Reprinted with permission from *Canadian International Lawyer*, (2011) Vol. 8, No. 3, 134, a publication of the Canadian Bar Association

Drafting Issues in International Joint Venture Agreements
A look at some of the recent drafting issues in the case law

*By James M. Klotz, LL.B.**

What makes drafting international joint ventures an interesting task is that the parties typically come from differing legal jurisdictions and cultures, often speak different languages, have separate norms of understanding of written English, and often have differing short and long term goals for the venture. The Japanese have a good phrase for it: “Same bed, different dreams.” Despite these differences, international joint venture agreements have ten key terms:

- The feasibility and scope of the business venture and its strategic plan
- Contributions and valuation of contributions of the partners
- Management and control
- Division of responsibilities
- Restrictions on transfers of interest to other parties
- Transfers of technology and proprietary property
- Right to compete against the venture
- Financing and distribution of profits
- Dispute resolution and governing law
- Duration and termination of the joint venture

Based upon recent cases, both in Canada and abroad, this short paper will provide basic joint venture drafting advice in eight key areas. No attempt has been made in this paper to canvas all of the issues of an international joint venture.

1. Government Interference

One feature that distinguishes international joint ventures from domestic Canadian ventures is the real potential for government interference. This must be fully considered prior to the commencement of the venture. Here are two recent examples:

- In the Zarafshan Newmont Joint Venture, a Canadian-Uzbekistan joint venture, the Uzbek partner was the state-owned Navoi Mining group. The Uzbek authorities claimed that taxes were due and as a result seized gold and some of the assets belonging to the venture. Thereafter, an Uzbek court declared the joint venture bankrupt after seizing $48M in taxes. Then it subsequently appointed a local official to run the venture.[1]

- In *re Oxus Gold PLC* [2] the Kyrgyz partner to a U.K.-Kyrgyz Republic mining joint venture was a company owned by the Kyrgyz government. The joint venture was granted a mining concession only to have it revoked by the Kyrgyz government. The U.K. party commenced arbitral proceedings under the United Kingdom-Kyrgyz Republic bilateral investment treaty.

Foreign governments can present significant complications. In considering the dispute resolution mechanism, the drafter must consider whether there is a bilateral investment treaty ("BIT") between Canada and the foreign jurisdiction. If so, the terms of the BIT should be examined to ensure that the dispute resolution mechanism is in harmony with the relief that may be sought under the BIT.

2. Dispute over Capital Contributions in a Joint Venture

Most joint venture agreements call for at least one party to make a contribution of capital. The terms of the capitalization must be very clear, as this is the first area of difficulty in negotiations. Generally, it is a flexible matter, although some countries require a minimum capitalization that varies between types of joint venture structure. Nevertheless, it is the rare joint venture agreement that specifies exactly how the cash contribution is to be received and the parties often rely upon fairly imprecise language.

In one reported Chinese entertainment joint venture case in inner Mongolia, each party was obliged to contribute capital to the joint venture within five months of obtaining the business license for the venture.[3] The foreign party was to contribute approximately $500K of foreign exchange and equipment, and the Chinese party was to contribute property. The joint venture obtained its license to conduct business, but discovered that the Chinese party's capital contribution of property was actually owned by the local government where the joint venture was located. When it commenced its arbitration against the Chinese party in China, the foreign party was met with the defense that it had not fully contributed its share of the capital, namely, that it could not produce satisfactory evidence, to the letter of the law, that the contribution had been made. This claim was asserted notwithstanding that a satisfactory inspection of the foreign party's contribution had been conducted by the accounting office of the local Industry and Commerce Administration. Although the arbitral panel found that the Chinese party had indeed tried to simply consign state property to the joint venture, the foreign party's report that it had contributed its full contribution was rejected by the arbitral panel, who thus terminated the joint venture without compensation to either party.

The Chinese arbitral association, CIETAC, on its website provided the following commentary on the case:

> Whenever property is offered as capital, the investor should provide valid evidence that it owns the relevant ownership and disposal rights. After formation of the joint venture company, an appraisal of the property should be conducted, and the ownership rights to the property should be formally transferred to the company. Whenever a foreign party contributes capital in the form of foreign currency, it must be converted to RMB or

the agreed upon currency according to the official exchange rate announced that day by the Foreign Exchange Control Bureau. The sum of money agreed upon should be deposited in the account of the joint venture within the time frame specified. …If the failure of one or both parties to meet investment obligations renders the execution of the contract impossible, the contract loses legal protection.

