



Tuesday, October 26
11:00am-12:30pm

608 - Joint Ventures: Are Two Heads Better Than One, or Just a Two-Headed Monster?

Wolf Frenkel
General Counsel
BearingPoint

Thomas McKee
Partner
Blake, Cassels & Graydon LLP

James Soo-Chul Derry
Associate General Counsel & Chief Intellectual Property Officer
Arbitron Inc.

Ray Tillett
General Counsel
ITI Group - International Trading and Investments Holdings S.A. Luxembourg

Faculty Biographies

James Soo-Chul Derry

James Soo-Chul Derry is the associate general counsel and chief intellectual property officer for Arbitron Inc., an NYSE-traded company, headquartered in Columbia, MD. Arbitron's Portable People Meter[®] technology was named Time Magazine's 2007 Invention of the Year and received a 2009 Emmy Award winner for Technology. He provides business counsel and actively manages matters across a number of substantive legal areas such as brand protection, litigation, antitrust, piracy, licensing, complex transactions, joint ventures, cross-border transactions, privacy, corporate, M&A, unfair competition, and IP. He drives, implements, and counsels Arbitron on various strategic and business development initiatives (domestic and internationally).

Prior to Arbitron, Mr. Derry worked as in-house counsel for MicroStrategy, Inc., and Procter & Gamble Co. He began his career with Dickstein Shapiro LLC in Washington, DC as an associate.

Mr. Derry is a member of NAPABA, APABA-DC, and KAFCC. He also does pro bono work such as for Bread for the City, is a mentor to underprivileged young minority adults in Northern VA and DC, and works with Big Brothers/Big Sisters National Capital Area.

Mr. Derry received a BS from the University of Illinois Urbana-Champaign. He graduated from DePaul University College of Law and served as an Article and Note Editor for law review and was a member of the Phi Kappa Phi honorary.

Wolf Frenkel

Wolf Frenkel is the general counsel of BearingPoint Management and Technology Consultants, an independent management and technology consultancy operated and owned by its 120+ partners. In this role, Mr. Frenkel is responsible for providing comprehensive legal and business support to the senior management team, and manages a legal staff of fifteen lawyers and paralegals.

Prior to joining BearingPoint, Mr. Frenkel had a career at Sun Microsystems, most recently as deputy general counsel, for the Europe Region, managing a group of more than 25 attorneys spread out over 15 countries. Previous to joining Sun, he was an associate counsel with Robert Half International Inc. (RHI), NYSE listed, and senior attorney with The PMI Group, Inc. NYSE listed, and located in San Francisco. Before relocating to the Bay area, Mr. Frenkel was in private practice in Montreal, Quebec, where, he represented numerous start-up and mid-sized technology and manufacturing concerns in mergers and acquisitions, international and domestic licensing arrangements, joint ventures and real estate development projects.

Mr. Frenkel is a graduate of McGill University and of the University de Montreal Law Faculty, earning his LLB.

Thomas McKee

Tom McKee practices in the business group as a partner for Blake, Cassels & Graydon LLP. He advises on business law matters for domestic and international clients, corporations and other business organizations, both publicly traded and private. His principal expertise involves structuring, negotiating and completing mergers and acquisitions transactions (including take-over bids, management and leveraged buyouts and divestitures), financings, securities offerings, foreign direct investment and joint ventures.

Mr. McKee is an active participant in legal education having delivered lectures to members of the profession and to corporate executives on mergers and acquisitions, regulatory developments and other topics. He has taught for Osgoode Hall Law School's professional development program, the Canadian Corporate Counsel Association (Canadian Bar Association), the Schulich School of Business, Division of Executive Development, and the Legal Education Society of Alberta. He is also a member of the ABA (Business Law Section) and the International Bar Association. Mr. McKee has been listed in The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada as one of Canada's repeatedly recommended corporate counsel.

He received an LLB from Osgoode Hall Law School and BA from McGill University.

