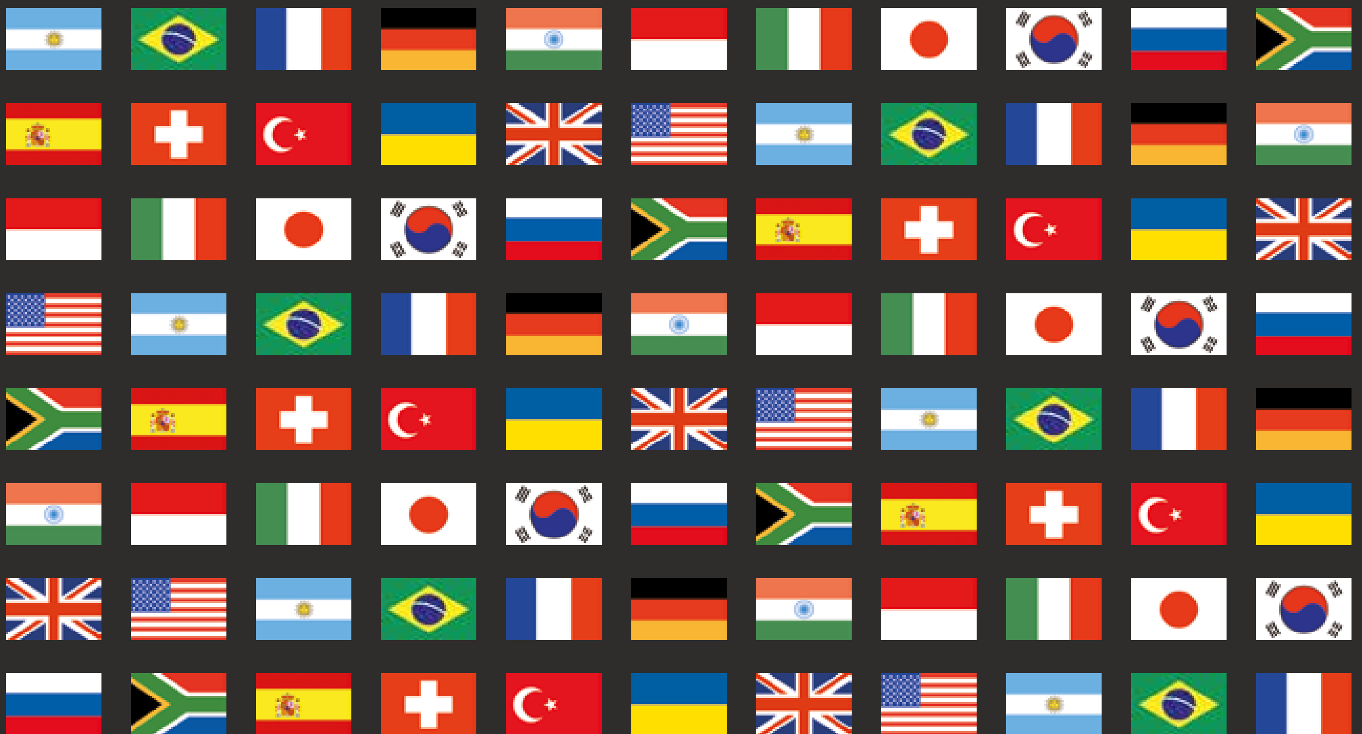
Joint Ventures

Contributing editors
Gavin Williams and James Farrell



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Joint Ventures 2019

Contributing editors

Gavin Williams and James Farrell

Herbert Smith Freehills

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Law Business Research Ltd
87 Lancaster Road
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Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Preface

Joint Ventures 2019

Second edition

Getting the Deal Through is delighted to publish the second edition of *Joint Ventures*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina and Spain.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gavin Williams and James Farrell of Herbert Smith Freehills, for their continued assistance with this volume.