3. Control and Management Issues

Unless both parties spend sufficient resources to fully consider the issues relating to the control and management of the international joint venture, the business will head straight to failure. When negotiating these arrangements, reflection upon both the principles and the practical details of the division of responsibilities, as well as the management and ultimate control of the venture, will increase the likelihood for subsequent success. The idea is that while the mechanisms for dispute resolution – mediation, perhaps arbitration – are necessary when the parties are unable to resolve their differences, more profound is the need to develop a strategy which avoids having to seek a legal remedy.

Control is often the driving force for a party to enter into a joint venture or consortium rather than a licensing, manufacturing or subcontracting arrangement. The amount of control will usually be reflected in the level of management that each party will have. While there are many methodologies for structuring the management of a joint venture, all boil down to two basic styles – management by the controlling partner, or collective management. Where a controlling partner leads management, the venture operates as if it were a subsidiary of that partner. Management decisions are made by the controlling parent executives, located either in the joint venture or in the controlling partner's company. Although a board of directors will contain representatives from each of the partners, it serves more as a formality; the various managers of the joint venture (production, finance, marketing and engineering) are selected by the controlling partner or actually work for the controlling partner.

To protect itself from abuse, the non-controlling partner uses safeguards which most often take two forms: a share of directors *pro rata* to the shares held by each partner, and a veto power on key decisions. Even though the minority partner may not be able to affect certain decisions, if there is a requirement that those decisions cannot be made without a director's meeting, at the least, the minority partner will feel included and that it has a right to be heard.

As for the veto, key decisions include those typically found in shareholder agreements – disposition of major assets, merger or consolidation with other businesses, liquidation, and increase in capitalization. A particularly savvy non-controlling partner will preserve for itself an equal voice in a "Management Committee" created to be responsible for determining long-term strategy, changes in which are also added to the key decisions that are susceptible to veto. As in any passive investor role, reporting requirements permit the non-controlling partner to monitor the progress of the venture and foresee cash flow difficulties in advance of crisis. Factual circumstances determine whether the reporting should be daily, weekly, monthly or yearly.

Even where one party maintains majority control over the joint venture, disputes arise where the other party asserts *de facto* control. For example, in a 51-49% Norwegian-Russian joint chemicals venture, the Norwegian majority partner claimed that the Russian minority party treated the joint venture as a wholly-owned subsidiary with no regard to the Norwegian party's interests.[4]

However, even where one party cedes control to the other, the results may not be satisfactory. The highly publicized dispute between Groupe Danone and Hangzhou Wahaha Group ("Wahaha") is a classic cautionary tale. Groupe Danone, the giant French food and beverage company, was the 51% partner in a joint venture with 49% partner, Wahaha. When the joint venture was first formed in 1996, it was hailed by Forbes magazine as a showcase joint venture. The Chinese partner, led by a strong Chinese entrepreneur, Mr. Zong, had become one of the largest beverage producers in China. Recognizing that Mr. Zong was an entrepreneurial force, Danone agreed to limited involvement in the joint venture, and permitted Mr. Zong to attend to the day to day running of the business. The dispute began when Mr. Zong's company began to manufacture and sell products in direct competition with the joint venture. Danone then commenced arbitral proceedings under the joint venture agreement in Stockholm, and Mr. Zong commenced a multi-pronged defense in the form of trademark arbitration in China. Eventually, the parties settled and Danone sold its interest to Mr. Zong in 2009.

One commentator on the dispute noted that although Mr. Zong was a 49% minority partner, this did not interfere with his control of the business. However, he nevertheless apparently complained that the restrictions contained in contracts and regulations considerably cramped his style, claiming that "Most of the decisions had to be approved by Danone board members at board meetings once every quarter. How you want me to run the business under such conditions?"

Another recent case involved the joint venture by British Petroleum ("BP") in Russia. Britain is the fifth largest investor in Russia, and BP is the largest British business investor in Russia. In 2003, it formed a 50/50 international joint venture with a group of Russian investors, under the name TNK-BP. By 2005, the joint venture was the second largest oil producer in Russia.

