

## AN INTERNATIONAL JOINT VENTURE AGREEMENT CHECKLIST: DEAL POINTS

February 2020 Revised and Updated-Focus on Foreign Investment, Technology Export and National Security

### I. Executive Summary

We developed this checklist as a tool and guide to necessary and optional elements to negotiate and document the principal agreement or deal document in an international or cross-border joint venture (“JV”) between a U.S. party or parties and one or more non-U.S. parties. JVs usually imply a formal collaboration short of merger or acquisition between two or more enterprises through a newly formed business entity or contract, as opposed to Strategic Alliances, which usually involve two or more parties working to achieve a specific goal of mutual interest while remaining independent. Joint Ventures can be structured in creative and flexible ways to provide the solution that best fits the parties’ needs. The checklist has been used by us specifically for cross-border JVs in the biotech, chemicals, pharmaceuticals, satellites and telecommunications sectors. Following the checklist are “Deal Points,” which address broader JV strategy.

The principal JV agreement that the checklist can be used to develop can be a corporation shareholders’ agreement, a partnership or limited partnership (“LP”) agreement, a limited liability company (“LLC”) operating agreement, or a bilateral or multilateral commercial contract not itself embodying a business entity, for example, a JV agreement denominated as such or an investment agreement.

The principal business terms and goals should be at least broadly agreed to before documenting them. Use of a preliminary document such as a Term Sheet, Memorandum of Understanding (“MoU”) or a Letter of Intent (“LoI”) can facilitate making sure the general terms are in place. The intended deal should drive the documentation, not the reverse. The checklist for a given JV Agreement should evolve as the deal is negotiated, and more detailed notes and terms can be annexed to the checklist as schedules referenced by the checklist section number.

As a general matter, heightened U.S., national security concerns and a resurgence of trade protectionism and sanctions emphasize the need to pass regulatory review of cross-border JVs on foreign investment, technology export, and sanctions grounds, and recently expanded regulatory review, especially of foreign investment and ownership, must be considered. The bottom line is that cross-border or international JVs remain a staple of international deal-making, especially when a formal business combination is not desired, but require more thoughtful and expert navigation than previously.

[Continued on following page]

II. JV Agreement Checklist

| Key Terms & Questions         | Transaction Specifics          | Additional Considerations  | Responsible Party | Due Date |
|-------------------------------|--------------------------------|--|-------------------|----------|
| <b>I. Main Business Terms</b> |                                |  |                   |          |
| A. Parties                    | [Party]<br>[Party]             | Consider formation of Special Purpose Vehicle (“SPV”) subsidiaries, holdcos or affiliates to serve as JV parties to isolate profits, losses and liabilities (incl. in bankruptcy or insolvency) or hold assets<br><br>Consider whether third party creditors (banks, vendors) will demand guarantees by parents  |                   |          |
| B. Scope                      | Define Scope and Purpose of JV | Consider whether JV should allow parties to widen or modify scope v. restrictive scope provision as to range of business engaged in, geographic scope, etc. Exclusivity of relationship can be dealt with as part of “scope”   |                   |          |
| C. Term and Termination       | Fixed Term v. Indefinite Term  | Consider if fixed term, renewable or not? If so, auto-renewal if no notice of termination v. must affirmatively agree to renew within [x] days of end of the then current term? Auto-renewal is obviously in interest of party most concerned that the JV continues after initial term. In any of these cases, what notice period?<br><br>Consider termination rights prior to the expiration of the initial or any renewal term. See Section IV(D), below |                   |          |

| Key Terms & Questions                              | Transaction Specifics   | Additional Considerations   | Responsible Party |  |
|--|---|---|-------------------|--|
| D. Division and Distribution of Profits and Losses | <input type="checkbox"/> Dividends<br><input type="checkbox"/> Periodic Distributions<br><input type="checkbox"/> Exceptional Distributions | <p>Consider mandatory distribution provisions</p> <p>Consider distribution “preferences” – for example, whether a party contributing cash is paid back first; preferences in the event of liquidation</p> <p>Consider, for tax and regulatory reasons, adjusting some distributions with employment, royalty-bearing license, service, and supply contracts that effectively “convert” profits to a fee or salary paid to a party</p> <p>Consider currency hedging and currency repatriation mechanisms for non-U.S. capital, interest, dividends and royalties, including tax implications, both during term and upon dissolution or termination</p> |                   |  |

