Baker & McKenzie

International Joint Ventures

Handbook

THE LEADING **CROSS-BORDER FIRM**

Baker & McKenzie and all contributors assert their rights under the Copyright, Designs and Patents Act 1988 to be identified as the authors of this work.

IMPORTANT DISCLAIMER: The materials in this handbook are of the nature of general comment only and are not intended to be a comprehensive exposition of the issues arising in the context of joint venture transactions, nor of the law(s) relating to such transactions. The contents of this handbook are not offered as advice on any particular matter and should not be taken as such. No reader should act or refrain from acting on the basis of any matter contained in this handbook without taking specific professional advice on the particular facts and circumstances at issue. Baker & McKenzie, the editors and the contributing authors expressly disclaim all and any liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or part of any of the content herein. This handbook may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Save where otherwise indicated, law and practice are stated as of 1 September 2015.

Baker & McKenzie International is a Swiss Verein with member law firms around the world and reference to "Baker & McKenzie" includes Baker & McKenzie International and its member law firms.

© 2015 Baker & McKenzie
www.bakermckenzie.com
All rights reserved

Editor's Note

We are pleased to present the latest edition of Baker & McKenzie's International Joint Ventures Handbook. Drawing on our unparalleled experience in all aspects of cross-border transactional work, this handbook is intended to help decision makers understand the breadth and depth of business and legal considerations associated with international joint venture transactions and suggests some ways to navigate the joint venture journey. This handbook is organized primarily in checklist, table and questionnaire format to assist users in gathering and assessing key information that impacts the various stages of joint venture planning. It is written primarily from the perspective of the foreign or "non-local" party entering into a new jurisdiction.

This handbook is not a comprehensive treatise. Its aim is to provide a framework for those contemplating a joint venture relationship, and it focuses on equity joint ventures where the parties participate through equity in a joint venture vehicle for the purpose of conducting business together. It does not attempt to provide a detailed discussion of the planning and execution of business acquisition and disposition transactions, even though many of those elements will be present in the joint venture context, particularly when one or both parties will be contributing an existing business to the venture.

This handbook is a product of numerous contributions from various practitioners around the world, to all of whom we would like to extend our profound thanks for their time, care and expertise.

Stuart Hopper, General Editor
Jennifer Ferguson, Editor

September 2015

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table of Contents

Section 1

Overview 1

Table 1(a) Transaction Continuum 2
1. Basic Considerations 2
2. Understanding the Different Approaches 4
Table 1(b) Transaction Matrix 5
Table 1(c) Comparison of Typical Contractual Joint Venture, Equity Joint Venture and Establishment of Wholly Owned Subsidiary 6

Section 2

Diligence 9

1. Local Risk Assessment 9
2. Compatibility Assessment 9
Table 2(a) Local Risk Assessment Checklist 11
Table 2(b) Compatibility Assessment Checklist 18

Section 3

Structure 23

1. Tax Strategies 23
2. Structure of the Operating Vehicle 24
3. Jurisdiction in which to Organize the Ownership Vehicle 25
4. Ownership Structuring 25
5. Capital and Financial Interests 31
6. Equity Participation 38
7. Management Control 38
8. Director and Officer Liability 39

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 3(a) Equity Participation Considerations 40
Table 3(b) Management Control Considerations 41

Section 4

Exit and Termination 43

1. Transfer of Interests 44
2. Intellectual Property Considerations 46
3. Covenants Not to Compete 48
4. Other Transition Issues 49

Section 5

Other Key Considerations 51

1. Tax 51
2. Dispute Resolution 55
3. Methods for Contributing Assets 56
4. Covenants Not to Compete 58
5. Competition/Antitrust Law 59
6. Foreign Ownership Restrictions 63
7. Employee Transfers and Benefits 64

Section 6

Documentation 69

1. Confidentiality Agreement 69
2. Term Sheet 70
3. Joint Venture Agreement 70
4. Company Formation Documents 71
5. Ancillary Agreements 71
   Table 6(a) Sample Term Sheet 72
   Supplement to Term Sheet Commentary and Alternative Provisions 77
   Table 6(b) Joint Venture Issues Checklist 96

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix A

Overview of D&O Duties and Liabilities in Foreign Entities 108

Appendix A1

Overview of Applicable US Laws Impacting D&O Liability 124

Appendix B

Illustrative Comparison Summary Table of Entity Establishment, Directors Appointment, Share Capital, Shareholders' and Cash Repatriation Issues in Various Jurisdictions 137