The joint venture agreement called for Westerners to assume key managerial positions, such as CEO, chief operating officer ("COO") and chief financial officer ("CFO"). Other foreigners were in charge of finance, marketing, planning and environmental protection, while Russians were in charge of extraction, legal support of business, security and relations with the government. In 2004, Mikhail Fridman, chairman of the TNK-BP board of directors and chairman of Alfa Group, mentioned some of the benefits of having Western managers within TNK-BP. He said that international managers had been able to contribute in the areas of new approaches to technology use, information management and accounting systems, performance management processes, and development of the company's long term strategy.[5] Unfortunately, within one year, 300 of the 1400 Russian employees had left the company, and the reason cited was that they could not work with

"Britishers." The issue was identified as mutual distrust between new expatriate arrivals and those who had worked in Russia before, including both Russian nationals and expatriates.

By 2008, a dispute had arisen between the British and Russian shareholders. The Russians felt that BP treated the joint venture as its own subsidiary. Also, the Russian partners criticized the British CEO's leadership, claiming that he put BP's interests ahead of the joint venture's, and they refused to approve the financial accounts for 2007. A number of the senior management left the joint venture, including the CEO, Robert Dudley, who cited harassment by the Russians. BP was subsequently able to renegotiate its relationship and signed a five-page Memorandum of Understanding ("MOU") in late 2008, saving its interest in the joint venture.[6] Nevertheless, BP continues to have an ongoing dispute with its Russian partners.[7]

4. Failure to Prohibit Transfer of Interest

Most parties to international joint ventures will be quick to state that the relationship with their partner is the most important aspect of the venture when the venture gets started. Unfortunately, when one party wants to leave the joint venture, it creates a problem for the remaining party – it may not wish to have an unfamiliar or unfriendly new partner thrust upon it. For this reason, drafters are obliged to invest considerable effort in ensuring that the transfer of interest and termination clauses in the international joint venture agreement capture as many of the possibilities as possible.

In *PetroKazakhstan Inc v Lukoil Overseas Kumkol BV,*[8] the partners were each 50% owners of Turgai, a joint venture company created to develop the northern part of the Kumkol oil and gas field in southwestern Kazakhstan. Despite lengthy provisions in the joint venture agreement restricting the transfer of control of either party to a third party, the Alberta partner, PetroKazakhstan entered into a merger with a Chinese-owned corporation that would have the effect of transferring ultimate control of its 50% interest to the Chinese-owned party. It applied to an Alberta Court for approval of the arrangement, and Lukoil attempted to block the approval on the basis that the merger would trigger its pre-emptive rights under the joint venture agreement. The Alberta Court of Queen's Bench acknowledged all the applicable principles under the UNCITRAL Model Law, but determined that the allegations made in the arbitration went well beyond the scope of the application to approve the merger and, in any event, the rights of the objecting party could be pursued in the arbitration against the merged entity. In addition, the Court noted that the language of the joint venture agreement, by virtue of the parties' contrary pleadings, was capable of two contrary interpretations of the pre-emptive rights provisions. They also illustrated to the Court that there were several complex arguments that needed to be analyzed, perhaps with the assistance of extraneous and parol evidence.

5. Ancillary Agreements

Joint venture agreements often have multiple ancillary agreements, such as technology transfer, property transfer, licenses, or exploration agreements. The terms of these agreements must dove-tail perfectly. For example, in *El Nino Ventures Inc. v. GCP Group Ltd*. [9], in addition to a joint venture agreement covering the exploration and development of mineral properties in the Democratic Republic of Congo, the parties had also entered into a Mineral Property Option Agreement, which contained many identical provisions. Unfortunately, the two agreements contained different dispute resolution mechanisms – the joint venture agreement requiring arbitration, and the Option Agreement referring disputes to court. The court determined that it did not have jurisdiction to rule on the existence of an applicable arbitration agreement, holding that was a matter within the exclusive competence of the single arbitrator. Although noted but not discussed in the case, both agreements also contained "entire agreement" clauses. The clause in the agreement was fairly standard, as follows: *"Entire Agreement: This Agreement and the Schedules hereto constitute the entire agreement between the parties hereto. This Agreement may not be amended or modified except by an instrument in writing signed by each of the parties hereto.*" With intertwined agreements, this is a common drafting error. In fact, as the agreements contained similar terms, they each on their own were not the entire statement of the matter. (The arbitration clause in question in this case was set out as follows: *"Single Arbitrator: Subject to the express provision of this Agreement, any matter required or permitted to be referred to arbitration hereunder or in dispute hereunder will be determined by arbitration under the International Commercial Arbitration Act of British Columbia (in this Article, the "Act") by a sole arbitrator."* Most arbitral institutions provide wording that is broader than this wording, and drafters would be wise to stick to the recommended language that such arbitral institutions put forth. For example, the ICC basic recommended clause is as follows: *"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." Drafters will need to add the various bells and whistles to this clause to deal with location, language and other vital particulars.*