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|---|---|---|-------------------|----------|
| <b>II. Regulatory Issues</b>  |   |   |                   |          |
| A. Antitrust – Competition  | <p>HSR Filing Required?<br/><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Clayton Act section 7 Review?<br/><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Horizontal – Vertical Cooperation Issues?<br/><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>E.U. Review?<br/><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Other?</p> | <p>Consider that a joint venture in which a legal entity is formed (LLC, LP, partnership, corporation) may activate the Hart-Scott-Rodino (“HSR”) reporting requirements, because HSR may treat each joint venture participant as an acquiring party and the JV entity as the acquired party. The reporting dollar thresholds change every year and are listed on the Federal Trade Commission website, ftc.gov</p> |                   |          |
| B. Foreign Ownership Restrictions?  | <input type="checkbox"/> Yes <input type="checkbox"/> No  | <p>See Section I(D), above. Foreign ownership restrictions, especially in sensitive or restricted industries with license holding requirements, can affect ownership structuring</p>  |                   |          |
| C. Committee for Foreign Investment in the U.S. (“CFIUS”) Review?<br><br>(Other Country Inbound investment issues)? | <input type="checkbox"/> Yes <input type="checkbox"/> No  | <p>Consider whether “sensitive industries” subject to foreign investment review are implicated, and front-loading of any necessary review. Ensure compliance with new Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) and 2019 CFIUS-FIRRMA expanded review regulations</p>   |                   |          |
| D. Industry-Specific Regulatory Review?   | <input type="checkbox"/> Yes <input type="checkbox"/> No  | <p>Are regulated industries such as financial services, securities, drug, communications, media, aerospace or defense involved?</p>   |                   |          |

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|--|--|---|-------------------|----------|
| E. Technology Export or Transfer Issues? | <input type="checkbox"/> Yes <input type="checkbox"/> No | Review for Commerce Department Export Administration Regulations (“EAR”) and/or State Department International Traffic in Arms Regulations (“ITAR”) Issues  |                   |          |
| Economic Sanctions Issues?               | <input type="checkbox"/> Yes <input type="checkbox"/> No | Review for Treasury Department Office of Foreign Assets Control (“OFAC”) or other economic transfer restrictions, including use of U.S. currency and/or use of U.S. banking system to clear transactions  |                   |          |
| F. Tax and Accounting                    |  | <p>Consider federal and state tax issues, ability to benefit from tax subsidies and tax credits</p> <p>Consider “flow-through” tax treatment of LLC, LP and Partnership forms</p> <p>Consider treatment of goodwill and any intangibles contributed to JV</p> <p>Establish and document auditing and reporting rights and obligations</p> <p>Consider tax implications of capital, interest, dividends and royalties, including foreign earnings repatriations, both during term and upon dissolution/termination</p> |                   |          |
| G. Insurance                             |  | Consider liability, D&O, other, allocation of responsibility between venturers  |                   |          |

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|--|--|--|-------------------|----------|
| <b>III. Preliminary Documentation</b>                          |  |  |                   |          |
| A. Term Sheet, Letter of Intent or Memorandum of Understanding | <input type="checkbox"/> Yes <input type="checkbox"/> No   | Consider whether any provisions or entire Term Sheet, LoI or MoU should be binding (frequently, confidentiality and standstill, no-shop/go-shop provisions are binding)  |                   |          |
| B. Confidentiality   | <input type="checkbox"/> Yes <input type="checkbox"/> No   | Consider duration of confidentiality provisions, whether confidentiality should survive JV termination   |                   |          |
| C. Press Release   | <input type="checkbox"/> Yes <input type="checkbox"/> No   | 8-K filing may be necessary for public companies   |                   |          |
| <b>IV. Principal Documentation</b>                             |  |  |                   |          |
| A. Form of JV  | <input type="checkbox"/> LLC<br><input type="checkbox"/> LP<br><input type="checkbox"/> Corp<br><input type="checkbox"/> Contract  | See Section II (F), "Tax and Accounting" above   |                   |          |
| B. Management  | <input type="checkbox"/> Board<br><input type="checkbox"/> Officers<br><input type="checkbox"/> Committee<br><input type="checkbox"/> Mgmt Member<br><input type="checkbox"/> GP | <p>Consider management committees, officers charged with specific responsibilities</p> <p>Consider director, officer indemnification by JV participants</p> <p>Provide for board meetings, how called/how often, quorum; "supermajority"/veto right provisions for out-of-ordinary course events in JV lifecycle: capital calls, debt incurrence, dissolution, contracting over set dollar value</p> |                   |          |