London
October 2018

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United States

Victor Goldfeld*

Wachtell, Lipton, Rosen & Katz

Form

1 What are the key types of joint venture in your jurisdiction? Is the 'joint venture' recognised as a distinct legal concept?

The 'joint venture' is not a specifically recognised type of entity in US jurisdictions. A joint venture entity can be organised under state law as a corporation, limited liability company (LLC), limited partnership or another entity of the parties' choosing. LLCs are frequently used by joint venture parties because of the flexibility they provide with respect to structuring governance arrangements and their tax treatment. In addition, the state of Delaware is frequently chosen as the jurisdiction of organisation of joint ventures because of its highly developed business-law statutes and jurisprudence, which favour freedom of contract between sophisticated parties, and the expertise of its judiciary. A joint venture can, however, potentially be organised under the law of any US state.

It is also possible to form a 'contractual' joint venture that is established purely by agreements between the parties, without any assets or liabilities being transferred to a joint venture entity. In a contractually created joint venture, the parties retain ownership of their respective businesses that comprise the contractual joint venture, and agree to effectively run them as a joint enterprise, with the governance and sharing of economic benefits and burdens determined through contractual arrangements.

The rules applicable to joint ventures arise primarily under the law of the state in which the joint venture entity is organised (or, in the case of a contractual joint venture, the law that governs the contractual arrangements), as well as US federal law. This chapter generally focuses on the rules that are most relevant for joint venture entities organised under Delaware law. All discussion of taxation herein is limited to certain US federal income tax considerations.

2 In what sectors are joint ventures most commonly used in your jurisdiction?

Joint ventures are used throughout a wide variety of sectors, including the technology, entertainment, media, telecommunications, food and beverage, automotive, industrial, pharmaceuticals, oil and gas, and real estate sectors. There are numerous reasons that parties may establish a joint venture, such as to spread risk or capital requirements, take advantage of complementary capabilities or retain partial ownership in the combined joint venture business. The breadth of a joint venture's business can vary as well. For example, a joint venture can be a standalone business that operates without significant support from the joint venture partners, or can be established for a limited purpose such as operating a manufacturing plant.

Venture parties

3 Are there rules that relate specifically to foreign joint venture parties?

Generally, there are no rules that specifically relate to foreign joint venture parties. However, as with all investments in companies with US assets or businesses, investments by foreign parties in US joint ventures, or joint ventures in which a party contributes the assets of a US business and that involve a foreign joint venture partner, may be subject to review by the Committee on Foreign Investment in the US (CFIUS). Foreign parties also should consider the US tax consequences of investing in a joint venture that operates a US business or owns US assets.

4 What requirements are there to disclose the ultimate beneficial ownership of a joint venture entity?

Under US law, there is generally no obligation to publicly disclose the ultimate beneficial ownership of a joint venture entity while it remains private. If the joint venture were to become a publicly traded entity, then it (and certain of its equity holders) would become subject to US securities laws requiring the disclosure of certain beneficial ownership information. In addition, the ultimate beneficial ownership of a joint venture entity may need to be disclosed to governmental authorities in certain circumstances (eg, in connection with tax filings or regulatory reviews such as antitrust notifications and CFIUS filings).

Setting up and operating a joint venture

5 Are there any particular drivers in your jurisdiction that will determine how a joint venture is structured?

The two primary driving factors for structuring a joint venture usually are governance and tax considerations. With respect to governance, parties often opt for a structure such as an LLC, which provides the benefit of limited liability for the joint venture parties as well as substantial contractual flexibility to establish governance arrangements. For example, unlike a corporation, which is managed by a board of directors, an LLC can be managed either through a board of directors (technically known as managers), or by one or more of its members. In addition, unlike a corporation in which directors have fiduciary duties as a matter of law, an LLC agreement can modify or even eliminate the duties of its managers (other than the implied covenant of good faith and fair dealing, which is relatively narrow). Although not necessarily appropriate in every case, limiting fiduciary duties may be preferable in certain joint ventures where the parties are sophisticated and are willing to rely on contractually specified governance rights without full fiduciary protections.