An earlier 2008 case, *Incanore Resources Ltd. v. High River Gold Mines Ltd*.,[10] dealt directly with the dangers of multiple formation agreements and the power of the "entire agreement" clause when used carelessly. The parties entered into a letter of intent to develop a mining property in Burkino Faso, West Africa. The actual critical terms of the letter of intent were as follows:

1. Incanore and High River will enter into a joint venture agreement regarding the Property subject to the terms and conditions hereof.
4. Upon execution of an acceptable agreement with the Government regarding the Property on terms and conditions acceptable to both parties, High River shall forthwith pay to Incanore $50,000 (Cdn) and issue 200,000 shares of High River. High River will issue to Incanore a further 100,000 shares of High River once a production decision is made.
5. At the same time as making the payment and issuing the shares referred to in paragraph 4, Incanore and High River will enter into a mutually agreeable joint venture agreement containing the usual terms and conditions and including the following...")

The letter of intent was followed by a more comprehensive joint venture agreement setting out the parties' proposed rights and obligations. Unfortunately, at the time that the joint venture agreement was executed, there were still outstanding obligations under the letter of intent. The joint venture agreement acknowledged the obligation under the letter of intent. However, it also contained an entire agreement clause:

> *Entire Agreement*
> *This Agreement contains the entire understanding and agreement of the participants with respect to the property and supercedes all prior agreements and understandings between the participants relating to the subject matter hereof.*

The parties had a dispute under the joint venture and entered into a release. The Release provided as follows:

> Queenstake and Incanore Gold hereby acknowledge and agree that the Option has been duly, properly and completely exercised on the basis of agreed terms as between the parties, such that Queenstake and/or Incanore Gold no longer have any right, title or interest in the Taparko Interest of any kind or nature whatsoever, or any other continuing relationship with High River. Further, Queenstake and Incanore Gold hereby remise, release and forever discharge High River and High River hereby remise, release and forever discharge Queenstake and Incanore Gold, their successors and assigns from any and all actions, suits, proceedings, claims or demands of any kind or nature whatsoever for, by reason of or in any way arising out of Incanore Gold holding the Taparko Interest, or by virtue of the Minutes of settlement.

However, the plaintiff claimed that it still had rights existing under the letter of intent, notwithstanding the entering into of the joint venture agreement and its subsequent termination and the release. The plaintiff was unsuccessful.

The case highlighted several legal issues in the drafting of a joint venture agreement. The first is that when parties expressly incorporate terms into a contract, the incorporated terms must be construed as if they had been written out in full in the contract.

Secondly, the court recognized that an entire agreement clause, so often incorporated into contracts by drafters without sufficient thought as to its consequences, cannot be rebutted outside a claim of mistake or fraud. Once such a clause is drafted clearly and unambiguously, the court should not hesitate to find that the entire agreement clause supersedes and replaces the prior agreement.

As a consequence, where the parties intend to convert a letter of intent into a joint venture agreement, consideration must be given to which terms are intended to remain specific obligations of one of the parties, even after the joint venture agreement has been consummated.

6. Dispute Resolution

Dispute resolution clauses need careful input from local counsel in drafting any international joint venture agreement. Primary factors to consider include: the language of the documentation; the convenience of the location; the flexibility of the law in allowing the parties to regulate their own affairs; the efficiency and familiarity of the litigation process; the perceived independence of the judiciary; the ability to enforce any judgment or award that is rendered; the level of damages and costs which may be awarded; and the choice of representation that it available to the parties.[11] Typically, the parties will agree upon arbitration as the mode of resolving disputes as it has numerous advantages over litigation in a foreign country. Arbitration can offer a neutral forum for resolving disputes; the opportunity to appoint an expert in the relevant field as arbitrator as opposed to relying on a judge who may be unfamiliar with the industry; a more flexible procedure than court litigation; confidentiality and privacy, since arbitration hearings should be held in private – this is particularly important where the parties are continuing the joint venture and do not wish to have their internal affairs aired in public; finality – in many jurisdictions an award will not be subject to an appeal on the merits and the circumstances in which a party may seek to have it set aside are fairly limited; and a wide variety of available remedies — an arbitrator's powers may extend to ordering a sale of shares or terminating the joint venture itself."[12] However, the parties often have difficulty reaching agreement on standard language provided by arbitral associations such as the International Chamber of Commerce ("ICC") or American Arbitration Association ("AAA"), and they will modify the language to find a satisfactory compromise. One such compromise is to permit arbitration, but not to make it mandatory.