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| C. Management Representation  | <input type="checkbox"/> Proportional<br><input type="checkbox"/> Other  | Consider whether foreign ownership restrictions require minority owner board control?   |                   |          |
| D. Termination or Dissolution | <input type="checkbox"/> Right to Terminate at Will?<br><input type="checkbox"/> Right to Terminate for Cause?<br><input type="checkbox"/> Termination as a result of event? | <p>Consider termination/ dissolution for various defaults, failure to reach milestones, losses, insolvency/bankruptcy</p> <p>Consider “cure” rights and periods for cause terminations, and whether some “cause” terminations are excluded from any right to cure, especially those with regulatory/criminal risk</p> <p>Consider distribution of JV assets, including cash, A/R, liabilities, IP (treating both pre-existing IP and IP developed jointly during the JV term), upon termination: preferences, modes of distribution, etc.</p> |                   |          |
| E. Auditing and Reporting     |  | <p>Consider what periods of reporting (annual, quarterly, monthly, etc.) are most in line with business needs</p> <p>Consider fiscal year, keeping of accounts, reports to venturers and audit procedure</p>  |                   |          |

| Key Terms & Questions                   | Transaction Specifics | Additional Considerations  | Responsible Party | Due Date |
|---|-----------------------|--|-------------------|----------|
| F. Governing Law and Dispute Resolution |                       | <p>Consider exclusion of applicability of 1980 Vienna Convention on International Sale of Goods</p> <p>Consider dispute forum (need not be jurisdiction of governing law): litigation, arbitration, mediation</p> <p>Consider enforceability of litigation or arbitral award under New York and Panama Conventions and otherwise, not only in context of the forum, but the parties: where do the parties operate and have assets?</p> <p>Consider dispute avoidance/escalation protocol</p> |                   |          |
| G. Assignment                           |                       | <p>Consider rights to assign, to both affiliates and to arms-length third parties</p> <p>Consider any third party consents needs, including by passive financiers</p>  |                   |          |



| Key Terms & Questions                   | Transaction Specifics                                    | Additional Considerations  | Responsible Party | Due Date |
|---|--|--|-------------------|----------|
| V. Required Ancillary Documentation     |  |  |                   |          |
| A. Investment Agreement                 | <input type="checkbox"/> Yes <input type="checkbox"/> No | <p>Consider a “Frame” Investment Agreement to which other investment terms will be annexed</p> <p>Consider terms of initial investment of capital, assets, IP, and issuances of securities in JV</p> <p>Consider procedure for additional “capital calls” during life of JV</p> <p>Consider distribution of capital, interest, dividends and royalties both during term and upon dissolution/termination</p> <p>Consider tax implications of capital, interest, dividends and royalties, including foreign earnings repatriations, both during term and upon dissolution/termination</p> |                   |          |
| B. Asset Sale and Assignment Agreements | <input type="checkbox"/> Yes <input type="checkbox"/> No | Schedule assets to be conveyed or assigned to JV by each party and each agreement  |                   |          |
| C. License Agreements                   | <input type="checkbox"/> Yes <input type="checkbox"/> No | <p>Consider terms of license for contributed IP or other intangible property</p> <p>Consider how to deal with jointly-developed IP and other assets upon termination or dissolution of JV</p>  |                   |          |

| Key Terms & Questions                   | Transaction Specifics  | Additional Considerations   | Responsible Party | Due Date |
|---|--|---|-------------------|----------|
| D. Contribution of Personnel            | <input type="checkbox"/> Employment Agreements<br><input type="checkbox"/> Secondement Agreements<br><input type="checkbox"/> Other  | <p>Consider non-solicitation and non-competition provisions for employees working on JV</p> <p>Consider accounting and tax for employees working part time on JV, part time for venture parties.</p> <p>Consider visa and business immigration requirements for seconded expatriate employees</p> |                   |          |
| E. Provision for Third Party Investment | <input type="checkbox"/> Provide for new investors<br><input type="checkbox"/> Separate Investment and Subscription Agreements   | <p>Consider provisions to bring in passive investment, rights of new investors to board representation, type of instruments and subscriptions, security, pledge and guarantee agreements, anti-dilution and liquidation preferences, if any</p>   |                   |          |
| F. Buy-Sell and Related Rights          |  | <p>Consider rights of first refusal, rights of first offer, buy-sell, put and call, tag-along and drag-along rights</p> <p>Consider valuation procedures</p>  |                   |          |
| <b>VI. Schedules Needed</b>             |  |   |                   |          |
|   | <input type="checkbox"/> Tangible Assets<br><input type="checkbox"/> Cash<br><input type="checkbox"/> Securities<br><input type="checkbox"/> Personnel<br><input type="checkbox"/> IP<br><input type="checkbox"/> IP Licenses<br><input type="checkbox"/> Contracts<br><input type="checkbox"/> Goodwill | <p>Consider whether licenses, employment agreements, investment agreements, services agreements, subscriptions should be scheduled or annexed to the JV Agreement</p>   |                   |          |

