenzie is in a unique position to assist companies in planning and implementing joint venture transactions and to deliver integrated solutions which take into account all relevant business and legal factors.

This handbook is intended to help clients (lawyers and non-lawyers) understand the breadth and depth of business and legal considerations associated with international joint venture transactions and suggests some ways to navigate the joint venture journey. This handbook is organized primarily in checklist and questionnaire format with the goal of helping the reader gather and assess key information that impacts the various stages of joint venture planning. It is written primarily from the perspective of the foreign or "non-local" party entering into a new jurisdiction.

This handbook is not a comprehensive treatise. It seeks only to provide a framework for those contemplating a joint venture relationship and it focuses on equity joint ventures where the parties participate through equity in a joint venture vehicle for the purpose of conducting business together. Further, this handbook does not attempt to provide a detailed discussion of the planning and execution of business acquisition and disposition transactions, even though many of those elements will be present in the joint venture context, particularly when one or both parties will be contributing an existing business to the venture. Baker & McKenzie publishes other handbooks, including the "Related Publications" listed below, that look at other transactions in greater depth.

Related Publications

Cross-Border Transactions Handbook – a guide to major legal issues to consider when embarking on a cross-border transaction.

Post-Acquisition Integration Handbook – a guide to major legal issues to consider when integrating an existing and newly acquired business operating in the same field, to save costs, develop synergies and generate value for shareholders.

Rapid Dispositions Handbook – an organized collection of practical know-how, specifically relevant to a situation where a company wishes to dispose of a business or undertake a disposal program.

Acquiring Companies and Businesses in Europe – a country-by-country introduction to the main legal issues to consider when contemplating an acquisition in Europe.

Guide to Mergers and Acquisitions in Asia Pacific – a country-by-country introduction to the main legal issues to consider when contemplating an acquisition in Asia Pacific.

A Legal Guide to Doing Business in the United States of America – an overview of several areas of US law that are of interest for non-US companies who either plan to enter the US market or already conduct business in the United States. Some editions are focused on investing companies from particular jurisdictions (including Austria, Germany and Switzerland).

For further details on any of the information contained in this handbook or to obtain copies of any of the related publications listed above, please contact your Baker & McKenzie contact partner. Further details on the firm, our people and our practice may be found at www.bakermckenzie.com.

TABLE OF CONTENTS

SECTION 1	OVERVIEW	1
	1. Basic Considerations.....	2
	2. Understanding the Different Approaches	3
	Exhibit 1(a) - Transaction Continuum	4
	Exhibit 1(b) - Comparison of Typical Contractual Joint Venture, Equity Joint Venture and Establishment of Wholly-Owned Subsidiary	5
SECTION 2	DILIGENCE.....	9
	1. Local Risk Assessment	9
	2. Compatibility Assessment.....	9
	Exhibit 2(a) - Local Risk Assessment Checklist.....	11
	Exhibit 2(b) - Compatibility Assessment Checklist	16
SECTION 3	STRUCTURE	21
	1. Note on Tax Strategies	21
	2. Jurisdiction in Which to Organize the Vehicle	22
	Exhibit 3(a) - Example Entity Forms	23
	3. Capital and Financial Interests.....	29
	4. Equity Participation	34
	5. Management Control	35
	6. Director and Officer Liability.....	35
	Exhibit 3(b) - Equity Participation Considerations.....	37
	Exhibit 3(c) - Management Control Considerations	38
SECTION 4	EXIT AND TERMINATION	41
	1. Transfer of Interests	42
	2. Sale or Dissolution	44
	3. Intellectual Property Considerations	44
	4. Non-Competition	45
	5. Other Transition Issues	46
SECTION 5	OTHER KEY CONSIDERATIONS	47
	1. Dispute Resolution	47
	2. Methods for Contributing Assets	48
	3. Non-Competition Provisions	50
	4. Competition/Antitrust Law	51

	5. Foreign Ownership Restrictions	54
	6. Employee Transfers and Benefits.....	55
SECTION 6	DOCUMENTATION	59
	1. Confidentiality Agreement	59
	2. Term Sheet.....	59
	3. Joint Venture Agreement.....	60
	4. Company Formation Documents	60
	5. Ancillary Agreements.....	60
	Exhibit 6(a) - Sample Mutual Confidentiality Agreement	62
	Exhibit 6(b) - Sample Term Sheet.....	76
	Supplement A to Term Sheet - Commentary and Alternative Provisions	82
	Supplement B to Term Sheet - Sample Exit Rights Provisions	95
	Exhibit 6(c) - Joint Venture Issues Checklist	97
Appendix A	Overview of D&O Duties and Liabilities in Foreign Entities.....	111
Appendix B	Overview of Applicable US Laws Impacting D&O Liability.....	123

SECTION 1

OVERVIEW

A corporate alliance may take many forms, from a purely contractual relationship to a jointly owned entity. It may involve transferring an existing business to the joint control of the parties or indirectly acquiring an existing business from another party, in which case organizing the venture will involve elements of a disposition or acquisition, or both. Alternatively, an alliance may only involve license agreements, joint marketing agreements, affiliate revenue sharing agreements or other types of agreements in which the parties agree to pursue a set of common goals. This handbook focuses on “equity joint ventures” in which a foreign partner and a local partner participate through equity in a joint venture vehicle for the purpose of conducting business together in a particular jurisdiction (often an emerging market).

The following is a generalization of the typical corporate transactions and where joint ventures fit along this continuum:

Outsourcing	Corporate Alliances			Traditional M&A		Greenfield
	(Non-Equity)		(Equity)	Contracting Acquisition >50%	Full Acquisition	
Contract Services	Contractual Joint Ventures / <i>licensing, supply, distribution</i>	Non-Controlling Acquisition <50% \ <i>resource sharing</i>	Equity Joint Venture			

There are, however, endless ways in which a joint venture can be structured that defy the simple categories shown above. For example, even though the parties may set up an equity joint venture, it may be the case that substantial (if not all) contributions are made via arm’s-length commercial agreements. Each opportunity thus will have its own characteristics which suggest a particular strategy, and rarely is there a single “right” or “wrong” approach.

This handbook considers the different stages of the equity joint venture deal process, from evaluation of the initial opportunity and potential partner, through high level structure planning, evaluation of specific legal issues including exit and termination rights, and drafting the necessary transaction documents.

1. Basic Considerations

Among the reasons commonly cited for entering into a joint venture are:

- Fast entry into local markets;
- Low market entry costs;
- Strong local player (*e.g.*, established customer base, market presence, production capacity, complimentary technology, employee base, distribution chain, and political savvy);
- Economical long-term resource commitment with shared risks;
- Diminished political risk (*e.g.*, government interference, nationalization, political volatility); and
- No suitable acquisition targets or greenfield projects (*e.g.*, establishment of wholly-owned subsidiary) due to cost, local cultural resistance, foreign ownership restrictions, and other factors.

Potential downsides and risks include:

- Cultural differences between parties from different jurisdictions can lead to significant misunderstandings and inefficiencies;
- Misalignment or divergence of strategies can result in losses and a failure to achieve overall business objectives;
- Operational problems, whether the result of strategic differences, production issues, management control issues or otherwise, can limit the effectiveness of the venture;
- Lack of trust between the parties can limit cooperation;
- Decision-making and dispute resolution processes can be lengthy and costly, depending upon what mechanisms are agreed in the joint venture documentation and what practices have evolved during the life of the joint venture in this respect;

- Service and contribution agreements, which are often seen as ancillary to the relationship, can create a crushing dependency of the joint venture on a particular party even though an equity joint venture may be established with the overarching goal of giving the joint venture some measure of independence from the participants; and
- Buy-out upon termination can be expensive or difficult.

That said, a joint venture may be the appropriate investment arrangement in the particular circumstances, and, like any investment arrangement, the potential downsides and risks can be managed through careful diligence, thoughtful planning and appropriate documentation.

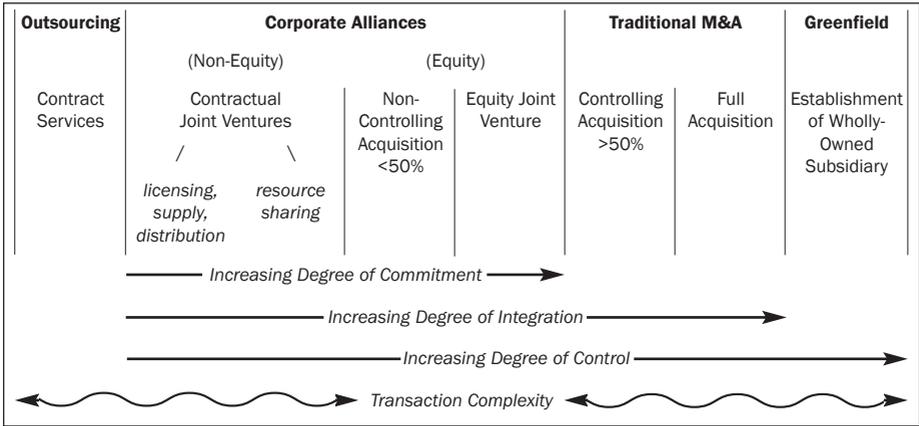
2. Understanding the Different Approaches

At the outset of any cooperative arrangement, the parties must determine the appropriate form to regulate their relationship in light of their respective goals and strategies. For example, in addition to establishing an equity joint venture, the parties should consider whether any of the following types of arrangements would be appropriate in light of their respective commercial objectives:

- a supply agreement for goods or services;
- a distribution or agency agreement;
- a license or franchise agreement;
- a research and development or cooperation agreement;
- a 100% acquisition; or
- establishment of a wholly-owned subsidiary without participation from another party.

The Transaction Continuum shown in **Exhibit 1(a)** depicts generally the levels of commitment, integration and control generally associated with these different types of relationships, and how transaction complexities can vary.

Exhibit 1(a) Transaction Continuum



The Comparison chart in **Exhibit 1(b)** compares in greater detail the basic characteristics of a contractual joint venture, equity joint venture and the establishment of a wholly-owned subsidiary, as three broad categories of international investment. We note that, for those participants who believe that the creation of contractual collaboration is sufficient and appropriate for the opportunity under consideration, local laws may impact on the relationship in any event, and imply obligations between the parties on the basis of agency or partnership as a matter of law which the parties themselves have not expressly addressed. As such, it will be beneficial for any potential participant to consider the possible effect of local laws even at the high level planning stage.

Exhibit 1(b) Comparison of Typical Contractual Joint Venture, Equity Joint Venture and Establishment of Wholly-Owned Subsidiary

	Contractual Joint Venture	Equity Joint Venture	Wholly-Owned Subsidiary
Structure	<ul style="list-style-type: none"> Contract between the parties 	<ul style="list-style-type: none"> Separate legal entity, jointly owned by foreign party and local party 	<ul style="list-style-type: none"> Separate legal entity, 100% owned by foreign investor
Entry into Market	<ul style="list-style-type: none"> Faster Foreign party benefits from local party's customers, connections, knowledge of competitors, local laws and practices 	<ul style="list-style-type: none"> Faster Foreign party benefits from local party's customers, connections, knowledge of competitors, local laws and practices 	<ul style="list-style-type: none"> Slower Foreign investor has to grow business from scratch (e.g., hire employees, build demand, obtain sales)
Start-up costs	<ul style="list-style-type: none"> Lower 	<ul style="list-style-type: none"> Lower to moderate Costs of establishing and maintaining joint venture vehicle can be shared 	<ul style="list-style-type: none"> Higher Costs of establishing and maintaining corporate entity borne solely by foreign investor
Resource Commitment	<ul style="list-style-type: none"> Lower Foreign party may, e.g., license intellectual property or supply goods Licensor/purchaser pays royalties/cash 	<ul style="list-style-type: none"> Lower to moderate Foreign party often contributes management expertise, intellectual property and know-how Local party often contributes employees, customers, plant and facilities 	<ul style="list-style-type: none"> Higher Foreign investor must hire local employees and/or transfer expatriates, purchase raw goods, etc.
Intellectual Property Risk	<ul style="list-style-type: none"> Higher Potentially sharing or giving away IP to other party (i.e., a competitor) 	<ul style="list-style-type: none"> Higher Potentially sharing or giving away IP to local party (i.e., a competitor) 	<ul style="list-style-type: none"> Lower IP less exposed to a competitor because subsidiary is wholly-owned
Return on Investment	<ul style="list-style-type: none"> Lower Royalties generally yield lower returns than equity 	<ul style="list-style-type: none"> Moderate to higher Equity generally yields higher returns than royalties, but returns are shared with other joint venture party Foreign party may have licensed intellectual property to the joint venture vehicle in exchange for royalty payments 	<ul style="list-style-type: none"> Higher Equity generally yields higher returns than royalties
Market Presence	<ul style="list-style-type: none"> Lower Foreign party not present in local market except through local party 	<ul style="list-style-type: none"> Moderate to higher Foreign party has direct access to local market through local party 	<ul style="list-style-type: none"> Higher Foreign investor has direct presence in local market

International Joint Ventures Handbook
Section 1 – Overview

	Contractual Joint Venture	Equity Joint Venture	Wholly-Owned Subsidiary
Political Risk	<ul style="list-style-type: none"> • Lower • Foreign party (licensor) does not bear risk of entry into volatile market 	<ul style="list-style-type: none"> • Moderate • Foreign party bears partial risk of politically volatile market, government interference, nationalization 	<ul style="list-style-type: none"> • Higher • Foreign investor bears full risk of politically volatile market, government interference, nationalization
Competition Law Risk	<ul style="list-style-type: none"> • Moderate to higher • Collaboration of competitors may trigger competition law obligations 	<ul style="list-style-type: none"> • Moderate to higher • Participation by competitors in joint venture vehicle may trigger competition law issues 	<ul style="list-style-type: none"> • Lower/none • No formal collaboration with a competitor, therefore generally no competition law concern
Control over Strategy	<ul style="list-style-type: none"> • Lower • Minimal integration of foreign party and local party's global strategy 	<ul style="list-style-type: none"> • Moderate • Certain degree of control over joint venture vehicle's global strategy • Dependent upon strategic objectives of local party and ability of both parties to adhere to agreed strategy for the duration of the joint venture 	<ul style="list-style-type: none"> • Higher • Complete control over wholly-owned subsidiary's global strategy
Complexity of Corporate Governance	<ul style="list-style-type: none"> • Lower • No joint corporate control 	<ul style="list-style-type: none"> • Higher • Conflicting strategic visions, different management/cultural styles, unequal capital investments, and other material differences often require complex corporate governance mechanisms 	<ul style="list-style-type: none"> • Lower • Foreign investor can exercise full control over wholly-owned subsidiary
Market Feedback	<ul style="list-style-type: none"> • Lower • No stand-alone entity for customers to identify with 	<ul style="list-style-type: none"> • Moderate to higher • Joint venture vehicle may provide a direct identity and presence in the market 	<ul style="list-style-type: none"> • Moderate to higher • Wholly-owned subsidiary provides direct identity and presence in the market
Formality	<ul style="list-style-type: none"> • Moderate • Need appropriate contracts • No need to form an entity 	<ul style="list-style-type: none"> • Higher • Need a joint venture agreement and must form joint venture entity • Possible ancillary agreements (e.g., intellectual property license, management services, shareholder rights agreement) 	<ul style="list-style-type: none"> • Moderate • Need to establish wholly-owned subsidiary
Complexity of Documentation	<ul style="list-style-type: none"> • Moderate to higher • Negotiation of license may be complex 	<ul style="list-style-type: none"> • Higher • Negotiation of profit-sharing, management, etc. may be complex 	<ul style="list-style-type: none"> • Lower • No counterparty or joint venture partner

<p>Termination Risk</p>	<p>Contractual Joint Venture</p> <ul style="list-style-type: none"> • Moderate to higher • May be difficult to obtain market intelligence and transfer jointly-developed products out of joint venture (i.e., cost and ownership issues) 	<p>Equity Joint Venture</p> <ul style="list-style-type: none"> • Moderate to higher • May be difficult to obtain market intelligence and transfer jointly-developed products out of joint venture (i.e., cost and ownership issues) • Potential for conflict over intellectual property developed during course of joint venture • Buy-out or termination procedures can be expensive and time-consuming 	<p>Wholly-Owned Subsidiary</p> <ul style="list-style-type: none"> • Lower/none • Foreign investor owns 100% of subsidiary and, therefore, all of its assets
--------------------------------	---	---	--

SECTION 2

DILIGENCE

Once a party has decided to proceed with a joint venture in a foreign jurisdiction, it will be necessary to conduct diligence in connection with the transaction and the potential partner. If the transaction involves the contribution of an existing business to the venture, the diligence exercise likely will share many of the same characteristics as a diligence exercise carried out in a traditional business acquisition or disposition transaction – *e.g.*, financial, business and legal diligence with respect to the business being contributed. In the international joint venture context, the diligence exercise should also focus on risks that are unique to doing business in the relevant local market as well as on assessing potential compatibility with prospective partners.

1. Local Risk Assessment

An international joint venture implies an ongoing relationship in a market that may be unfamiliar to at least one of the parties. Especially where the joint venture will conduct business in an emerging market, the diligence exercise should thus include an assessment of the particular risks that are unique to that local market, including political, business, legal, and cultural risks. The Local Risk Assessment Checklist in **Exhibit 2(a)** is designed to assist the analysis of these types of risks.

2. Compatibility Assessment

A joint venture also implies a degree of cooperation between the parties. An important aspect of the joint venture diligence exercise should thus be an evaluation of factors that may indicate compatibility between the prospective parties to assess the prospects of a successful joint venture. The Compatibility Assessment Checklist at **Exhibit 2(b)** is intended to identify specific operational and non-operational areas for review in this regard. This checklist can also be used to help monitor the relationship throughout the life cycle of the joint venture. Bear in mind, however, that:

- Many of these factors can only be assessed through frank discussions between the parties;

- The parties may not be forthcoming until they know the transaction is likely to proceed; and
- Cultural sensitivities may impact the level and nature of the diligence exercise.

A compatibility assessment is thus often easier said than done. Nevertheless, it is critical to include in the diligence process the persons who will ultimately be involved in the management of the joint venture so they can begin to develop a working relationship and head off potential problems early in the joint venture's life cycle.

The information and tools included in this section are not intended to be static, and the levels of importance of the individual factors will undoubtedly vary depending on the particulars of the party proposing to enter into the joint venture, and its objectives for the specific opportunity.

Exhibit 2(a) Local Risk Assessment Checklist Political and Business Risks

Risk	Issue	Possible Solutions
Stability of Local Government	<ul style="list-style-type: none"> Is the local government stable (e.g., mature democracy, representative political parties, civilian controls, free press, no recent history of dictatorship)? 	<ul style="list-style-type: none"> One way to assess stability is to examine country studies prepared by government agencies, including those of the US Department of State (http://www.state.gov/) and the CIA World Fact Book (https://www.cia.gov/), as well as local newspapers. Minimize capital investment (reserve) in the joint venture entity. Delay until stability increases.
Corruption and Anti-Corruption Regulation	<ul style="list-style-type: none"> Is corruption common? If so, can the joint venture effectively operate its business without participating in corruption? 	<ul style="list-style-type: none"> One way to assess corruption is to consult Transparency International's Corruption Perception Index (http://www.transparency.org/). Establish and implement a meaningful compliance program that contains strict internal policies against corrupt practices. This requires effective communication to the joint venture's employees, as well as on-going monitoring. Include appropriate representations and covenants in the joint venture agreement and impose penalties that align the joint venture parties in the outcome. Conduct private investigation of the potential partner and key employees.
Currency Risk	<ul style="list-style-type: none"> Is the local currency convertible? If the currency cannot be converted directly, do alternative means of conversion exist? Is the currency market (or currency system) stable? Do the exchange control/currency laws of the jurisdiction restrict the payment of dividends or movement of capital? Does the joint venture entity form restrict the payment of dividends? Are there any ways to overcome the restrictions? 	<ul style="list-style-type: none"> Hedge currency risk with derivatives. Obtain exemptions as a condition to investment. Conduct joint venture in convertible currency.

Risk	Issue	Possible Solutions
Local Business Risks	<ul style="list-style-type: none"> • Is the local economy stable? Is it possible that the local government will face financial crisis? • Could manufacturing costs, including labor costs, increase drastically? • Are labor unions generally powerful in the country? • Is local consumer behavior/preference susceptible to drastic change? • Are there existing or potential local competitors to whom the local government can give special privileges? 	<ul style="list-style-type: none"> • Buy insurance policies for country risks. • Assess local business risks in detail and use realistic or modest discount rates. • Venture with politically savvy local partner. • Work with local business, labor and political leaders to obtain investment and other local support.

Legal Risks

Risk	Issue	Possible Solutions
Rule of Law Enforceability of Contractual Safeguards in Joint Venture Documents	<ul style="list-style-type: none"> • Does the target country have well-established rules of law in general or do officials have significant discretion with respect to interpretation and enforcement? • Is the choice of law and forum valid and enforceable? • Are penalty clauses valid and enforceable? • Is an injunction order to enforce contractual rights available? Can local courts enforce specific performance? • Are local courts prejudiced towards local companies? • Are judgments of local courts predictable? • How long will it usually take to obtain and enforce a judgment? • Does the local government have strict enforcement procedures? • Is the local country party to international treaties for the enforcement of foreign money judgments and arbitral awards? 	<ul style="list-style-type: none"> • Select governing law and dispute resolution forum of a jurisdiction with well-developed and flexible legal system. • Provide for arbitration in the joint venture agreement. • Select governing law and forum of a jurisdiction with well-developed and flexible legal system.

Risk	Issue	Possible Solutions
Selection of Entity	<ul style="list-style-type: none"> Identify available corporate forms for joint ventures (e.g., corporation, limited liability company, partnership) Which of these entity types is customarily/normally used for joint ventures? Which of these offer greatest flexibility of management? Does local law require a minimum capital contribution? Are contributions in-kind allowed? Are contributions subject to an independent valuation? Can the corporate form pay dividends at any time or are there any timing restrictions? Can distributions be made out of capital or only out of profits? Are there mandatory reserves? Are interests in the particular kind of entity assignable? Are limitations on the right to assign/transfer (such as requiring management consent, right of first refusal, or right of first offer) legal and binding? Does a member have any right to withdraw and have its interest redeemed by the company? Can members dissolve the company in case of deadlock? Is an agreement concerning such a withdrawal or dissolution binding and enforceable? Does the local entity provide limited liability to its equity owners? What is the risk of “piercing the corporate veil?” Does the local country or the country where the party/entity is located recognize the corporate form as a pass-through entity for tax purposes? Are there any limitations on such recognition? Will contributions to the corporate form be taxed? Is the corporate form well-recognized in the local business community for the type of business being contemplated? 	<ul style="list-style-type: none"> If there is no corporate form suitable for a joint venture, contractual arrangements without establishing a corporate form can be a solution (e.g., joint marketing, distribution or supply arrangement, licensing arrangement). To reduce the risk of direct liability of the equity owners, consider interposing holding companies. See handbook Section 3 (Structure) for a discussion of potential corporate forms.

Risk	Issue	Possible Solutions
Intellectual Property	<ul style="list-style-type: none"> Does the local government have well-established intellectual property laws and are they regularly enforced? Are cross-border transfers of intellectual property by assignment or licensing subject to government review/control? What are the mandatory rules regarding employee ownership in inventions (e.g., in some countries, inventors are entitled to a certain level of compensation for successfully exploited inventions which may increase intellectual property development costs)? Does local law prohibit or limit the right of a contributor to receive an automatic assignment or license-back of improvements made by a licensee (i.e., the joint venture)? Does local law require that intellectual property developed using governmental funds/sponsorship remain under the ownership of a local entity? (This could impact intellectual property ownership upon termination or exit.) Does local law require that a trademark can only be registered by an entity located and/or doing business locally? 	<ul style="list-style-type: none"> Implement a business structure where proprietary information will not be disclosed to the local party. Establish and implement strict internal confidentiality policies for the joint venture entity. Factor into on-going contributions and distributions any required compensation arising as a result of employee-owned inventions. Establish the joint venture in a jurisdiction with favorable intellectual property laws.
Antitrust	<ul style="list-style-type: none"> Does the local government have well-developed antitrust regulations and are they regularly enforced? 	<ul style="list-style-type: none"> Request a no-action letter from local antitrust authorities. Choose a joint venture structure that will not violate applicable antitrust regulations.
Foreign Investment Laws	<ul style="list-style-type: none"> Do investments by a foreign person require prior approval of any governmental authorities? Does local law allow a foreign person to own a majority of the shares in a company? 	<ul style="list-style-type: none"> Foreign party reduces investment to less than majority, and obtains control over the joint venture through shares with special voting power or through special contractual arrangements.
Regulation (Licensing)	<ul style="list-style-type: none"> Are foreign companies allowed to have a license to do business without the participation of the local party? If the majority of shares in the joint venture are owned by a foreign company, is the joint venture allowed to have such a license? 	<ul style="list-style-type: none"> Foreign party reduces investment to less than majority, and obtains control over the joint venture through shares with special voting power or through special contractual arrangements.
Accounting & Compliance	<ul style="list-style-type: none"> Does local corporate law specify accounting rules for the particular entity types or are the parties free to choose? Is there any limitation on the ability of the non-local party to require the use of its own accounting standards? Are any specific compliance requirements of the non-local party acceptable locally? Is the financial reporting of the joint venture subject to the requirement that one or both parties maintain adequate internal controls? 	<ul style="list-style-type: none"> Require the joint venture entity to adopt accounting standards that are as close as possible to the non-local party's (e.g., same fiscal year). Require financial statements to be prepared in accordance with US GAAP or other applicable accounting standards. Retain personnel at the joint venture who are versed in applicable securities and accounting requirements with respect to internal controls over financial reporting.

Cultural Risks

Risk	Issue	Possible Solutions
Language/Society	<ul style="list-style-type: none"> • What is the primary language spoken by people in the country? How prevalent is the use of English? • What is the predominant religion in the country? • Are interactions between members of society based upon wealth? Class? Race? Pedigree? Seniority? 	<ul style="list-style-type: none"> • Cultural briefing for the non-local party representatives negotiating the joint venture. • Cultural training program for expatriate employees of the non-local party. • Cultural training program (including communications training, problem-solving and cultural awareness) for local employees. • Hire local manager to represent the non-local party in the joint venture.
Business/Cultural Practices	<ul style="list-style-type: none"> • Do people communicate with each other explicitly or implicitly? • Is common communication combative or friendly? • What are the important dos and don'ts of doing business in the local jurisdiction? Shaking hands? Smiling? Handing out business cards? Being early/late? Treating men and women differently? Tipping in a bar/restaurant? 	<ul style="list-style-type: none"> • Appoint joint venture team representatives who ideally speak the local language or otherwise are locally trained. • Regular training programs on practices and standards of the non-local party.
View of Foreign Countries	<ul style="list-style-type: none"> • Is there an anti-foreign (e.g., anti-American) sentiment in the country? • Has such a sentiment historically existed in the country? • What are the key historical events of the country involving the non-local party's home country? Involving the United States? • What is the level of influence of foreign business, culture, entertainment, etc. in the local country? 	<ul style="list-style-type: none"> • Hold meetings frequently in the local jurisdiction and in the home jurisdiction of the non-local party (e.g., board meetings, business meetings, employee retreats).