Ray Tillett

Ray Tillett is the general counsel of International Trading and Investments Holdings S.A. Luxembourg (ITI). ITI is the owner of Poland's largest integrated media group, including free-to-air television broadcasting, digital television broadcasting, television production and internet and new media. Mr. Tillett has acted for ITI in connection with IPO and high yield bond securities offerings, joint venture arrangements with international strategic partners and M&A transactions.

Prior to joining ITI, Mr. Tillett was a partner in Mayer, Brown and an international counsel with Debevoise & Plimpton. He has worked in Central and Eastern Europe and Russia.

Mr. Tillett is a graduate of Hamilton College and received his law degree from Case Western Reserve University.

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James Derry Associate General Counsel & Chief Intellectual Property Officer Arltron Inc. Columbia, Maryland, USA	Why a Joint Venture? – Structuring Issues
Ray Tillett Group General Counsel ITI Corporation Sp. z o.o. Warsaw, Poland	Dealing with Local Issues and Local Partners
Wolf Frenkel General Counsel Bearing Point Consulting Management & Technology Consultants Paris, France	Governance Issues
Thomas McKee Partner Baker, Caspell & Graydon LLP Toronto, Canada	Exit and Termination Issues/Dispute Resolution

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Why a Joint Venture?

- Like a creative plaintiff's attorney, JV structures are only limited by one's imagination
- Allocation and sharing of risk
- Leveraging limited resources
- Synergy
- Why not? ~66% fail in 1-3 years after formation and ~50% of JVs ultimately fail

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A Term of Art

- Master of disguise
- Who, What, When, Where, and Why?
- Answer 'why and where' before focusing on 'who'
- Doomed from the beginning: the right or wrong partner can make or break the JV

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Blueprint it: Avoid the 2-headed Dragon

- Coordinate with the right people
- Walk a mile in their shoes
- The best legal provisions can be rendered ineffective if your company is unwilling to enforce them
- Know the key battlegrounds

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Compilation and Synthesis

- A bad case of indigestion
- Determine walk-away points
- Does it align with your company's 3-5 year strategic plan?

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Closing Thoughts

- Run do not walk from a bad proposal, partner, or business case
- Beware the trap
- Does your blueprint allow you to write a simple agreement that succinctly memorializes the relationship?
- Blueprint looks good – moving forward: local partner and counsel issues

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Dealing with Local Issues and Local Partners
Ray Tillet
Overview

- Local Partner Issues
- Local Counsel Issues

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Local Law Issues

- They can impact JV "entry" and "shape"
- The JV Agreements – Just because it works at home ...
- JV Articles – The JV agreements are not enough
- Cutting Corners – Law as a gun
- Local Counsel – Your best enemy, your worst friend

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Local Partner Issues

- Your Partner – Good guy or bad guy
- Cultural Differences – The "more like us" syndrome
- Cultural Differences – Corporate culture meets the entrepreneur
- Related Party Transactions – A necessary evil or just evil
- Non Compete Provisions – A local perspective

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Governance Issues
Wolf Frenkel

Overview

- Agenda
- Introduction
- Strategy & Execution Alignment
- JV Board Participation
- Modes of Operation
- Operational Support
- Highlights: the Pros & Cons

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Introduction – Ensuring the Right Governance Means

- Address affiliated and third party relationships and know when to be "arms length"
- Distinguish between legal systems that are more or less transparent and sufficiently well established
- Identify the initiatives designed to enable the JV to introduce / increase each partner's market presence in the chosen jurisdiction
- Adapt the approach for conducting business in the chosen jurisdiction
- Recognize the business drivers needed for the JV to succeed: Resolve strategic conflicts and align your company's interests with other divergent strategic interests ahead of time
- Identify and mitigate the key risks of failure (including matters of local corruption, competition, export control, tax and employment issues)

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Strategy & Execution Alignment

- An ounce of prevention: Comprehensive due diligence
- JV partner selection: Be sure to manage the cultural differences
- Identifying the right management skills can be a balancing act:
 - Loose vs tight governance
 - Create clear protocols for decision-making
- Pick the right business manager or management structure to guide/support the JV business
- Address and resolve the potential for conflicting incentives
- Consider the manner in which financial and legal oversight is to be conducted and the impact of the chosen form of governance
- Develop a risk management strategy and procedures for regulatory reporting , required public disclosure and transfer pricing (to name a few)