The form of organisation of the joint venture entity will affect the tax consequences to the parties (and the entity itself). A US corporation will be treated as a corporation, and an entity other than a corporation (eg, an LLC or a partnership) that has two or more owners will, absent an election to treat such entity as a corporation, be treated as a partnership. Generally, an unincorporated joint venture through which the parties conduct a business and share profits and losses will be treated as a partnership. The consequences of this tax classification are further discussed below. Both the tax classification of the entity (or arrangement) and the structure through which an interest in the joint venture is held will have a significant impact on the tax consequences to the parties and the joint venture, including with respect to formation transactions, income or loss generated by the joint venture, distributions to the parties, redemptions and sales of interests in the joint venture, future investments and liquidation or termination.

6 When establishing a joint venture, what tax considerations arise for the joint venture parties and the joint venture entity? How can tax charges be lawfully mitigated?

Often, the most significant tax consideration is the tax classification of the joint venture (ie, determining whether to use an entity (or

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arrangement) that would be treated as a partnership or a corporation). A partnership is not subject to income tax at the entity level. Rather, its profits and losses are reported on the income tax returns of its partners, regardless of actual distributions. For tax years beginning before 1 January 2026, a non-corporate partner may be entitled to an income tax deduction of up to 20 per cent of certain qualified business income allocated to such partner from certain US trades or businesses conducted by a partnership, but several limitations apply. A distribution to a partner that is not in excess of the partner's tax basis in its partnership interest is generally not taxable, subject to certain exceptions. Generally, neither partnerships nor contributing partners incur tax on contributions of assets in exchange for partnership interests, with certain exceptions (eg, those related to assumptions of liabilities).

A corporation is a separately taxable entity subject to corporate income tax (currently, at a 21 per cent federal rate, plus applicable state and local taxes). Additionally, distributions to shareholders are generally taxable to shareholders and are not deductible by the corporation. Corporate shareholders are generally eligible for a dividends-received deduction. A contribution of assets in exchange for stock in a corporation is generally not taxable to the corporation. However, such a contribution is taxable to the shareholder, absent the application of certain rules, for which certain foreign parties may not be eligible, providing tax-free treatment in the case of transfers of assets to a corporation in exchange for at least 80 per cent of its stock. Foreign parties will also need to consider special tax rules (eg, those applicable to transfers by foreign corporations of US assets to a US corporation).

Other tax considerations may be relevant for foreign parties to a joint venture conducting a US business. For example, because a foreign partner in a partnership conducting a US business will generally be subject to US tax (including withholding tax) on its share of partnership income, foreign parties may prefer a corporate structure, where only dividends would attract US withholding tax (subject to an applicable income tax treaty). Foreign parties should also consider the rules relating to foreign investments in US real property and the impact of the joint venture structure on eligibility for tax treaty benefits.

7 Are there any restrictions on the contribution of assets to a joint venture entity?

There generally are no restrictions on the contribution of assets to a joint venture other than restrictions that apply generally to the transfer of assets. For example, the contribution to, or acquisition by, a joint venture of US assets or businesses may require competition clearance under the Hart-Scott-Rodino Act (the HSR Act). In addition, if one or more of the parties operates in a regulated industry, such as telecommunications, energy or the financial sector, regulatory approvals similar to those that would apply to a sale of such contributed business may be required.

8 What is the interaction between the constitution of the joint venture entity and the agreement between the joint venture parties?