Exhibit 2(b) Compatibility Assessment Checklist Operational Considerations

Risk	Issue	Discussion
Alignment of Goals	<ul style="list-style-type: none"> Are the goals of the potential joint venture parties complementary and aligned toward the success of the joint venture? 	<p>This analysis requires the collection of the goals of each party, usually obtained through frank discussions between the parties. This data must then be compared and carefully considered. In some instances, goals may be complementary and a prospective joint venture party may identify opportunities for aligning goals. In other cases, a prospective party may determine that its goals and the goals of the potential partner are not aligned.</p>
Business Cultures	<ul style="list-style-type: none"> Are the business cultures of the potential joint venture parties compatible? Factors to consider include: <ul style="list-style-type: none"> How does the potential partner make decisions (e.g., employee empowerment or rigid top-down style)? Are results rewarded? How much value does the potential partner place on lifestyle (e.g., valuing employees as people as well as workers)? 	<p>Business culture can play a key role in several aspects of business process, including fostering innovation, decision-making and risk-taking. Information as to a party's business culture can be gleaned from frank discussions not only between the prospective managers of the joint ventures, but, ideally, also with the rank and file employees. Outside consultants, including human resource and other business consultants, may be able to assist with this assessment. This information may then be compared to the non-local party's business culture and formal business processes to determine the level of compatibility. The Local Risk Assessment Checklist in Exhibit 2(a) contains additional discussion regarding general cultural risks that may be present in the local jurisdiction that could impact the success of the joint venture.</p>
Financial Resources	<ul style="list-style-type: none"> Will the parties be able to meet the funding needs of the joint venture? 	<p>Parties that are not strong financially may lack the resources to commit to a successful joint venture operation. Parties that are strong financially may be better able to meet their funding and operational commitments to the joint venture. The financial strength of the potential partner may be determined through publicly available information, credit checks and from other sources supplied by the potential partner. This information should also be used to craft appropriate requirements and protections with respect to on-going capital contributions.</p>

Risk	Issue	Discussion
Operational Savvy	<ul style="list-style-type: none"> Does the potential partner have the desired operational and performance capabilities? 	<p>Information about operational and performance capabilities may be derived through reviews of a potential partner's strength in its particular markets, an analysis of the partner's potential market weaknesses and the partner's historical operating and financial performance. This information may be identified through interviews and discussions with key managers, business clients and associates of the potential joint venture partner. A review of a potential partner's operational savvy should also take into consideration the competitive environment in the markets in which it does business. It is also helpful to consider the extent of the potential partner's experience in cooperative arrangements of the sort contemplated, or with similar partners (e.g., other multinationals).</p>
Leadership Commitment	<ul style="list-style-type: none"> Will the parties commit the necessary internal leadership to the success of the joint venture? 	<p>This includes an analysis of the prospective party's own leadership support for any particular joint venture and the leadership support of the potential partner. This analysis should include identification of the leaders from each party that are committed to the joint venture's success (including their titles and roles within their respective organizations), the degree to which any performance evaluations of these individuals will be tied to the success of the joint venture (i.e., internal accountability for the joint venture), and the role that these individuals will play in the joint venture.</p>
Business Plan	<ul style="list-style-type: none"> Do the parties have a clear and well-developed business plan for the joint venture? 	<p>A clear and well-developed business plan that aligns the goals of the potential parties is valuable in guiding the parties toward a successful relationship. The key data element for this analysis is the preliminary draft business plan and its relationship to the goals of the parties. In many instances, potential parties will be hesitant to expend considerable resources developing a detailed business plan before believing that the venture will proceed. At a minimum, however, the parties should agree on the basic outline of the fundamentals of the business plan, including economic interests with respect to profits (i.e., distributions vs. reinvestment in the joint venture), before agreeing to move forward together as business partners.</p>

Non-Operational Considerations

Risk	Issue	Discussion
Reputation	<ul style="list-style-type: none"> Does the potential partner have a good reputation in the local and global business community? 	<p>A prospective party should consider the obvious potential downsides of aligning itself with disreputable businesses and business practices, particularly if the relationship with the disreputable business could damage it or its brand image in the local or world market. Information about business reputation may be identified through public press releases as well as through interviews and discussions with business clients and associates of the potential joint venture partner. In addition, engaging a private investigation firm can provide additional insight.</p>
Legal Compliance	<ul style="list-style-type: none"> What is the potential party's legal track record? 	<p>Not only should the prospective party inquire as to the potential partner's track record for legal compliance and the processes and procedures that the potential partner has in place for ensuring compliance with applicable laws, but it should also consider the general legal compliance landscape for the jurisdiction in which the joint venture may operate (e.g., established rules of law, effective and consistent enforcement of those laws and sophistication of judicial system). This information is often obtained through traditional due diligence requests and searches of publicly available litigation records.</p>
Ongoing Disputes	<ul style="list-style-type: none"> What is the nature and extent of any ongoing legal disputes that involve the potential partner? 	<p>While disputes involving the potential partner (even if unrelated to the potential joint venture) may not directly impact its reputation or compliance history, significant disputes may distract leadership attention from the success of the joint venture. Legal disputes may be identified through public reporting sources or from direct inquiry of appropriate personnel within the potential partner.</p>
Organizational Compatibility	<ul style="list-style-type: none"> Is the potential partner structured and organized to interact properly? 	<p>The prospective party should assess the potential partner's organization and structure in light of its own organization and structure to determine whether personnel with similar responsibilities within their own organizations will be working and communicating on similar levels at the joint venture. This information is often obtained through traditional due diligence requests and interviews with management.</p>

Risk	Issue	Discussion
Geographic Stability	<ul style="list-style-type: none"> How stable is the political, business and legal landscape in the relevant jurisdictions? 	<p>The Local Risk Assessment Checklist in Exhibit 2(a) is designed to assist the analysis of various political, business and legal risks that could impact the success of a joint venture. This information should be analyzed with respect to the potential partner's home jurisdiction and with respect to the jurisdiction in which the joint venture entity will operate. This information may be identified through public sources or may be identified through non-public sources available to the potential party. Baker & McKenzie also maintains "doing business" memoranda for many jurisdictions, which may be useful in analyzing geographic considerations.</p>

SECTION 3

STRUCTURE

Once a party has decided to proceed with a joint venture with a particular partner, the next step is to determine how the joint venture should be structured. There are a number of business, legal and tax considerations that any prospective party should take into account in this regard. First, a party will need to consider what corporate structure it should use in order to own its interest in the joint venture. It will also need to consider what type of equity ownership and management control it should have. This section provides an overview of the considerations with respect to the jurisdiction in which to organize the vehicle (and general entity forms from which to choose), capital and financial interests, equity participation, management control, and director and officer liability.

1. Note on Tax Strategies

A detailed discussion of tax planning strategies is outside the scope of this handbook; however, it is essential to involve tax specialists and seek their input at the earliest stages of joint venture planning. Some of the key tax areas to consider when planning a joint venture structure include the following taxes and duties applicable to the future business (which are common to most jurisdictions):

- Income/profit taxes;
- Value added tax (VAT)/sales tax;
- Real and personal property taxes;
- Employee-related taxes;
- Customs duties;
- Tax holidays;
- Withholding taxes;
- Double taxation treaties; and
- Marketplace transfer pricing regulations applicable for goods and services.

2. Jurisdiction in Which to Organize the Vehicle

For tax efficiency, initial consideration should be given to the jurisdiction where the direct jointly owned entity should be organized. For example, it may well be beneficial from a tax perspective for the parties to form an entity outside the jurisdiction in which the joint venture operates (such as a Delaware limited liability company, a British Virgin Islands company, or other entity formed in a low tax common law jurisdiction), which will then own the local joint venture operating entity.

In many cases, however, the parties will create a new local joint venture entity. Under this scenario, the prospective party will need to consider what entity form is appropriate to the particular joint venture. The chart in **Exhibit 3(a)** highlights the characteristics of three potential entity forms that a party may consider.

Exhibit 3(a) Example Entity Forms

Entity Type	Characteristics
Corporation	<ul style="list-style-type: none"> • Limited liability • Double taxation • Flexibility in equity structure (e.g., joint venture parties typically could cause shares to be issued with preferred allocation of profits, preferred return, preference upon dissolution or other special features) • Local corporate formalities (e.g., some jurisdictions require a company to file audited accounts, which can be costly to prepare and result in a loss of confidentiality) • Strong identity (the corporate form is generally familiar to potential lenders, customers and employees, and local corporate laws are generally well-established) • Similar non-US entities: Brazil: SA (<i>Sociedade por Ações</i>); Germany: AG (<i>Aktiengesellschaft</i>); Japan: KK (<i>Kabushiki Kaisha</i>); Netherlands: NV (<i>Naamloze Vennootschap</i>)
Limited Liability Company	<ul style="list-style-type: none"> • Limited liability • Often flow-through treatment • Flexibility in equity structure (see above) • Local corporate formalities (see above) • Strong identity (although the LLC is a relatively new entity form in the United States, its US popularity is increasing and it shares many of the same advantages of being a stand-alone entity as does a corporation; in many non-US jurisdictions, the local equivalent of an LLC has been permissible and common for many decades) • Similar non-US entities: Brazil: Ltda (<i>Sociedade por Quotas de Responsabilidade Limitada</i>); China: WFOE (wholly foreign owned enterprise); Germany: GmbH (<i>Gesellschaft mit beschränkter Haftung</i>); Japan: GDK (<i>Godo Kaisha</i>); Netherlands: BV (<i>Besloten Vennootschap</i>)
Partnership	<ul style="list-style-type: none"> • Unlimited liability for a general partnership (both joint venture partners would have joint and unlimited liability for any liabilities incurred by the joint venture, excluding only those situations where one of the joint venture partners did not act with either express or implied authority to bind the joint venture) • Typically flow-through treatment • Fewer corporate formalities (the joint venture would in most circumstances not need to make local law filings, e.g., the reporting of financials or reporting of changes in officers and directors) • Lack of corporate identity (it is relatively rare to find a joint venture organized as a partnership unless the partners to the general partnership are special purpose companies with limited liability) • Consider limited partnership (a limited partnership would allow the non-local partner to retain limited liability while the local joint venture partner could act as general partner with unlimited liability; however, this entity form would preclude the non-local partner from taking any role in the management of the joint venture. Thus, the parties could form a jointly owned general partnership in which the management provisions are laid out) • Similar non-US entities: Germany: GmbH & Co. KG (limited partnership with a limited liability entity as the general partner); Japan: YSJK (<i>Yugen sekin jigyo Kumiai</i> – variant of US LLP); Netherlands: VOF (<i>Vennootschap onder firma</i> – general partnership); CV (<i>Commanditaire vennootschap</i> – limited partnership)

A prospective party might also consider acquiring a portion of its joint venture partner’s interest in an existing entity, thereby inheriting the corporate form of the existing entity. Under this scenario, the prospective party should perform due diligence to assess and plan for liabilities it might assume by acquiring part of the existing entity.

Regardless of whether the joint venture vehicle is a newly formed entity or an existing entity, from the non-local party’s perspective the joint venture vehicle should be organized, if possible, in a jurisdiction in which: (i) there is a well-tested corporate law regime, (ii) specific performance is available as a remedy (this is particularly important with respect to enforcing provisions in the joint venture agreement on equity transfers), and (iii) the parties are able to limit the potential liabilities of the representatives who sit on the joint venture board.

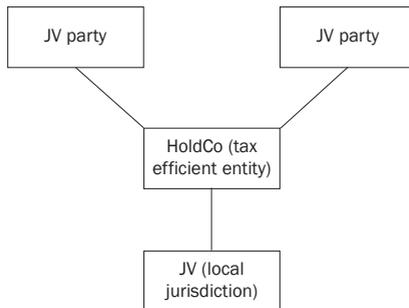
Holding Company Outside of Local Jurisdiction

Because these criteria will not be met in many developing countries, a prospective party should consider establishing a holding company in a well-established legal jurisdiction, utilizing a joint venture agreement governed by the laws of the jurisdiction in which the holding company is established, and operating the joint venture through a company that is wholly owned by the holding company.

If a holding company structure is not possible, the prospective party could consider using an escrow for the parties’ shares in the joint venture vehicle and an irrevocable proxy to guarantee the non-local party’s rights with respect to equity transfers.

A simple diagram of a holding company structure is:

Holding company structure



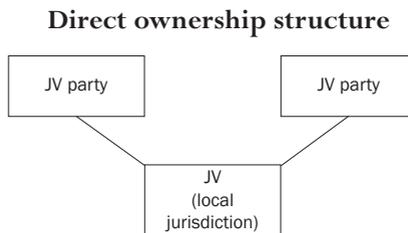
The following threshold questions should be asked in considering whether a holding company structure is appropriate:

- Is 100% foreign ownership (*i.e.*, by the holding company) of a local entity (*i.e.*, the joint venture operating entity) permitted under local law and practice of the jurisdiction in which the joint venture will operate?
- Is it possible to address favorably any significant practical disadvantages, such as obtaining investment control clearance or any permits required to operate the business, which are presented by 100% foreign ownership?
- Are local nationals or local entities (*i.e.*, the local joint venture party) permitted to own part or all of a foreign entity (*i.e.*, the holding company)?

If the answer to these questions is “yes,” the prospective party might be able to negotiate for a vehicle outside the jurisdiction where the joint venture will conduct its business if that local jurisdiction does not have a well-tested legal regime. Although any holding company structure will be informed largely by the tax position of the parties, common law jurisdictions (*e.g.*, the United States, Canada and the component jurisdiction of the United Kingdom) tend to offer greater flexibility in capital structure, management structure, transfers of interests and dissolution as compared to civil law jurisdictions (*e.g.*, Continental European jurisdictions).

Directly Owned Entity In the Local Jurisdiction

If it is not possible to establish a joint venture vehicle outside the jurisdiction where the joint venture will conduct its business, the prospective party will need to examine the different local entity types and available flexibility with respect to tax, equity, management, transfers of interest, and accounting/auditing issues in the jurisdiction in which the joint venture will operate. A simple diagram of a direct ownership structure is:



The following are among the questions that should be asked when determining the appropriateness of a given local entity type:

Entity Type

- What are the available entity types in the local jurisdiction? Are they similar to a US corporation, limited liability company, partnership or hybrid of the foregoing?
- Which of these entity types may legally be used for a business of the kind contemplated for the joint venture? Which are normally/commonly used (as a matter of local practice) for the kind of business contemplated for the joint venture?
- Which types of entities provide limited liability for the equity owners?

Tax

- What tax rates will be applicable to the joint venture vehicle?
- What other taxes will be applicable to the non-local party as a foreign shareholder in the joint venture vehicle (*e.g.*, withholding or other taxes on dividends, royalties, or payment for products or services)? Do applicable double taxation treaties reduce these taxes?
- What are the rules permitting deduction and set-off of losses and expenses?

Equity

- How is the equity interest in the joint venture vehicle determined (*e.g.*, by number of shares or units, or by specified percentages)?
- If equity participation is expressed in shares or units, to what extent is it possible to have shares or units with special preferences, such that some shares or units carry a preferred allocation of profits, preferred return or a preference on dissolution?
- Are there restrictions on majority ownership by a non-resident entity? Is the non-local party in any way prohibited from owning a majority interest? Are shares/units of the same class capable of being held by more than one person?

- May the voting power of each share/unit be different from one vote per share/unit? May the entity have non-voting shares/units?
- If it is possible to express the equity interest of the parties in percentage terms:
 - May a party's share of profits be different from its share of assets on dissolution?
 - May there be special allocations of profits to one or another party (including a preferred return to one party)?
 - May a party's voting percentage be different from its percentage interest in profits or asset distributions on dissolution?

Management

- May the parties manage the entity directly, without directors, managers or officers? If so, must one vote attach to each share/unit or is it possible to vary the number of votes that attach to the shares/units?
- Are there any matters for which a supermajority vote is required as a matter of law?
- Are the parties free to agree on a requirement of unanimity or supermajority for certain specified decisions? Are these types of provisions specifically enforceable as opposed to merely legal and binding?
- What notice and quorum requirements apply to board/shareholder meetings? What will happen if a quorum does not exist? Will it be possible to hold meetings on short notice or to take actions by written resolution? Must meetings be held within the local jurisdiction?
- Is it customary or possible to utilize a board of directors? If so, may the parties each appoint a specified number of directors? If so, is it possible to have two (or more) classes of directors, each with the same voting power but each class appointed by one of the joint venture parties? If not, is it mandatory that each joint venture party have a vote for director equal to its number of shares/units? Are there any residency or nationality requirements for directors or officers?

- Is it possible for the joint venture parties to adopt a voting agreement pursuant to which they agree to vote for the individual directors nominated by the other party? Is such an agreement specifically enforceable (*i.e.*, would a court step in and appoint a director nominated by a party even if the other party refused to vote for the director)? May directors grant proxies?
- Is a two-tier board with supervisory and managing levels appropriate or applicable under local law?
- Is it permissible or mandatory for the joint venture vehicle to have officers (*i.e.*, persons given a specific function in the conduct of the day-to-day business of the entity, with specified powers)? If so, how are officers appointed (*e.g.*, by the board of directors)?
- Does local law require information with respect to the names and authority of officers and directors to be filed publicly?
- Are limitations on the authority of an officer or director valid and binding on third parties? Is there a way under local law to notify third parties of any such limitations (*e.g.*, commercial register)?
- What are the rules with respect to removing officers and directors? Can a party revoke its own appointment, or is a shareholder or board vote required?

Transfers of Interests

- Are interests in this kind of entity transferable? If so, how is a transfer accomplished (*e.g.*, delivery of a certificate, recordation on the entity's register)?
- Are complete prohibitions on transfers and assignments valid? If not, are limitations on the right to transfer/assign (*e.g.*, right of first refusal or requiring shareholder or management consent) legal and binding? Are these types of restrictions binding on third parties? Are there any formal requirements for these restrictions to be binding, such as a notation on a certificate or a notation in the commercial register?

- If transfer restrictions are binding on third parties, are both the entity and the other party nonetheless required to recognize any rights in an assignee/transferee if interests are transferred in violation of such a restriction?
- Does an assignee/transferee who has acquired an interest in violation of a restriction nonetheless have economic rights as against the entity (*e.g.*, rights to profit and/or asset distributions)?
- Does a party have any right to withdraw and have its interest redeemed by the entity? If so, how is the redemption price determined?

Accounting/Auditing

- Does local law require the entity to name a statutory (or other) auditor or commissaire? What are the specific functions of this office? Is any financial information required to be publicly filed?
- Does local corporate law specify accounting rules for the entity or are the joint venture parties free to choose themselves?
- Are there any limitations (including requirements that may be imposed by local lenders) on the ability of the non-local party to require the use of its own accounting standards? Do the non-local party's accounting and auditing standards conform to relevant local law?

3. Capital and Financial Interests

Fundamental to the establishment of a joint venture is identifying the contributions that the parties will make to the venture. These contributions may be both tangible and intangible and the parties will have to agree on their respective valuations. The nature and value of these contributions will in turn be reflected in some manner in the degree of ownership of each of the parties in the joint venture. Further, while ownership will typically reflect each party's financial interest in the venture, it also is likely to impact the degree of control over the venture by each party and the management structure through which that control will be exercised.

Capital Contributions

Subject to local law considerations, the parties' contributions may be in a variety of forms, including cash, tangible property (including real property) know-how or other intellectual property, and other intangibles. In some cases, one or another of the parties will be contributing a going concern to be continued by the joint venture. The following questions should be considered with respect to capital contributions in connection with the proposed joint venture structure:

- Are there restrictions under local law on the percentage amount that can be owned by a non-resident?
- May a joint venture party's share of profits be different from its share of assets on dissolution?
- May there be special allocations of profits to one or another party (including a preferred return to one party)?
- May a party's voting percentage be different from its percentage interest in profits or asset distributions on dissolution?
- Are there any minimum capital requirements? Does a capital contribution need to be registered with any governmental authorities?
- Are there any rules or restrictions on in-kind contributions (*e.g.*, contributions of assets necessary to conduct the business of the joint venture)? Is there a required ratio under local law of cash versus in-kind contributions? What type of valuation is required for in-kind contributions (*e.g.*, by independent firm or governmental authorities)?
- How, and when, are in-kind contributions to be valued? Will one party conduct due diligence on in-kind contributions of the other party? Will the contributing party give any representations and warranties with respect to assets being contributed?
- Are any third party consents or notices required for any in-kind contributions?
- If assets are being contributed and those assets are located in a separate jurisdiction, is a separate conveyancing document required under the laws of that jurisdiction?

- Are any transfer taxes or duties applicable to in-kind-contributions?
- Can the entity be capitalized through loans? Does local law regulate debt-to-equity levels? Are there any tax or other advantages to funding through debt rather than equity, or vice versa?
- Will the joint venture business require ongoing funding (*e.g.*, for working capital, expansion)? If so, will each party be required to contribute to future calls for funding pro rata to its initial investment? Will the commitment to fund be capped or open-ended? What should happen if any ongoing funding obligation is not met?
- What are the requirements for reducing capital (*e.g.*, approval of commercial court)?

Ongoing Financing Needs

If a joint venture is sufficiently capitalized and is organized as a stand-alone entity, it may be able to obtain financing on its own to meet its ongoing operational needs. Frequently, however, substantial financing will have to depend upon the support of the parties themselves, including in the form of additional capital contributions. If the parties are to provide loan financing in addition to capital contributions, it should be determined at the outset. As an alternative, the parties may prefer to have the joint venture obtain financing locally but supported by the parties' guarantee. Financial institutions will generally prefer that these guarantees be joint and several, that is, that each party be responsible for the full amount of any loans issued in reliance on the guarantees. On the other hand, if the parties have differing financial standing, this may as a practical matter more significantly expose the stronger party in the event that the joint venture fails. In a US joint venture between US and non-US parties, the US party or parties may feel more exposed simply because it will be easier for the financial institution to enforce the guarantee in the United States. In this case, the parties may wish to negotiate for several (and not joint) guarantees, under which each party is responsible only for its pro rata share of any financing of the venture.

Profit Distribution

In addition to planning for the financing needs of the joint venture, the parties also must address their plans with respect to profit distribution. As a threshold matter,

the parties should agree on whether, and to what extent, profits will be reinvested in the business of the joint venture. This goes to the parties' overall goals for entering into the relationship and it should be assessed during the diligence phase. Beyond that, tax planning will be a crucial element for structuring the joint venture in a way that enables the parties to extract profits in an economically efficient manner. The following questions should be considered in this regard:

- What are the rules for declaring dividends and distributing profits? If the parties have developed a plan for the payment of dividends, does their plan conform to relevant local law? For example, are the parties free to determine when voluntary distributions can be made and by whom? Are there tax or regulatory constraints on the distribution of profits? Will it be necessary to establish a special structure for the effective distribution of profits (*e.g.*, an income access structure)?
- Can distributions be made out of capital or only out of profits under local law? Are there requirements for mandatory reserves?
- Is it possible to provide for “special allocations” of profits (*e.g.*, allocation of profits from one aspect of the business to one of the parties in a ratio different from the allocation of profits from another aspect of the business)?

Consolidation

Financial Accounting. Parties to a joint venture frequently need or at least want to be able to treat their interest in the venture on a consolidated basis for financial accounting purposes. The accounting rules relating to consolidation vary from country to country.

In the United States, it is ordinarily necessary for a party to a joint venture to “control” the venture in order to consolidate under generally accepted accounting principles. Control is generally present where the party owns more than 50% of the voting shares or equivalent equities in the joint venture. A more difficult situation arises where the ownership of the joint venture is split 50/50. Here, it is sometimes possible for a party to be considered in “control” by having the right to decide something of considerable importance without the agreement of the other party (*e.g.*, the right to appoint or remove the majority of the board of directors or other governing body, or the power to direct their votes). The nuances of

determining whether control is present are beyond the scope of this handbook but it is vital that parties contemplating a venture take these issues into account as early as possible.

Consolidation is particularly important to a party contributing a business to the venture. If the contributing party can consolidate, it can report the financial results of the venture on a line-item-by-line-item basis. Thus, the party's share of the sales, costs and earnings of the venture will be reported as part of the sales, costs and earnings of the party. If the results cannot be reported on a consolidated basis, only the net profit can be reported.

Tax. Separate from the analysis of consolidation for financial accounting purposes is whether the joint venture entity can be included in a consolidated income tax filing. Subject to certain limitations, advantages of filing consolidated tax returns for US federal income tax purposes include the following:

- offsetting operating losses of the joint venture against the controlling party's profits;
- offsetting capital losses of the joint venture against the controlling party's capital gains;
- avoidance of tax on distributions from the joint venture to the controlling party;
- deferral of income on transactions between the joint venture and the controlling party; and
- use by the controlling party's corporate group of the excess of the joint venture's foreign tax credit over its limitation.

Disadvantages of filing consolidated tax returns for US federal income tax purposes include the following:

- deferral of losses on transactions between the controlling party and the joint venture;
- additional bookkeeping required to keep track of deferred transactions between the controlling party and the joint venture;
- possible elimination of foreign tax credits because of a lack of foreign income on the part of the joint venture; and

- possible accumulated earnings tax liability when the consolidated accumulated earnings and profits of the group exceed the minimum credit amount.

Internal Controls Over Financial Reporting

The Sarbanes-Oxley Act of 2002, together with its related regulatory reforms, significantly changed the corporate governance practices not only of US public companies, but also of non-US companies with securities that are listed, traded or otherwise registered in the United States. Often of particular concern in the joint venture context are the rules that require maintenance of internal control over financial reporting that conforms to US accounting and securities law standards. In particular, Section 404 of the Sarbanes-Oxley Act requires each annual report of a public company to include a report by management on the company's internal control over financial reporting. Section 404 also requires the company's auditors to attest to, and report on, management's assessment of the effectiveness of the company's internal control over financial reporting. Careful diligence and on-going monitoring are typically necessary to assess the risk of a particular target or joint venture party with respect to Sarbanes-Oxley compliance.

Even in situations where the US company does not consolidate or otherwise control the joint venture vehicle, internal control issues still arise to varying degrees, depending on such factors as the level of the US company's ownership, the materiality of the investment to the US company, and the level of control that the US company exerts. For example, where a US company is a minority partner in a joint venture, it may not need to expressly certify and obtain an audit report with respect to the internal controls of the joint venture, but it will need to do so with respect to its own financial statements and various line items which contain financial information with respect to the joint venture. Accordingly, a joint venture party who is subject to the Sarbanes-Oxley Act will typically need to ensure that the joint venture maintains an appropriate level of internal control over financial reporting.