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JV Board Participation: The Classic Trade-Offs

- JV participants will usually have proportionate representation on the JV board of directors
- Depending on the JV model (50/50 or other %), establish clear rights to nominate right number of directors
- Consider rights and obligations of the JV board of directors in:
 - Influencing alignment of direction and strategy of the JV
 - Approving annual business plans (for example, revenue targets, Capex, H/C)
 - Approving "Authority Matrix" for operations
 - Conducting quarterly business reviews (including JV finance and governance)
 - Advising and recommending structure and approach for hiring of key personnel

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Modes of Operation

- Carefully consider how/whether to integrate assets and capabilities
- Provide for regular information exchanges and each JV partner should consider conducting regular meetings with JV personnel
- Develop periodic reporting requirements and reporting policies based upon:
 - Weekly/bi-weekly revenue calls / reviews
 - Monthly industry customer review discussions
 - Quarterly business review
 - What participants may do with mutual customers, suppliers and other distributors

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Operational Support & Infrastructure

- Each JV partner should support appropriate management resources that
 - Are in line with the JV's needs whether involving permanent/temporary or foreign employed managers (seconded or otherwise), external management or third party contractors
 - Clearly identify the rights and duties of management:
 - To facilitate contracting with third parties/related parties and the manner and the extent to which such is permitted
 - To ensure compliance with appropriate accounting procedures, legal requirements, preparation and filing of accounts and returns and other governance procedures
- Personnel
 - Know the hiring markets, culture, compensation and professional standards and practices, and carefully align these to the organizational structure
- Create a Participant Compliance Team comprising legal, finance and compliance personnel

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Operational Support & Infrastructure

- Key third parties engagement:
 - External service providers, business consultants (tax and similar)
 - Local auditors, local legal counsel, insurers, search consultants
 - Payroll and other similar financial functions
- Key contacts - identify and establish contacts with relevant offices/officials:
 - Business and personal taxing authorities
 - Commercial record-keeping officials
 - Relevant courts, embassies, consulates
 - Other governmental contacts
- Rights of participants:
 - Inspection rights and access to business accounts, books and records
- Consider degree of freedom of JV partners to compete with the JV, to exploit IPR or technology developed by JV and any obligation to refer business

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Highlights – Where Two Heads are Better than One

- Optimize the alignment of the JV with the goals of each JV partner - this will drive the direction/ strategy of the JV, as well as the quality and speed of execution
- The confidence of customers in the JV will be increased if such alignment is suitably handled
- Customers may perceive the JV as the best representative of both participants and will be more willing to engage with the JV
- The ability to hire and retain high caliber staff may be enhanced with the JV approach with the result that better market coverage may be obtained
- Regular and win-win communications between the JV partners and the outside world will be the key to success of the JV
- Be sure to contemplate matters relating to ongoing access to capital, people, intellectual property, raw materials and customers, and the execution mechanics therefor

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Lowlights – Examples of Where the Two-Headed Monster can Rear its Head

- Inability to maintain focus on strategy, deal economics or governance
- Consolidation risks: internal failure to adhere to the designed management controls for the JV
- ROI risk – JV entity financial mismanagement
- Credit & going concern risk due to liquidity or other concerns
- Failure to address compliance risks: *Fraud/Foreign Corrupt Practices Act/Export Controls*
- Governmental risks: governmental intervention or lack of clarity in application of local laws/ regulations, regulatory failure, expropriation
- Unenforceability of contracts or JV partner rights, whether legal or practical, in local jurisdictions
- Employment risks: JV employees may claim that they are JV partner employees

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Exit and Termination Issues/Dispute Resolution
 Thomas McKee