The interaction of the joint venture's governing documents depends on the entity form of the joint venture. For example, for an LLC in Delaware, the key organisational document is the LLC agreement (also referred to as the operating agreement), which would normally contain all of the specifically negotiated governance and exit mechanisms. On the other hand, a corporation, another potential form of joint venture entity, is governed by a certificate of incorporation (or articles of incorporation, depending on the state of incorporation), by-laws and, most likely, a shareholders' agreement. Of these documents, the certificate of incorporation must be filed with the Secretary of State in the state of organisation, but the by-laws and shareholders' agreement do not need to be filed. Including a provision in the certificate of incorporation (where appropriate to do so) is generally viewed as stronger than including it in the shareholders' agreement, although in some cases, a provision is included in both in order to maximise potential remedies for its violation. In any event, care should be taken to avoid any conflict between the joint venture's various governing documents.

9 How may the joint venture parties interact with the joint venture entity? Are there any restrictions?

Interactions between the joint venture entity and the parties themselves are generally governed by the contractual relationship established between the parties. Parties are often concerned about a joint venture party using its influence over the joint venture to enter into an arrangement that may be unfavourable to the joint venture. For this reason, joint venture governance arrangements often provide some mechanism for approval of related-party transactions, such as a supermajority vote at the board or an equity holder consent right. Joint venture agreements may also include provisions regarding the sharing of information and related confidentiality obligations owed to the joint venture entity by the joint venture parties (and by the joint venture entity's directors and officers, who may have been appointed by an equity holder). In addition, fiduciary obligations (to the extent applicable) may also constrain interactions between the joint venture entity and the joint venture parties, and may also include obligations of confidentiality.

10 How may the joint venture parties exercise control over the joint venture entity's decision-making?

There are various ways to allocate control rights with respect to a joint venture. For example, if the joint venture entity has a board, the parties can be given board-designation rights. There may also be additional directors on the board aside from the parties' designees (eg, the CEO or independent directors). In addition, joint venture arrangements will often include veto rights at the board or equity holders' level for various matters. The parties may also provide for certain members of the joint venture's senior management team to be appointed by individual joint venture parties (possibly on a rotating basis).

11 What are the most common governance issues that arise in connection with joint ventures? How are these dealt with?

The most common governance issues in joint ventures relate to the level of control that joint venture parties have over the joint venture's decision-making. Parties must balance the need to ensure that the joint venture can function with their desire for control over its management. These issues are generally dealt with by creating various tiers of decision-making authority. Daily operation of the joint venture is generally vested in its management, subject to oversight by the board, the composition of which is determined in an agreed manner. Certain decisions, such as significant transactions or the issuance of equity to a new investor, may require the approval of a supermajority of the board or of the equity holders.

The level of control that each party has in a joint venture is highly variable based on the purpose of the joint venture, the number of parties in the joint venture, whether one party is expected to have greater influence because of its level of ownership or expertise, and other factors. For example, in a joint venture that is designed principally for financing purposes, the operating partner may retain most of the control, while the financing partner may have consent rights over fundamental decisions (eg, changing lines of business or a liquidation of the company). In 50:50 joint ventures, in which the parties expect to run the joint venture business together, it is common to have a fairly substantial list of actions that require board or equity holders' approval; in practice, this means that the two partners must agree on a course of action, or a deadlock will ensue (see below).

In joint ventures where there are multiple partners with ownership stakes of varying sizes, it is not uncommon to see approval rights set at different thresholds. For example, purchasing or disposing of a substantial asset may require a low supermajority vote of the board. More fundamental matters may require a unanimous vote of the board or of the equity holders. A minority equity holder also will often have a basic set of protections against unfair treatment by the majority.

12 With an incorporated joint venture, what controls exist in your jurisdiction in relation to nominee directors? How should a nominee director balance the potentially conflicting interests of the joint venture company and the appointing shareholder?

A joint venture may, through its governing documents, establish the method by which directors are nominated or appointed. The duties of nominee directors of a joint venture are related to the entity form of that joint venture. In a joint venture that is organised as a corporation, a director of that corporation, even if appointed by a specific shareholder, has legally prescribed fiduciary duties to the corporation and not solely to that shareholder, and may not, for example, delegate decision-making to that shareholder. However, the parties can provide for a waiver of the 'corporate opportunity' doctrine (which would otherwise restrict a

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director from diverting certain opportunities away from the corporation). On the other hand, if the joint venture company is organised as an LLC, the parties can provide for corporation-like fiduciary duties but may alternatively provide that directors' duties are modified or limited, as discussed above. A director of a joint venture should be cognisant of the extent of his or her duties in that capacity.

