

KEY POINTS

- The language used at the beginning of s 2.1 of the model joint venture agreement ('JVA') may need to be modified either to extend or limit fiduciary duties.
- The joint venture company ('JVC') name has significant implications.
- The joint venture's objects establish the scope of commitment of the joint venture parties to each other and define the JVC's business opportunities.

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Joint venture agreements: part 3 – the premise, title and plot

■ Section 2.1 of the model JVA sets out the obligation of the JV parties to 'pool their resources and efforts by establishing jointly a corporation'. As described last month, the obligation of the JV parties to each other may be in the nature of a partnership, with attendant fiduciary duties, or a purely contractual relationship, with few or no fiduciary duties. Both ends of this spectrum may be appropriate for different circumstances, so the lawyers must help their clients understand their options and appropriately match their legal obligations with their intentions and expectations.

While it is in theory possible to include undertakings in a purely contractual relationship that emulate the fiduciary duties of a partnership, it is in practice difficult to anticipate all contingencies. An overarching fiduciary duty thus provides a mechanism to redefine roles, rights and duties in the future in a multitude of unanticipated situations.

On the other hand, where the JV parties have multiple existing business interests that may compete with the JV, and/or desire to remain free to establish or acquire such business interests in the future, having a fiduciary joint venture is likely to complicate and restrict their separate business activities. Where this is likely to be the case, use of a purely contractual JV, with few or no fiduciary obligations, is more appropriate. The language used at the beginning of s 2.1 of the model JVA may need to be modified in such circumstances as it could otherwise be interpreted as creating fiduciary duties.

Section 2.1 also anticipates that the JV parties will specify a name for the JVC. The JVC name has significant implications. Use of a trade name or mark that belongs to one or more of the JV parties may be desirable to establish immediate recognition of the

This article is third in a series examining project development and finance joint ventures ('JV's) based on the International Trade Centre incorporated joint venture model agreement among three or more parties.¹ This instalment addresses the legal relationship among the JV parties, and the name, objects and business plan for the joint venture company ('JVC'), as covered in art 2 of the model joint venture agreement ('JVA').

JVC with the good will of the JV party whose name or mark is used. If the JV is bidding for a government licence, concession or contract, then the association of the JV with one of the JV parties through a common name may help instil confidence in the government evaluators or regulators of a sufficiently strong nexus between the JV and that JV party to improve the JV's prospects of winning the bid.

Use of the established name or mark of a JV party by the JV may also give the JVC a market entry advantage in terms of consumer

of the JVC to use the name or mark, the limitations on such use, and the obligations of the JVC to maintain and protect the good will associated with the name or mark. The JV parties should also value the licence, and determine whether it will be considered as part of the initial capital contribution to the JVC by the owner of the name or mark, and/or whether it will thereafter be royalty free or require royalty payments. The circumstances under which the owner of the name or mark may terminate the licence will also be important. To the extent the JVC will rely

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brand recognition and acceptance where the JVC's business involves retail sales of goods or services to the public in a competitive market, as in the case of a telecom business. It may be of less importance, however, where the JVC will not have retail customers, as in the case of a power plant owned and operated by a JVC that will sell electricity to a single wholesale customer (such as an electric utility) or a single retail customer (such as a factory), or where retail customers will buy in a monopoly marketplace where brand is relatively unimportant (such as an airport, toll bridge or toll road).

When the JVC will use the name or mark of a JV party, it will need a licence agreement for the name or mark. This ancillary agreement must define the rights

on the licensed name or mark to establish and grow its business, the JV parties other than the owner of the name or mark will want to ensure that the JVC can continue to use the name or mark indefinitely without arbitrary termination of the licence by the owner.

Sometimes, the JV parties may decide to use a name or mark that combines or is a hybrid of names or marks owned by two or more different JV parties. This has the same implications as the use of a single JV party's name or mark, but with the added complexity of two licences and the implications of creating good will for the combined or hybrid name or mark.

In some circumstances, the JV parties may coin a new name or mark for the JV. If the JV is successful, the new name or mark

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may become a valuable JVC_o asset in which all the JV parties share proportionately. One issue to address in the JVA is whether any or all of the JV parties will have rights to use the name or mark in markets outside that developed by the JVC_o, and on what terms and conditions. In some cases, the JVC_o may be able to expand its business to other jurisdictions, and, in these circumstances, it may be appropriate for new business under the JVC_o's name and marks to be reserved exclusively for the JVC_o and not the JV parties. Though it is difficult to foresee all the possible outcomes, the lawyers drafting the JVA must work closely with their clients

straightforward. If the JV parties are building a power plant or toll road, then the purpose of the JV may be well-defined and strictly limited to the specific project for which the JV is bidding.