4. Equity Participation

When determining how a joint venture will be controlled, a prospective party must consider both the equity interest that each joint venture party will own in the joint venture, and what each joint venture party's role will be in the management and decision-making of the joint venture.

There are generally three options for structuring the equity ownership of a joint venture: (1) 50/50 equity ownership split between the prospective party and its joint venture counterpart; (2) the prospective party owning a majority equity interest; and (3) the prospective party owning a minority equity interest. The Equity Participation Considerations chart in **Exhibit 3(b)** compares these options.

5. Management Control

Management of a joint venture will typically consist of a board of directors (or similar body) that makes extraordinary decisions on behalf of the joint venture as well as a slate of officers or managers who oversee the day-to-day business of the joint venture. Typically, the level of management control held by a joint venture party will correspond to its level of equity ownership. However, subject to any local law limitations, it is possible for joint venture parties to establish a management structure in whatever form they think is most beneficial, even if the allocation of management control does not correspond with each joint venture party's equity interest.

There are generally three options for structuring the management of a joint venture: (1) 50/50 management control; (2) non-local party with a stronger management role; (3) non-local party with a weaker management role. The Management Control Considerations chart in **Exhibit 3(c)** compares these options. A prospective party should individually analyze each joint venture to determine what management structure best suits its particular set of circumstances.

6. Director and Officer Liability

Another area to consider when determining the structure of the joint venture is the potential exposure to liabilities at the director and officer level, particularly where the parties envision a joint venture vehicle in a foreign jurisdiction.

Although, as a general matter, the duties of a director of a foreign entity are similar in many respects to those of a US corporate director, the exact nature and scope of those duties and liabilities may vary depending on the laws of the country in which the joint venture entity is incorporated. Individuals who are asked to serve as a director of a foreign entity should familiarize themselves with the broad range of issues that they are likely to face while serving in that capacity in any given country

and should be prepared to address them, if and when they arise. They should remain fully informed of the company's activities and monitor the company's compliance with the legal requirements of that jurisdiction.

Appendix A – Overview of D&O Duties and Liabilities in Foreign Entities provides a brief overview of the duties, risks and potential civil and criminal liabilities of a director of a non-US entity.

Likewise, several US laws, including the Foreign Corrupt Practices Act, money laundering, trade and investment sanctions, export controls and anti-boycott regulations could impact the joint venture and expose the joint venture, its directors and a US joint venture party to liability. **Appendix B - Overview of Applicable US Laws Impacting D&O Liability** briefly summarizes these laws.

Exhibit 3(b) Equity Participation Considerations

50/50	Non-local party majority	Non-local party minority
<ul style="list-style-type: none"> • Equal incentives: This ownership structure gives each joint venture party an equal financial incentive to maximize the success of the joint venture. • Problematic for dissimilar joint venture parties: This ownership structure can be problematic where two joint venture parties are not matched in terms of culture, financial strength or capabilities. To force dissimilar joint venture parties into an equal ownership arrangement could result in a great deal of conflict. • Potentially more work for the parties: A 50/50 structure could mean more intense work and a greater time commitment for both joint venture parties, as compared to a majority or minority situation, in order to keep a workable balance between the joint venture parties. 	<ul style="list-style-type: none"> • Maintain control: By owning a majority of the joint venture, the non-local party can better implement its business plan and strategy for the joint venture. • Control exposure of intellectual property and know-how: This structure can help prevent the premature exposure of technological or other know-how to the local party and might prevent the local party from gaining a competitive advantage in the joint venture's industry. • May result in lack of motivation by local joint venture partner: Where multinational corporations maintain control over a joint venture, they often have a tendency to run the joint venture as a subsidiary corporation. The disadvantage of this approach is that the multinational corporation could lose the expertise of its local joint venture partner and run the risk that the local joint venture partner will lose its motivation to maximize the success of the joint venture. One way to counteract this problem is to reinvest the profits back into the joint venture, which can result in increased goodwill and less concern about the devaluation of the local currency. 	<ul style="list-style-type: none"> • Consider restrictions on foreign investment: Acquisition targets may not be available in a country and some countries restrict the level of equity ownership by a non-resident entity; therefore, the non-local party may have no choice but to hold a minority interest in some jurisdictions. • Allows for passive investment: This structure often allows for the non-local party to test out a market with a lower initial investment of capital and other resources. • May result in premature exposure of intellectual property and know-how: This structure might increase the risk of premature exposure of technological or other know-how to the local party and possibly lead to the local party gaining a competitive advantage in the joint venture's industry. • Loss of control: One important disadvantage of this structure is that the non-local party would lose a significant amount of control over the operations of the joint venture. However, there are some strategies by which the non-local party could increase its equity ownership in a joint venture or otherwise protect its minority interest, including the following: <ul style="list-style-type: none"> – right to trigger the sale of the joint venture upon a material breach by the local joint venture party – right to purchase additional shares – put option – drag-along rights – management control or other rights to appoint key managerial personnel

Exhibit 3(c) Management Control Considerations

50/50	Non-local party stronger control	Non-local party weaker control
<ul style="list-style-type: none"> • Equal incentives: A 50/50 management structure can maximize trust and mutual concern between two joint venture parties because each will have an equal voice in the management of the joint venture. • Deadlock: This management structure relies heavily on cooperation between the two joint venture parties. However, there is a possibility that the joint venture parties may reach a deadlock on particular issues. There are certain corporate governance mechanisms that can be crafted to help break a deadlock if one arises, including the following: <ul style="list-style-type: none"> – give chairman of the board a tiebreaking vote – give independent, non-executive director a tiebreaking vote – refer deadlock matters to an independent third party (e.g., an industry expert or arbitrator) for resolution – refer deadlock matters to the joint venture parties' respective senior management to attempt resolution – trigger buy-sell option • Allows for local expertise: Sharing control with its local joint venture partner can assist the non-local party in learning from the experience of its local joint venture partner with respect to the local business and economic climate as well as unfamiliar bureaucratic circumstances (e.g., local systems of labor management and regulatory authorities). 	<ul style="list-style-type: none"> • May be required for purposes of consolidation: A dominant management role might be required for purposes of establishing "financial control" of the joint venture in order for the non-local party to include the joint venture on a consolidated basis in its financial statements. • May be advantageous to the joint venture: There is some empirical evidence that a joint venture will be more successful where one party has dominant control because the joint venture will be run with one voice, one business strategy and one management style. • Consider the expense of maintaining control: Maintaining control over a joint venture can be very expensive, especially where the joint venture is geographically distant from the dominant joint venture party, and can include the following costs: providing the technology for the joint venture, providing all support not otherwise covered by a contract between the non-local party and the local party, and maintaining expatriate managers for the joint venture. • Consider appointing local managers: One way for a multinational corporation to retain a high level of control and oversight is to maintain control of the board of directors as well as specifically delineated matters, but appoint local managers to run the day-to-day operations of the joint venture. 	<ul style="list-style-type: none"> • Allows for local expertise: It can be beneficial to let the local party maintain control over the management of the joint venture where the local party lends greater critical resources and relevant business and industry expertise to the joint venture. • Trusting the local joint venture partner: Under this management structure, the non-local party, having less managerial control over the joint venture, would rely heavily on the discretion and management decisions of its local partner. Therefore, it is important for the non-local party to know its local joint venture partner and maintain a high level of trust in the joint venture partner. • Consider providing for a veto right: The non-local party should consider requesting that it be provided with veto power with respect to specifically delineated "extraordinary" decisions — e.g., the issuance of additional shares by the joint venture or the sale of a substantial portion of the joint venture's assets. • Consider providing for cumulative voting: By providing for cumulative voting, the non-local party would increase its ability to impact decisions of the board of directors.

50/50	Non-local party stronger control	Non-local party weaker control
<ul style="list-style-type: none"> Consider role of management: This management structure can be beneficial where two joint venture parties bring different skills to the joint venture — e.g., one party brings manufacturing technology and expertise and the other party brings knowledge of, and access to, local markets. Under this scenario, each party could be responsible for certain decisions and might even have sole decision-making authority for those decisions. However, the joint venture agreement could provide that certain key decisions require approval by both parties. Consider local law restrictions: Consider whether local law requires supermajority approvals under certain circumstances, provides for specific enforcement for voting arrangements between joint venture parties, requires a “one share, one vote” structure, requires a chairman of the board of directors, or provides for any other requirements or limitations on the management structure of a joint venture. Where local law does not allow for departures from a “one share, one vote” structure, consider having the joint venture agreement governed in a jurisdiction which does. This will allow greater flexibility in deciding how the joint venture should be governed. 	<ul style="list-style-type: none"> Consider providing for a veto right: The non-local party may consider providing the local party with veto power with respect to specifically delineated “extraordinary” decisions — e.g., the issuance of additional shares by the joint venture or the sale of a substantial portion of the joint venture’s assets. Consider providing for cumulative voting: In order to maximize the local party’s incentive, consider providing for cumulative voting, which would increase the local party’s ability to impact decisions of the board of directors. Consider local law restrictions: These are generally the same considerations as those described under the 50/50 approach. Higher responsibility: With “control” the non-local party would likely have a higher level of responsibility with respect to, e.g., improper conduct of the joint venture entity. 	<ul style="list-style-type: none"> Consider appointing key management personnel: If the non-local party does not maintain majority control over the joint venture’s board of directors, it could consider appointing key management personnel that will be involved in the day-to-day management of the joint venture such as a financial controller. This approach can increase its participation and influence in the joint venture. This approach can be especially effective where the non-local party is geographically distant from the joint venture because it physically places its managers at the site of the joint venture. However, there are certain costs involved in sending expatriate managers to help manage a joint venture — e.g., the financial cost of maintaining expatriate managers in another country and the implication to local management that oversight is required from the non-local party. One way to avoid this outcome but achieve the same ends is to work with the local joint venture party in connection with training and developing the joint venture’s employees, including local managers. Consider local law restrictions: These are generally the same considerations as those described under the 50/50 approach.

SECTION 4

EXIT AND TERMINATION

Where the joint venture is intended to have a fixed duration or a specific and limited purpose, termination issues are often dealt with early in the negotiations. Where the joint venture is intended as a long-term relationship, however, the parties may be reluctant to discuss terminating their relationship while negotiating the joint venture documentation. Nevertheless, it is always possible that one or both of the parties will wish to no longer participate in the joint venture for some reason. Further, studies suggest that the average alliance lasts between four and seven years, with very few lasting more than 15 years.¹

Even where the termination provisions of the joint venture agreement are not strictly followed (especially where the joint venture has been in existence for many years), they nevertheless provide a context within which the parties can negotiate an appropriate exit. Accordingly, careful attention should be paid to drafting appropriate termination provisions in the joint venture agreement.

Generally speaking, when the parties contemplate a long-term relationship, a prospective party's first choice for an exit mechanism is often the transfer of the joint venture interests, then the sale of the entire company, and then the dissolution of the company. These topics, as well as various post-termination and transition issues, are addressed in checklist format in the remainder of this Section. In addition, the Sample Term Sheet included as **Exhibit 6(b)** includes provisions and detailed commentary with respect to many of these issues.

Under each of the topics listed below, consider the extent not only to which the prospective party desires a particular right, but also the extent to which it would be willing to permit the local partner to have the reciprocal right. If the non-local party is unwilling to grant a particular right to the local partner, it will be difficult to obtain that right for itself.

¹ Alison Maitland, *Joint ventures: Getting out without getting hurt*, Financial Times, October 10, 2002.

1. Transfer of Interests

The broad categories for the transfer of interests are: third party transfers, transfers to a joint venture party or to the joint venture vehicle itself, and withdrawal or exit.

The following questions should be asked with respect to any transfer of interest:

- What bases for the right to transfer are enforceable under local law?
 - Deadlock?
 - Failure to reach certain milestones?
 - Change in control of a party to the joint venture?
 - Completion of a particular project?
 - Expiration of initial lock-in (*e.g.*, 10 years)?
 - Insolvency of a party to the joint venture?
 - Voluntary desire to terminate?
 - Material breach?
 - Failure to agree on capital expenditures for more than *e.g.*, 3 consecutive years?
 - Other?
- In the event of a withdrawal from or sale to the joint venture vehicle, would the joint venture vehicle have the financial resources to be able to pay cash up front for the exiting party's interest?
- Are interests in this kind of entity assignable? If so, how is an assignment accomplished (*e.g.*, delivery of a certificate, recordation in a public register, other formal process)?
- Are complete prohibitions on assignment and transfer valid?
- If not, what transfer restrictions are enforceable under local law?
 - Management consent?
 - Other party's consent?
 - Right of first offer?

- Right of first refusal?
- Other?
- Are these transfer restrictions binding on third parties?
- Are there any formal requirements for these restrictions to be binding against the joint venture parties or third parties, such as a notation on a certificate or a notation in the commercial register?
- If transfer restrictions are binding on third parties, are both the joint venture vehicle and the joint venture parties nonetheless required to recognize any rights in an assignee/transferee if interests are transferred in violation of the restrictions?
- Does an assignee/transferee who has acquired an interest in violation of a restriction nonetheless have economic rights as against the joint venture vehicle (*e.g.*, rights to profit and asset distributions)?
- Are there local law rules on how the interests are to be valued, or are the parties free to determine a mechanism? Price-to-earnings ratio? Discounted cash flow analysis? Net asset test? An offer from a bona fide third party? A valuation by an independent expert?
- Will partial transfers be permitted, or will the exiting party be required to sell (or the remaining party be required to buy) all of the exiting party's shares?
- Will the parties permit intra-group transfers without prior consent from the other joint venture party? Or without triggering any rights in the other joint venture party (*e.g.*, right of first refusal)?
- Will the minority party have tag-along rights?
- Will the majority party have drag-along rights?
- Will the parties have buy-sell rights?
- Should the obligations of the exiting joint venture party be required to be assumed by a transferee (*e.g.*, guarantees)?
- Should any loans payable by the exiting joint venture party be required to be paid upon exit or should they be required to be assumed by a transferee?

- Consider including a provision in the joint venture agreement requiring the parties to refinance (*e.g.*, reinsertion of capital/reinvestment into the joint venture), whether by agreement or as required by local law, and, in the event a party fails to do so, the joint venture may be terminated by the other party.

2. Sale or Dissolution

If it is not possible for one joint venture party to purchase the other party's interests, then, in general, the next best approach may be to provide for a sale of the joint venture company as a going concern. This will tend to maximize shareholder value; however, the most significant risk is a competitor taking over the joint venture.

In connection with the sale or dissolution of the joint venture, consider the following questions:

- What are the local law mechanics for the sale of the joint venture vehicle?
- How will the value of the business be determined?

If a sale is not possible (or not desirable), dissolution or liquidation of the vehicle might allow the parties to recover all or part of their investment.

- What are the local law mechanics for terminating the venture, followed by dissolution? Followed by liquidation?
- What are the local law mechanics of an auction sale?
- How will the value of the business be determined?

3. Intellectual Property Considerations

When negotiating the termination provisions of the joint venture agreement, the parties should establish what will happen upon termination to their respective intellectual property, as well as the intellectual property developed during the term of the joint venture. The following issues should be addressed:

- The joint venture should be required to change its corporate name if the name includes the trademark or brand of the exiting joint venture party. A time limit should be established for this requirement.

Consideration should also be given to whether, and on what terms, the joint venture would be permitted to continue using the trademark or other intellectual property of the exiting joint venture party.

- The joint venture agreement should address what happens to the intellectual property developed by the parties during the course of the joint venture. For example, the parties may each be free to use and exploit this “joint” intellectual property after the termination of the joint venture.
- The joint venture agreement should address the effect of termination on any intellectual property license agreements between the joint venture and the exiting joint venture party. If the joint venture entity survives (*e.g.*, because the exiting party has exercised its put rights), the other party will want to make sure that the exit does not destroy the viability of the business itself. If a long-term joint venture is contemplated the parties could provide that the license survives but then becomes a royalty-bearing license (if it is not already structured that way). If the license does survive, the parties may want to understand in advance, however, whether the scope of any licensed intellectual property, or the contributing party’s retained rights to that intellectual property, should change upon an exit. These issues should be considered closely in conjunction with any non-competition commitments applicable to the exiting party as described in the following sub-section.

4. Non-Competition

It may be appropriate for the parties to implement a cooling-off period after termination of the joint venture, during which the exiting party and the joint venture vehicle agree not to compete. The following questions should be asked:

- What is an appropriate duration of the non-compete?
- Will the territory of the non-compete be limited to the jurisdiction of the joint venture entity? Will it cover other jurisdictions in which the joint venture did business while both parties participated in the joint venture? Will it cover jurisdictions in which the joint venture plans to do business?

- How should the business to which the non-compete covenant relates be defined?
- What scope and duration is enforceable under local law?
- Will the confidentiality provisions of the joint venture agreement continue after the termination of the joint venture? If so, for how long?
- What should be the procedure for the return of confidential information upon termination of the joint venture?

The next chapter of this handbook contains further discussion of non-compete arrangements in the joint venture context. In particular, see Section 5.3 (Other Key Considerations – Non-Competition Provisions).

5. Other Transition Issues

If one party is permitted to exit the joint venture but the joint venture will continue to operate, the remaining party may want to secure transition services from the exiting party. This will depend upon the extent of the exiting party's contributions to the joint venture (*e.g.*, services, assets, employees) and whether a transition period is needed to minimize business interruptions. The specific transition services may be difficult to anticipate at the time of entry into the joint venture, in which case the parties may need to negotiate a transition services agreement in connection with the exit. In this regard, the parties may agree at the time of entry into the joint venture that an exiting party will agree to provide transition services to be mutually agreed by the parties at the time of exit. The following questions should be asked:

- What services are required from the exiting joint venture party? What are the fees for these services? What is the duration of the transition period?
- What agreements are appropriate to document the provision of transition services?
- Will any consents from or notices to third parties (*e.g.*, customers) be required due to a change of control in the joint venture?
- What other issues arise as a result of the termination of the joint venture that require the cooperation of the exiting party and remaining party in order to ensure a smooth transition for the joint venture business?

SECTION 5

OTHER KEY CONSIDERATIONS

This section contains discussion and checklists of other key considerations that should be addressed by any prospective party during the joint venture process. This section assumes that a decision has already been made to establish an equity joint venture (*i.e.*, a jointly-owned vehicle), as opposed to entering into a contractual joint venture (*i.e.*, a contract under which the parties agree to the terms of their commercial relationship without any sharing of profits and losses).

1. Dispute Resolution

Despite careful evaluation of the potential joint venture partner and detailed formulation of the business plan and other key commercial terms, the parties will inevitably have differences of opinion concerning some aspects of the operation of the venture. Accordingly, the joint venture agreement should provide a thoughtful mechanism for resolving disputes before they threaten to impact the long-term prospects of the relationship. The following questions should be asked in this regard:

- If the parties cannot agree on an issue which is fundamental to the joint venture, how should matters be resolved? Specifically, in what circumstances will deadlock arise:
 - on all material issues?
 - on certain issues determined by the parties when the joint venture is established?
 - on issues designated as deadlock issues by one of the parties at the time they arise?
- Will deadlock issues be referred to the respective chief executive officers of the parties in the first instance? Will alternative mechanisms to resolve deadlock be used, such as:
 - the joint venture chairman’s tie-breaking vote?
 - reference to an independent director?
 - reference to an independent third party?

- Will different deadlock issues be resolved by different methods? Should an alternative dispute resolution procedure be developed?
- What rights will a party have on a deadlock? For example, will a party be able:
 - to require the termination of the joint venture and either a winding up or sale?
 - to exercise a “buy-sell” option requiring the other party to sell or purchase its interest in the joint venture?

Generally speaking, the parties will prefer issue resolution by senior management personnel, as most joint venture disputes concern business issues, not legal issues. Since arbitration awards are often easier to enforce than foreign court judgments, the parties may wish to consider that the joint venture documentation provide for arbitration in the event that senior management is unable to resolve disputes. The following questions should be asked in this regard:

- Where will the non-local party most likely want to enforce the various provisions of the joint venture agreement?
- What are the standard dispute resolution practices for joint ventures in the local jurisdiction? Is it appropriate from a local perspective to hold arbitration outside the local jurisdiction?
- Is there an advantage to the non-local party to have arbitration in or outside of the jurisdiction where the joint venture vehicle is organized?
- How can the party holding relevant intellectual property best enforce its rights?
- How can the parties best enforce the confidentiality and non-compete covenants?

2. Methods for Contributing Assets

When the parties are contributing assets to the joint venture they will need to consider precisely how to make those contributions.

Intellectual Property

From the intellectual property perspective, it may be a no-brainer as to whether one or both parties possess the relevant intellectual property, but it is a separate question to decide how that intellectual property is contributed – *e.g.*, by way of license or assignment.

License. With a license the contributing party maintains control of the asset and can insist on a right to terminate the license in the event of a breach by the joint venture. A license may make particular sense where the contributing party also uses the intellectual property outside the scope of the joint venture and where the contributing party does not have sufficient control over the management and direction of the joint venture. The contributing party also maintains control over the prosecution and maintenance of the intellectual property registration and is often the only party that can enforce the intellectual property rights against third party infringers.

Assignment. With an assignment, by contrast, the joint venture controls the asset. This can help ensure that the joint venture is not at the mercy of the contributing party for its intellectual property rights (and the proper maintenance of those rights). If the joint venture will have marketing rights, ownership is helpful in that it encompasses the right to sue third party infringers without the need to join the contributing party as a plaintiff in the action (thus mitigating the contributing party's own potential exposure). This structure may be a natural choice where the joint venture is formed upon the divestiture by the contributing party of a subsidiary or stand-alone business unit, or where most of the creative talent associated with the intellectual property will be transitioned to the joint venture. In addition, by owning outright its key assets, the joint venture may be a more viable entity where, for example, the exit strategy is an IPO or other scenario where the parties may ultimately become passive participants over time.

Bear in mind, however, that these are rarely mutually exclusive choices and there will likely be a need for both assignments and licenses as part of the final deal documents. If a contribution is made by license, for example, the contributor may want an assignment of any improvements made by the joint venture or other party. If a contribution is made by an assignment, then one or both of the participants may want a license-back if for no other reason than to ensure their continued freedom to operate.

Other assets

Similar issues arise with respect to contributions of any real property which the joint venture will occupy to conduct its operations. If one party is to contribute real property, will that contribution be made by way of a sale, lease or license, and will any parent or other guarantee be required in connection with the payment of any related purchase price or lease/license payments or satisfaction of other contractual obligations?

Likewise, even where it is clear which party will be providing human resources to an equity joint venture, that contribution can be in the form of a transfer of employees, secondment, or services agreement. Section 5.6 (Other Key Considerations – Employee Transfers and Benefits) discusses employee transfer issues in greater detail.

3. Non-Competition Provisions

In most joint ventures, it will be understood that the parties will engage in other business activities. In fact, the joint venture may represent a relatively small part of the overall activities of a given party. Competing with the joint venture is an entirely different matter, however, and it is not at all unusual for joint venture agreements to prohibit competition.

These prohibitions may take a variety of forms. In certain cases, it would be intended that the joint venture engage broadly in a given line of business, in which case the parties may be prohibited from engaging at all in that line of business. All opportunities within the scope of that business will be reserved to the joint venture. On the other hand, if the joint venture is intended to have a more limited objective, the parties may merely be prohibited from directly competing with those defined activities. The joint venture agreement may also provide that no party may solicit business, or even do business, with a customer or client of the joint venture or seek to employ anyone that has been employed by the joint venture, all subject to appropriate time periods. There may also be restrictions on the parties' ability to use or disclose any confidential information regarding the venture.

In the United States, the enforceability of non-competition agreements, generally, depends to a large extent on the reasonableness of the restrictions. Although non-competition standards vary from jurisdiction to jurisdiction, it is generally considered reasonable to restrict direct competition at least within the geographic

area and range of business activities in which the joint venture actually engages. If the joint venture involves an acquisition, a non-competition undertaking may be enforced even more broadly since the undertaking will be seen as a means of insuring that the joint venture will receive the full benefit of the acquired business. Again, however, these laws vary from jurisdiction to jurisdiction, and it is important to involve local counsel in assessing the enforceability and impact of non-compete provisions which the parties seek to impose.

4. Competition/Antitrust Law

Regardless of whether the parties intend to directly impose non-competition provisions, they will be required to assess and comply with relevant competition or antitrust laws with respect to the formation of the joint venture.

Regulatory Filings

Most equity joint ventures will be required to file a notice with appropriate government agencies if the parties are substantial and the size of the venture exceeds a certain amount. For example, in the US if the joint venture involves an acquisition of assets or voting securities, the formation of a for-profit joint venture may require a filing with the US antitrust agencies. Since a filing is likely to be required prior to closing and implementation of the venture, it is important to determine all regulatory requirements prior to closing and to consider whether the joint venture is likely to raise any competitive concerns.

The following questions should be asked in this regard with respect to filing requirements with antitrust or competition authorities:

- Which competition law(s) will apply to the joint venture (*e.g.*, national, regional, local)?
- Are there any filing requirements for the joint venture and, if so, in which countries or jurisdictions?
- Are the relevant thresholds met?
- If the relevant thresholds are met, are there any available exemptions?
- If there are no available exemptions, are the parties required to make a filing or give notification before or after the closing or implementation

of the joint venture? What is the relevant waiting period or likely time frame before the parties can expect to receive approval from the authorities?

- What are the specific documentary requirements for the relevant filings or notifications?
- What are the relevant standards of review by the relevant authorities?
- Are any industry-specific approvals required? Are any sensitive industries involved such that governmental approval or notification (*e.g.*, Exxon-Florio in the United States) is advisable?

Impact on Competition

Even if no regulatory filing is required, a joint venture between competitors or potential competitors can trigger antitrust or competition law concerns. In that event, it is important to consider the structure of the venture, its purpose, the market in which it competes, and any competitive restrictions that it imposes on the parties. The fundamental question in any joint venture or collaboration between competitors is whether the parties intend a genuine joint venture (*i.e.*, their operations are integrated and financial risks are shared) in which case the venture is likely to be viewed as procompetitive, or only a sham arrangement whose principal purpose is price fixing, territorial or customer allocation, control of production, or other anticompetitive purpose.

Although joint ventures vary significantly, most involve one or more business activities (*e.g.*, production, marketing, sales, research and development, or group buying). Of these, the most likely to cause competitive harm and therefore to be challenged on antitrust or competition grounds is a marketing and sales joint venture, particularly if there is little integration or economic risk-sharing to justify any restraints on price or territories. On the other hand, joint ventures involving production, research and development or purchasing are typically more procompetitive in that their purpose is usually to lower prices, improve quality, enhance service or create a new product. Generally, these ventures do not present an antitrust or competitive risk so long as neither the venture nor the parties to the venture have a large market share or a dominant market position in the market in which the venture competes.