The danger of such a departure was apparent in the Ontario case of *Gramercy Limited v. Dynamic Tire Corp.*[13] This was a Chinese-UK joint venture to manufacture tires. The Chinese partner alleged that the UK partner had not provided the technology and capital which it was required to provide pursuant to the joint venture agreement. As a result, the joint venture company was unable to go into normal operation. Although the joint venture agreement contained an arbitration clause, the Chinese partner brought an action before the courts in China. The UK partner chose not to defend this action and judgment was issued in favour of the Chinese partner. Although the arbitration clause of the joint venture agreement contained mandatory language obliging the parties to first seek to resolve disputes through amicable negotiations, it further provided that if negotiations failed, the dispute "may" be arbitrated. Nothing in the agreement purported to prevent litigation if arbitration had not occurred. The Court recognized that under Chinese law, which governed the joint venture agreement, an arbitration agreement is void if it permits resort to both arbitration and litigation. The Chinese partner's claim that the UK partner was interfering with the marketing of its product was not dismissed. The joint venture agreement provided for limited allowable damages.

The UK partner commenced an action in Ontario against the Chinese partner, claiming breach of the joint venture agreement, intentional interference with the UK partner's economic interests under the joint venture agreement, and conspiracy to deprive the UK partner of its rights under the joint venture agreement. It also sued several Canadian parties for various claims relating to their alleged inducing of the Chinese partner to breach the joint venture agreement. While the Ontario Court recognized the Chinese judgment, it rejected a request to stay the proceedings brought in Ontario against the Chinese partner, as the Chinese court had only dealt with the Chinese partner's claims against the UK partner, and not the UK partner's claims against the Chinese partner.

The lesson from *Gramercy* is that foreign courts do not always rule as one would expect. Canadian law tends to respect broad jurisdiction under arbitration clauses. For example, in an earlier Canadian case,[14] the British Columbia Court of Appeal considered B.C.'s *International Commercial Arbitration Act*, (S.B.C. 1986, c. 14, which, like Ontario's *International Commercial Arbitration Act,* is based on the UNCITRAL Model Law). The Court held that on an application for a stay of proceedings, the court should not reach any final determination as to the scope of the arbitration agreement or whether a party to the litigation is a party to the arbitration agreement, as those are matters within the jurisdiction of the arbitral tribunal. The court went on to state that only where it is clear that the dispute is outside the terms of the arbitration agreement or that the party is not a party to the arbitration agreement, or that the application is out of time, should the court reach any final determination in respect of such matters on an application for a stay of proceedings. When it is unclear that the matters in dispute fall outside the arbitration agreement, the question of whether they fall within it is, at first instance, for the arbitrator to decide, not the court. In international arbitrations, it is also not uncommon for arbitrators to apply the theory of "group of contracts" to apply an arbitration clause in a joint venture agreement to the various agreements stemming from it. For example, in one case, where the joint venture agreement and the implementing agreements were part of the execution of a single project, a breach of an implementing agreement was ruled to be a breach of the joint venture agreement, thus permitting the issue to be arbitrated.[15]

7. <u>Enforcement</u>

The conventional wisdom with regard to international joint venture dispute resolution clauses was to insist upon arbitration in a neutral country. As long as the joint venture partners were both based in jurisdictions that have acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Commonly known as the "New York Convention"), parties could expect that the foreign arbitral award would be enforced in the losing party's jurisdiction.