It may be more complex in other cases, such as when the parties are bidding for a telecom licence or a sports and entertainment complex concession, where potential core and ancillary business opportunities may be more far-reaching than simply the immediate project. A bidding consortium that is awarded a mobile telecom licence may in the future be able to use the spectrum allocated not only to provide mobile voice and data

integral part of the legal documentation for the JV. Its terminology and contemplated actions must be in harmony with the representations, warranties and covenants of the JV parties in the JVA and other JV documents. The lawyers should thus be involved in preparing the business plan from the outset, ensuring that it covers all needed topics, with clarity and precision, and in a manner consistent with the legal rights and obligations of the JV parties.

In addition, in most competitive bidding situations where the JV is seeking a licence, concession or contract, the business plan is a key element of the bid package that must be reviewed for conformity with the bidding requirements.

The business plan will anticipate all cash and other inflows and outflows from the JV (pre-incorporation) and the JVC_o (post-incorporation). These include the JV's initial capital requirements, both in-kind and cash, and any future capital contributions from the JV parties, as well as third-party funding from lenders and others (such as an Initial Public Offering). The cash inflows and outflows also include anticipated sources, timing and amounts of revenues, and anticipated expenses, including any service fees, rents or royalties payable to JV parties and their affiliates. The business plan will establish expectations for free cash flow and profits, and will project the timing, amount and likelihood of any distributions of profits to the JV parties. Finally, the business plan will provide for negative financial contingencies, and other events that may be inconsistent with the key assumptions in the business plan, many of which may trigger certain capital call and other provisions in the JVA.

Short as it is, art 2 of the model JVA introduces fundamental elements of the JV with significant implications for its success or failure and for the relationship among the JV parties and the JVC_o. Understanding the significance of each such element, negotiating with a view to its implications and drafting with care are critical to the success of the venture.

"The business plan's terminology ... must be in harmony with the representations, warranties and covenants ... in the JVA and other JV documents."

to ascertain whether their aspirations or intentions envision any of these possible outcomes, or whether such outcomes are likely, and, if so, to ensure that they are adequately addressed in the JVA.

Section 2.2 of the model JVA is where the JV parties set out the objects of the JVC_o. As mentioned in the previous instalments, the JV's objects establish the scope of commitment of the JV parties to each other and define the JVC_o's business opportunities. If the relationship of the JV parties includes fiduciary duties, the JV's objects define the breadth of those duties. Even when the JV is solely contractual in nature, its objects define the scope of those contractual obligations.

Coupled with the recitals (see last month's article), s 2.2 is the single most important clause in articulating the commercial objectives of the JV. While the recitals paid attention to the expected individual contributions and withdrawals of the JV parties, s 2.2 concentrates on the objects of their joint enterprise carried out through the JVC_o. In drafting the objects clause, the lawyers will want to ensure sufficient scope to allow the JVC_o to realise the full potential of the business the JV parties are building together. In some cases, this may be fairly

services but also to provide wireless Internet access for fixed or other users. If the JV parties would want these additional revenue-generating opportunities, and potential needs for investment of additional capital, to be within the JVC_o's scope of business opportunities, then the objects clause must be sufficiently broad to include them and not allow one or more dissenting JV parties to block them.

On the other hand, the lawyers for the JV parties will want to ensure that the objects clause is not overbroad or otherwise such that it may limit the ability of their JV party clients to pursue their separate businesses outside the JV without fiduciary or contractual accountability to each other.

Section 2.3 of the model JVA introduces the business plan for the JV. The business plan is a fundamental element of the terms of reference for the JV parties in establishing, defining and realising or performing their rights and obligations to each other and the JVC_o. Lawyers drafting a JVA may be tempted to leave preparation of the business plan entirely to the financial, engineering and marketing teams and simply use whatever document they develop. This approach sells the JV parties short. The business plan is an

¹ The model JVA discussed may be found at www.jurisint.org/doc/orig/con/en/2005/2005jiconen1/2005jiconen1.pdf.