13 What competition law considerations are engaged by the formation and operation of the joint venture? Is approval needed?

In the US, formation of a joint venture may be subject to the HSR Act in the same manner that generally applies to the transfer of, or investment in, voting securities and assets. For example, the contribution to, or acquisition by, a joint venture of US assets or businesses may require competition clearance if the size of the investment exceeds the thresholds set forth in the HSR Act. Under the HSR Act, transactions may be subject to notification and waiting obligations. The reviewing agency (the US Department of Justice or the Federal Trade Commission, depending on the sector) may, within an initial 30-day period, make a request for additional information and documentary material, which is called a 'second request'. In the event that a second request is made, the waiting period under the HSR Act expires in 30 days following the date that the parties certify substantial compliance with the requirements of that second request. If applicable, the parties may not consummate the proposed transaction until those notification and waiting period obligations are satisfied.

14 What are the key considerations in your jurisdiction in structuring the provision of services to the joint venture entity by joint venture parties?

An agreement pursuant to which one joint venture party provides services to the joint venture typically would be put in place when the joint venture is formed (so that the parties are comfortable with its terms), or, if it is put into place afterwards, typically would be treated as a related party transaction (discussed above). Joint ventures also present particular issues regarding the provision by a joint venture party of health and welfare benefits and equity incentive awards that require careful consideration and planning at the structuring stage. In addition, in some cases, a foreign joint venture party may be required to accept certain restrictions on its involvement (governance, operational or otherwise) with the joint venture for regulatory reasons (eg, in connection with obtaining CFIUS approval for its investment in the joint venture).

15 What impact do statutory employment rights have in joint ventures?

The treatment of employees of a joint venture is dependent upon both the structure of the joint venture and the parties' desires for structuring. Where the parties intend to actually transfer employees to a new joint venture entity, the form of contribution of assets by the parties to the joint venture affects how those employees can be moved. If a joint venture party is contributing the equity of an entity to the joint venture, then that contributed entity's employees will move with the entity without further action by either party or the joint venture. If, on the other hand, assets and liabilities are being transferred directly by a party to the joint venture, then employees cannot be transferred directly and the joint venture must make the employees of such party new offers of employment. It is also possible to structure the joint venture so that minimal employees are actually employed by the joint venture. This can be accomplished by a joint venture party providing services for a fee through transition or long-term service agreements, or employee leasing or seconding from the joint venture parties.

16 How are intellectual property rights generally dealt with on the creation, operation and termination of a joint venture in your jurisdiction?

Upon formation of a joint venture, the parties may either transfer or license relevant intellectual property (IP) rights to the joint venture. Joint venture parties should be careful in their structuring to avoid weakening IP rights. Parties also should consider the tax consequences of any IP transfers or licences.

With respect to the time period during which the joint venture is in operation, parties have substantial flexibility to address the treatment of newly created IP. For example, the joint venture can retain ownership of such newly created IP, and license it to the joint venture parties. Parties also have flexibility to determine how IP is treated upon termination of the joint venture (eg, they might agree to long-term, royalty-bearing or royalty-free licences to a party that is not receiving the IP upon termination).

Funding the joint venture

17 How are joint ventures generally funded in your jurisdiction? Are there any particular requirements relating to funding and security packages?

Joint ventures in the US are typically funded through a combination of cash generated by the joint venture's operations, debt raised by the joint venture entity or equity investments of the joint venture partners. There are no specific funding requirements other than those that may be agreed by the parties. Each party should, however, carefully review its existing debt agreements to ensure that any financing is compliant with their terms.