In addition, any competitive restrictions must be limited to the joint venture and not extend beyond the joint venture. Thus, parties to a production joint venture may jointly set the price for the products produced by the venture but not the price of products outside the venture. Similarly, parties to a co-development agreement may restrict research on the products that are the subject of the agreement but not with respect to other unrelated products.

Accordingly, the following questions should be answered at least with respect to a US joint venture regardless of whether there is a regulatory filing:

- What is the business purpose of the joint venture?
- Is the joint venture between competitors or potential competitors? If so, what are the respective market shares of the parties, and what is the projected market share of the venture?
- Will the parties to the venture be allowed to compete with the venture? If not, what is the extent of the covenant not-to-compete?
- What is the term of the venture? Can either of the parties terminate the venture?
- What is each party contributing to the venture?
- Are the parties going to share the profits and losses of the venture? If so, on what basis?
- What are the likely consumer benefits resulting from the venture? Is the venture likely to reduce prices, improve quality, enhance service or create any new products or services? If so, how is this likely to be accomplished?
- To what extent will the venture be able to set prices, divide territories or customers or otherwise restrict the parties to the venture from competing?
- Have the parties agreed to any restrictions beyond the scope of the venture? If so, what are these restrictions?

- Have either of the parties or the venture itself been the subject of any prior investigation, review or enforcement action by an antitrust or competition authority or a defendant in antitrust litigation by a private party?

5. Foreign Ownership Restrictions

It is important for a multinational corporation, as the non-local joint venture party, to understand the restrictions under relevant local law and practice on its ability to own, manage and otherwise participate in the joint venture business. The following threshold questions should be asked in this regard:

- Are there any foreign investment law approvals or licenses required for the non-local party's participation in the joint venture vehicle? If so, how long does the approval procedure take and what are the application requirements? (In this regard, note that even a minority foreign investment may require foreign investment law approval.)
- Are there any central bank or exchange control requirements for the non-local party's participation in the joint venture vehicle? For its expatriation of profits? For any payments by the joint venture vehicle to the non-local party for products, services or management fees?
- Will the local party contribute real property to the joint venture? Are there any restrictions on ownership by the joint venture vehicle of real property, taking into consideration the non-local party's participation in the joint venture vehicle? Is the real property owned by the government?
- Will the non-local party be contributing intellectual property or know-how to the joint venture? Are there any restrictions on its ability to do so? For example, are there any tax implications or exchange control restrictions on royalty payments from the joint venture vehicle to the non-local party for use of the know-how?
- Will it be possible to enforce and protect the non-local party's intellectual property rights in the local jurisdiction?

6. Employee Transfers and Benefits

When two companies engage in a joint venture, there are a number of significant employee, management, and employee benefit issues that result. The majority of employee transfer issues will flow from the structure of the transaction, namely, how the joint venture is established and from which joint venture party the employees will come. These issues should be addressed early in negotiation stage because they can greatly impact the timing of the formation of the joint venture. The following are the types of questions that should be asked in this regard:

Employee Transfer Issues

- Who are the employees who will be employed by (that is, directed and controlled by) the joint venture?
- How will the employees transfer to the joint venture? Corporate spin-off? Offer/Acceptance? Automatic transfer of employment? Right of employees to oppose automatic transfer?
- Are any approvals or consultations required to transfer employees to the joint venture? If so, which party is obligated to secure them?
- Are employee notices required prior to transfer? If so, which party is obligated to provide them? Are there any minimum statutory periods for employee notices/employee oppositions?
- Is employee consent required to transfer the employees to the joint venture?
- What terms and conditions of employment will apply to the joint venture employees?
- Are employment contracts required for some or all joint venture employees?
- Does seniority transfer?
- Are joint venture employees entitled to severance/termination indemnities or change in control payments when transferring to the joint venture? If so, who is liable for payment?

- What happens to employees who do not transfer to the joint venture? If they are terminated, are they entitled to severance? If so, who is liable?
- Will joint venture employees be subject to restrictive covenants (*e.g.*, non-competition, non-disclosure)? Note that existing agreements may not protect the rights and interests of the co-venturer, so new agreements may be required. What is enforceable in the local jurisdiction?
- Will any expatriates transfer to the joint venture? If so, who will be their employer? Will they be tax-equalized or tax-protected? What employee benefits will they receive? How can the non-local party best minimize the expatriate's and its own tax liabilities?
- Will the managers be employees of the joint venture vehicle, or will they be retained as consultants? What are the tax and employment law implications of each type of relationship?
- What are the employment, immigration and tax law implications of using seconded employees?

Employee Benefits Issues

- What employee benefits will cover the joint venture employees?
 - Retirement plans?
 - Incentive plans?
 - Equity compensation plans?
 - Health and other welfare benefit plans?
 - Pension plans?
- Will the joint venture establish its own plans or will employees remain in existing plans?
- If the joint venture establishes its own plans, will there be a transfer of assets/liabilities to the joint venture plans?
- Will the joint venture retirement plans be fully funded? If so, at what funding level?

- Will the joint venture employees have the same/similar/substantially similar employee benefits as they enjoyed prior to transfer to the joint venture?
- Will the joint venture replicate the employee benefit plans the joint venture employees participated in prior to transfer?
- Will the joint venture plans be in place at the commencement of the joint venture?
- Will current employee benefit plans need to cover the joint venture employees during a transition period?
- If the joint venture employees participated in equity compensation plans prior to transfer, will the joint venture create a new equity compensation plan for those employees? If so, will equity of the joint venture or one of the joint venture parties be used?
- Will the joint venture need transitional services (*e.g.*, payroll, HR administration, benefits administration, and so forth)? If so, for how long and at what cost to the joint venture?
- Will the joint venture employees receive service credit under the joint venture plans for their service prior to transfer to the joint venture?
- What steps are required to establish plans for the joint venture employees? How long will these steps take?

Local Legal Regulations

- What local rules apply to the transfer of employees to the joint venture (*e.g.*, in the United Kingdom, the Transfer of Undertakings (Protection of Employment) Regulations 1981 or “TUPE”)? Will any other termination, transfer or relocation laws (*e.g.*, in the United States, the Worker Adjustment and Retraining Notification Act or “WARN Act”) have an effect on the joint venture?
- What local rules apply to the employment relationship (*e.g.*, statutory severance, wrongful dismissal)?
- Are there any collective labor agreements that cover the joint venture employees?

- Will the joint venture have one or more works councils?
- What non-discrimination, workplace safety, privacy, and other similar rules apply to protect the joint venture employees?
- Are restrictive covenants (*e.g.*, non-competition, non-disclosure) enforceable against employees or former employees?
- What is the role, strength and influence of the unions, if any?

SECTION 6

DOCUMENTATION

As the potential joint venture participants assess the business and legal issues that are likely to have a significant impact on the joint venture and decide whether and under what terms to proceed with the venture, it will be necessary to memorialize their understandings and responsibilities at various stages of the process and to ultimately execute binding agreements governing the formation, operation and management of the joint venture.

This section includes model documents, checklists and accompanying discussion of material issues designed to assist in successfully negotiating and drafting the joint venture documents.

At the highest level, the following are the documents which one would expect to be entered into and the general issues which they typically address:

1. Confidentiality Agreement

At the outset of discussions, it will be in the parties' interests to ensure that their discussions (and any due diligence information that they may disclose to each other) are kept completely confidential. **Exhibit 6(a)** contains a sample mutual confidentiality agreement. Note that in relation to the standard provision which entitles a party to make a disclosure when securities laws require it to do so, it may be worth checking what securities laws apply to any local joint venture party and establishing the circumstances when a disclosure is required under those laws.

2. Term Sheet

A term sheet generally contains a statement of the proposed key terms of the transaction and it is intended to serve as the basis for negotiating the joint venture agreement. **Exhibit 6(b)** contains a sample term sheet accompanied by two supplements containing detailed commentary. A letter of intent is sometimes used in place of or in addition to a term sheet, but either document can be drafted to contain the appropriate provisions. Care should be taken in relation to any statements of obligation to negotiate in good faith, and in particular to the governing law which may apply to the term sheet or letter of intent, since in some jurisdictions

an “agreement to agree” may be enforceable and a duty to negotiate in good faith could be triggered not only upon entering into a term sheet or letter of intent, but also with respect to the negotiation of the term sheet or letter of intent itself.

3. Joint Venture Agreement

The joint venture agreement is the core document to be executed between the parties which will govern the formation of the joint venture vehicle and any applicable conditions precedent, the running of the joint venture vehicle, its funding and distribution policies, transferability of shares, termination and exit. This document will vary considerably depending on the objectives of the parties and, accordingly, is not included in this handbook. However, **Exhibit 6(c)** contains a general issues checklist to consider when establishing a joint venture, including items that are typically addressed in the joint venture agreement.

4. Company Formation Documents

These will vary considerably depending on where the joint venture vehicle is to be formed and, for that reason, are not included in this handbook. Consideration should be given to the relationship between the rules established in any charter documents, and the obligations set out in the joint venture agreement.

5. Ancillary Agreements

The parties will often need to enter into various ancillary documents to enable the joint venture to conduct its business. Again these documents will vary depending on the precise nature of the deal and templates are not included in this handbook. Typically, they will include the following:

- **IP assignments/licenses.** It would be unusual for the parties not to contribute a certain amount of intellectual property to the joint venture vehicle to enable it to exploit the parties’ combined resources. These documents will need to address what, if anything, will happen to the intellectual property assigned or licenses granted in the event of termination of the joint venture.

- **Secondment agreements.** Often, these will be standard templates to cover any employees of either party who are agreed to be seconded to the joint venture vehicle. These agreements should also address such matters as the ownership of any intellectual property developed during the course of the secondment.
- **Services and supply agreements.** These will cover the sourcing of any required services and products required by the joint venture from either party.

Exhibit 6(a)

Sample Mutual Confidentiality Agreement

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the “*Agreement*”) is dated [date] and is by and between [company name], a [jurisdiction] [form of entity], and [company name], a [jurisdiction] [form of entity]. In this Agreement, the party disclosing its Confidential Information (as defined below), is referred to as the “*Disclosing Party*,” and the party receiving Confidential Information is referred to as the “*Investigating Party*.”

Preliminary Statement

Each party desires to share certain of its Confidential Information with the other party in connection with a possible transaction (the “*Transaction*”).

Agreement

The parties, intending to be legally bound, agree as follows:

1. Confidential Information

- (a) “*Confidential Information*” means all non-public information of the Disclosing Party disclosed or made available to the Investigating Party or any of the directors, officers, employees, agents, consultants, advisors, legal counsel or accountants (collectively, “*Representatives*”) of the Investigating Party, regardless of the form or manner of disclosure, including:
 - (i) all information relating to the Disclosing Party’s trade secrets (including all information that applicable law defines as “trade secrets”);
 - (ii) all information concerning products, product specifications, data, formulae, compositions, designs, sketches, photographs, graphs, drawings, samples, inventions, discoveries, ideas, know-how, past, current, and planned research and development, current and planned methods and processes, client or customer lists and files, current and anticipated

client or customer requirements, venter and supplier lists and files, price lists,¹ market studies, business plans and business opportunities;

- (iii) all information concerning [**computer hardware,**] software that was developed or modified by or for the Disclosing Party (including object and source codes), databases, data modules or structures, algorithms, [**mask works, circuit layouts**] and computer system architectures;²
- (iv) all information concerning the Disclosing Party’s business and affairs, assets, liabilities, historical and current financial statements, financial projections and budgets, forecasts, historical, current and projected sales, capital spending, budgets, strategic plans, marketing and advertising plans, publications, agreements, the names and backgrounds of key personnel, personnel training techniques and materials and the names, contact information and any other information relating to an identified or identifiable natural person;
- (v) all third-party confidential information in the possession of the Disclosing Party;
- (vi) all information relating to the ability to finance the Transaction; and
- (vii) all notes, analyses, compilations, studies, summaries, interpretations and other material prepared by the Investigating Party or its Representatives to the extent they contain, are based on or refer to, in whole or in part, any information described in (i) through (vi) above (collectively, “*Notes*”).

1 If the parties are competitors, applicable antitrust/competition laws should be considered before they disclose pricing or other confidential market information to each other.

2 Include “computer hardware” only if the Disclosing Party views information about it as sensitive, *e.g.*, if the Disclosing Party manufactures computer hardware. Include “mask works” and “circuit layouts” if the Disclosing Party produces microchips.

- (b) The term “*Confidential Information*” does not include any portions of such information:
 - (i) that become generally available to the public, other than as a result of disclosure by the Investigating Party or any of its Representatives; or
 - (ii) that becomes available to the Investigating Party on a non-confidential basis from a source (other than the Disclosing Party or its Representatives) which, to the Investigating Party’s knowledge after due inquiry, is not prohibited from disclosing such information to the Investigating Party by a legal, contractual or fiduciary obligation to the Disclosing Party.³
- (c) Any trade secrets of the Disclosing Party will also be entitled to all of the protections and benefits under applicable trade secrets law and any other applicable law. If any information that the Disclosing Party deems to be a trade secret is found by a court of competent jurisdiction not to be a trade secret for purposes of this Agreement, the information nonetheless will be considered Confidential Information for purposes of this Agreement unless it falls within the exception described in Section 1(b).

³ The following alternative to 1(b)(ii) requires the Investigating Party to inform the Disclosing Party of otherwise “Confidential Information” that is or becomes available to it. It may be appropriate to seek this type of an undertaking from the Investigating Party where, for example, the Disclosing Party and Investigating Party are close competitors and have serious questions or concerns about what information each may claim to already be available:

that were, are or become available to the Investigating Party on a non-confidential basis prior to being made available by the Disclosing Party, but only if (A) the source of such information is not bound by a duty of confidentiality, and (B) the Investigating Party provides the Disclosing Party with written notice of such prior possession either (1) prior to the execution and delivery of this Agreement or (2) if the Investigating Party later becomes aware of (through disclosure to the Investigating Party or otherwise through the Investigating Party’s work on the Transaction) any aspect of the Confidential Information of which the Investigating Party had prior possession, promptly upon the Investigating Party becoming aware of such aspect.

2. Restricted Use and Nondisclosure

- (a) The Investigating Party agrees that the Investigating Party and its Representatives (i) will keep the Confidential Information confidential and (ii) without limiting the foregoing, will not disclose the Confidential Information to any person (including current or prospective financing sources) except with the specific prior written consent of the **[insert names or titles]** of the Disclosing Party (collectively, the “*Disclosing Party Contacts*” and individually, the “*Disclosing Party Contact*”) or except as expressly otherwise permitted by the terms of this Agreement or a Definitive Agreement (as defined in Section 8). It is understood that the Investigating Party may disclose Confidential Information only to those of the Investigating Party’s Representatives who require such material for the purpose of evaluating the Transaction, and who are informed by the Investigating Party of the confidential nature of the Confidential Information and the obligations of this Agreement. The Investigating Party and its Representatives will not use any of the Confidential Information for any reason or purpose other than to evaluate and negotiate the Transaction.

- (b) The Investigating Party will enforce the terms of this Agreement as to its Representatives and will take all steps (including all action the Investigating Party would take to protect its own trade secrets and confidential information) necessary to cause them to comply with this Agreement and thereby prevent their disclosure of the Confidential Information, except as permitted by this Agreement. If an unauthorized use or disclosure occurs, the Investigating Party will immediately notify the Disclosing Party and take, at the Investigating Party’s expense, all steps (including available actions for seizure and injunctive relief) necessary to recover the Confidential Information and prevent its subsequent unauthorized use or dissemination. If the Investigating Party fails to take these steps in a timely and adequate manner, the Disclosing Party may take them in its own or in the Investigating Party’s name and at the Investigating Party’s expense.

3. Nondisclosure of Transaction

Except as expressly permitted by a Definitive Agreement, neither the Investigating Party nor its Representatives will, without prior written consent of the Disclosing Party Contact, disclose to any person the terms or existence of this Agreement, the fact that the Confidential Information has been made available to the Investigating Party or the Investigating Party's Representatives, the fact that discussions or negotiations are taking place concerning a Transaction, or any of the terms, conditions, or other facts with respect thereto; provided, however, that the Investigating Party and its Representatives may disclose such information to those of the Investigating Party's Representatives who require such information for purposes of assisting with the Transaction.

4. Legal Compulsion to Disclose Confidential Information

If the Investigating Party or any of its Representatives become legally compelled (including pursuant to any rule or regulation promulgated by any securities regulation authority or any securities exchange) to make any disclosure that is prohibited or otherwise constrained by this Agreement, then the Investigating Party or such Representative, as the case may be, will give the Disclosing Party immediate written notice of such requirement so that it may seek a protective order or other appropriate relief, or waive compliance with the nondisclosure provisions of this Agreement. Subject to the foregoing, the Investigating Party or such Representative may make only such disclosure that, in the written opinion of counsel reasonably acceptable to the Disclosing Party, it is legally compelled or otherwise required to make to avoid standing liable for contempt or suffering other material censure or penalty; *provided, however*, that the Investigating Party and its Representatives must use reasonable efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so disclosed.

5. Disclosing Party Contact

The Disclosing Party will determine, in its sole discretion, what information, properties and personnel it wishes to make available to the Investigating Party. All requests by the Investigating Party or its Representatives for Confidential Information, meetings with

Disclosing Party personnel or Representatives, inspections of Disclosing Party properties, and discussions or questions regarding procedures will be made exclusively to a Disclosing Party Contact. The Investigating Party and its Representatives will not initiate any communications with any director, officer or employee of the Disclosing Party (other than a Disclosing Party Contact) without the prior written consent of a Disclosing Party Contact.

6. Return of Confidential Information

If either party notifies the other party that it does not wish to proceed with the Transaction, then the Investigating Party will, within five business days of such notification, (a) deliver to the Disclosing Party Contact all documents and other materials constituting Confidential Information, other than Notes, in the possession or under the control of the Investigating Party or the Investigating Party’s Representatives, and (b) destroy all Notes, without retaining a copy of any such material. Alternatively, if the Disclosing Party Contact so requests or gives his or her prior written consent to the Investigating Party’s request, the Investigating Party will destroy all documents and other materials constituting Confidential Information in the possession or under the control of the Investigating Party or the Investigating Party’s Representatives, including all copies that are stored in an electronic or other medium and are retrievable in perceivable form. An appropriate⁴ officer of the Investigating Party must certify any such destruction to the Disclosing Party in writing, and a list of the destroyed documents and materials must accompany the certification.

7. Attorney Work Product and Attorney-Client Privilege

The Investigating Party acknowledges that the Disclosing Party may be entitled to the protections of the attorney work-product doctrine, attorney-client privilege or similar protections or privileges with

⁴ Many drafters find it cumbersome at such an early stage in the transaction to name a specific officer in charge of certifying the destruction of documents. The Disclosing Party should not be comfortable accepting the certification of “any officer,” however. The word “appropriate” is intended to signal that the officer must be one who had first-hand knowledge of or supervisory responsibility for the destruction.

respect to certain of the Confidential Information. The Disclosing Party is not waiving, and will not be deemed to have waived or diminished, any of its attorney work-product protections, attorney-client privileges or similar protections or privileges as a result of the disclosure of such Confidential Information to the Investigating Party in connection with the Transaction. The parties (a) share a common legal and commercial interest in such Confidential Information, (b) are or may become joint defendants in proceedings to which such Confidential Information relates, and (c) intend that such protections and privileges remain intact should either party become subject to any actual or threatened proceeding to which such Confidential Information relates.

In furtherance of the foregoing, the Investigating Party will not claim or contend, in proceedings involving either party, that the Disclosing Party waived the protections of the attorney work-product doctrine, attorney-client privilege or similar protections or privileges as a result of the disclosure of Confidential Information to the Investigating Party in connection with the Transaction.⁵

8. No Obligation to Negotiate Definitive Agreement

The Disclosing Party reserves the right, in its sole discretion, to reject any and all proposals made by the Investigating Party or the Investigating Party's Representatives with regard to a Transaction and to terminate discussions and negotiations with the Investigating Party and the Investigating Party's Representatives at any time. No contract providing for a Transaction will be deemed to exist unless and until a definitive agreement, if any, with respect to a Transaction (a "*Definitive*

5 Jurisdictions vary in their application of the attorney work-product doctrine and the attorney-client privilege, and some apply them quite narrowly, if at all. A court may ignore this provision, particularly if a third party is claiming waiver of the attorney-client privilege or if the transaction never closes. Therefore, even with a provision like this in the Confidentiality Agreement, counsel for the Disclosing Party should monitor the disclosure of any information that may be protected.

When the Investigating Party is contemplating acquiring the target business, it will want the work-product protection and attorney-client privilege preserved if it ultimately purchases the target business. If, however, the Investigating Party is or may become adverse to the Disclosing Party in litigation involving information to be disclosed, counsel to the Investigating Party may seek to eliminate this provision.

Agreement”) has been executed and delivered, and the parties waive any claims (including breach of contract claims, but excluding all claims directly or indirectly based on this Agreement) in connection with a Transaction unless and until they enter into a Definitive Agreement. Neither party nor their respective Representatives or stockholders will have any legal obligation of any kind with respect to a Transaction by virtue of this Agreement, except to the extent explicitly set forth herein.

9. No Representations or Warranties

Neither the Disclosing Party nor its Representatives make any representation or warranty (express or implied) concerning the completeness or accuracy of the Confidential Information, except pursuant to representations and warranties that may be made to the Investigating Party in a Definitive Agreement if, when, and as executed and subject to such limitations and restrictions as may be specified therein. The Investigating Party also agrees that if the Investigating Party determines to engage in a Transaction, the Investigating Party’s determination will be based solely on the terms of such Definitive Agreement and on the Investigating Party’s own investigation, analysis, and assessment of the business to be acquired.

10. [Compliance with Securities Laws⁶

The Investigating Party is aware, and its Representatives who are apprised of the Transaction will be advised, that the securities laws of the United States prohibit any person who has material, non-public information concerning the Disclosing Party from purchasing or selling securities in reliance upon such information or from communicating such information to any other person or entity under circumstances in which it is reasonably foreseeable that such person or entity is likely to purchase or sell such securities in reliance upon such information.]

⁶ Include if Disclosing Party is a public company or an affiliate of a public company.

11. Data Protection and Privacy Restrictions⁷

The Investigating Party will inform itself about and observe all applicable data protection and/or privacy requirements in **[insert names of the jurisdictions in which the Confidential Information is located]** and any other relevant jurisdictions. The Investigating Party will also implement and maintain all such technical and organizational security measures as may be reasonably available (having regard to technical developments at the time) and as are appropriate in the circumstances to protect Confidential Information against unauthorized or unlawful processing, accidental loss, distribution or damage. In addition, in the event that any Confidential Information is located in a jurisdiction that restricts the transfer of such information to other countries or locations, the Investigating Party will maintain such information within that jurisdiction only, and will not transfer it to any other country or location in a manner that violates such restrictions. The Investigating Party will indemnify and hold the Disclosing Party harmless for any damage or expense (including legal fees and costs) resulting from the Investigating Party's contravention or other violation of any applicable data protection and/or privacy laws.⁸

12. Remedies

The Investigating Party acknowledges that the Disclosing Party would be damaged irreparably if any of the provisions of this Agreement are not performed in accordance with the specific terms, that the

⁷ Include this provision if either party or Confidential Information is located in a jurisdiction that has or may have applicable data protection or privacy laws (such as the European Union, the United States, Switzerland, Hungary, Canada, Argentina and Australia). Also, before disclosing any personally identifiable information to the Investigating Party, the Disclosing Party should ensure that such disclosure does not violate any privacy policy or representation that it has made to the affected individuals, and should also ensure that such disclosure does not violate any applicable data protection or privacy law.

⁸ In many jurisdictions, depending on the particular circumstances, the Disclosing Party could be held primarily liable for any violations of data protection laws that are caused by the Investigating Party. The indemnification clause is intended to help address this issue, but the Disclosing Party should closely review how the Investigating Party intends to use and disclose personally identifiable information, in particular in circumstances where cross-border transfers might be involved.

Disclosing Party would encounter extreme difficulty in attempting to prove the actual amount of damages suffered by it as a result of the Investigating Party’s breach and that any breach of this Agreement by the Investigating Party would not be adequately compensated by monetary damages alone. Accordingly, the Investigating Party agrees that, in addition to any other right or remedy to which the Disclosing Party may be entitled at law or in equity, the Disclosing Party will be entitled to enforce any provision of this Agreement by a decree of specific performance and to temporary, preliminary and permanent injunctive relief to prevent any breach or threatened breach of this Agreement, without posting any bond or other security and without the necessity of proving the amount of any actual damage to the Disclosing Party resulting therefrom.⁹ In addition, the Investigating Party will indemnify and hold the Disclosing Party and its stockholders harmless from any damages, loss, cost or liability (including reasonable legal fees and the cost of enforcing this indemnity) arising out of or resulting from the Investigating Party’s breach of the terms of this Agreement or any other unauthorized use or disclosure by the Investigating Party or its Representatives of the Confidential Information. The Disclosing Party’s stockholders have the right to enforce all indemnity obligations of the

9 The following subsection could be added where disclosure may be made to employees or agents of the Investigating Party located in civil law jurisdictions where there is no effective injunctive relief. Formulation of the penalty would be dictated by the laws of the Investigating Party’s jurisdiction:

“(b) In the event that the Disclosing Party is unable to obtain effective injunctive relief or other equitable remedy against the Investigating Party in a court of competent jurisdiction, then the Investigating Party agrees to pay the Disclosing Party a penalty in the amount of **[maximum penalty allowable in jurisdiction in which agreement would be enforced]**.”

If this subsection is added, then the bold-face language that follows should be added to the governing law provision:

“This Agreement will be governed by and construed under the laws of **[jurisdiction]** without regard to conflicts of law principles that would require application of any other law, **provided, however, that if the Disclosing Party pursues a remedy pursuant to Section 12(b), then Section 12(b) alone will be governed by and construed under the laws of the jurisdiction where the Disclosing Party brings the claim.**”

Investigating Party under this Agreement independently of the Disclosing Party. The rights and remedies of the parties to this Agreement are cumulative and not alternative.

13. Notice

All notices and other communications under this Agreement must be in writing and are deemed duly delivered when (a) delivered if delivered personally or by nationally recognized overnight courier service (costs prepaid), (b) sent by facsimile with confirmation of transmission by the transmitting equipment (or, the first business day following such transmission if the date of transmission is not a business day) or (c) received or rejected by the addressee, if sent by certified mail, return receipt requested; in each case to the following addresses or facsimile numbers and marked to the attention of the individual (by name or title) designated below (or to such other address, facsimile number or individual as a party may designate by notice to the other party):

[Company name]:

Attention: **[Disclosing Party Contact]**

Address: _____

Facsimile No.: _____

[Company name]:

Attention: **[Disclosing Party Contact]**

Address: _____

Facsimile No.: _____

14. Entire Agreement

This Agreement constitutes the entire agreement between the parties and supersedes any prior understandings, agreements or representations by or between the parties, written or oral, with respect to the subject matter of this Agreement. This Agreement may not be amended, supplemented or otherwise modified except by a written agreement executed by the party to be charged with the modification.