Overview

- Dispute Resolution
- Exit and Termination Provisions

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Dispute Resolution

- JV agreements usually contain detailed provisions addressing dispute resolution and exit mechanisms to address the possibility that the parties are unable to reconcile their differences
- The ultimate goal will be to ensure that the JV operates smoothly despite disagreement or to provide a mechanism for termination upon the occurrence of certain specified events
- JV agreements typically include mediation and arbitration provisions
- JV agreements may also provide for an escalation clause that requires deadlocks on the JV board (in the case of joint venture corporations) to be sent to the respective boards or senior management of the participant corporations for resolution
- Typically, JV agreements specify the governing law and the law to be applied when resolving any dispute under the agreement

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Dispute Resolution

- Be careful about local court litigation and the quality of local courts in some jurisdictions. This can be a two-headed monster depending upon the jurisdiction – international arbitration may be preferable (consider, for example, the Rules of the International Centre for Dispute Resolution (American Arbitration Association), the International Chamber of Commerce Rules and others)
- Vast majority of international JV's provide for arbitration to resolve disputes in the event of failed mediation or negotiation
- Pros – arbitration tends to be faster, cheaper, more private, more flexible and will permit the parties to adopt a tailor made solution
- Cons – arbitration may render it difficult for a party to leverage superior resources in a "scorched earth"/"wear down" litigation strategy opposite the other party. Arbitration may also not give due consideration to legal precedents, may take place too quickly and may limit full discoveries

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Dispute Resolution

- Location, language, applicable law, the number and identity of the arbitrators governing the arbitration will be critical decision points, as well as the procedures for choosing the arbitrators and the procedures/time periods for conduct of the arbitration
- Beware of standard clauses not carefully considered!

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Exit and Termination Provisions

- The JV documents should contain termination events and describe what happens upon the occurrence of a termination event
- Some terminations may arise due to events affecting the JV parties in terms of their status or their dealings with each other:
 - deadlocked board
 - breach of JV agreement provisions (including confidentiality/non-competition provisions)
 - default by a joint venture party in capital funding or other financial obligations
 - changes affecting a joint venture party (e.g., a change in control, merger or amalgamation or corporate restructuring)
 - bankruptcy or insolvency type event affecting a joint venture party
 - financial difficulty of a party
- Other terminations may arise due to events exogenous to (beyond) the parties themselves:
 - elapse of fixed time period
 - termination of a fundamental contract, license or approval
 - governmental action (nationalization, foreign exchange controls, tax)

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Exit and Termination Provisions

- change in economic circumstances or markets
- failure of business to achieve certain business milestones
- force majeure
- Termination events usually include:
 - termination by mutual agreement
 - termination for parties' failure to satisfy, or non-occurrence of, certain conditions precedent
 - the expiration of a set term or the end of the natural life of the joint venture (such as, for example, the exhaustion of capacity of a mine or the completion of a particular project or venture)
 - withdrawal of a partner (if permitted)
 - transfer/termination for default or breach
 - the failure of the business to meet certain milestones
- Wind-up or "put" and "call" rights may arise due to deadlock or default or other termination event

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Exit and Termination Provisions

- At certain times with notice, or upon default, a JV partner can usually exit the JV through the exercise of a "call" or "put" of the JV shares
- If there is no default but another "triggering event" such as a change in control of a participant, the other participant can often exit through a "put" or "call" equal to the fair market value of the JV shares (sometimes with or without a premium payable)
- At any time, the parties may mutually agree to terminate and dissolve the JV
- In appropriate cases, as mentioned above, consider including the right of a JV partner to dissolve the JV if there is a failure to meet agreed critical business criteria

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Exit and Termination Provisions

- If a JV partner defaults, the other is often entitled to indemnity, to recover damages for material breach and exercise put/call rights at a favourable price (required sale at X% of FMV if option exercised to buy the other participant's interest at X% of FMV)
- If a default involves violation of laws such as the *Foreign Corrupt Practices Act*, export controls or antitrust laws, a JV partner may also have the right to invoke more favorable put/call rights, in addition to liquidated damages, or a participant may "cash out" the other participant's security deposit if there is one
- Valuation formulas can vary so beware of these (punitive valuation, premium valuation, book value, arbitration in order to resolve disputes)
- Sometimes JV agreements contain "buy-sell" or "shot gun" provisions - the financial resources of a particular partner may affect the willingness of such partner to adopt such provisions
- Liquidity events are often contemplated - for example, a planned divestiture of the JV interests through a third party sale or initial public offering