18 Are any restrictions on the injection of capital into, or the distribution of profits or the extraction of cash by other means from, the joint venture entity imposed by law or regulation?

In the US, there are generally no practical restrictions on the injection of capital into the joint venture. In addition, there are limited restrictions on the distribution of profits or the extraction of cash by other means from joint ventures. State corporate codes generally prohibit corporations from distributing assets to shareholders unless the corporation has surplus (ie, net assets minus stated capital), and other entity types may have different legal capital requirements, but joint ventures generally are otherwise free to distribute cash to their members, subject to any restrictions in the joint venture agreements and solvency considerations.

19 What tax considerations should be taken into account in the operation of the joint venture?

The tax consequences of the operation of the joint venture will be determined by reference to the tax classification of the joint venture. See question 6 regarding tax considerations relating to distributions to joint venture parties.

If debt owed by a corporation to its shareholder is respected as debt for US federal income tax purposes, generally, any related interest payments will be deductible by the corporation and taxable to the shareholder. Capitalising a corporate joint venture with debt may have certain benefits to foreign parties (eg, access to favourable treaty rates applicable to interest payments and ability to receive repayments of principal without US withholding tax); however, debt owed by a corporation to certain foreign-related persons may be recast as equity (in which case, interest payments on such debt will not be deductible by the corporation). Recently, the question of when to properly recharacterise corporate debt as equity has been the subject of increased scrutiny by US tax authorities.

If debt owed by a partnership to a partner therein is respected as debt for US federal income tax purposes, generally, any related interest payments will generate deductions to be allocated to the partners and will be taxable to the partner that made the loan to the joint venture. Complex partnership tax rules govern the allocation of partnership debt (and related deductions) between partners. Where a loan from a joint venture partner to the joint venture (or other contribution to a partnership), taken together with a distribution to a partner, resembles a sale of partnership assets or interests, certain rules governing 'disguised sales' may apply to recharacterise such transactions as taxable sales.

The deductibility of interest payments by certain large businesses is limited based on such business's taxable income (regardless of whether such business is conducted through a corporation or partnership). Certain other limitations on the deductibility of interest payments may apply in the case of either corporations or partnerships (eg, rules relating to debt originally issued at a discount).

A joint venture party that is a US corporation owning at least 80 per cent (by vote and value) of the joint venture corporation will generally be eligible to include the corporation in its 'affiliated group', in which case, any income or loss generated by the joint venture would generally be consolidated with any such items generated by the other

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members of its affiliated group. The 'pass through' nature of partnerships effectively allows a partner to 'consolidate' its allocable share of partnership income or loss with its other tax items.

Special tax rules may apply to a corporation that engages in business outside of the US (eg, rules applicable to certain payments by large US corporations to related foreign persons and rules relating to income earned by US corporations from certain export sales or services).

20 Are there any noteworthy accounting or reporting issues for the joint venture partners regarding their investment in the joint venture?

The accounting treatment of the ownership of joint ventures depends on the level of ownership and control of the joint venture by the various parties. Joint venture parties should consult with their accounting advisers regarding the need to consolidate the joint venture or use equity-investment accounting. For example, the terms of a joint venture may be relevant in determining whether a majority joint venture partner can consolidate the joint venture. If one of the joint venture parties has securities registered under the US federal securities laws, special care should also be paid to the size of the joint venture as compared to the parent joint venture party, because separate financial statements of equity method investees may be required where certain financial thresholds are met.

Deadlock, exit and termination

21 What deadlock provisions are commonly included in joint venture agreements in your jurisdiction?

There are a number of mechanisms that joint venture parties may include to resolve a deadlock (ie, where the joint venture is unable to make a necessary decision) and then, if necessary, ultimately terminate the joint venture. Parties may include, as a first step, an escalating set of internal dispute resolution mechanisms. For example, if the board is unable to resolve the issue, it may be referred to senior management or a committee of directors of each joint venture party.