15. Severability

If any court of competent jurisdiction holds any provision of this Agreement invalid or unenforceable, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

16. Waiver

Neither any failure nor any delay by any party in exercising any right, power, or privilege under this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power or privilege.

17. Governing Law [;Jurisdiction; Service of Process]

(a) This Agreement will be governed by and construed under the laws of **[jurisdiction]** without regard to conflicts of law principles that would require application of any other law.

[(b) Any action or proceeding arising out of or relating to this Agreement may be brought in the courts of the State of [state], County of [county], or, if it has or can acquire jurisdiction, in the United States District Court for the [district] District of [state], and each of the parties irrevocably submits to the jurisdiction of each such court in any such action or proceeding and waives any objection it may now or hereafter have to venue or convenience of forum. Process in any action or proceeding referred to in the preceding sentence may be served on any party anywhere in the world.]

[Alternative to (b): Any action or proceeding arising out of or relating to this Agreement will be referred to and finally resolved by arbitration under [arbitration rules], which [arbitration rules] are deemed to be

incorporated by reference into this Section. The tribunal will consist of a sole arbitrator. The place of arbitration will be _____. The language of the arbitration will be English. Process in any such arbitration proceeding may be served on any party anywhere in the world [by notice given to the party in accordance with this Agreement].]¹⁰

18. Expenses

[Each party will bear its own expenses incurred in connection with pursuing or consummating the Transaction, including any broker’s or finder’s fees and all fees and expenses of its Representatives.]¹¹

19. Counterparts

This Agreement may be executed in one or more counterparts, including by means of faxed signature pages, any one of which need not contain the signature of more than one party, but all such counterparts taken together will constitute one and the same instrument.

10 An advantage of arbitration is that disputes over the confidential sale, evaluation and offer process do not become a matter of public record. Disadvantages include plaintiff’s difficulty in obtaining injunctive relief and the unavailability of extensive discovery. Arbitration is particularly ill suited to enforcement of a standstill provision in a public deal.

11 A provision concerning expenses may be advisable if the parties are not going to enter into a letter of intent. If a cost provision is included in the confidentiality agreement, make certain that any cost provisions in subsequent agreements are either consistent with it or explicitly supersede it.

The parties have executed and delivered this Agreement as of the date indicated in the first sentence.

[Company name]

By: _____

[Name]

[Title]

[Company name]

By: _____

[Name]

[Title]

Exhibit 6(b)

Sample Term Sheet

(50/50 Joint Venture – Initial Discussion Draft)

***Commentary:** This term sheet is intended for use as an initial discussion draft in negotiating a joint venture in which the non-local party initially will take a 50% equity interest and roughly share management responsibility with the local joint venture partner. Because this term sheet assumes that all major management decisions will need to be taken initially with the agreement of both parties, this term sheet does not focus on which decisions need to be taken by a supermajority versus a simple majority. If the non-local party is able to negotiate a clear path to an increased equity position, care should be taken in considering which decisions will require a supermajority and in establishing an appropriate supermajority threshold. If the non-local party seeks initially to possess a greater degree of control, the “Majority Position Considerations” in Supplement A to this term sheet (Commentary and Alternative Provisions) should be considered in negotiating the term sheet and subsequent joint venture agreement. If the non-local party initially will take a minority position in the joint venture, the “Minority Position Considerations” in Supplement A to this term sheet similarly should be considered in negotiating the term sheet and subsequent joint venture agreement. This term sheet assumes that the non-local party will not enter into a 50/50 joint venture without either (i) a clear path to control or (ii) a clear exit right. See Supplement B to this term sheet (Sample Exit Rights Provisions) for a discussion regarding exit rights.*

TERM SHEET

This Term Sheet summarizes the principal terms with respect to the potential formation of a joint venture (“**JV**”). In consideration of the time and expense devoted and to be devoted by the parties with respect to this transaction, the Expenses provision of this Term Sheet shall be binding on the parties whether or not the JV is consummated. No other legally binding obligations will be created until definitive agreements are executed and delivered by the parties. This Term Sheet is not a commitment to invest or to proceed with a transaction, and is conditioned on the completion of due diligence, legal review and documentation that is satisfactory to the parties. This Term Sheet shall be governed in all respects by the laws of [**jurisdiction**].

Parties:	_____ (“ <i>Non-local Party</i> ”) and _____ (“ <i>JV Partner</i> ”).												
Structure:	JV would be established as a [jurisdiction] [form of entity] .												
Purposes:	JV would be organized for the purpose of _____ (the “ <i>Joint Venture Purpose</i> ”), and all other activities that are necessary in furtherance of the Joint Venture Purpose. JV would not engage in any other activity.												
Term:	The term of JV would be indefinite, unless terminated earlier in accordance with the definitive written agreement providing for JV (the “ <i>Joint Venture Agreement</i> ”).												
Territory:	The geographic scope of JV’s business would be limited to [country/region] (the “ <i>Territory</i> ”).												
Business Plan:	The parties would draft and agree on, prior to the formation of JV, a written business plan (the “ <i>Business Plan</i> ”) for the first [three] years of operation of JV.												
Initial Capital Contributions and Ownership:	<p>Upon establishment of JV, the parties would make the following cash contributions and have the following membership interests in JV:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Member</th> <th style="text-align: left;">Cash Contribution</th> <th style="text-align: left;">Membership Interest</th> </tr> </thead> <tbody> <tr> <td>Non-local Party</td> <td>\$ _____</td> <td>____%</td> </tr> <tr> <td>JV Partner</td> <td>\$ _____</td> <td>____%</td> </tr> </tbody> </table>	Member	Cash Contribution	Membership Interest	Non-local Party	\$ _____	____%	JV Partner	\$ _____	____%			
Member	Cash Contribution	Membership Interest											
Non-local Party	\$ _____	____%											
JV Partner	\$ _____	____%											
Additional Contributions:	<p>The parties would be obligated to make the following additional capital contributions:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Member</th> <th style="text-align: left;">Amount</th> <th style="text-align: left;">Timing</th> </tr> </thead> <tbody> <tr> <td>Non-local Party</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>JV Partner</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>_____</td> <td>\$ _____</td> <td>_____</td> </tr> </tbody> </table>	Member	Amount	Timing	Non-local Party	\$ _____	_____	JV Partner	\$ _____	_____	_____	\$ _____	_____
Member	Amount	Timing											
Non-local Party	\$ _____	_____											
JV Partner	\$ _____	_____											
_____	\$ _____	_____											
Distributions:	Distributions would be made to the parties on the following basis: [_____]												

<p>Intellectual Property:</p>	<p>Any IP licensed or contributed to JV will be licensed or contributed pursuant to a separate IP licensing agreement that would include standard terms and protections for such IP. Any IP licensed to JV by the Non-local Party, including any goodwill appurtenant thereto, will remain the exclusive property of the Non-local Party or its licensors. The JV Partner and JV will not have or acquire any rights in or to such IP except as may be provided in the applicable license or contribution agreement. In the event that the JV Partner or JV have or acquire any rights in or to any of the Non-local Party’s IP, the JV Partner will assign and agree to assign and to cause JV to assign all such rights to the Non-local Party for no additional consideration. Upon dissolution of JV all licensed IP would be returned to the respective licensees and all IP owned by JV would be distributed as follows:</p> <p>[_____]</p>
<p>Management:</p>	<p>JV would be managed by a board of directors (the “Board”) consisting of [four] directors. The Non-local Party and the JV Partner would each appoint [two] directors to the Board (initially _____ and _____ designated by the Non-local Party, and _____ and _____ designated by the JV Partner). The Board would make all decisions with respect to JV, and the parties would not be entitled to vote on any matters in their capacities as equity holders. All decisions would require a majority vote of all directors, not just of those in attendance at a meeting. The Board would meet at least [monthly] [quarterly]. Each director would be entitled to one vote on all matters to be voted upon by the Board. Any director would be entitled to call a special meeting of the Board and 75% of the directors would constitute a quorum for the transaction of business.</p> <p>An affirmative vote of a majority of the Board would be required to:</p> <ul style="list-style-type: none"> • establish or modify the Joint Venture Purpose; • establish or modify the Business Plan; • amend JV’s charter documents; • appoint and enter into employment agreements with the officers; • consummate transactions or otherwise make expenditures outside the ordinary course of business; • acquire or divest a business or merge or consolidate with any other entity;

<p>Management: (<i>continuation</i>)</p>	<ul style="list-style-type: none"> • make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties; • approve transactions or other arrangements between or involving JV and any party or affiliate thereof; • raise capital from the parties; • make any distributions to the parties or repurchase any equity of the parties; • appoint or change public accountants; • admit new parties to JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to JV.
<p>Officers:</p>	<p>The day-to-day operations of JV would be run by a [chief executive officer] designated by _____. The Board also would appoint a [chief financial] officer designated by _____.</p>
<p>Deadlock Events:</p>	<p>If a majority of the Board is not able to agree on any material business or management issue arising out of the venture during a _____ month period, a deadlock would be deemed to exist (a “<i>Deadlock</i>”). Upon the occurrence of a Deadlock, the parties would be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution either party would have the right to:</p> <ul style="list-style-type: none"> • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set forth below; • [other specified action]
<p>Buy-Sell Option:</p>	<p>Under a Deadlock [and [other specified events]], each party would have the right to exercise a buy-sell option (the “<i>Buy-Sell Option</i>”), whereby the exercising party would be required to designate a price at which it would be willing to sell its interest or to purchase the other party’s interest in JV, and the non-exercising party would have the option to buy or sell such interest at that price.</p>

<p>Commercial Agreements:</p>	<p>JV would enter into the following commercial agreements with [Non-local Party and/or JV Partner], providing reimbursement for agreed upon services and goods provided to JV on the following basis:</p> <ul style="list-style-type: none"> • [trademark license agreement] • [patent license agreement] • [sourcing agreement] • [services agreement]
<p>Compliance:</p>	<p>The Joint Venture Agreement would include provisions requiring JV to comply with all Non-local Party compliance requirements, including the Sarbanes-Oxley Act of 2002, the Foreign Corrupt Practices Act of 1977 [and the Non-local Party code of conduct].</p>
<p>Exit Rights:</p>	<p>The Joint Venture Agreement would provide the parties with appropriate rights of exit from JV.</p> <p><i>See Supplement B to this term sheet for sample exit rights provisions and related discussion.</i></p>
<p>Restrictions on Competition:</p>	<p>Each party and its affiliates would be prohibited from directly or indirectly competing with JV in the Territory during the term of JV [and for ____ years thereafter].</p>
<p>Representations and Warranties:</p>	<p>The Joint Venture Agreement would contain representations and warranties that are customary for a joint venture transaction.</p>
<p>Conditions to Closing:</p>	<p>The Joint Venture Agreement would contain customary closing conditions including the approval of the Non-local Party’s board of directors for the transaction and the completion of satisfactory due diligence.</p>
<p>Anticipated Documentation:</p>	<p>The Non-local Party would be responsible for preparing first drafts of the following documents:</p> <ul style="list-style-type: none"> • JV’s charter/formation documents • Joint Venture Agreement • Organizational resolutions of the Board of JV • Contribution agreements (with representations and warranties appropriate for the contemplated contributions) • Business Plan • [Commercial agreements] • [Loan agreement] • [Other agreements]

Governing Law:	The Joint Venture Agreement and other related agreements would be governed by _____ law.												
Dispute Resolution:	The Joint Venture Agreement would provide the parties with appropriate means to resolve disputes.												
Expenses:	Each party will bear its own expenses incurred in connection with pursuing or consummating the JV, including any broker's or finder's fees and all fees and expenses of its directors, officers, employees, agents, consultants, advisors, legal counsel or accountants.												
Schedule:	<p>The expected time schedule is as follows:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; width: 70%;">Event</th> <th style="text-align: right;">Date</th> </tr> </thead> <tbody> <tr> <td>First draft of definitive agreements</td> <td style="text-align: right;">_____</td> </tr> <tr> <td>Approval by boards of directors</td> <td style="text-align: right;">_____</td> </tr> <tr> <td>Regulatory filings</td> <td style="text-align: right;">_____</td> </tr> <tr> <td>Signing definitive agreements</td> <td style="text-align: right;">_____</td> </tr> <tr> <td>Closing date</td> <td style="text-align: right;">_____</td> </tr> </tbody> </table>	Event	Date	First draft of definitive agreements	_____	Approval by boards of directors	_____	Regulatory filings	_____	Signing definitive agreements	_____	Closing date	_____
Event	Date												
First draft of definitive agreements	_____												
Approval by boards of directors	_____												
Regulatory filings	_____												
Signing definitive agreements	_____												
Closing date	_____												

The parties have executed and delivered this Term Sheet as of **[date]**.

[Non-local Party]

By: _____

[Name]

[Title]

[JV Partner]

By: _____

[Name]

[Title]

**Supplement A to Term Sheet
 Commentary and Alternative Provisions**

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
General	<p>Commentary: 50/50 structure provides both parties with maximum incentive to make relationship work, but provides little clarity as to who will control.</p>	<p>Commentary: Majority position provides the Non-local Party with positive control allowing it to implement its business strategies with low risk of giving control over its technology and other assets to the JV Partner. The JV Partner, however, has a low incentive to contribute.</p>	<p>Commentary: Minority position may allow the Non-local Party to keep its financial investment in JV relatively low and to partner with a successful JV Partner that wishes to maintain control. The Non-local Party, however, would have few rights to implement its own business strategies and may risk losing control over its technology or other contributed assets to the JV Partner.</p>
Parties	<p>Commentary: The identity of the entities that ultimately will hold JV's equity interests will depend on a tax structure that the parties view as the most efficient. If the Non-local Party or the JV Partner does not hold directly the equity interests in JV, the Non-local Party and/or the JV Partner generally will need to enter into either (i) the Joint Venture Agreement (in addition to its designated affiliate holding the equity interest) or (ii) a separate guarantee.</p>	<p>Commentary: The Non-local Party, as the majority party, is likely to consolidate JV, but the choice of how it ultimately holds its interest, and what type of entity to use, has implications not only with respect to taxes, but also with respect to exposure to liabilities, ability to extract profits, and how to provide for the joint venture's on-going capital requirements, among other aspects.</p>	<p>Commentary: While it may not consolidate JV for tax and financial purposes, the Non-local Party should still carefully consider how it should ultimately hold its interest in JV, and what type of entity to use for that purpose. This has implications not only with respect to taxes, but also with respect to exposure to liabilities, ability to extract profits, and how to provide for the joint venture's on-going capital requirements, among other aspects, whether the Non-local party holds a majority or minority interest.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Structure	<p>Commentary: JV should be established, if possible, as an entity and in a jurisdiction in which (i) there is a well-tested corporate law regime, (ii) specific-performance is available as a remedy (this is particularly important with respect to enforcing provisions in the Joint Venture Agreement on equity transfers), and (iii) the parties are able to limit the potential liabilities of the representatives who sit on the JV Board. Because these criteria will not be met in many developing countries, the Non-local Party should push from the outset for a holding company structure in a well-established legal jurisdiction, the Joint Venture Agreement should be governed by the laws of the jurisdiction in which the holding company is established, and the actual operations in the local company should be run through an operating company that is wholly-owned by the holding company. If a holding company structure is not possible, the Non-local Party should consider use of an escrow for the parties' shares in JV and an irrevocable proxy to guarantee the Non-local Party's rights with respect to equity transfers. See the related handbook Section 3 (Structure) for further discussion.</p>	<p>Commentary: With a larger investment and/or share of the profits and losses, the Non-local Party's tax exposure is likely to be more significant in amount. However, consideration should be given to any structural issues that could adversely affect the JV Partner as the JV Partner may require some form of compensation to accept potentially adverse tax consequences.</p>	<p>Commentary: The Non-local Party as the minority party should still pursue a tax-efficient structure and should seek compensation for a tax structure that adversely affects it, whether in the way of special allocations or otherwise.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Purposes	<p>Commentary: It is not uncommon to provide for a broad purposes clause that permits a joint venture entity to engage in all activities permissible under applicable law. However, a narrow purpose clause may be an important provision if the Non-local Party wishes to use JV to conduct only a subset of the Non-local Party's business - any broadening of the Joint Venture Purpose would require amending JV's charter documents, which may be difficult or time-consuming if neither party holds sufficient votes to effect such an amendment.</p>	<p>Commentary: A broadly defined purpose clause, including all acts permissible under applicable law, would allow the Non-local Party to direct JV to pursue changing business strategies without requiring the approval of the JV Partner, unless otherwise required in JV's governing documents. However, if the Joint Venture Agreement provides the JV Partner with potential rights to acquire control of JV during the Non-local Party's continued participation, the Non-local Party should consider limiting the statement of purpose to ensure that JV cannot compete with the Non-local Party without its consent.</p>	<p>Commentary: A narrowly defined purpose clause may be particularly important if the Non-local Party wishes to limit JV's conduct to only a subset of the Non-local Party's business - any broadening of the Joint Venture Purpose would require amending JV's charter documents, which may be difficult or time-consuming if neither party holds sufficient votes to effect such an amendment. In this regard, the Non-local Party should ensure that any broadening of the purpose clause would require the amendment of JV's charter documents and be subject to a Non-local Party veto right based upon Supermajority voting requirements, as discussed under "Management" below.</p>
Term	<p>Commentary: The term need not be indefinite and a specified term for the operation of JV may be appropriate in some cases. A specified term may be particularly appropriate where JV has a purpose that will be accomplished within a discreet period of time or upon completion of a discreet goal.</p>	<p>Commentary: Appropriate exit and termination provisions go hand in hand with the discussion of the term. See the related handbook Section 4 (Exit and Termination) and Supplement B to this term sheet (Sample Exit Rights Provisions) for further discussion.</p>	<p>Commentary: Appropriate exit and termination provisions go hand in hand with the discussion of the term. See the related handbook Section 4 (Exit and Termination) and Supplement B to this term sheet (Sample Exit Rights Provisions) for further discussion.</p>
Territory	<p>Commentary: The definition of the Territory will be critical to analyzing whether there are any significant competition or antitrust issues under local law and the enforceability of the non-compete provisions.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
<p>Business Plan</p>	<p>Commentary: A well-defined business plan can serve several purposes. First, the business plan (including budgets) can ensure at the outset that there is a meeting of the minds between the parties on several key aspects of the JV including managerial and operational roles and responsibilities, anticipated financing needs, and anticipated distribution policy. Second, the business plan can define certain "critical targets." If these critical targets are not met, the parties may have recourse to certain "no fault" exit provisions. Finally, the business plan can provide stability in the event of a deadlock, as JV may continue to operate under the most recent version of the business plan (with the possibility of applying relevant cost of living adjustments) until the deadlock has been resolved. Generally, the business plan should employ a "rolling" concept under which each year the parties modify the business plan to cover an agreed upon period.</p>	<p>Commentary: The Non-local Party may wish to consider requiring approval of the business plan on a biannual or longer basis to limit the need to negotiate with the JV Partner on an annual basis. Provisions regarding emergency expenditures in excess of the business plan should also be addressed in the Joint Venture Agreement.</p>	<p>Commentary: The business plan can provide the Non-local Party with negative control over the operation of JV by requiring the Non-local Party's approval of the business plan on an annual basis and/or for significant expenditures not included in the current business plan.</p>
<p>Initial Capital Contributions and Ownership</p>	<p>Commentary: It is critical that the parties' initial capital contributions are spelled out. If the parties are making in-kind contributions, it is critical to confirm whether there are any requirements under applicable law for an independent valuation of the contribution. In addition, if in-kind contributions are anticipated, it is important that the party making those contributions make appropriate representations and warranties. To the extent that the Non-local Party anticipates that it and/or the JV Partner will be required to provide financing to the JV, key terms should be agreed to in the term sheet and reflected in the business plan.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Additional Contributions	<p>Commentary: Because the business planning process may require a substantial period of time, it may be helpful at the term sheet stage to address any anticipated additional capital contributions, the timing for such contributions, and the effect of any failure to make them.</p>	<p>Commentary: The Non-local Party should seek to provide that it can make required additional contributions if the JV Partner refuses or is otherwise unable to make a required contribution. The Non-local Party should also consider imposing appropriate penalties for failing to make additional capital contributions, particularly when the JV Partner's financial capabilities are in question. These can include the right to terminate JV, the right to a preferred allocation of future distributions and the right to modify other aspects of the relationship.</p>	<p>Commentary: The Non-local party, as the minority party, should also reserve the right to make additional contributions if the JV Partner refuses or is unable to make the contribution. In addition to the types of penalties discussed under the majority position considerations, a key penalty in the minority party's favor is to increase its control over the management and operations of JV.</p>
Distributions	<p>Commentary: The parties should specify, to the extent possible, the principles that will be applied in determining what to do with any distributable profits. For example, in the Joint Venture Agreement, the Non-local Party may consider explicitly defining "Net Cash Flow" and requiring regular distributions net of any required tax payments.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>
Intellectual Property	<p>Commentary: Special attention should be paid to any IP that will be contributed or licensed to JV. See the related handbook Sections 4.3 (Exit and Termination-Intellectual Property Considerations) and 5.2 (other Key Considerations-Methods for Contributing Assets) for further discussion of key IP-related issues.</p>	<p>Commentary: All critical Non-local Party IP should be subject to separate IP licensing agreements under which the Non-local Party would retain the rights to the critical IP in the event of a termination. To the extent that the Non-local Party's goal is to acquire local brands and/or other intellectual property, it is important that the Non-local Party has a right to exploit these brands and or other intellectual property upon termination of JV.</p>	<p>Commentary: The Non-local Party may exert greater control over JV operations through separate IP licensing agreements. For example, with respect to trademark licenses, the Non-local Party may require quality control commitments, notice and consent with respect to marketing and promotional campaigns and compliance with branding programs. The Non-local Party may use royalty bearing licenses to extract revenue from JV or to set a minimum business generation commitment.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
<p>Management</p>	<p>Commentary: These management provisions assume that JV has only one management body. If JV is required by law to have two management bodies (e.g. board and shareholders meeting), it will be important to specify which decisions by law must be made by a decision of the shareholders (as opposed to the board) and whether such decisions must be made by a simple or supermajority. To the extent that JV utilizes a holding company structure, it will be important to provide that JV's management will control the management of the operating subsidiary. A simple way to provide for the management of a holding company structure is to provide for a mirrored management structure at the holding company and operating company levels. The management provisions must be viewed carefully in combination with the commercial agreements that the parties may enter into with JV. If the Non-local Party desires to consolidate JV for financial reporting purposes, it will be important to look at all of the facts and circumstances that would indicate that the Non-local Party has "control" of JV (e.g., ability to control the board, right to appoint key managers, ability to control operations through commercial agreements) to determine if consolidation will be possible.</p>	<p>Alternative Provision: JV would be managed by a board of directors (the "Board") consisting of [five] directors. The Non-local Party would be entitled to designate [three] directors (initially _____, _____, and _____) and the JV Partner would be entitled to designate [two] directors (initially _____ and _____). The Board would make all decisions with respect to JV and the parties would not be entitled to vote on any matters in their capacities as equity holders. Except for matters requiring a Supermajority vote as described below, decisions would require a majority vote of all directors, not just of those in attendance at a meeting. The Board would meet at least [monthly] [quarterly]. Each director would be entitled to one vote on all matters to be voted upon by the Board. Any director would be entitled to call a special meeting of the Board and 75% of the directors would constitute a quorum for the transaction of business. An affirmative vote of 75% of all directors (a "Supermajority") of the Board would be required to:</p> <ul style="list-style-type: none"> • amend JV's charter documents; • acquire or divest a business or merge or consolidate with any other entity; • make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties; • approve transactions or other arrangements between or involving JV and any party or affiliate thereof; 	<p>Alternative Provision: JV would be managed by a board of directors (the "Board") consisting of [five] directors. The JV Partner would be entitled to designate [three] directors (initially _____, _____, and _____) and the Non-local Party would be entitled to designate [two] directors (initially _____ and _____). The Board would make all decisions with respect to JV and the parties would not be entitled to vote on any matters in their capacities as equity holders. Except for matters requiring a Supermajority vote as described below, decisions would require a majority vote of all directors, not just of those in attendance at a meeting. The Board would meet at least [monthly] [quarterly]. Each director would be entitled to one vote on all matters to be voted upon by the Board. Any director would be entitled to call a special meeting of the Board and 75% of the directors would constitute a quorum for the transaction of business. An affirmative vote of 75% of all directors (a "Supermajority") of the Board would be required to:</p> <ul style="list-style-type: none"> • establish or modify the Joint Venture Purpose; • establish or modify the Business Plan; • amend JV's charter documents; • appoint and enter into employment agreements with the officers; • consummate transactions or otherwise make expenditures outside the ordinary course of business;

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Management (<i>continuation</i>)		<ul style="list-style-type: none"> • raise capital from third parties; • repurchase any equity of the parties; • admit new parties to JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to JV. <p>Commentary: If JV is governed by two management bodies (e.g., the board and the shareholders), the unanimous or supermajority vote of the shareholders may be required to make material decisions regarding JV.</p>	<ul style="list-style-type: none"> • acquire or divest a business or merge or consolidate with any other entity; • make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties; • approve transactions or other arrangements between or involving JV and any party or affiliate thereof; • raise capital from third parties; • make any distributions to the parties or repurchase any equity of the parties; • appoint or change public accountants; • admit new parties to JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to JV. <p>Commentary: If JV is governed by two management bodies (e.g., the board and the shareholders), the unanimous or supermajority vote of the shareholders may be required to make material decisions regarding JV.</p>
Officers	<p>Commentary: Generally, it is important that the Non-local Party agree with the JV Partner on the roles and responsibilities of each party. Depending on the local law applicable to JV, it may be possible to ensure that certain officers have wide discretion in various operational or financial areas. Although the business plan will contain the basic agreement of the parties on high-level business issues, the officers of JV will still need to apply a good deal of discretion with respect to the operational aspects of JV.</p>	<p>Commentary: It will likely be important to involve the JV Partner in certain decision-making aspects. This is beneficial not only to foster a cooperative spirit, but also to instill in the JV Partner a sense of responsibility and accountability toward JV. Accordingly, the Non-local Party may wish to allow the JV Partner to hold officer positions with respect to the areas of JV business for which the JV Partner is expected to be responsible.</p>	<p>Commentary: The Non-local Party should negotiate for the right to appoint a key member or members of the management team to provide the Non-local Party with some participation in the management of JV and to permit the Non-local Party to accurately monitor JV's operations.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
<p>Deadlock Events</p>	<p>Commentary: Generally, disputes should be escalated as high up the executive chain as practically possible to encourage “peaceful” resolution, particularly when the dispute concerns business issues. Arbitration may not be an appropriate vehicle through which to resolve most deadlocks, which typically occur because the parties have a fundamental disagreement with respect to the business or operations of JV. If the Buy-Sell Option is not generally available as a mechanism for resolving all disputes, a deadlock that persists for longer than a defined period of time could trigger a Buy-Sell Option. Alternatively, the parties could empower the chairman of the board of JV to cast the tie-breaking vote, which effectively shifts control to the party appointing the chairman. Or, the parties could craft a “swing director” provision that allows them to appoint an independent director who would cast a tie-breaking vote. This independent seat could be kept open and filled only for a limited time to break a deadlock, or it could be occupied at all times. Despite its perceived simplicity, a swing director provision effectively shifts control to an outsider with respect to deadlock events.</p>	<p>Alternative Provision: If a Supermajority of the Board is not able to agree on any material business or management issue arising out of the venture during a _____ month period, a deadlock would be deemed to exist (a “Deadlock”). Upon the occurrence of a Deadlock, the parties would be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution, either party would have the right to:</p> <ul style="list-style-type: none"> • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set forth below; • [other specified action] 	<p>Alternative Provision: If a Supermajority of the Board is not able to agree on any material business or management issue arising out of the venture during a _____ month period, a deadlock would be deemed to exist (a “Deadlock”). Upon the occurrence of a Deadlock, the parties would be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution, either party would have the right to:</p> <ul style="list-style-type: none"> • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set forth below; • [other specified action]