### III. Deal Points

**Deal Point No. 1: JV Formation.** Parties can form a JV simply by means of a contract to collaborate in business for a common purpose and profit. However, JVs may also be embodied in a legal entity such as a corporation, partnership, LP or LLC, with the joint venturers taking debt or equity (or mixed) positions in the JV. Most typically in the United States, the JV is embodied in an LP or LLC, because those forms grant the joint venturers limited liability protection like corporations, but, under U.S. Internal Revenue Code rules, also automatically provide for “pass-through” taxation like partnerships, without imposing corporate level tax or stranding profits or losses at the corporate level.

**Deal Point No. 2: Foreign Ownership Restrictions.** In the cross-border venture context, foreign ownership restrictions in regulated industries like defense and aerospace, communications and pharmaceuticals can play a significant role in venture structure. More importantly, in some instances a JV can offer new ownership and control opportunities, or a means of avoiding a regulatory burden that would necessarily fall on a single entity. In this way, JV structures can actually create strategic options and alternatives that would not otherwise exist.

**Deal Point No. 3: Structuring Around Foreign Ownership Restrictions I.** Some U.S. regulations pertaining to specific industries prohibit non-U.S.-domiciled entities from holding certain licenses. In addition, U.S. corporations or other business entities may not hold such licenses if more a certain percentage of their voting equity is owned or controlled by non-U.S. entities (with similar restrictions going up the ownership chain). However, the use of convertible debt securities under some circumstances does not activate the regulatory restrictions (although it may activate equity-plus-debt “attribution rules” relating to other ownership prohibitions and reporting rules) and can therefore be a useful vehicle to attract non-U.S. investors. For these reasons, a non-U.S. investor desiring a 30% equity interest in a licensee might (for example) take 20% of its interest in the form of equity, and the other 10% in the form of a convertible debt instrument. In this way, the non-U.S. investor would own no more than 20% of the JV’s equity while maintaining the 30% interest on an “as converted” basis to which it would be entitled based on its capital contribution. The JV vehicle might in these circumstances qualify for the U.S. license. Moreover, the parties could enhance the flexibility of this arrangement by varying the circumstances under which the debt was convertible, and the valuation of equity at the time of conversion (for example, to alter the equity percentage on the achievement of revenue, profit or development milestones).

**Deal Point No. 4: Structuring Around Foreign Ownership Restrictions II.** Regulatory scrutiny can also sometimes be avoided by having U.S.-domiciled SPVs hold a restricted license and have different proportional ownership in another JV vehicle (U.S. or non-U.S.) that holds non-restricted assets. In such a case, the license-holding and other asset-holding entities might be jointly owned by a holding company or “blocking” entity that was in turn owned by the venturers. In such a structure, super-majority voting provisions at the holding/SPV and operating company levels can limit majority votes to routine matters, while giving both the venturers shared control, or a minority veto right, over extraordinary events such as acquisitions and divestitures, mergers, debt incurrence, raising capital, business plan adoption and liquidation. Through combinations of these mechanisms, investors contributing a majority of the venture’s capital or assets can maintain effective control consistent with

their expectations while technically being relegated to minority positions required for regulatory reasons. Additionally, the investors' own local tax or regulatory interests may be served by this type of structuring.

**Deal Point No. 5: Investment Issues.** If one or both joint venturers are contributing capital to the JV, the terms of investment may have to be incorporated into the venture through an investment agreement ancillary to the main JV document. Typically, a party contributing cash will expect repayment, dilution protection and liquidation preferences much like those expected by a venture capitalist, and possibly enhanced board representation and governance rights, such as veto over extraordinary events. Preferential rights to return of capital in event of termination of the JV, events giving rise to a right of termination and how termination rights are exercised may be incorporated into an investment agreement, when one is part of a JV. Super-majority and veto voting rights can also be incorporated into an investment agreement. Alternatively, these rights can be incorporated into the principal JV agreement, be it a corporation's shareholders' agreement, an LP agreement, LLC operating agreement or otherwise.

