

# International Joint Ventures

A Presentation to the Charlotte Chapter of the Association of  
Corporate Counsel

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## Introduction

- Fundamentals of International Joint Ventures
- Planning the Joint Venture
- Transfers and Exit Strategies
- The Foreign Corrupt Practices Act
- Export Controls
- Reporting Requirements
- Dispute Resolution

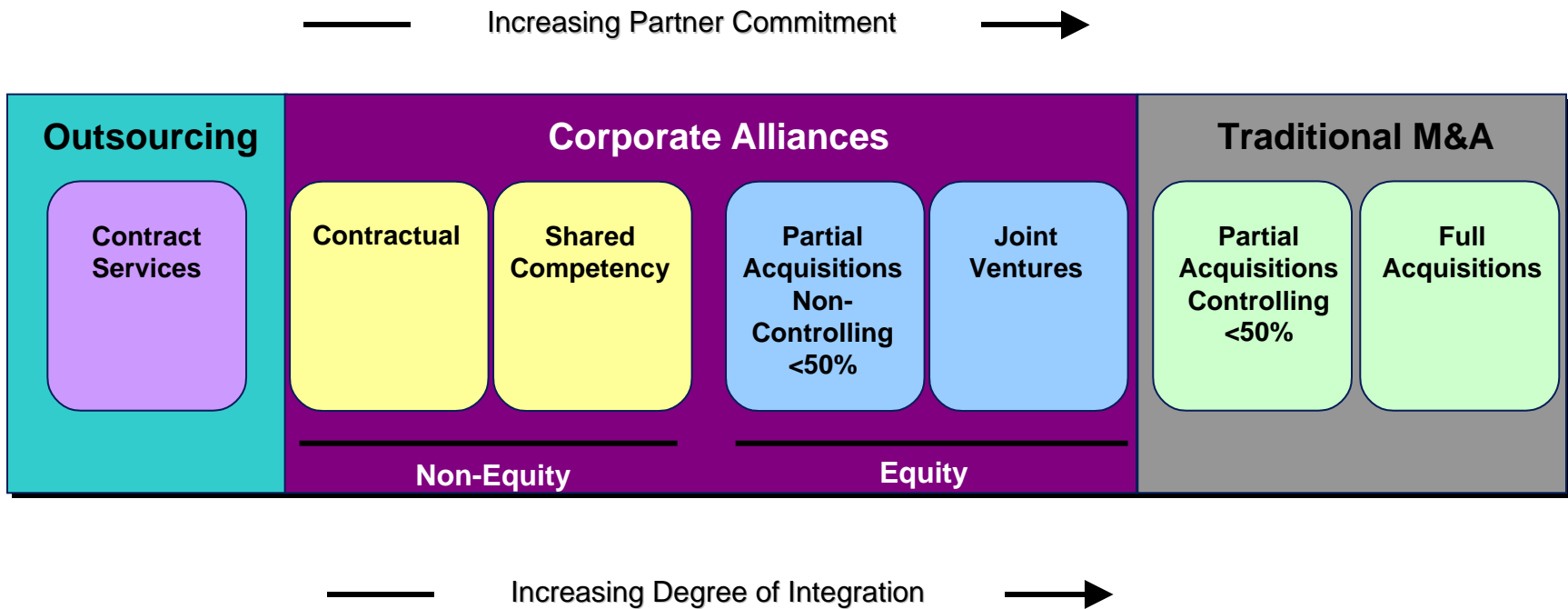
## Why Establish Joint Ventures?

- Greater Access to Resources - JVs as a means to reduce costs and gain access to:
  - Capital
  - Markets
  - Skills
  - Technology

## Types of Joint Ventures

- Concentration: Co-operate to form larger, more economic unit
- Complementary Skills: Combine skills to expand product/market portfolios
- Market Technology: Combine market knowledge with production/product know-how
- Supply: Co-operate to safeguard supplies/reduce procurement costs
- R&D: Joint use of research facilities; combining know-how and sharing risks
- Sales: Co-operate in an arrangement for sales or distribution

# The Association Continuum



## **Basic Attributes of a Corporate Joint Venture**

- Contribution of assets
- Shared risks
- Community of interest
- Right to direct and govern policy

## Structuring the Joint Venture

- Choosing the Right Vehicle: considerations include -
  - The type of business involved
  - Tax issues
  - Management structure
  - Size of venture and anticipated duration
- Memorandum of Understanding
  - Purpose of JV
  - Term
  - Structure of JV
  - Tax treatment
  - Exclusivity and non-competition
  - Sale/offering of interests
  - Dissolution

## Planning the Joint Venture - Due Diligence

- Know the foreign country - what local government restrictions or opportunities exist?
  - Incentives (e.g., tax holidays)
  - Restrictions on distributions/repatriation of funds
  - Currency exchange controls
  - Withholding requirements
  - Restrictions on exports or imports
  - Government or quasi-government fees
  - Licenses to conduct the business
  - Restrictions on technology transfers