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Buy-Sell Option	<p>Commentary: If the JV Partner has strong financial resources, the Non-local Party should consider proposing that the parties have a Buy-Sell Option available generally after an initial lock-in period. This may be preferable because, in practice, it will be possible for either party to force a Deadlock in a true 50/50 arrangement. The JV Partner, however, likely will resist the general availability of a Buy-Sell Option if the JV Partner is in a substantially weaker financial position. In that case, the JV Partner likely would view such a Buy-Sell Option as a call option in the Non-local Party's favor. If the JV Partner strongly resists the general availability of the Buy-Sell Option, more emphasis should be placed on negotiating a put/call option at an agreed valuation.</p>	<p>Commentary: Even where the JV Partner is in a weaker financial position, the Non-local Party should consider whether the remedy of acquiring a 100% interest in JV is an appropriate remedy for all disputes, particularly if JV's operations are heavily dependent on the JV Partner.</p>	<p>Commentary: Where the Non-local Party is the minority party and if it has stronger financial resources than the JV Partner, it may be able to use the Buy-Sell Option as a strategic tool for resolving disputes in its favor.</p>
Commercial Agreements	<p>Commentary: The Non-local Party should consider the extent to which commercial agreements such as trademark and patent licenses, as well as sourcing and services agreements, can be used to increase the Non-local Party's degree of control in JV. Further, control over commercial agreements may support an argument that the Non-local Party is able to consolidate JV for financial reporting purposes. Bear in mind that commercial agreements, which are often seen as ancillary to the relationship, can create a crushing dependency of the joint venture on a particular party even though an equity joint venture may be established with the overarching goal of giving the joint venture some measure of independence from the participants.</p>	<p>Commentary: Key considerations for the Non-local Party will include ensuring appropriate protections over its intellectual property rights. See the general considerations discussed above with respect to Intellectual Property.</p>	<p>See the Sample Exit Rights Provisions following this chart.</p>

Provision	General Considerations See the Sample Exit Rights Provisions following this chart.	Majority Position Considerations See the Sample Exit Rights Provisions following this chart.	Minority Position Considerations See the Sample Exit Rights Provisions following this chart.
Exit Rights	Commentary: Considerable care should be given to the ultimate definition of the "Territory" and the scope and nature of JV's business, which should be consistent with the Joint Venture Purpose. Special consideration should be given as to whether specific performance will be available with respect to a breach of the non-compete obligation in the jurisdiction of JV's operations. If specific performance is not available in the jurisdiction of operations, by utilizing a holding company structure in a jurisdiction in which specific performance is available, a breach of the non-compete obligation could be expressly deemed to be a material breach of the Joint Venture Agreement thus giving rise to remedies under the Joint Venture Agreement, which could include shifting control of JV to the non-breaching partner. The parties should also ensure that the non-compete obligations are consistent with applicable competition and antitrust laws.	Commentary: This is an important consideration not only during the life of JV, but also with respect to activities that may be undertaken upon exit or termination of JV. The Non-local Party should be hesitant to agree to broad reciprocal restrictions on competition, particularly where the geographic scope of its general business is greater than that of the JV Partner, or where it intends to expand the scope of its business.	Commentary: The Non-local Party should seek to impose tight restrictions on the JV Partner's ability to compete as a way to increase leverage with respect to other JV operational aspects. In addition, where the JV represents an initial foray into a particular market and the Non-local Party is ultimately seeking to expand that business (with or without the assistance of the JV Partner), the scope and duration of any post-termination non-compete clause should be limited or an appropriate payment to allow the Non-local Party to compete following termination of the JV should be factored into a buy-out right.
Representations and Warranties	Commentary: Certain basic representations and warranties should be included in the Joint Venture Agreement. If in-kind contributions are anticipated, a separate contribution agreement with appropriate representations and warranties, should be used.	Commentary: Indemnification provisions often go hand in hand with representations and warranties. Where the JV Partner may not have the financial resources to satisfy claims for breaches of representations and warranties, the Non-local Party should consider alternative remedies, such as rights to preferential distributions.	Commentary: The Non-local party should seek to gain additional control over the management and operations of JV as a remedy for breaches of representations and warranties.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
<p>Conditions to Closing</p>	<p>Commentary: Although the Non-local Party may want to move quickly from term sheet to closing, sufficient flexibility should be built into the Joint Venture Agreement to ensure that all compliance (including filings with appropriate governmental authorities), financial reporting and business planning issues have been resolved to the Non-local Party's satisfaction prior to key steps such as closing, contributions of assets by the Non-local Party, and effectiveness of the JV, as appropriate. With respect to due diligence, if the Non-local Party is investing in an existing business, then there should be a unilateral due diligence review of the existing business by the Non-local Party. The Non-local Party, however, may be required to provide diligence information regarding any significant non cash contributions it makes to the joint venture. If JV is a newly formed business venture, then the due diligence review will be a bilateral endeavor. The parties may wish to limit access to certain personnel, customers and other sensitive information, at least until they are reasonably certain the transaction will proceed.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>
<p>Anticipated Documentation</p>	<p>Commentary: From a project management perspective, it is important to identify as soon as possible the universe of agreements that the partners anticipate will constitute the joint venture. To the extent possible, the Non-local Party should try to control the drafts of all relevant documents.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Governing Law	<p>Commentary: Ideally, the governing law of the Joint Venture Agreement and related agreements should be the same as the law governing the establishment and operation of JV. In this way the Non-Local Party would minimize the risk that the JV Partner would try to forum shop or exploit differences in the default rules governing the Joint Venture Agreement and related agreements and JV's operations and governance.</p>	See Commentary under General Considerations.	See Commentary under General Considerations.
Dispute Resolution	<p>Commentary: While parties to a 50/50 joint venture will likely include a mechanism for resolving deadlocks, the parties may also wish to include in their transaction agreements a general dispute resolution clause for the purpose of enforcing their agreements. The choices in this regard are typically litigation and arbitration, with various levels of negotiation and/or mediation often included as a preliminary step. The parties may also choose not to include a dispute resolution clause, which would leave them free to file a lawsuit in any court which they believe will exercise jurisdiction, but this approach could increase uncertainty over the outcome of disputes. The ultimate decision depends on a consideration of several factors including enforceability of judgments or awards, the length of time required to resolve disputes, the need for discovery, the relative costs of the potential approaches, the need for injunctive or other interim relief, the desire to maintain confidentiality, and the types of damages which potentially could be awarded.</p>	See Commentary under General Considerations.	See Commentary under General Considerations.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Expenses	<p>Commentary: If an expenses provision has previously been included in the confidentiality agreement, make certain that any expense provisions in the term sheet and other subsequent agreements are either consistent with it or expressly supersede it.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>
Schedule	<p>Commentary: Once the parties have reached the stage of negotiating a term sheet, the Non-local Party should determine as promptly as practicable if there is a real possibility to close the deal and whether the Non-local Party is able to work effectively with the JV Partner. A transaction schedule can help in both regards.</p>	<p>See Commentary under General Considerations.</p>	<p>See Commentary under General Considerations.</p>

Supplement B to Term Sheet

Sample Exit Rights Provisions

<p>Right of First Offer for Transfers of Equity Interests:</p>	<p>If either party (the “Offering Party”) intends to enter into negotiations or discussions to sell or otherwise transfer all (but not less than all) of its equity securities of JV, it would give notice to the other party (the “Offeree Party”) of such intent. If the Offeree Party notifies the Offering Party of its desire to purchase such equity securities, the Offering Party would negotiate in good faith to reach an agreement with the Offeree Party for the sale of the equity securities prior to engaging in any negotiations or discussions for the sale or transfer of any of such equity securities with (or making any offer to sell such securities to) any third party. If the Offeree Party does not desire to purchase the equity securities, or if the Offering Party does not reach an agreement with the Offeree Party within 30 days of receipt of the Offeree Party’s notice of its desire to purchase, then for 90 days thereafter, the Offering Party would be entitled to sell the equity securities to a bona fide purchaser.</p> <p>Commentary: <i>This provisions contemplates a right of first offer as opposed to a right of first refusal. In practice, a right of first refusal will make a transfer of equity extremely difficult because it is generally triggered only when a potential third party purchaser has made an offer (or has been identified). That third party, however, is unlikely to seriously consider a bid (or may discount its bid) if the bid is subject to the right of another party to trump it. The example right of first offer shown above is combined with co-sale and drag-along rights described below. The combination of the right of first offer with co-sale and drag-along rights would have the practical effect of requiring a disposition of the JV to a third party. The parties may want to consider, as an alternative, a right to force a disposition of JV through an auction process initiated by an agreed investment bank – a process in which each party may participate.</i></p>
<p>Co-Sale Rights for Transfers of Equity Interests:</p>	<p>Subject to the right of first offer discussed above, the Offering Party would have the right to sell all (but not less than all) of its equity securities in JV to a third party, provided that the Offeree Party would have a right to sell all (but not less than all) of its equity securities to the third party, upon the same terms and conditions.</p>
<p>Drag-Along Rights for Transfers of Equity Interests:</p>	<p>Subject to the right of first offer discussed above, the Offering Party would have the right to compel the Offeree Party to sell its equity securities in JV upon the same terms and conditions as agreed with a third party, and the Offeree Party would waive any dissenter’s or similar rights.</p> <p>Commentary: <i>Co-sale and drag-along rights are traditionally used in the context of a minority strategic investment. However, by requiring that a right of first offer include all (but not less than all) of the Offering Party’s equity and requiring that a co-sale or drag-along right require the disposition of all (but not less than all) of the Offeree Party’s equity, the co-sale and drag along rights are the functional equivalent of a sale of the JV.</i></p>

<p>Put/Call Option:</p>	<p>Beginning ___ [months] [years] after the date on which the parties make their initial capital contributions to JV, the Non-local Party would have a right to call up to ___% of the JV Partner’s equity and the JV Partner would have a right to put to the Non-local Party up to ___% of its equity for an amount equal to [a pro rata portion of ___ times JV’s EBITDA for the prior fiscal year]/[other appropriate measure]/[amount determined by independent appraisal].</p> <p>Commentary: <i>To the extent possible, the Non-local Party will want to negotiate in advance for a right to take greater control of the JV. Such a right most likely will need to reflect a control premium plus a formula that links the valuation to some determinable measure (whether established by the parties or an independent party). Alternatively, the parties may agree that any such put or call would be valued by an independent valuation expert.</i></p>
<p>Remedies Upon Default:</p>	<p>If one party (the “Defaulting Party”): (i) is in material breach of its non-compete, confidentiality or additional capital contribution obligations; (ii) transfers its equity in violation of the Joint Venture Agreement; (iii) undergoes a change of control; or (iv) becomes subject to a proceeding for bankruptcy, dissolution or winding up; the other party (the “Non-Defaulting Party”) would have a right to exercise a Buy-Sell Option under which the Non-Defaulting Party would have a right to buy the Defaulting Party’s equity for [80%] of fair market value or to sell its equity to the Defaulting Party for [120%] of fair market value, with fair market value determined in each case by an independent valuation expert.</p> <p>Commentary: <i>The remedies upon default are designed to address the situation where the JV’s operations are located in a jurisdiction in which specific performance is unavailable, but a holding company structure is put in place in a jurisdiction in which specific performance is available. In this way, the non-defaulting party’s practical remedy is to take control of the JV.</i></p>

Exhibit 6(c)

Joint Venture Issues Checklist

The following checklist is intended to help formulate the key provisions of the joint venture documents once the parties have already considered the main international issues discussed in this handbook. Cross-references are included to handbook sections that contain relevant preliminary questions to consider under local law.

1. Preliminary matters

- 1.1 Who are the parties to the joint venture? Are they individuals, companies, partnerships or other entities? Are any of the parties subsidiary or holding companies?
- 1.2 If a subsidiary is a party, will a parent company guarantee of its obligations be required?
- 1.3 Do the parties want the principle terms embodied in a term sheet or letter of intent?
- 1.4 Do the parties wish to have a period of exclusivity during which they are prevented from negotiating with third parties regarding arrangements which may compete with the joint venture business?
- 1.5 Will confidential information be disclosed during negotiations? If so, the parties should consider entering into a confidentiality agreement.
- 1.6 Are there any conditions precedent to the final establishment of the joint venture? For example, is shareholder consent required? Will third party financing need to be obtained? In certain industries, it may also be necessary to obtain governmental or regulatory consent.

2. Relationship between the parties

Is a joint venture appropriate to regulate the relationship between the parties? What are the commercial objectives of the parties? Would any of the following alternatives be appropriate:

- (a) a supply agreement for goods or services;
- (b) a distribution or agency agreement;
- (c) a license or franchise agreement;

- (d) a research and development or cooperation agreement;
- (e) a 100% acquisition; or
- (f) establishment of a wholly-owned subsidiary without participation from another party?

3. Business of the joint venture

- 3.1 What activities will be carried on by the joint venture? Is the purpose of the joint venture to carry out a specific project or a continuing business?
- 3.2 Has a feasibility study or business plan been prepared?
- 3.3 Will there be geographical limitations placed on the joint venture's operations?
- 3.4 Will any regulatory consents, approvals and/or licenses be required for the joint venture?
- 3.5 Will any tax clearances be required in connection with either the setting up or the continuing operation of the joint venture?

4. Financing

- 4.1 How will the joint venture be funded? Will any initial investment by the parties be in cash or by the contribution of assets? If cash, will this take the form of loans or equity?
- 4.2 Will it be necessary for the parties to secure funding from external sources? If so, what security and/or recourse to the parties will the lenders require (*e.g.*, guarantees)?
- 4.3 Will any loans by the parties be interest-free? Will they be secured and, if so, will they be subordinated to any external funding?
- 4.4 Are there any tax or other advantages to funding through debt rather than equity, or vice versa?
- 4.5 Will the joint venture require ongoing funding (*e.g.*, for working capital, expansion) to carry on its business? If so, will each party be required

to contribute to future calls for funding pro rata to its original investment? Will the commitment to fund be capped or open-ended? What should happen if any ongoing funding obligation is not met?

Key preliminary local law considerations: Section 3.3 (Structure – Capital and Financial Interests).

5. Contribution of assets

- 5.1 Are any specific assets to be contributed to the joint venture by any party?
- 5.2 If so, will such contribution be by outright transfer or by lease/license to the joint venture? Will such lease/license be for a fixed or an indefinite period?
- 5.3 Will stamp duty or other tax consequences effect the method of contribution?
- 5.4 How, and when, are the contributed assets to be valued? Is it necessary to incorporate a mechanism to make adjustments for any shortfall or excess in the relevant funding obligation?
- 5.5 Are any third party consents required before any assets can be transferred or licensed? If so, should the transfer of the relevant assets be a condition to completion of the joint venture?
- 5.6 Will any due diligence investigation be carried out on the contributed assets and will any representations and warranties or indemnities be given?

Key preliminary local law considerations: Section 3.3 (Structure – Capital and Financial Interests) and Section 5.2 (Other Key Considerations – Methods for Contributing Assets).

6. Cross-border/local law issues

Is it a cross-border joint venture? If so, local law advice should always be obtained. The following issues may be relevant.

- (a) Are there any specific laws relating to joint ventures in the relevant jurisdictions?
- (b) What will be the governing law of the joint venture agreement?

- (c) Where will the joint venture be located? Are there any laws governing foreign ownership or investment?
- (d) Are there any restrictions on the repatriation of profits and/or the payment of dividends? In what currency will payments be made and at what exchange rate will these be calculated?
- (e) Are any local governmental or regulatory consents required?
- (f) What will be the governing language of the joint venture agreement and/or any ongoing information provided to the parties?

7. Competition

- 7.1 Will establishing the joint venture trigger any competition or antitrust laws, including:
 - (a) the US Hart-Scott-Rodino Antitrust Improvements Act;
 - (b) the EC Merger Regulation;
 - (c) Article 81 of the EC Treaty; or
 - (d) other relevant competition or antitrust laws?
- 7.2 If so, what competition notifications need to be made?
- 7.3 Are any industry specific approvals required? Are any sensitive industries involved such that government approval or notification (*e.g.*, Exon-Florio in the US) is advisable?

Key preliminary local law considerations: Section 5.4 (Other Key Considerations – Competition/Antitrust Law).

8. Structure of the joint venture

- 8.1 Is the joint venture business to be carried out through a separate vehicle or through a direct contractual relationship between parties? For example, a contractual arrangement may be more appropriate for joint research or marketing projects.
- 8.2 If the joint venture is to be carried out through a separate vehicle, will it be an existing entity or one specially created?

- 8.3 What form will the joint venture vehicle take? There are a number of possible forms, including:
- (a) a corporation;
 - (b) a limited liability company;
 - (c) a partnership or limited liability partnership; or
 - (d) a profit pooling or revenue sharing arrangement.

The structure will be influenced by a number of factors, including:

- (e) the need to have a separate identity to provide a flexible structure for investment;
 - (f) publicity and disclosure requirements; and
 - (g) tax matters.
- 8.4 Will the joint venture be incorporated in one jurisdiction or will there be a series of joint venture vehicles in different jurisdictions? Will the joint venture be on or offshore?
- 8.5 Will the structure provide the best tax treatment for the joint venture itself and for each of the parties?
- 8.6 Should the joint venture vehicle be party to the joint venture agreement?
- 8.7 Is an initial public offering of the shares of the joint venture contemplated as an exit strategy? Will it be possible to convert the joint venture vehicle into an appropriate entity form in connection with such an offering without adverse tax or other consequences to the joint venture parties?.

Key preliminary local law considerations: Section 3 (Structure).

9. Accounting

- 9.1 How will each joint venture participant account for its interest in the joint venture? Does a party intend to treat its interest on a consolidated basis for financial accounting purposes or to file consolidated income tax returns? What are the applicable rules relating to consolidation?

9.2 What accounting policies will be adopted by the joint venture?

Key preliminary local law considerations: Section 3.2 (Structure – Jurisdiction in Which to Organize the Vehicle).

10. Share capital

- 10.1 If the parties contemplate a joint venture vehicle in the form of a corporation with pre-set share capital, what will be the initial authorized and issued share capital? In what currency will the share capital be denominated?
- 10.2 Will there be different classes of shares/interests with varying rights, (*e.g.*, will any party have preferential dividend rights)? Will shares/interests of the same class be capable of being held by more than one person?
- 10.3 Will there be an obligation on the parties to subscribe for additional shares/interests? What should happen if any such obligation is not met?
- 10.4 Will additional shares/interests be issued on a pro rata basis (no dilution) or a pre-emptive basis (dilution will happen if the pre-emptive offer is not accepted)?

Key preliminary local law considerations: Section 3.2 (Structure – Jurisdiction in Which to Organize the Vehicle).

11. Profit distribution

- 11.1 What policy will apply to the distribution of profits? Should a minimum level of profits be retained or distributed every year? Will distribution levels be restricted for an initial period?
- 11.2 How will changes to the distribution policy be made?
- 11.3 Are there any tax or regulatory constraints on the distribution of profits? Will it be necessary to establish a special structure for the effective distribution of profits (*e.g.*, an income access structure)?

12. Transfers of interests

- 12.1 Should there be restrictions on transfers of interests in the joint venture? Should transfers be prohibited within an initial period in order to firmly establish the joint venture? Should the parties be allowed to transfer part of their respective interests?
- 12.2 If transfers are permitted, should the other parties have pre-emptive rights?
- 12.3 Should there be exceptions from any pre-emptive provisions for transfers to other group companies or to family members and trusts? If so, consider including an obligation to re-transfer if such relationship is broken.
- 12.4 How will interests be valued for pre-emption purposes (*e.g.*, market value, fair value)? Will there be a mechanism for valuation by an independent third party?
- 12.5 If the pre-emptive rights are not exercised, should a party have a right to call for liquidation of the joint venture?
- 12.6 Is it appropriate to include any of the following transfer mechanisms:
 - (a) “co-sale” rights - the transferor is able to require that a potential purchaser also purchases the interests held by other joint venture partners;
 - (b) “drag-along” rights - the transferor is able to require other joint venture partners to transfer their interests to a potential purchaser; or
 - (c) “buy-sell” option - a party receiving notice of a potential transfer must elect to either purchase the interests of the other party or transfer its interests to the other party.
- 12.7 Should all new joint venture partners be required to enter into the joint venture agreement on the same terms and conditions as the original parties?

- 12.8 Will the name of the joint venture need to be changed if interests are transferred to a new party? Will arrangements need to be made for the continued use of assets contributed by a selling joint venture partner?
- 12.9 Will the parties be required to transfer their interests in certain circumstances (*e.g.*, insolvency, breach of the joint venture agreement or a change of control)? How will a change of control be defined? Consider the use of put and call options to cover these events.
- 12.10 Should the parties be permitted to grant security over their interests in the joint venture?

Key preliminary local law considerations: Section 4.1 (Exit and Termination – Transfers of Interests).

13. Board of Directors/Management

- 13.1 How many directors will serve on the board? How many directors will each party be entitled to designate?
- 13.2 What rights will each party have to remove directors? Can the board itself appoint additional directors?
- 13.3 Is a two-tier board structure with supervisory and managing levels appropriate?
- 13.4 Will decisions be made by simple majority or will certain directors have weighted voting rights?
- 13.5 Who will be the chairman and will he/she be entitled to cast a tie-breaking vote? Will the right to appoint the chairman be rotated between the parties?
- 13.6 Will the directors be able to delegate their power?
- 13.7 How frequently, and where, will board meetings be held?
- 13.8 What notice and quorum requirements will apply for board meetings? What will happen if a quorum is not present? Will it be possible to hold meetings on short notice or to take action by written resolution?

- 13.9 Who will be entitled to appoint executive officers? Will the shareholders/members have any direct rights with respect to the appointment of particular executives or management positions?
- 13.10 Will certain matters be reserved for decision at the shareholder/member level?
- 13.11 What exculpation and indemnification protections will be extended to the officers and directors of the joint venture?
- 13.12 Will the joint venture enter into employment agreements and confidentially and invention assignment agreements with key employees?
- 13.13 Will a set of common incentives be established for key management personnel?

Key preliminary local law considerations: Section 3.2 (Structure – Jurisdiction in Which to Organize the Vehicle).

14. Shareholder meetings

- 14.1 Will the shareholders/members have decision-making power?
- 14.2 If so, what notice and quorum requirements will apply for shareholder meetings? What will happen if a quorum is not present? Will it be possible to hold meetings on short notice or to take actions by written resolution?
- 14.3 Where will shareholder meetings be held?
- 14.4 Will any shareholders have weighted voting rights?

15. Minority protection

- 15.1 Will the minority be protected against majority decision on certain matters by:
 - (a) a requirement for a unanimous vote;
 - (b) a requirement for a special majority (*e.g.*, in excess of 50.1%) or, in addition to a majority vote on the relevant matter, a vote in favor by a specified percentage of the minority;

- (c) veto rights; or
 - (d) shareholder class rights?
- 15.2 Will any such protection be entrenched at board or shareholder level?
- 15.3 When will the minority protection mechanisms apply? For example, the minority protection may apply to:
- (a) establish or modify the purpose of the joint venture;
 - (b) establish or modify the business plan;
 - (c) amend the joint venture’s charter documents;
 - (d) appoint and enter into employment agreements with the officers;
 - (e) consummate transactions or otherwise make expenditures outside the ordinary course of business;
 - (f) acquire or divest a business or merge or consolidate with any other entity;
 - (g) make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties;
 - (h) approve transactions or other arrangements between or involving JV and any party or affiliate thereof;
 - (i) raise capital from the parties;
 - (j) make any distributions to the parties or repurchase any equity of the parties;
 - (k) appoint or change public accountants;
 - (l) admit new parties to JV;
 - (m) liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to JV.

16. Representations and warranties

- 16.1 What representations and warranties will the parties be required to make?

16.2 Will the parties indemnify each other for breaches of representations and warranties or covenants under the joint venture agreement?

16.3 Will indemnification obligations be subject to limitations based on time, amount, or otherwise?

17. Restrictive covenants

17.1 Will the parties be restricted from competing with the joint venture? If so, what territorial or other limitations will apply?

17.2 Will the parties be required to refer business opportunities to the joint venture?

17.3 To what extent will the parties have access to, or rights over, confidential information belonging to the joint venture? Will the parties be under any confidentiality obligations regarding the other parties?

Key preliminary local law considerations: Section 4.4 (Exit and Termination – Non-Competition Provisions) and, with respect to enforceability, Section 5.3 (Other Key Considerations – Non-Competition Provisions).

18. Administration

18.1 Who will act as the company secretary? What professional advisers will be appointed and by whom?

18.2 What information on the business and performance of the joint venture will be provided to the parties and how frequently?

18.3 What rights will shareholders have to inspect the accounts and records of the joint venture company?

19. Intellectual property

19.1 What intellectual property rights will the joint venture acquire? Will these be transferred or licensed and on what terms? Will the transferring/licensing party retain the ability to use the intellectual property rights?

19.2 Who will own the intellectual property developed by the joint venture?

- 19.3 What will happen to the intellectual property rights on termination of the joint venture and will this vary depending on the nature of the termination or exit by a particular party?

Key preliminary local law considerations: Section 4.3 (Exit and Termination – Intellectual Property) and, with respect to enforceability, Section 5.2 (Other Key Considerations – Methods for Contributing Assets).