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Exit and Termination Provisions

- Exit and termination provisions should address what will happen to intellectual property and other property of the JV under various exit or termination scenarios
- Placing restrictions on voluntary transfers of interests will be important to ensure the stability of the joint venture and control the choice of other joint venture participants
 - Most JV agreements contain rights of first refusal (or rights of first offer) whereby the joint venturer must offer its interest in the project to a fellow joint venturer prior to selling (or offering to sell) the interest to a third party
 - Beware of such rights as they may seriously affect third party sale negotiations. Also beware of inadvertently creating binding legal relations if this is not desired
 - JV agreements sometime require the consent of the other joint venturers in order for a joint venturer to transfer its interest (often, not to be unreasonably withheld)
 - Where the JV is being carried on as a partnership, partnership law usually provides that no person may be introduced as a new partner without the consent of the existing partners
 - JV agreements also often contain "drag along" and "tag along" rights

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Exit and Termination Provisions

- Consider whether the decision to exit or terminate may have implications for a partner's continuing access to a local market and the effect upon relationships with:
 - the joint venture partners themselves
 - customers and suppliers
 - local governments
 - competitors
 - third parties to contracts with the JV
 - employees
- Exit and termination provisions must, of course, be considered in light of the laws and regulations of the relevant local jurisdiction
- Such laws may limit the application and effectiveness (e.g. foreign investment review) of many exit options

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Exit and Termination Provisions

- Consider whether under the laws of the applicable local jurisdiction there are maximum and minimum shareholdings for foreign and domestic participants (as is often the case for regulated industries)
- Also consider foreign investment review and other governmental approvals (including competition approval) required for transfers to the remaining joint venture parties or a third party
- Minority partner approval may also be required for approval of transfers or terminations
- The key is for the parties to carefully consider in advance the various pros and cons of exit and termination provisions in order to appropriately draft such provisions in the JV agreement
- There is no one way of structuring a joint venture arrangement – tailor your agreements to fit your circumstances

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James Derry
 Associate General Counsel
 & Chief Intellectual Property Officer
 Adiptron Inc.

Why a Joint Venture? – Structuring Issues

APPENDIX I to Presentation Materials (Slides #2-6)

□

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Why a Joint Venture?

- 2/3 of JV's undergo significant financial and operating difficulties in the first 1-3 years of operation, and approximately 1/2 of JV's ultimately fail.
- Range of potential JV structures: An investment, a sales or manufacturing relationship, provision of access to resources or the utilization of the other partner's knowledge/expertise with respect to a particular field, market, or foreign jurisdiction.
- Risk aversion and resource allocation: Allocating and sharing risks (financial, intellectual property, project risk, other liabilities), budgets, manpower and other resources. A JV also permits joint leverage of limited resources for a greater ROI.
- Synergies: May provide a vehicle for the improvement, development and deployment of existing or new technologies.
- Bottom-line: A JV makes sense in the context of increasing globalization and specialization and permits companies to selectively engage in creative solutions to grow their business in this environment.

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A Term of Art and Master of Disguise

- Every JV collaboration should begin with the following questions and clear answers should be obtained to each: Who, What, When, Where, and Why? Tip: Start in "reverse" order - answering "why and where" may shed light on "who".
- Do not buy a Porsche if you need a SUV: Select the right vehicle to accomplish your goals. The answer to this question drives what type of relationship and vehicle should be formed between the participating parties.
- A JV can take several guises and is only limited by the creativity of the drafting parties: Foreign direct equity or debt investment, joint-development, royalty-share, partnership, provision of business services, reseller relationship, co-marketing relationship, franchise, intellectual property right transfers, or distributor (among others).
- Round hole with square peg. Do not force particular facts into a pre-existing agreement; focus more on the "type" of relationship that the parties will engage in.
- Think of a JV as a "term of art" that is fluid and dynamic depending on the particular facts and objectives at hand.