A recent case in China suggests that the conventional wisdom may require examination.[16] The pharmaceutical joint venture, the Jinan-Hemofarm Pharmaceutical Co. Ltd., consisted of two Serbian companies and a Liechtenstein company as the foreign parties. The dispute arose over a lease between the Chinese joint venture partner as lessor and the joint venture as tenant. Although the joint venture agreement had an ICC arbitration clause requiring disputes to be resolved in Stockholm, the Chinese party brought a claim in a local Chinese court for non-payment of rent and return of leasehold improvements. The Chinese court held that since the joint venture company was not a party to the joint venture agreement, the arbitration clause did not cover the dispute, and the court ruled in favour of the Chinese party. The court went on to attach some of the joint venture's bank accounts and inventory. The foreign parties commenced an arbitration in Stockholm, and received a positive award in the amount of $8M. In 2007, they applied to the Chinese courts to enforce the arbitral award. The Chinese court, for the first time (as reported), refused to enforce the arbitral award. It held that the Chinese courts had jurisdiction over the disputes, and had issued judgements on the disputes. For the ICC to then hear the dispute on the same facts was held to be a violation of China's judicial sovereignty and the jurisidiction of its judiciary – essentially the exercise of public policy to avoid enforcing an award.

The converse result occurred in *Oakwell Engineering Ltd. v. Enernorth Industries.*[17] In this case, which also involved the recognition and enforcement of a foreign judgment, the joint venture agreement was for a project company that would finance, construct, and operate two barge-mounted plants in India. The Canadian partner, Enernorth, owned 87.5% and the Singapore partner, Oakwell, owned 12.5% of the joint venture. However, the licenses necessary for the project were never obtained, and a new Indian government requirement to use natural gas instead of furnace oil made the project infeasible. Oakwell commenced arbitration in Singapore against Enernorth for failure to release the funds for the project. The parties ultimately settled their dispute and the case involved matters arising out of the settlement agreement, not the joint venture. Notably, Enernorth claimed that the Singapore judgment should have been overturned because of Singapore's biased legal system. The Ontario Court found that to be successful in such a claim, there is a high bar - the plaintiff must prove actual bias and that it influenced the outcome of the proceeding. The mere reputation of Singapore's courts being biased was insufficient.

Drafters also tend to ignore the need for potential injunctive relief when drafting an arbitration clause. In some circumstances, resort to the courts may be the only realistic method of protecting the joint venture from a difficult partner. Permitting an arbitral panel to grant injunctive relief usually will not help matters, as arbitral panels are usually slow to get moving. In addition, there may be management matters within the joint venture, such as theft by one party's representative, that might be best served by litigation in local courts rather than through arbitration.

The rules vary on a country by country basis as to whether local courts will intervene to either support or supervise an arbitration, or to grant interim measures. Accordingly, it is important to consider this when choosing the location of the arbitration.

In a recent case in the Ukraine, the agreements all contained arbitration clauses mandating arbitration under the ICC in the Ukraine, at the Ukrainian Chamber of Commerce.[18] The plaintiff commenced an action against the defendants, and added a third party (in this case, the Ukrainian Ministry of Transportation and Communication). Despite the existence of the arbitration clauses, the Ukrainian Commercial Court seized jurisdiction on the basis that the third party Ministry was not part of the arbitration agreement. Thus, at least in the Ukraine, it is possible to circumvent an arbitration clause by adding a non-party to the joint venture to the dispute.

8. <u>Termination</u>

There will always be provisions for terminating the joint venture upon default. At a minimum, the agreement should make it painful for the other party to default. Most typically, the non-defaulting party should have the right to purchase the defaulting party's interest, preferably at a discount. This is known as a "forced buyout." While this provision is open to negotiation, it is critical to ensure that the host country will permit such a transfer. If this is problematic, the non-defaulting partner should be able to sell to another party in the host country. Alternatively, the joint venture can be dissolved and the assets liquidated.

In one recent case, the consequences of a poorly-considered default clause occurred in an international joint venture where, upon the event of a default under the joint venture agreement, the non-defaulting party could purchase the interest of the defaulting party for the "fair market value" of the defaulting party's interest. One of the events of default was insolvency. Unfortunately, the mechanism contained in the agreement for determining finality for the fair market value was extremely slow, requiring more than ten months to reach a final number. The non-defaulting party, a party to the voluminous joint venture agreement, was surprised to discover that there was no other way in which it could eject its now bankrupt partner.