**Deal Point No. 6: Governance Issues.** As noted, JV structures can allow for more governance flexibility than acquisition structures typically do. This is especially valuable if the kinds of local regulatory requirements discussed above require management, ownership or governance structures different from what the simple economic interests may yield. Grants in charter documents for the JV vehicle, investment agreement or voting rights agreements of super-majority or veto rights over specified matters, especially those with regulatory sensitivity; isolation of certain governance matters in SPVs holding licenses or other government rights domiciled elsewhere than in the main JV vehicle and board representation, committee membership and other rights negotiated at the time of formation, including with rotation over time and upon the occurrence of specified events, can satisfy highly customized needs of the venturers. Frequently, where the JV vehicle is an LP, for example, the required general partner of the LP will be another business entity whose representation, voting rights and other powers must be negotiated by the venturers. If the joint venture vehicle were an LLC, the equivalent of a "general partner" would typically be a "managing member," perhaps another LLC, whose attributes would be negotiated just as a general partner's would be.

**Deal Point No. 7: Contribution of Intellectual Property and Other Assets.** If IP forms a significant portion of a party's contribution to the JV, a license to use the IP during the joint venture will probably be a necessary part of the documentation. The scope, exclusivity, duration and other attributes of the license should be carefully negotiated; typically, the party contributing the IP and granting the license will want to limit exclusivity, scope, duration and other attributes, while the other venture party will want the license to be as broad and expansive in its rights grant as possible. The parties will need to make provision for the license rights upon termination of the JV (see below), especially as to any products of the JV in inventory or otherwise awaiting sale at the time of termination. A perpetual license to end-customers to use the embedded IP in a JV product may also be necessary.

**Deal Point No. 8: Division of Profits and Losses.** The venturers' division of profits and losses will typically follow their economic interests, but may, as noted above, be affected by regulatory issues and conditions of

investment, under which, for example, a party that contributed cash would be repaid out of profits first. For tax and other reasons, profits and losses may be adjusted by employment, service and supply contracts that, in effect, convert some of the profits to fees paid to a party, and similar devices. In the case of employment contracts in particular, it is critical to observe the national laws of the place of employment. For example, the legal and regulatory regimes governing employment contracts in most of the European Union (“EU”) are stricter than in most of the United States. Data privacy is also a heightened concern, both in the employment context and otherwise.

***Deal Point No. 9: Rights to Contributed Intellectual Property upon Termination.*** Typically, the venturers will negotiate for each to maintain its reversionary rights in the pre-existing IP post-JV termination, subject to limited licenses for products in inventory and already sold to end-customers. More complicated will be the disposition of any IP developed jointly during the JV. Such property can subject to buy-sell rights upon termination, royalty-bearing licenses or cross-licenses between the venturers post-termination, or shared use agreements. A perpetual, limited license to pre-existing IP to the extent embedded in jointly developed IP may be necessary to the extent necessary to use, sell, license and exploit the jointly developed IP. For both IP and other contributed assets, a valuation mechanism both at the time of formation/contribution and upon termination should be negotiated and documented.

***Deal Point No. 10: Other Termination Issues.*** Termination rights and events activating them must be clearly spelled out in either the agreements for the vehicle embodying the JV (for example, an LLC operating agreement or an LP agreement), or in ancillary contracts among the parties. Termination events and rights may activate buy-sell rights, in which the parties have rights to buy out each other’s interest; rights of first refusal and first negotiation will typically be a part of such buy-sell rights. Rights to agree to or veto other exits, such as a sale to a third party, or even to an initial public offering (“IPO”), must also be negotiated. For example, the case in which an offer to purchase the JV is received, and the venturers are divided as to whether to sell, must be negotiated. It will probably be necessary to establish in the governing documents a valuation procedure for the JV to determine whether the offer is a fair market one, and whether, and how, the buy-sell rights should be activated. For example, if a JV was originally scheduled to last for five years, and an offer determined to be for fair market value was received late in the fifth year, buy-sell rights with rights of first refusal and first negotiation might well be activated; whereas a clearly below-market offer received in the first year of the JV might not need to activate those rights. A dissolution and winding up procedure, including disposition of JV property (including IP) and property pre-existing the JV should also be negotiated.

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