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Blueprint it: Avoid the 2-headed Dragon by Taking 2 Steps Back

- JV's require people to take 2 steps back before taking 1 step forward. Do not begin building the framework without a solid blueprint.
- Employ a M&A mindset and examine all angles by doing proper due diligence.
- Walk in their shoes: engage in due diligence not only from your company's perspective but "also" from the other company's perspective.
- Asking and answering the right questions, objectively and honestly, can avoid the 2-headed dragon.
- The best legal provisions can be rendered ineffective if they are unenforceable (from either a legal or practical perspective).
- Know the key battles: Negotiations can proceed more smoothly if one knows the battles to engage in and those to avoid.

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Two Sides to Every JV: Non-Exhaustive List of Questions

- Does the JV further your company's 3-5 year strategic plan? Does the JV hinder it?
- Does the JV currently have capacity to provide its own 3-5 year strategic plan?
- What is the financial strength and stability of the JV partner?
- Is there cultural compatibility between the JV partner and your company?
- Are the parties on an unequal footing? Do we have an 800 lb. gorilla or a tsetse fly (consider for each element of the relationship)?
- What are the intellectual property considerations, strengths, weaknesses and how should one deal with developed know-how? Will the JV enable the other company to become a competitor?
- What are the JV's capitalization needs and needs for other resources? What will be the working capital required and the money, assets, skills, capacities and resources needed to carry out the material business goals? What will be the capacity of the parties to bear responsibility for or to provide these resources?

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Two Sides to Every JV: Non-Exhaustive List of Questions (Continued)

- What are the potential barriers to the JV's ability to achieve its business goals?
 - Consider issues relating to the: *Foreign Corrupt Practices Act*, regulatory, privacy, IT, tax and antitrust matters, the potential for manufacturing or marketing failure, the extent to which reliance must be placed on third parties for products/services, associated litigation risk, the influence of political affiliations, the impact of contractual obligations to third parties (indemnifications, non-competes, or licenses), real estate matters, export/import matters, disclosure issues, the degree of intellectual property rights and protection available vicarious liability issues and the quality of management (especially in foreign jurisdictions).
- Is the proposed partner a target for litigation (for example, with respect to intellectual property) or engaged in litigation (regulatory, intellectual property, contractual or otherwise)?
 - **TIP:** Look at court dockets for prior litigations (for example, check the dockets in the partner's home state and incorporated state).

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Two Sides to Every JV: Non-Exhaustive List of Questions (Continued)

- Are there unanticipated costs and transfer pricing considerations involved? Are these matters transparent and resolvable?
- What is the time to market? Does the JV lower the cost of market entry? Are there available distribution channels?
- Can your company engage in this venture alone? What are the opportunity costs? Do you want to suffer dilution?
- Is any one company chasing a mythical unicorn? Are you chasing a Ferrari riding a bicycle?
- What is the other party's "end game" with the JV? What is your company's "end game"?
- Any quality assurance or time-sensitive concerns?

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Compilation and Synthesis

- Indigestion - answering the above questions may indicate that: a) the parties' interests are not aligned; b) there are significant differences in experience, culture or resources; c) there is a high risk of failure or stress upon a particular partner; or d) it will be difficult to unwind the JV if the relationship sours.
- Key Insight: examine public documents (public press releases, quarterly/yearly filings, court dockets, intellectual property filings and other public documents).
- Identify strengths and weaknesses for each party.
- Identify potential ancillary agreements - maybe it will be easier to use an arrangement for business services, technology transfer, joint-development, co-marketing, distribution or another approach rather than a broader JV agreement.
- Determine walk-away points.
- Analyze substantial, moderate, and low risks of failure, or risks of attenuation of business goals.

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Mental Gymnastics: Closing Thoughts

- Engage in mental gymnastics: be open-minded, honest, practical, objective, flexible and willing to devote a substantial amount of time to create a proper blueprint.
- Spot the Issues: Knowledge is power and knowing is half the battle.
- Bend but do not break. Know the walk-away items before negotiations and the less critical ones that can be grounds for compromise.
- Run do not walk from a bad proposal, partner, or business case.
- Beware the trap: What worked yesterday may not work today, and what worked today may not work tomorrow.



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