20. Employee issues

- 20.1 How will employees be transferred to the joint venture (*e.g.*, offer/acceptance, automatic transfer)? Is there a transfer of a business to the joint venture? What local rules apply to the transfer of employees to the joint venture (*e.g.*, in the United Kingdom, the Transfer of Undertakings (Protection of Employment) Regulations 1981)? Will any other termination, transfer or relocation laws (*e.g.*, in the United States, the WARN Act) impact the joint venture?
- 20.2 Will the joint venture have its own employees? What terms and conditions of employment will apply to the joint venture employees? Are service contracts required? What share option and pension arrangements are envisioned?
- 20.3 Is any particular management structure envisioned?
- 20.4 Will any of the parties second staff to the joint venture? If so, on what terms?

Key preliminary local law considerations: Section 5.6 (Other Key Considerations – Employee Transfers and Benefits).

21. Land

- 21.1 What premises will the joint venture occupy?
- 21.2 Will the joint venture own, lease or license its premises?
- 21.3 Is a parent or other guarantee required in relation to the occupation of the premises?

22. Ancillary arrangements

Are any ancillary arrangements required, for example, in relation to:

- (a) the transfer (sale or contribution) of business assets;
- (b) the supply of goods;
- (c) transitional arrangements for sharing information technology facilities, including software;
- (d) the provision of technical assistance/know-how/training;
- (e) the secondment of staff; or
- (f) the provision of facilities?

23. Deadlock

23.1 If the parties cannot agree on an issue which is fundamental to the joint venture, how should matters be resolved? Specifically, in what circumstances will deadlock arise:

- (a) on all material issues;
- (b) on certain issues determined by the parties when the joint venture is established; or
- (c) on issues designated as deadlock issues by one of the parties at the time they arise?

23.2 Will deadlock issues be referred to the respective chief executive officers of the parties in the first instance? Will alternative mechanisms to resolve deadlock be used, such as:

- (a) the joint venture chairman's tie-breaking vote;
- (b) reference to an independent director; or
- (c) reference to an independent third party?

23.3 Will different deadlock issues be resolved by different methods? Should an alternative dispute resolution procedure be developed?

- 23.4 What rights will a party have on a deadlock? For example, will a party be able:
- (a) to require the termination of the joint venture and either a winding up or sale; or
 - (b) to exercise a “buy-sell” option requiring the other party to sell or purchase its interest in the joint venture?

24. Termination

- 24.1 Is the joint venture for a fixed term or indefinite in duration? If for a fixed term, can it be renewed and on what basis?
- 24.2 Are there any circumstances in which the joint venture will automatically terminate (*e.g.*, the insolvency of any party, the destruction of a particular asset, loss of regulatory approval)?
- 24.3 In what circumstances will a party be entitled to terminate the joint venture (*e.g.*, on a material breach of the joint venture agreement by another party or a change of control of another party)? How will the parties define change of control?
- 24.4 Will the parties have a right to terminate by notice after an initial period?
- 24.5 What arrangements will apply on termination in relation to the distribution of assets, the discharge of outstanding contracts, or the assumption or discharge of any other liabilities of the joint venture?
- 24.6 Will any restrictions on the parties apply after termination of the joint venture?

Key preliminary local law considerations: Section 4 (Exit and Termination).

Appendix A

Overview of D&O Duties and Liabilities in Foreign Entities

Joint ventures parties are likely to ask some of their own officers and employees to serve as directors of the joint venture entity. Most individuals who are asked to serve in this position assume that being a director of a joint venture is not a significant burden and does not involve much risk about which to be concerned. Generally speaking, this is true, provided everything is running smoothly. The position of a director of a foreign entity has its pitfalls, however, and a prudent director should be aware of their existence and should watch out for them.

This appendix provides a brief overview of the duties, risks and potential civil and criminal liabilities of a director of an entity incorporated outside the United States in order to create a general awareness of the kinds of problems that a director should anticipate, particularly if the entity finds itself in financial difficulty. This summary is not, in any way, intended to be an exhaustive discussion of all the relevant issues and potential liabilities that a director of a foreign joint venture entity might face and it should not be construed as legal advice because the recommended approach will vary according to the issue, the director's actions and the jurisdiction involved.

Position and Duties of a Director

A prospective or current director should have a clear understanding of what the term “director” means in a particular jurisdiction. While in the United States there is a clear distinction between a “director” and an “officer,” this is not necessarily the case in other jurisdictions. For example, in Singapore, the Companies Act defines an “officer” of a company to include any director of the company. In Hong Kong, the Companies Ordinance defines a director as “any person occupying the position of a director by whatever name called,” and all directors are vested with the same powers, duties and liabilities, whether they are called “director,” “manager,” “managing director,” “chief executive” or other similar title.

On the other hand, many jurisdictions distinguish between a director (*i.e.*, a member of the board of directors) and a managing director. In Sweden, for example, the board of directors is responsible for the management and organization of a limited

liability company, whereas the powers of a managing director are restricted to day-to-day management. A Japanese stock company (K.K.) must have a minimum of three directors of which at least one must be resident in Japan and serve as a “representative director,” carrying on the day-to-day functions of the company pursuant to the direction and policies established by the board of directors. A Dutch private limited liability company (B.V.) is managed by a “management board” consisting of one or more “managing directors,” who can be individuals or companies.

The duties and liabilities of a director may also depend on the type of entity. A French S.A. (stock corporation), for example, may have a “Président Directeur Général” (Chairman of the Board), directors (members of the board of directors) and a “managing director.” A French SARL (limited liability company), on the other hand, only has a “manager” (gérant), who may be held personally liable while acting in his or her managerial capacity.

A director’s duties vary depending on the position (*e.g.*, member of the board of directors vs. manager), the type of legal entity and the jurisdiction. A director’s duties may be defined by a statute, by common law (in common law jurisdictions) or by the articles or bylaws of the company. In some jurisdictions, a director has the power to bind the company by his or her single signature. For example, a managing director (Geschäftsführer) of a German GmbH has unlimited statutory powers to legally represent the company. Although the shareholders (*i.e.*, the joint venture partners) of a GmbH may internally limit the scope of the managing director’s powers by including restrictions in the Articles of Association, the managing director’s employment contract or so-called “standing orders,” these restrictions are generally not enforceable against third parties.

A director’s general duties can be broadly described as fiduciary. The director has a duty, among other things, to act in good faith and with loyalty to the company, to act prudently and in the best interests of the company, to exercise powers and discharge duties with care and diligence, not to misuse corporate information or the position for personal gain, and to avoid conflict of interest.

An officer or employee of a US corporation should be aware of the potential conflict of interest inherent in the situation where he or she serves as a director of a joint venture entity in which his or her employer is one of the parties to the joint venture, thus owing a duty to both entities. Most of the time, the interests of

the joint venture party and the joint venture entity are in alignment; however, circumstances may arise under which a joint venture party's interest could be adverse to the interest of the joint venture entity. Most notably, this may occur when either of the two entities is in financial difficulty. For example, the joint venture party that is struggling to remain financially afloat may want to take cash out of the joint venture entity, which could render the joint venture entity insolvent. Or, in a situation where the joint venture entity is insolvent, its directors may be required by law to take steps to liquidate it contrary to the wishes of the joint venture parties.

In some jurisdictions, even transactions in which such entities' interests are in alignment may be deemed legally problematic (*i.e.*, void or voidable) where a director has a potential conflict of interest. For example, if a director of a French S.A. is also a director of an entity contracting with the S.A. (*e.g.*, of an affiliated company), the transaction between the two entities is considered a "regulated agreement" and is subject to advance authorization by the board of directors of the S.A. and approval by a meeting of its shareholders.

In addition to general fiduciary duties, directors typically have specific duties under the applicable foreign corporate laws, including, among other duties, the preparation and submission to the shareholders of the annual balance sheet, and an obligation to call shareholders' meetings. Directors may also be responsible for the company's compliance with other laws and regulations of the foreign country, such as unfair competition laws, environmental laws, labor laws, workplace hygiene and safety regulations and personal data protection laws. Individuals serving as directors of a foreign joint venture entity should make a special effort to ascertain the specific duties of their positions in each jurisdiction where they are serving as a director and endeavor to discharge them with diligence and care.

Civil Liability of Directors

Sources of Potential Liability

As in the United States, most foreign jurisdictions recognize the general principle that corporations and limited liability companies are distinct legal entities, separate from their shareholders, and are responsible for their own debts and liabilities. (Limited partners in limited partnerships may also benefit from principles of limited liability although often at the expense of giving up managerial rights.)

Nonetheless, there are various circumstances in which directors of foreign entities may become liable not only to the entity itself, but also to its shareholders (*i.e.*, the parties to the joint venture) or to third parties.

Corporate Compliance. One usual source of personal liability for directors is the failure to comply with corporate formalities. For example, under Dutch law, the failure to comply with the formalities of incorporation makes the directors liable on the company's obligations to third parties. In Singapore, directors are personally liable for the company's failure to comply with various corporate and filing formalities in connection with an increase in the company's capital and share allotments, for failure to properly maintain the company's registers, failure to hold an annual meeting, failure to have a registered office which is open and accessible to the public (as required by law) and other corporate compliance requirements.

Income and Payroll Taxes. In many jurisdictions, directors may become personally liable for unpaid company tax or social security contributions. For example, a director (*gérant*) of a French SARL may be personally liable for the payment of unpaid corporate tax and penalty if he or she has made tax and penalty assessments and payments impossible, either through fraud or through serious and repeated failure to comply with the company's tax obligations. In Germany, the managing director of a GmbH may become personally liable for payment of social security contributions and administrative fines. The managing directors of a Dutch B.V. may be personally liable, jointly and severally, for the B.V.'s unpaid corporate, social security and pension fund taxes and premiums, if the B.V.'s inability to pay these sums resulted from "obvious mismanagement" or if the managing directors failed to give timely notice to the competent agencies.

Violation of Other Foreign Laws. In addition to corporate and tax laws, directors may also be liable for the company's violation of other laws and regulations of the foreign country in which the entity is organized. For example, under Italian law, directors may become personally liable for failure to comply with data protection laws. In France, a director may be liable for violations of labor law and workplace hygiene and safety regulations. Under Mexican law, a director may be liable to third parties for damages caused by the payment of dividends out of funds other than profits. Similarly, in Singapore, directors may be personally liable to the company's creditors to the extent to which dividends paid to the shareholders (*i.e.*, the parties to the joint venture) exceed the company's profits.

Liability to the Entity. In most jurisdictions directors may incur personal liability to the entity itself. The most common source of this liability is breach of fiduciary duties and acting contrary to the best interest of the company. Under Argentine law, for example, directors may become personally liable if they undertake business activities that compete with the company. A director of a French S.A. who had a potential conflict of interest in a transaction (*i.e.*, the “regulated agreement” situation) may be personally liable to the S.A. for damages if the “regulated agreement” was not properly approved by the board of directors and by the shareholders of the S.A.

Limiting Exposure

Prevention. A director’s first line of defense against liability is, of course, prevention. To avoid liability, a director of a foreign entity should be well aware of his or her duties to the company under applicable law and should discharge these duties with care and diligence. The director should act in good faith and avoid conflict of interest. The director should monitor the company’s activities, exercise reasonable business judgment in pursuing the company’s best interests and should seek professional advice in case of doubt. The director should be particularly careful and should monitor the entity’s affairs particularly closely when the entity is in financial difficulty.

Indemnification. Most US corporations put in place some indemnification arrangements to protect the directors of their foreign subsidiaries and joint venture entities from liability incurred while serving as director. In general, a director’s right to be indemnified for such liability may come from three sources: (1) articles of incorporation, bylaws or other charter documents of the foreign entity (if permissible under applicable foreign law); (2) indemnification agreements between the director and the foreign entity or the US entity that is his or her employer that owns the interest in the foreign entity, or both; and/or (3) the statutory right to indemnification that the individual has as an employee of the US entity that is his or her employer that owns the interest in the foreign entity.

Indemnification provisions included in the articles of incorporation or other charter documents of the foreign joint venture entity do not necessarily provide a sufficient level of protection to the company’s directors and may be difficult to enforce in some jurisdictions. It would be more prudent for a director of a foreign joint venture entity to obtain a contractual right to indemnification by entering into an

indemnification agreement either with the entity itself or with the US entity that is his or her employer that owns the interest in the foreign joint venture entity, or with both.

The laws of some jurisdictions either prohibit or severely limit the scope of permissible indemnification of directors of entities incorporated in those jurisdictions. For example, Austria and Germany permit indemnification of directors only for slight negligence. In Australia, a company or a related body corporate may not indemnify a director against liability that (1) is owed to the company or a related body corporate; (2) is a fine or compensation order made under the Corporations Act; or (3) arises out of conduct that is not in good faith. Australian law also limits the circumstances under which a company may indemnify its directors for legal costs (although in many cases this type of indemnification is permissible).

In jurisdictions that prohibit or limit the scope of indemnification, an indemnification provision included in the articles of incorporation or other charter document may be void. Similarly, an indemnification agreement between the director and the entity incorporated in such jurisdiction would be of questionable enforceability. On the other hand, a US joint venture party may be able to enter into an enforceable agreement under US law to indemnify a director of its foreign joint venture entity even if the joint venture entity itself is prohibited from indemnifying its directors.

Although in many cases indemnification agreements offer adequate protection from liability, there are several pitfalls of which directors should be aware. First of all, the director should establish who is the indemnitor under the agreement. In the joint venture context, this would typically be either the foreign joint venture entity itself or the US entity that is his or her employer that owns the interest in the joint venture entity. If the agreement is with the foreign joint venture entity itself, the director should confirm that the agreement will not be unenforceable because applicable law prohibits indemnification of directors. In addition, the director should make sure that the foreign joint venture entity has complied with all corporate formalities applicable under the laws of the foreign jurisdiction with respect to approval and execution of the indemnification agreement (*e.g.*, board resolution, shareholder approval and signature authority).

The identity of the indemnitor also bears on the practical aspects of indemnification: if the indemnification obligation is undertaken by the foreign entity itself, the director should consider whether the entity is likely to have sufficient funds to meet

this obligation. In this regard, if a joint venture entity is underfunded, the director would feel more secure if the indemnitor were his or her employer that holds the interest in the joint venture or another entity within the employer's corporate group that has sufficient assets to provide adequate indemnification. But even that may be of little practical value in the event the employer (or other indemnitor) finds itself in financial difficulty. Under these circumstances, director and officer insurance may help (see below).

The director should review the draft indemnification agreement carefully before signing it. For one thing, the director should make sure that his or her right to indemnification is not subject to a burdensome condition that could make indemnification unfeasible. For example, if indemnification is subject to approval by the joint venture entity's board of directors or shareholders (*i.e.*, the parties to the joint venture), that approval may be difficult to obtain under some circumstances (such as when the director's employer holds only a minority interest in the joint venture). The director should also carefully consider the substantive provisions of the indemnification agreement and should have a clear understanding of the scope of liabilities that are indemnifiable under the agreement (which are often made subject to various contractual limitations and exclusions). Of great importance is also the director's right to advancement of litigation expenses, without which many directors would not be able to fund their defense.

Director and Officer Insurance. Traditional director and officer insurance (commonly called "D&O" insurance) policies offer two types of coverage. The first covers individual directors and officers for losses not indemnified by the corporation; the second reimburses the corporation for the amount it spends indemnifying directors and officers for their losses. A newer kind of D&O insurance not only covers the director or officer as the insured, but also provides protection for the corporation itself (so-called "entity coverage"). In the joint venture context, if D&O insurance is purchased by a joint venture party, its joint venture director appointees should confirm that the policy covers his or her actions as director of that foreign joint venture entity. Most foreign jurisdictions allow a company to procure D&O insurance, even if that jurisdiction does not permit indemnification provisions. For example, although U.K. law prohibits indemnification provisions in most circumstances, it does not preclude a company from purchasing D&O insurance.

A director of a foreign entity should carefully review the terms of the policy – particularly the exclusions and endorsements contained in it. For public policy

reasons, most D&O insurance policies contain a dishonesty exclusion. That is, they do not cover dishonest or criminal acts by an officer or director. Another typical exclusion concerns claims brought by regulatory agencies. Endorsements may enhance or diminish coverage and can often be negotiated with the insurer, possibly with an increased or reduced premium.

Statutory Indemnification of Employees. When an employee of a US corporation is asked to serve as director of the corporation's foreign joint venture entity, service in that capacity becomes part of his or her employment duties. To the extent that such director's liability is incurred within the course and scope of his or her employment by the US corporation, the individual may be protected by the statutory indemnification provisions of the applicable state employment law or by common law principles of agency. For example, in Illinois, general principles of agency law provide that employees in the private sector are entitled to indemnification from their employer for all losses incurred by the employee while acting in good faith within the scope of their employment. "Scope of employment" is understood broadly: an employee's conduct is within the scope of his or her employment where it is a lawful action undertaken at the direction of and for the benefit of the employer. The employee's right to indemnification under general agency principles is fairly broad. However, an employee will not be indemnified for conduct that is illegal, even if performed pursuant to the express direction of the principal.

Criminal Liability of Directors

Sources of Potential Liability

A director of a foreign entity potentially may face criminal liability in two types of situations: (1) criminal liability arising from intentional, willful or knowing misconduct of the individual director while in office and (2) criminal liability arising from the foreign entity's acts in contravention of the applicable foreign law where the director did not act intentionally, willfully or knowingly.

As a matter of common sense, most individuals realize that certain acts (*e.g.*, fraud, forgery and theft) are clearly dishonest, improper and/or criminal. In the corporate context, such offenses may take the form of providing false information or making untrue statements to authorities or shareholders, intentional destruction of financial records, or other improprieties. Most directors recognize the illegality of such acts and understand that they may give rise to criminal liability.

There are, however, less obvious sources of criminal liability, to which a director of a foreign entity may expose himself or herself inadvertently, for example by signing a document on behalf of the entity without being aware that this causes the entity to violate local criminal laws. These “hidden” sources of criminal liability may be associated with corporate compliance, tax or other laws of the foreign jurisdiction.

Corporate Compliance. A company’s violation of corporate compliance requirements may give rise to criminal liability for the directors responsible for the company’s compliance. For example, in the United Kingdom, a director may be held criminally liable for the company’s failure to hold an annual general meeting within 15 months of its last annual general meeting and, if convicted, will be subject to a fine. In Japan, a director is criminally liable for an illegal distribution of dividends in the absence of adequate distributable profit. It should be noted that it is not a defense that the joint venture parties authorized the act. If convicted, the director could face a significant fine and/or imprisonment.

Tax. Criminal liability may also be imposed on directors for corporate tax violations including tax evasion, failure to pay taxes, making a false entry in a tax return and destroying records. In Ireland, for example, most revenue offenses committed by a director are punishable by imprisonment and/or a significant fine. Similar punishment exists in the United Kingdom and the People’s Republic of China.

Other Foreign Laws. Directors may also be held criminally liable for the company’s violations of numerous statutes of general applicability. For example, in the United Kingdom, a director may be held criminally liable under the Consumer Protection Act of 1987. The Consumer Protection Act covers offenses such as producing and/or importing defective (unsafe) products and giving misleading price indications, and violations are punishable by imprisonment and/or significant fines. Directors may also be criminally liable for the company’s violations of environmental protection laws, antitrust laws, copyright laws, patent and trademark laws and other laws. In Japan, for example, a director is criminally liable for violations of the Anti-Monopoly Law and infringement of third parties’ industrial rights under the Copyright Code.

Past Violations. In some countries, a director may also be criminally liable for past violations of law by the company of which he or she becomes director. If upon election to the board of directors, the director becomes aware of a continuing or ongoing failure of the company to comply with its legal obligations, the director could be criminally liable if he or she failed to take corrective action.

Limiting Exposure

Some defenses to potential criminal liability exist. For example, a director who takes all reasonable steps to secure compliance with a particular provision and endeavors to correct any irregularities of which he or she might become aware is more likely to avoid criminal liability.

Indemnification agreements may provide for indemnification from criminal liability; however, in some jurisdictions these provisions may be considered contrary to public policy and may be unenforceable. Most indemnification agreements exclude indemnification for liability incurred by a director through gross negligence, intentional misconduct or fraud. Similarly, D&O insurance policies typically exclude dishonest or criminal acts committed by a director or officer.

Director Liability in Connection with a Subsidiary's Insolvency/Bankruptcy

Sources of Potential Liability

The improper or faulty management of a company before or after it finds itself in financial difficulty represents a source of potential liability of which directors of foreign entities should be particularly aware. In general, absent mismanagement, a director is not personally liable for the company's financial failure, particularly when such failure results from general market conditions. In many jurisdictions, however, a director may be exposed to potential liability if he or she fails to exercise reasonable business judgment regarding the financial status of the company and, either expressly or implicitly through inaction, authorizes the continuation of business activity for a company that is or is likely to become insolvent.

A director of a bankrupt company may incur personal liability, in general, under the following circumstances: (1) in instances of mismanagement (defined broadly and often by case law), if the mismanagement leads to an insufficiency of assets; (2) if the director has not ensured that the company's taxes and social security contributions have been paid; (3) if the director has abused his or her position or committed fraud; or (4) if the director intentionally fails to commence bankruptcy proceedings within a specified period of time once the company becomes insolvent. This latter obligation warrants additional discussion.

In most jurisdictions, a director of a company has an affirmative duty to assure that the company does not trade or conduct business while the company is insolvent, a situation that is typically defined as one where the company cannot cover its liabilities with its current assets on an ongoing basis. Civil liability may also be imposed on a director of a company that becomes insolvent where the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation and the director failed to take every step he or she ought to have taken to minimize the potential loss to the company's creditors. Furthermore, in many jurisdictions, a director also has an affirmative duty to notify shareholders (*i.e.*, the parties to the joint venture) if the company becomes insolvent or overindebted and to initiate liquidation or bankruptcy proceedings within a specified period of time after it is determined that the company will not be able to meet its current financial obligations on a continued basis. The timeframe for initiating these proceedings is relatively short in many countries.

The threshold requirements for determining whether voluntary liquidation or involuntary bankruptcy proceedings must be initiated vary from jurisdiction to jurisdiction, and a director anticipating that the company may soon meet with financial difficulty should seek specific advice regarding the company's options in advance. The decision with respect to the type of winding up procedure to pursue should be based on analysis of accurate financial statements. Although in some jurisdictions a liquidation proceeding can be converted into a bankruptcy proceeding if a determination is made during the liquidation process that a solvent liquidation is impossible, other jurisdictions are not so flexible.

Limiting Exposure

Directors should take care to avoid "surprises" regarding the financial situation of the company. The timely and accurate preparation of financial accounts on a regular (*i.e.*, monthly and quarterly) basis (in addition to annual filings) should assist the directors in assessing the financial condition of the company. If the company's financial situation is beginning to deteriorate, it is advisable to increase the frequency of management accounts in order to monitor the situation as closely as possible. The directors should seek timely professional advice regarding their specific duties in connection with the company's possible insolvency in that particular foreign jurisdiction.

If the company experiences financial difficulties, and the directors have determined that the company is, or is about to become, insolvent, they should immediately notify the shareholders (*i.e.*, the parties to the joint venture) of this situation. The shareholders may rectify the situation through an infusion of funds. Thus, in the joint venture context, so long as the company remains funded by the joint venture parties and is therefore able to meet its debt obligations as they fall due (thereby avoiding insolvency), directors may not need to take action to wind up the company. They should, however, remain vigilant regarding the company's financial situation and exercise due care with regard to any asset transfers or contractual engagements, so as not to incur new liabilities or debts that could lead to charges of fraudulent trading.

As a practical matter, a director should also keep in mind the potential costs of liquidation in analyzing the company's financial situation. In some cases, the decision to cease operating should be made early, while the company still has sufficient funds to pay liquidation costs, particularly in the joint venture context if there is any doubt that the joint venture parties will finance the liquidation.

Conclusion

Serving as a director of a foreign entity is not a risk-free proposition. The general duties and responsibilities that apply to a director of a US corporation may also apply to a director of a foreign entity. The law of the jurisdiction in which the foreign entity is incorporated determines the potential civil and criminal sanctions that may be imposed on a director. The scope and severity of the failure to comply with local law and the associated consequences can vary widely, as discussed in this brief overview. Individuals serving as directors can take some steps towards reducing their liability exposure, notably by requesting indemnity agreements and confirming the level of D&O or entity insurance in effect. These steps may not be options in all jurisdictions, particularly in those which may consider such actions to be void as against public policy. These steps, however, are not a substitute for diligent performance of one's duties as a director.

The guiding principle for any director, in addition to any available indemnification or insurance, is to be constantly aware of the company's business and financial situation and to confirm that all corporate formalities, tax filings and required annual reports and filings are attended to in a consistent and timely manner.

Appendix B

Overview of Applicable US Laws Impacting D&O Liability

Where a US party is contemplating entering into a joint venture in a foreign jurisdiction, the directors of the joint venture must be prepared to identify activities or transactions at the joint venture level that may create the risk of civil or criminal liability under US and local laws. Regardless of whether a US party controls the joint venture (through equity ownership or management control), there are a number of activities and transactions at the joint venture level that can expose the joint venture, its directors themselves and even the US party, to civil and criminal liability under US or local laws, and that can seriously damage the US party's business reputation. Some of the activities that could most seriously impact the joint venture and the joint venture directors are:

- Bribes to local government officials to win business concessions;
- Partnering with a local company which is funded by illegal activities;
- Engaging in anti-competitive discussions with competitors; and
- Entering into agreements that contain provisions supporting boycott activities.

In addition, acts that ratify or otherwise signal the intent of the joint venture directors or the US party to aid and abet or conspire to violate local laws could expose the joint venture, its directors or the US party itself to liability under local and US laws. For example, if the joint venture directors are present at meetings where bribes to government employees are discussed, or if the US party accepts dividends from a joint venture sourced in revenues from contracts derived from bribes, both the joint venture directors and the US party could face serious liability. Moreover, if the US party continues to invest in a joint venture after having knowledge (*e.g.*, through its joint venture board representatives) of improper activities or transactions by the joint venture or the other party to the joint venture, the US party may be deemed to have acquiesced in, ratified or been involved in the activity.

Finally, the joint venture directors may find themselves in situations where there is a real or potential conflict between their roles as senior executives of the US party and their roles as directors of the joint venture. Those conflicts will require a balancing of potentially inconsistent duties.

US Laws That Could Expose the US Party, the Joint Venture and its Directors to Liability

Some US laws apply to activities and transactions that occur outside the United States, even if a US entity does not wholly own or control the non-US entity. Indeed, in appropriate circumstances, some US laws, such as the money laundering laws, can apply if only a part of a transaction occurs in the United States – such as a wire transfer through a US bank accounts that touches the United States only momentarily.