If the deadlock has not been resolved by the end of the internal dispute resolution process, there are other potential ways to address the deadlock. One method is to have an independent director on the board of the joint venture with the ability to break a deadlock. Another possibility is to send a deadlocked issued to binding arbitration. While parties may be reluctant to have a third party resolve internal matters (and some matters may not be susceptible to third-party resolution), this can provide a strong incentive to avoid deadlock. The other principal method of addressing deadlock is a termination of the joint venture. See below for a discussion of termination provisions.

22 What exit provisions are commonly included? Does the law restrict any forms of mandatory transfer provision or any basis of calculation?

Parties to a joint venture have substantial flexibility in designing exit mechanisms that meet the parties' commercial goals. Exit mechanisms are designed to provide liquidity and disposition options for one or more parties and may also be used where the joint venture is to be terminated. Parties should think carefully about how to structure exit mechanisms, including their triggers, how they would work in practice and what effect they may have on the parties' incentives.

Many joint venture agreements prohibit all transfers without consent of the other parties (other than in limited circumstances, such as to affiliates) for a period of time, or completely, on the bases that the joint venture requires time to establish itself and that the parties need to be comfortable with their partners. Parties may also include a variety of other transfer provisions, such as drag-along and tag-along rights, rights of first offer or refusal, and put and call rights.

Where a party has a binding right or obligation to sell or buy, the valuation can be based on a pre-agreed multiple of some financial metric (eg, EBITDA), minimum return on invested capital, an appraisal of the company's fair market value by investment banks or other valuation experts (with the determination of fair market value made pursuant to specified parameters, eg, without any minority discount), or based on a market check, or any other method on which the parties agree as a commercial matter. Another potential liquidity mechanism is to cause the joint venture entity to undertake an initial public offering in which the joint venture parties sell their interests. While making the joint venture publicly traded allows for initial and continued liquidity, parties should consider whether they want to have many minority investors and also the cost and scrutiny that is inherent in being a public company.

In the event of termination of the joint venture, whether because of deadlock or otherwise, one potential exit mechanism is for the joint venture parties to each have their assets and liabilities returned in order to put the joint venture parties back into the position they were in before the transaction. While this can be an appealing option early in a joint venture, its practical use may be limited once the joint venture has been operating for some time or its assets are commingled in a manner that makes it impractical to distribute the assets to the individual parties. Another possibility is to liquidate the joint venture's assets and distribute the proceeds to the parties, though this may lead to a destruction of value. Other exit mechanisms provide for one joint venture party, or a third party, to take full ownership of the joint venture. For example, one method is to allow one party to place a value on the joint venture and then allow the other party to determine if it wishes to sell its interests to the first party or buy the first party's interests at that valuation. Another possibility is to give one party drag-along rights to require all joint venture parties to sell to a third party.

Parties should seek specific guidance with respect to bankruptcy and insolvency situations, as US bankruptcy courts have historically treated LLC agreements and shareholders' agreements on a highly individualised and fact-specific basis.

23 What are the tax considerations on termination of the joint venture?

The tax consequences of the termination of a joint venture will be determined by reference to the tax classification of the joint venture.

Generally, the disposition of corporate stock is taxable to a shareholder (absent the satisfaction of certain requirements, pursuant to which the exchange of stock in a US corporation for stock in another US corporation may qualify for tax-free treatment). The termination of a corporation via a liquidating distribution of assets to shareholders is generally taxable to the corporation and its shareholders, with certain exceptions that may apply to a corporation's liquidation of its (at least) 80 per cent-owned corporate subsidiary.

The disposition of a partnership interest in a non-redemption transaction is generally taxable to the partner, and a foreign partner generally will be subject to US taxation on the disposition of an interest in a US partnership that conducts a US trade or business (subject to an applicable income tax treaty). However, a partner generally does not incur tax on a redemption of its partnership interest (assuming it does not receive value in excess of its tax basis in the redeemed interest). The redemption of a partnership interest is not a taxable event at the partnership level. A foreign partner in a partnership conducting a US business may be subject to a 10 per cent withholding tax on both dispositions and redemptions of partnership interests, but certain exemptions may be available.