## Planning the Joint Venture - Structure

- A number of factors determine the best structure for a JV, including:
  - The type of business involved
  - Tax and accounting considerations
  - Anticipated length of the venture
  - Financing requirements
  - Fiduciary obligations
  - Non-entity strategic alliances

## Planning the Joint Venture - Capitalization

- Contributions by the Partners
  - Equity vs. debt
  - Foreign thin capitalization rules
  - Supporting agreements
  - Return of capital/expatriation of revenues

## Planning the Joint Venture – Governance

- How will the joint venture be governed?
  - Meetings of partners or the Board of Directors
    - Impact of local law
      - Local ownership/management/residency requirements
      - Action taken by proxy
      - Meetings outside of the foreign country
      - Frequency with which meetings must be held
  - Immigration and taxpayer issues

## Planning the Joint Venture - Governance

- How will the joint venture be governed?
  - Governance of day-to-day operations
    - Should there be a rotation?
    - What authority should each officer have?
    - Checks and balances on local partner
    - Fiduciary duty issues – imposing it when local law does not provide for it; carve-out of duties to parent company
    - Accounting and financial controls for the JV

## Planning the Joint Venture – Non-Competition

- Placing restrictions on each partner’s ability to compete
  - Enforceability of non-competition covenants varies considerably from jurisdiction to jurisdiction
  - Remedies
    - If the partner breaches a non-competition covenant, an injunction is appropriate (if available)
    - If the partner’s affiliate “breaches” a non-competition covenant, an injunction may not be possible
  - Compliance with applicable antitrust/competition laws

## Transfers and Exit Strategies

- Agree upon exit strategies at the outset
  - Joint ventures are inherently unstable
  - Even if the joint venture is “successful,” an exit will likely occur
  - Valuation issues are always difficult
  - Consider necessary exits (e.g., FCPA or nationalization issues) and forced exits

## Transfers and Exit Strategies

- How can the United States partner exit the joint venture?
  - Most successful exit strategies involve a sale by one partner to the other or a sale of the joint venture as a whole

## Transfers and Exit Strategies

- Foreign Ownership Restrictions
  - Consider “putting” (selling) the interest to the joint venture or the other partner
  - Consider requiring a recapitalization or reorganization
- Consider the effect transfer will have on the dynamics of the joint venture
  - Immigration issues
  - Effect on ancillary agreements with partners
  - Unique attributes of partners



## Foreign Corrupt Practices Act

- Two components
  - Antibribery
  - Books and Records

## Foreign Corrupt Practices Act

- Antibribery provisions prohibit:
  - paying or offering “anything of value”;
  - to foreign officials, political parties, candidates for political office or officials of certain public international organizations (such as the organizations of the European Union);
  - for the purpose of influencing an official act or decision; and
  - in order to obtain or retain business or secure an improper advantage.

## Foreign Corrupt Practices Act

- “Knowledge”
  - Technically, a “corrupt” motive is required -- an intent to induce the misuse of a foreign official’s authority, which can be inferred from circumstances
  - “Knowledge” is more expansive than actual knowledge and includes awareness (or conscious disregard) of a “high probability” that the payment will be made in violation of the FCPA
  - A company could be in violation if an intermediary (including a joint venture partner) makes such a payment, and the company “knows” of that payment

## Foreign Corrupt Practices Act

- FCPA antibribery provisions apply to:
  - Any individual who is a U.S. citizen, national or permanent resident located in the U.S. or abroad;
  - Any business entity organized in the U.S. or having its principal place of business in the U.S.; and
  - Any foreign business entity or person acting in U.S.

## Foreign Corrupt Practices Act

- FCPA Books and Records Provisions
  - Must maintain books and records that, in reasonable detail, accurately reflect company's transactions
  - Must follow generally accepted accounting principles and provide reasonable assurances that sufficient financial controls exist to protect against unauthorized payments or "off book" accounts
  - No corrupt motive and no materiality standard
  - FCPA accounting provisions apply to companies listed on U.S. securities exchanges and their subsidiaries wherever located

## Foreign Corrupt Practices Act

- Application to Joint Ventures
  - Technically, antibribery provisions do not apply to foreign-organized and operated joint ventures (unless the violation occurs within U.S. jurisdiction), BUT . . .
  - Joint venture participation
    - >50% JV
    - ≤50% JV
    - 25%-50% JV and largest shareholder
    - Actual control
    - Employees as JV directors or officers

## Foreign Corrupt Practices Act

- Best Practices for Joint Ventures
  - Pre-acquisition due diligence
    - Identify potential FCPA risk
    - Assess controls environment
    - Vet partner and third-party intermediaries
    - Analyze books and records if business being contributed
  - Immediate post-acquisition compliance
    - Business risk of bringing partner into compliance
  - Negotiate FCPA provisions in JV agreement
  - ALWAYS maintain records of all due diligence

## Foreign Corrupt Practices Act

- *Nature's Sunshine Products, Inc.* Settlement
  - Complaint against company, CEO and CFO
  - “Knowledge” was not alleged by government
  - “Control person” under §20(a) of the Exchange Act
  - Failure to “adequately supervise . . . personnel . . . to make and keep books and records that accurately reflected in reasonable detail . . .”