The US laws of particular note are the following:

- the Foreign Corrupt Practices Act (or “FCPA”), which prohibits bribes to foreign government officials, political parties or political candidates, and imposes accounting and internal control requirements on the US party;
- money laundering and Bank Secrecy Act reporting and recordkeeping requirements, which prohibit transactions with funds sourced from illegal activity;
- trade and investment sanctions, which generally restrict the ability of US individuals and companies to engage in any transactions with countries such as Cuba, Iran and Sudan;
- export controls, which regulate the export and re-export of so-called “US-origin items;”
- US anti-boycott regulations, which prohibit or penalize certain activities and agreements in connection with foreign boycotts that are not sanctioned by the United States, such as the Arab League boycott of Israel;
- anti-competition laws; and

- certain other criminal laws, such as mail and wire fraud, conspiracy, aiding and abetting, and other vicarious liability theories, all of which could be used by US authorities to prosecute the joint venture, its directors or the US party itself in appropriate circumstances, for customs fraud, foreign tax evasion and other fraud committed against foreign governments.

Discussion

The following is a discussion of each of the above-listed US laws that could expose a joint venture, its directors and the US joint venture party to liability.

Improper Payments to Foreign Government Officials

Any time a joint venture is dealing with government officials or employees of government-owned entities, the joint venture directors should ask appropriate questions at board meetings and oversee the joint venture's activities to ensure that improper payments are not promised, offered or made, and that all contracts are obtained on the merits and in good faith. The FCPA prohibits certain improper payments, directly or indirectly through third parties, to foreign officials, political parties or political candidates, and officials or employees of public international organizations, such as the European Union. These laws can apply to the joint venture, its directors and the US party itself, in appropriate circumstances, given the level of general and specific involvement in the improper payments. Thus, if a joint venture makes improper payments, the US party could be held responsible for such payments.

Foreign officials may include not just officials themselves, but also officers and employees of foreign-owned or controlled enterprises such as hospitals, schools, train stations or other public transportation facilities. Bribes to such officials to obtain concessions so the US party can expand its operations are likely to violate the FCPA and local anti-bribery laws. Penalties for violations of these laws include heavy civil and criminal fines, imprisonment and potentially very serious damage to the US party's business reputation.

In addition, under the US securities laws, including the accounting provisions of the FCPA, a US party which is a US publicly-traded company must meet various standards as to the accuracy of financial statements and internal controls of consolidated joint ventures, minority interest joint ventures and joint ventures or alliances that perform certain "outsourcing" functions.

To the extent the joint venture commits any act in the United States in furtherance of an activity prohibited by the FCPA, such as wire transfer through US banks of monies used for a bribe to a government official, the joint venture would be subject to jurisdiction under the FCPA. The FCPA also will apply to a joint venture director who uses faxes or telephones in furtherance of a prohibited bribe. The US party could have direct responsibility for the FCPA violation based upon its connection to the joint venture.

Joint venture directors should not, in their individual capacities, be liable for improper payments made by the joint venture or joint venture parties if the joint venture directors do not have knowledge of, and are not willfully blind or deliberately ignorant to, any improper payments by the joint venture or joint venture parties. If the joint venture directors have knowledge, that knowledge could be imputed to the US party in appropriate circumstances. Joint venture directors also should confirm that none of the joint venture parties are government officials or related to foreign government officials.

Engaging in Transactions with the Proceeds of Illegal Activity

Joint venture directors should ensure that the joint venture does business and enters into financial transactions only with reputable business partners who are sourced in funds generated from wholly legal activities and routed through reputable banking centers. Under the US money laundering laws, the joint venture, its directors and the US party can all be potentially liable for serious money laundering violations if they enter into transactions with funds that are sourced from illegal activity – including foreign tax evasion and bribery of government officials. Penalties for violations of these laws include civil and criminal fines, imprisonment and forfeiture. The US money laundering laws, generally speaking, prevent persons from entering into financial transactions where knowledge of, or being willfully blind or deliberately ignorant to, the fact that the funds involved in the transaction are the proceeds of unlawful activities. These laws can apply in appropriate circumstances to the joint venture, its directors and the US party, even if the relevant conduct takes place outside the United States or if the conduct occurs only in part in the United States, such as wire transfers to or from US banks.

Moreover, the US party itself could be deemed to have aided and abetted or conspired to participate in a money laundering violation if dividends sourced from the joint venture's illegal activities are paid to the US party in the United States,

and the joint venture directors knew or failed to ask questions in the face of red flags that the joint venture's dividends were sourced from violations of law, or that payments made by the joint venture funded terrorist activity. Finally, joint venture directors also may have recordkeeping obligations relating to foreign joint venture bank accounts under the US Bank Secrecy Act and/or the US Patriot Act.

Regardless of actual legal exposure, however, any involvement by the joint venture in money laundering or terrorist financing is likely to cause significant damage to the US party's business reputation.

Entering into Agreements with Sanctioned Persons or Countries, including Cuba

A US joint venture party may not be involved in or facilitate offshore transactions involving countries or persons that have been sanctioned by the United States. The United States currently maintains country-specific trade and investment sanctions against various countries, such as Burma (Myanmar), Cuba, Iran and Sudan, and individuals and entities deemed to be foreign policy concerns, such as narcotics traffickers or terrorists. These trade sanctions apply to US joint venture parties and to joint venture directors who are US citizens and green card holders. The trade sanctions generally would not apply to a foreign joint venture itself unless the US party owns or controls the joint venture. More expansive rules apply in the case of Cuba, and a US party should be especially vigilant with any activities relating to Cuba. Violations of trade sanctions are punishable by civil and criminal penalties and imprisonment in some cases.

Examples of improper activities include a US party's review or approval of prohibited transactions, or purchase of capital equipment earmarked for the joint venture's business with sanctioned countries. If the joint venture entity discusses expansion plans that involve countries, individuals or entities that are sanctioned by the US, the joint venture directors may be liable for US trade sanctions violations. It is likely that large sales or investment transactions contemplated by a joint venture may require approval or guarantees by the joint venture partners. If sanctioned countries or persons are involved, the US party may not provide its approval or guarantee, and could not specifically delegate that responsibility to others.

Joint venture directors who are US citizens or permanent resident aliens are fully subject to the trade sanctions, even if they are overseas or on temporary assignment

to the joint venture. All such joint venture directors should recuse themselves from activities or transactions with sanctioned countries or sanctioned persons that are permissibly entered into by the joint venture.

Monitoring for Export Controls and Export License Requirements

Exports or re-exports by a joint venture involving US-origin items or foreign items with US content generally are restricted to certain countries, such as Cuba, Iran, Sudan and Syria. In addition, such exports or re-exports might trigger certain licensing requirements (*e.g.*, the US party may supply computers or encryption software to the joint venture that are subject to US export license requirements). Accordingly, joint venture directors must be certain they are instructed on export controls before entering into transactions on behalf of the joint venture. In addition, there are somewhat technical exceptions for de minimis levels of US content.

It is important to note that a company found to be in violation of export controls can have its export privileges denied by the US Department of Commerce. A denial of export privileges could have very serious implications for the regular exports and re-exports from the United States of the US party's other products.

Transactions With the Middle East Involving the Arab Boycott of Israel

The United States prohibits and/or penalizes participation in or compliance with foreign boycotts against countries that are considered "friendly" to the United States and that are not the object of any form of boycott under US laws or regulations. Anti-boycott laws are particularly relevant for companies doing business in the Middle East, where the Arab League boycott of Israel is still actively maintained, or with other countries that boycott Israel.

A US joint venture party is fully subject to the US anti-boycott rules, limited to the extent of its knowledge of or actual involvement, such as specific authorization or direction, in the joint venture's boycott-related acts. Boycott-related participation or cooperation by the joint venture also could have negative tax consequences for the US party. In that regard, any boycott action taken by the joint venture, such as agreeing to enter into a contract or set up a store with terms that are favorable to the boycott of Israel, will be subject to US anti-boycott rules. Any time the joint venture does business with Middle Eastern countries, the joint venture directors

should ensure that all underlying documentation, including seemingly innocent or standard boilerplate terms, do not, in fact, support the Arab League boycott of Israel.

Prohibited Communications with Competitors and Other Anti-Competitive Behavior

Anti-competitive conduct by a foreign joint venture or its directors, such as exchanging information with competitors, price fixing or acting as a monopoly, can be charged under US criminal and civil antitrust laws if there are certain harmful effects on US commerce. The joint venture, its directors and potentially the US party can be exposed to civil and criminal antitrust claims in this regard.

Related US Criminal Laws

In addition to the laws described above, the joint venture, its directors and the US party can all, in appropriate circumstances, be charged by enforcement authorities with mail fraud and wire fraud, conspiracy or aiding and abetting as well as under other theories of vicarious liability for fraudulent and improper acts taken by the joint venture with the knowledge and/or involvement of the joint venture directors or the US party. Situations that can arise might include the joint venture's involvement in failing to comply with local requirements relating to taxes, currency controls or customs duties.

Baker & McKenzie Offices Worldwide

Office phone numbers and addresses change from time to time. Please refer to www.bakera.com for current contact information.

ARGENTINA - BUENOS AIRES

Baker & McKenzie Sociedad Civil
Avenida Leandro N. Alem 1110,
Piso 13, C1001AAT Buenos Aires,
Argentina
Telephone: +54 11 4310 2200;
5776 2300
Facsimile: +54 11 4310 2299;
5776 2399

AUSTRALIA - MELBOURNE

Baker & McKenzie
Level 39 Rialto
525 Collins Street
Melbourne, Victoria 3000
Telephone: +61 3 9617 4200
Facsimile: +61 3 9614 2103

AUSTRALIA - SYDNEY

Baker & McKenzie
Level 26, A.M.P. Centre
50 Bridge Street
Sydney, N.S.W. 2000
Telephone: +61 2 9225 0200
Facsimile: +61 2 9225 1595

AUSTRIA - VIENNA

Diwok Hermann Petsche
Rechtsanwälte GmbH
Am Heumarkt 10
1030 Vienna, Austria
Telephone: +43 1 24 250 660
Facsimile: +43 1 24 250 600

AZERBAIJAN - BAKU

Baker & McKenzie - CIS, Limited
The Landmark Building
96 Nizami Street
Baku AZ1010 Azerbaijan
Telephone: +994 12 497 18 01
Facsimile: +994 12 497 18 05

BAHRAIN

Baker & McKenzie Limited
Al Salam Tower, 6th Floor
Diplomatic Area
P.O. Box 11981
Manama, Kingdom of Bahrain
Telephone: +973 17 538 800
Facsimile: +973 17 533 379

BELGIUM - ANTWERP

Baker & McKenzie
Meir 24
2000 Antwerp, Belgium
Telephone: +32 3 213 4040
Facsimile: +32 3 213 4045

BELGIUM - BRUSSELS

Baker & McKenzie
149 Avenue Louise
1050 Brussels, Belgium
Telephone: +32 2 639 3611
Facsimile: +32 2 639 3699

BELGIUM - European & Competition Law Practice

Baker & McKenzie
149 Avenue Louise
1050 Brussels, Belgium
Telephone: +32 2 639 3611
Facsimile: +32 2 639 3699

BRAZIL - BRASILIA

Trench, Rossi e Watanabe - Advogados
SCN Q.04 - Bloco B - Sala 503 B
Centro Empresarial Varig
70714 900 Brasília, DF, Brazil
Telephone: +55 61 2102 5000
Facsimile: +55 61 327 3274

BRAZIL - PORTO ALEGRE

Trench, Rossi e Watanabe - Advogados
Avenida Borges de Medeiros, 2233
4º andar - Centro
90110 150 Porto Alegre, RS, Brazil
Telephone: +55 51 3220 0900
Facsimile: +55 51 3220 0901

BRAZIL - RIO DE JANEIRO

Trench, Rossi e Watanabe - Advogados
Av. Rio Branco, 1 - 19º andar, Setor B
Centro Empresarial International Rio
20090-003 Rio de Janeiro, RJ, Brazil
Telephone: +55 21 2206 4900
Facsimile: +55 21 2206 4949

BRAZIL - SAO PAULO

Trench, Rossi e Watanabe - Advogados
Av. Dr. Chucuri Zaidan, 920,
13º andar, Market Place Tower I
04583 904, São Paulo - SP, Brazil
Telephone: +55 11 3048 6800
Facsimile: +55 11 5506 3455

CANADA - TORONTO

Baker & McKenzie LLP
Brookfield Place, Suite 2100
181 Bay Street, P.O. Box 874
Toronto, Ontario
M5J 2T3, Canada
Telephone: +1 416 863 1221
Facsimile: +1 416 863 6275

CHILE - SANTIAGO

Cruzat, Ortúzar & Mackenna Ltda
Nueva Tajamar 481
Torre Norte, Piso 21
Las Condes, Santiago, Chile
Telephone: +56 2 367 7000
Facsimiles: +56 2 362 9876; 362 9877;
362 9878

CHINA - BEIJING

Baker & McKenzie LLP
Suite 3401, China World Tower 2
China World Trade Center
1 Jianguomenwai Dajie
Beijing 100004
People's Republic of China
Telephone: +86 10 6535 3800
Facsimile: +86 10 6505 2309;
6505 0378

CHINA HONG KONG - SAR

Baker & McKenzie
14th Floor, Hutchison House
10 Harcourt Road, Central
Hong Kong SAR
Telephone: +85 2 2846 1888
Facsimiles: +85 2 2845 0476;
2845 0487; 2845 0490

CHINA - SHANGHAI

Baker & McKenzie LLP
Unit 1601, Jin Mao Tower,
88 Century Boulevard, Pudong
Shanghai 200121
People's Republic of China
Telephone: +86 21 5047 8558
Facsimile: +86 21 5047 0020

COLOMBIA - BOGOTA

Baker & McKenzie Bogota
Avenida 82 No. 10-62
6th Floor Bogota, Colombia
Telephone: +57 1 634 1500; 644 9595
Facsimile: +57 1 376 2211

CZECH REPUBLIC - PRAGUE

Baker & McKenzie v.o.s.
Praha City Center
Klimentská 46
110 02 Prague 1, Czech Republic
Telephone: +420 236 045 001
Facsimile: +420 236 045 055

EGYPT - CAIRO

Helmy, Hamza & Partners/
Baker & McKenzie
Nile City Building, North Tower
21st Floor 2005C, Cornich El Nil
Ramlet Beaulac, Cairo, Egypt
Telephone: +2 2 2461 9301
Facsimile: +2 2 2461 9302

ENGLAND - LONDON

Baker & McKenzie LLP
100 New Bridge Street
London EC4V 6JA, England
Telephone: +44 20 7919 1000
Facsimile: +44 20 7919 1999

FRANCE - PARIS

Baker & McKenzie SCP
1 rue Paul Baudry
75008 Paris, France
Telephone: +33 1 4417 5300
Facsimile: +33 1 4417 4575

GERMANY - BERLIN

Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern, Steuerberatern
und Solicitors
Friedrichstrasse 79-80
10117 Berlin
Germany
Telephone: +49 30 2038 7600
Facsimile: +49 30 2038 7699

GERMANY - DUSSELDORF

Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern, Steuerberatern
und Solicitors
Neuer Zollhof 2
40221 Düsseldorf
Germany
Telephone: +49 211 311 160
Facsimile: +49 211 311 16199

GERMANY - FRANKFURT

Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern, Steuerberatern
and Solicitors
Bethmannstrasse 50-54
60311 Frankfurt/Main
Germany
Telephone: +49 69 299 080
Facsimile: +49 69 299 08108

GERMANY - MUNICH

Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern, Steuerberatern
und Solicitors
Theatinerstrasse 23
80333 München
Germany
Telephone: + 49 89 552 380
Facsimile: + 49 89 552 381 99

HUNGARY - BUDAPEST

Martonyi és Kajtár
Baker & McKenzie Attorneys at Law
Andrássy út 102
1062 Budapest, Hungary
Telephone: +36 1 302 3330
Facsimile: +36 1 302 3331

INDONESIA - JAKARTA

Hadiputranto, Hadinoto & Partners
The Indonesia Stock Exchange Building
Tower II, 21st Floor
Sudirman Central Business District
Jl. Jendral Sudirman Kav.52-53
Jakarta 12190, Indonesia
Telephone: +62 21 515 5090;
515 5091; 515 5092; 515 5093
Facsimiles: +62 21 515 4840;
515 4845; 515 4850; 515 4860;
515 4865

ITALY - BOLOGNA

Studio Professionale Associato a
Baker & McKenzie
Via Mascarella, 94-96
40126 Bologna, Italy
Telephone: +39 51 240 788
Facsimile: +39 51 240 131

ITALY - MILAN

Studio Professionale Associato a
Baker & McKenzie
3 Piazza Meda
20121 Milan, Italy
Telephone: +39 2 762 311
Facsimile: +39 2 762 31620

ITALY - ROME

Studio Professionale Associato a
Baker & McKenzie
Viale di Villa Massimo, 57
00161 Rome, Italy
Telephone: +39 6 440 631
Facsimile: +39 6 440 63306

JAPAN - TOKYO

Baker & McKenzie GJBJ
Tokyo Aoyama Aoki Koma Law Office
(Gaikokuho Joint Enterprise)
The Prudential Tower, 11th Floor
13-10 Nagatacho 2-chome
Chiyoda-ku, Tokyo 100 0014
Telephone: +81 3 5157 2700
Facsimile: +81 3 5157 2900

KAZAKHSTAN - ALMATY

Baker & McKenzie - CIS, Limited
Samal Towers, Samal-2, 14th Floor
97 Zholdasbekov Street
Almaty, Kazakhstan 050051
Telephone: +7 727 250 99 45
Facsimile: +7 727 258 40 00

MALAYSIA - KUALA LUMPUR

Wong & Partners
Level 41 Suite A, Menara Maxis
Kuala Lumpur City Centre
50088 Kuala Lumpur, Malaysia
Telephone: +60 3 2055 1888
Facsimile: +60 3 2161 2919

MEXICO - CANCUN

Baker & McKenzie Abogados S.C.
Edificio Galerías Infinity, Piso 2
Av. Nichupté 19, Mza 2 SM 19
77500 Cancún, Q. Roo, México
Telephone: +52 998 881 1970
Facsimile: +52 998 881 1989

MEXICO - CHIHUAHUA

Baker & McKenzie Mexico, S.C.
Edificio Punto Alto 2, Piso 4
Av. Valle Escondido 5500
31125 Chihuahua, Chihuahua, México
Telephone: +52 614 180 1300
Facsimile: + 52 614 180 1329

MEXICO - GUADALAJARA

Baker & McKenzie Abogados S.C.
Bld. Puerta de Hierro 5090
Fraccionamiento Puerta de Hierro
45110 Zapopan, Jalisco, México
Telephone: + 52 33 3848 5300
Facsimile: + 52 33 3848 5399

MEXICO - JUAREZ

Baker & McKenzie Abogados, S.C.
P.T. de la República 3304, Piso 2
32330 Juárez, Chihuahua, México
P.O. Box 9338 El Paso, TX 79995
Telephone: +52 656 629 1300
Facsimile: +52 656 629 1399

MEXICO - MEXICO CITY

Baker & McKenzie S.C.
Edificio Scotiabank Inverlat, Piso 12
Blvd. M. Avila Camacho 1
11009 México, D.F., México
Telephone: +52 55 5279 2900
Facsimile: +52 55 5279 2999

MEXICO - MONTERREY

Baker & McKenzie Abogados, S.C.
Edificio Oficinas en el Parque
Torre I Piso 10
Blvd. Antonio L. Rodriguez 1884 Pte.
64650 Monterrey, Nuevo León, México
Telephone: +52 81 8399 1300
Facsimile: +52 81 8399 1399

MEXICO - TIJUANA

Baker & McKenzie Abogados, S.C.
Blvd. Agua Caliente 10611, Piso 1
22420 Tijuana, B.C., México
P.O. Box 1205 Chula Vista, CA 91912
Telephone: +52 664 633 4300
Facsimile: +52 664 633 4399

**THE NETHERLANDS -
AMSTERDAM**

Baker & McKenzie Amsterdam N.V.
Claude Debussylaan 54
1082 MD Amsterdam
P.O. Box 2720
1000 CS Amsterdam
The Netherlands
Telephone: + 31 20 551 7555
Facsimile: + 31 20 626 7949

PHILIPPINES - MANILA

Quisumbing Torres
12th Floor, Net One Center
26th Street Corner 3rd Avenue
Crescent Park West
Bonifacio Global City
Taguig, Metro Manila,
Philippines 1634
Postal Address:
MCPO Box 1578
Makati City 1299, Philippines
Telephone: +63 2 819 4700
Facsimiles: +63 2 816 0080, 728 7777

POLAND - WARSAW

Baker & McKenzie
Gruszczyński i Wspólnicy
Attorneys at Law LP
Rondo ONZ 1
00-124 Warsaw, Poland
Telephone: +48 22 445 3100
Facsimile: +48 22 445 3200

RUSSIA - MOSCOW

Baker & McKenzie - CIS, Limited
Sadovaya Plaza, 11th Floor
7 Dolgorukovskaya Street
Moscow, Russia 127006
Telephone: +7 495 787 2700
Facsimile: +7 495 787 2701

RUSSIA - ST. PETERSBURG

Baker & McKenzie - CIS, Limited
57, Bolshaya Morskaya Street
St. Petersburg, Russia 190000
Telephone: +7 812 303 9000
Facsimile: +7 812 325 6013

SAUDI ARABIA - RIYADH

Baker & McKenzie Gulf Limited
Olayan Complex Tower II
Al Ahsa Road
PO Box 4288
Riyadh 11491, Saudi Arabia
Telephone: +966 1 291 5561
Facsimile: +966 1 291 5571

SINGAPORE

Baker & McKenzie. Wong & Leow
#27 01 Millenia Tower
1 Temasek Avenue
Singapore 039192
Telephone: +65 6338 1888
Facsimile: +65 6337 5100

SPAIN - BARCELONA

Baker & McKenzie Barcelona S.L.
Avda. Diagonal, 652
Edif. D, 8th floor
08034 Barcelona, Spain
Telephone: +34 93 206 0820
Facsimile: +34 93 205 4959

SPAIN - MADRID

Baker & McKenzie Madrid S.L.
Paseo de la Castellana, 92
28046 Madrid, Spain
Telephone: +34 91 230 4500
Facsimile: +34 91 391 5149

SWEDEN - STOCKHOLM

Baker & McKenzie Advokatbyrå
Linnegatan 18
P.O. Box 5719
SE - 11487 Stockholm, Sweden
Telephone: +46 8 5661 7700
Facsimile: +46 8 5661 7799

SWITZERLAND - GENEVA

Baker & McKenzie Geneva
Chemin des Vergers 4
1208 Geneva, Switzerland
Telephone: +41 22 707 9800
Facsimile: +41 22 707 9801

SWITZERLAND - ZURICH

Baker & McKenzie Zurich
Zollikerstrasse 225
P.O. Box 8034 Zürich
Switzerland
Telephone: +41 1 384 1414
Facsimile: +41 1 384 1284

TAIWAN - TAIPEI

Baker & McKenzie
15th Floor, Hung Tai Center
No.168, Tun Hwa North Road
Taipei, Taiwan 105
Telephone: +886 2 2712 6151
Facsimiles: +886 2 2716 9250;
2712 8292

THAILAND - BANGKOK

Baker & McKenzie Ltd.
25th Floor, Abdulrahim Place
990 Rama IV Road
Bangkok 10500, Thailand
Telephone: +66 2636 2000; 2636 2222
Facsimile: +66 2636 2111

UKRAINE - KYIV

Baker & McKenzie - CIS, Limited
Renaissance Business Center
24 Vorovskoho St.
Kyiv 01054, Ukraine
Telephone: +380 44 590 0101
Facsimile: +380 44 590 0110

UNITED STATES - CHICAGO

Baker & McKenzie LLP
300 East Randolph Drive
Chicago, Illinois 60601, US
Telephone: +1 312 861 8000
Facsimiles: +1 312 861 2899; 861 8080

UNITED STATES - DALLAS

Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201, US
Telephone: +1 214 978 3000
Facsimile: +1 214 978 3099

UNITED STATES - HOUSTON

Baker & McKenzie LLP
Pennzoil Place, South Tower
711 Louisiana, Suite 3400
Houston, Texas 77002-2746, US
Telephone: +1 713 427 5000
Facsimile: +1 713 427 5099

UNITED STATES - MIAMI

Baker & McKenzie LLP
Mellon Financial Centre
1111 Brickell Avenue
Suite 1700
Miami, Florida 33131, US
Telephone: +1 305 789 8900
Facsimile: +1 305 789 8953

UNITED STATES - NEW YORK

Baker & McKenzie LLP
452 Fifth Avenue
New York, New York 10018, US
Telephone: +1 212 626 4100
Facsimile: +1 212 310 1600

UNITED STATES - PALO ALTO

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, California 94304, US
Telephone: +1 650 856 2400
Facsimile: +1 650 856 9299

**UNITED STATES -
SAN FRANCISCO**

Baker & McKenzie LLP
Two Embarcadero Center
Twenty-Fourth Floor
San Francisco,
California 94111-3909, US
Telephone: +1 415 576 3000
Facsimiles: +1 415 576 3099; 576 3098

**UNITED STATES -
WASHINGTON, D.C.**

Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, D.C. 20006-4078, US
Telephone: +1 202 452 7000
Facsimile: +1 202 452 7074

VENEZUELA - CARACAS

Baker & McKenzie SC
Torre Edicampo, PH
Avenida Francisco de Miranda
Cruce con Avenida Del Parque
Urbanización Campo Alegre,
Caracas 1060
Postal Address: PO Box 1286
Caracas 1010-A, Venezuela
US Mailing Address:
Baker & McKenzie
M-287, Jet Cargo International
P.O. Box 020010
Miami, Florida 33102-0010, USA:
Telephone: +58 212 276 5111;
276 5112
Facsimiles: +58 212 264 1532;
264 1637

VENEZUELA - VALENCIA

Baker & McKenzie SC
Edificio Torre Venezuela, Piso No.4
Av. Bolivar cruce con Calle 154
(Misael Delgado)
Urbanizacion La Alegria
Postal Address: PO Box 1155
Valencia, Estado Carabobo, Venezuela
Telephone: +58 241 824 8711
Facsimile: +58 241 824 6166

VIETNAM - HANOI

Baker & McKenzie LLP
13th Floor, Vietcombank Tower
198 Tran Quang Khai Street
Hoan Kiem District
Hanoi, Socialist Republic of Vietnam
Telephone: +84 4 825 1428;
825 1429; 825 1430
Facsimile: +84 4 825 1432

VIETNAM - HO CHI MINH CITY

Baker & McKenzie LLP
12th Floor, Saigon Tower
29 Le Duan Blvd.
District 1, Ho Chi Minh City
Socialist Republic of Vietnam
Telephone: +84 8 829 5585;
829 5601; 829 5602
Facsimile: +84 8 829 5618