Disputes

24 In your jurisdiction are there constraints on the choice of law or the method of dispute resolution provided for in joint venture agreements?

US jurisdictions generally respect the choice-of-law provisions included by parties in joint venture agreements, and the parties also have substantial flexibility to include alternative dispute resolution provisions in those agreements. Parties including arbitration clauses in their agreements should, however, be aware that, to the extent a party seeks to enforce an arbitral award, it would need to petition a court of competent jurisdiction.

Update and trends

Parties should monitor commercial and legal developments in determining whether and on what terms to pursue a joint venture.

The recent amendments to the CFIUS regime, as well as the recent amendments to the US federal tax code (including the reduction in the US federal corporate tax rate from 35 per cent to 21 per cent), may affect the structuring of joint ventures in certain circumstances.

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25 What mandatory provisions of local law will apply irrespective of the choice of governing law?

Generally, only provisions of federal law (eg, tax and bankruptcy laws) would be potentially applicable irrespective of the choice of governing law.

26 Are there any restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes? Are there any restrictions on the arbitration of shareholder claims?

In general, the arbitral tribunal will have the authority to issue whatever remedies may be contemplated by the arbitration provisions of the joint venture agreement (although, as noted above, enforcement of an arbitration award would require a court of competent jurisdiction). There generally are no restrictions on what joint venture parties may agree to with respect to the arbitration of claims by the joint venture parties. If the joint venture becomes a public company and there are public equity holders not bound to the arbitration provisions, the joint venture parties could not force such public equity holders into arbitration.

27 Are there any statutory protections for minority investors that would apply to joint ventures?

There are generally no statutory protections for minority investors that would apply to joint ventures (other than in specific contexts, such as appraisal rights in a merger involving the joint venture entity). As noted above, however, in the case of a corporation or an LLC that has determined that the directors will have fiduciary duties to the joint venture, those fiduciary duties would provide a measure of protection to equity holders.

28 How can joint venture parties have liabilities to each other beyond what is expressly agreed in the joint venture agreement?

Generally, in US jurisdictions – absent fraud – the parties' agreements with respect to liability sent forth in the joint venture agreement will be their sole liabilities to each other. One notable exception is that fiduciary duties (to the extent applicable) may be another source of potential liability.

29 Are there any particular issues that can arise in joint venture disputes in your jurisdiction concerning disclosure of evidence?

While there are no specific issues regarding discovery in joint ventures, a party should be careful with how privileged information is shared, as it can nullify privilege to have information shared with third parties. Parties should also not assume that information that is privileged with respect to the joint venture would be protected in proceedings with other joint venture parties.

Market overview

30 What advantages does your jurisdiction offer for parties wishing to set up and operate joint ventures?

As detailed above, the key advantage for setting up and operating joint ventures in the US is flexibility and a well-developed body of law, as well as a reliable and sophisticated judiciary, particularly in Delaware. As most of the terms of the arrangements between the joint venture and the joint venture parties can be defined by contract, parties generally can design joint venture terms that fit their needs.

31 Are there any particular requirements or restrictions relating to joint ventures in your jurisdiction that could deter international investors?

International investors should be cognisant of the CFIUS regime (which is even more rigorous following the passage of new legislation in August 2018, and now potentially covers a broader range of transactions) and tax considerations, but the US is generally a welcoming environment for international investors in joint ventures. However, international investors should be aware that, in the event that the joint venture becomes a public company, US public-reporting requirements can be extensive and costly.

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WACHTELL, LIPTON, ROSEN & KATZ

Victor Goldfeld	vgoldfeld@wlrk.com
51 West 52nd Street New York NY 10019 United States	Tel: +1 212 403 1000 Fax: +1 212 403 2000 www.wlrk.com

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