## Foreign Corrupt Practices Act

- UK Bribery Act 2010
  - Similar to FCPA, but important differences
    - Strict criminal liability for “failure to prevent bribery” unless have “adequate procedures” in place to prevent bribery
    - Prohibits commercial bribery between private parties
    - No exception for “grease” or “facilitating” payments
  - Generally speaking, applies to any company having a presence in the UK

## Foreign Corrupt Practices Act

- UK Bribery Act 2010
  - “Adequate Procedures”
    - Procedures will be “adequate” based on particular facts and circumstances, but six “guiding principles” offered
    - Principles are those that would be expected in establishing an effective compliance program
    - Procedures will not be “adequate” if do not require compliance with the UK Bribery Act
  - Update FCPA compliance program so that it also complies with UK Bribery Act?

## Foreign Corrupt Practices Act

- Dodd-Frank Whistleblower Provisions
  - >\$1 million recovered, then whistleblower entitled to 10%-30% of recovery
  - Bypass “hotlines” in favor of reporting first to the SEC?
- Bill to debar FCPA violators from government contracts

## Export Controls

- Primary regulations
  - Department of Treasury: Office of Foreign Assets Control (OFAC)
  - Department of Commerce: Export Administration Regulations (EAR)

## Export Controls

- OFAC
  - Country Embargoes
  - Specially Designated Nationals (SDNs)
    - Master list with names of individuals, companies, vessels and banks all over the world
    - Persons subject to U.S. jurisdiction cannot do business with individuals or entities on the SDN list and must block all property or assets within their control
    - SDN list updated frequently with current version available on the OFAC website
    - <http://www.bis.doc.gov/complianceandenforcement/liststocheck.htm> (also other lists to check at this website)

## Export Controls

- EAR
  - What constitutes an “export”?
    - Sending an item outside of the U.S. (regardless of mode of shipment, transmission, medium, etc.)
    - Releasing U.S. technology or source code to a foreign national in the U.S. or abroad (“Deemed Export”)
    - Re-exporting an item from the original country of destination to a third country

## Export Controls

- EAR
  - Is a License Required?
    - Review the general characteristics of the item
    - Determine the Export Control Classification Number (ECCN)
      - If purchased, obtain number from vendor
    - Examine the appropriate ECCN in the Commerce Control List (CCL)
    - Review the Country Chart
    - Determine whether license exception applies

## Reporting Requirements

- U.S. Laws and Regulations
  - International Investment and Trade in Services Survey Act
    - Designed merely to gather data, not regulate investment
    - Applies to foreign and domestic investments
  - Others
    - Agricultural Foreign Investment Disclosure Act
    - Hart-Scott-Rodino Antitrust Improvements Act
    - CFIUS



## Resolving Disputes

- Dispute Resolution Mechanisms
  - Two types of disputes
    - Legal Disputes
    - Business Disputes

## Resolving Disputes

- Dispute Resolution Mechanisms
  - Resolving Legal Disputes
    - Negotiation
    - Mediation
    - Arbitration
    - Litigation

## Resolving Disputes

- Build structure into contract
- Consider local enforcement
  - New York Convention
- Consider effect of cultures

## Resolving Disputes

- Arbitration
  - New York Convention
  - Confidential
  - Arbitrators with particular expertise
  - Familiarity of international community with process
  - Neutral location
  - As expensive as litigation?

## Resolving Disputes

- Litigation
  - No general treaty in force
  - Advantageous if have leverage (home cooking), but enforcement issues?
  - Can appeal decisions
  - Foreign views of U.S. court system

## Resolving Disputes

- Dispute Resolution Mechanisms
  - Resolving Business Disputes
    - An arbitrator or judge is ill-suited to resolve “Business Disputes”
    - How are Business Disputes resolved?
      - Refer Business Dispute to a third person
      - Submit the Business Dispute to successive higher levels of authority within each partner’s organization

## Resolving Disputes

- Dispute Resolution Mechanisms
  - Resolving Business Disputes
    - How are Business Disputes resolved?
      - Swap the right to appoint the President or the tie-breaking vote for the Board of Directors
      - Threaten implementation of an exit strategy
      - Best means of resolving disputes is to anticipate them before they arise (importance of a business plan when entering into JV)



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