To this end, a serious effort has to be made to predict the future. It is often insufficient to permit the parties to rely on boilerplate termination provisions. For example, the HSBC, in its credit card partnership with China's Bank of Communications, took the necessary steps to consider, in the drafting of its initial agreement for the venture, what changes would be required to the arrangement if a change in regulation made it possible to convert the joint venture into a credit card company. This discipline, which included consideration of the future board structure and the exit amounts to be paid to the partners, avoids the expensive uncertainty that afflicts most international joint ventures when the parties have to negotiate such provisions after the fact.[19]

Conclusion

Regrettably, there is no standard international joint venture agreement which fits a typical joint venture. Each arrangement, by virtue of the nature of the parties, their locations, their contributions and their goals, will require different considerations. While it is impossible to draft the agreement for all contingencies, examining the common causes of international joint venture disputes can assist the drafter in contemplating the advice to be given and the words to be used in the creation of the necessary documentation.

- **James Klotz, LL.B., Osgoode Hall Law School (1982), ICD.D, Institute of Corporate Directors, (2008) is a partner in the Business Law Group of Miller Thompson LLP in Toronto and Co-Chair of the firm's International Business Transaction Group. International business is his area of specialty; international anti-corruption is a related practice area. He is President and Chairman of the Board of the Canadian chapter of Transparency International, a global organization dedicated to the fight against corruption,*

and is an adjunct professor of International Law at Osgoode Hall Law School. He is Chair of the Bar Issues Commission, at the International Bar Association and is a member of its Management Committee. Among his past positions he has been Chair of the International Law Section of the Canadian Bar Association, and Chair of the International Law Section of the Ontario Bar Association. Excerpts included from the author's text Power Tools for Negotiating International Deals, 2nd, Kluwer International, New York, 2008.

---

[1] 'Uzbek Court Declares U.S.-Uzbek Joint Venture Bankrupt", Radio Free Europe, online: <http://www.rfel.org/content/article/1071737.html, July 4, 2011>

[2] MISC No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007)

[3] "Dispute Over Capital Contribution in a Joint Venture", China International Economic and Trade Arbitration Commission ("CIETAC"), online: <http://www.cietac.org/index/references/cases/47603791dea0167f001.cms>

[4] "Yara International to sue Russia's Acron over joint-venture dispute" *ABCMoney* (18 January 2007), online: <http://www.abcmoney.co.uk/news/1820077869.htm>

[5] Gevork Papiryan, "BP in Russia: Settling the Joint Venture Dispute" Harvard Business Review Case Study (10 December 2008), citing Interview of Mikhail Fridman September 2004 Magazine TNK-BP *Insight*.

[6] "BP puts Russian dispute behind it and looks to long-term TNK tie-up" *Financial Times* (5 September 2008)

[7] "BP Rosneft alliance on hold until March" *Globe and Mail* (11 February 2011) B10

[8] (2005), 12 B.L.R. (4th) 128

[9] 2010 BCSC 1859

[10] (2008), 50 B.L.R. (4th) 221

[11] Joanne Westcott, "Cross-border joint ventures – getting the dispute resolution clause right", (2010) 2:4 ABLJ 44 at 45.

[12] *Ibid.*

[13] (2004), 69 O.R. (3d) 210, additional reasons in (2004), 71 O.R. (3d) 191.

[14] *Gulf Canada Resources Ltd. v. Avochem International Limited* (1992), 66 B.C.L.R. (2d) 113.

[15] Jane Player, Bird & Bird, dated January 8, 2008, <http://www.twobirds.com/English/News/Articles/Pages/Arbitration_of_joint_venture_disputes. Aspx, citing Valérie Pironon, "Les joint ventures – Contribution à l'étude juridique d'un instrument de coopération internationale", *Dalloz*, 2004, pp. 138 at p. 292

[16] Intermediate People's Court of Shangdong Province, Jinan, 27 June 2008 (Hemofarm DD, et al. v. Jinan Yongning Pharmaceutical Co. Ltd.) ICCA Yearbook XXXIV (2009) pp. 478-484

[17] (2005), 76 O.R. (3d) 528

[18] Ivan Lischyna, "Ukrainian Higher Commercial Court allows court proceedings despite arbitration clause", online: http://arbitration.practicallaw.com/8-501-6370, February 4, 2011.

[19] Stephan Bosshart, Thomas Luedi and Emma Wang *"Past lessons for China's new joint ventures"*, McKinsey Quarterly (Dec 2010), online: http://www.mckinseyquarterly.com/Past_lessons_for_Chinas_new_joint_ventures_2717