Appendix C

Broad Principles of Information Exchange and 'Gun-Jumping' 151

Appendix C1

Overview of EU Merger Control Provisions 157

Appendix D

OECD Convention & Signatories, FCPA and UK Bribery Act 2010 Summaries 163

Appendix E

Baker & McKenzie Offices Worldwide 166

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Section 1

Overview

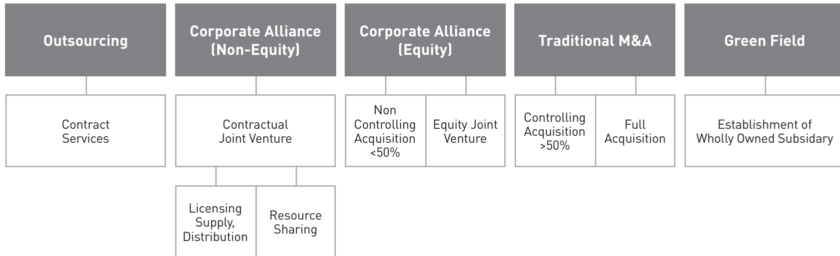
Today's business leaders are exploring a wider range of strategic growth solutions across the whole continuum from acquisitions to alliances and joint ventures. According to a recent Baker & McKenzie report, joint ventures are one of the leading types of transactions that companies plan to pursue in the next 12 months.[1] While a corporate alliance may take many forms—from a purely contractual relationship to a jointly owned entity—at its heart it is simply a commercial arrangement between two or more participants. What is agreed between those participants may involve transferring an existing business to the joint control of the parties or indirectly acquiring an existing business from another party, in which case organizing the venture will involve elements of a disposition or acquisition, or both. Alternatively, an alliance may only involve license agreements, joint marketing agreements, affiliate revenue sharing agreements or other types of agreements in which the parties agree to pursue a set of common goals.

This handbook focuses on "equity joint ventures" in which a foreign partner and a local partner participate through equity in a joint venture vehicle for the purpose of conducting business together in a particular jurisdiction.

Table 1(a) is a simplified overview of the range of typical corporate transactions to illustrate where joint ventures fit along the transaction continuum:

[1] "Growing pains: Succeeding at business transformation in an increasingly complex world" Baker & McKenzie (2014)

Table 1(a) Transaction Continuum



There are, however, endless ways in which a joint venture can be structured that defy the simple categories shown above. For example, even though the parties may set up an equity joint venture, substantial (if not all) contributions may be made via arm's-length commercial agreements. Each opportunity thus will have its own characteristics which suggest a particular strategy, and rarely is there a single "right" or "wrong" approach.

This publication considers the different stages of the equity joint venture deal process, from evaluation of the initial opportunity and potential partner, through high level structure planning, evaluation of specific legal issues including exit and termination, and drafting the necessary transaction documents.

1. Basic Considerations

Some of the reasons commonly cited for entering into a joint venture are:[2]

- Fast entry into local markets;
- Low market entry costs;

[2] See, for example, "Getting more value from joint ventures" Boston Consulting Group (December 2014); "A study of Joint Ventures: The challenging world of alliances" Deloitte (June 2010)

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Strong local player (e.g., established customer base, market presence, production capacity, complimentary technology, employee base, distribution chain, and political savvy);
- Economical long-term resource commitment with shared risks;
- Diminished political risk (e.g., government interference, nationalization, political volatility); and
- No suitable acquisition targets or greenfield projects (e.g., establishment of wholly owned subsidiary) due to cost, local cultural resistance, foreign ownership restrictions, and other factors.

Potential downsides and risks include:

- Cultural differences between parties from different jurisdictions can lead to significant misunderstandings and inefficiencies;
- Misalignment or divergence of strategies can result in losses and a failure to achieve overall business objectives;
- Operational problems, whether the result of strategic differences, production issues, management control issues or otherwise, can limit the effectiveness of the venture;
- Lack of trust between the parties can limit cooperation;
- Decision-making and dispute resolution processes can be lengthy and costly, depending upon what mechanisms are agreed in the joint venture documentation and what practices have evolved during the life of the joint venture in this respect;
- Service and contribution agreements, which are often seen as ancillary to the relationship, can create a dependency of the joint venture on a particular party, even though an equity joint venture may be established with the overarching goal of giving the joint venture some measure of independence from the participants; and

- Exit upon termination can be expensive or difficult.

That said, a joint venture may be the appropriate investment arrangement in the particular circumstances, and, like any investment arrangement, the potential downsides and risks can be identified and managed through careful diligence, thoughtful planning and appropriate documentation.

2. Understanding the Different Approaches

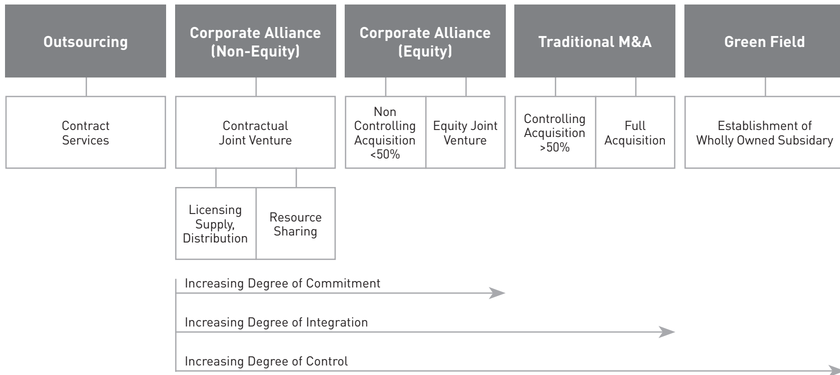
At the outset of any cooperative arrangement, the parties must determine the appropriate form to regulate their relationship in light of their respective goals and strategies. For example, in addition to the option of establishing an equity joint venture, the parties should consider whether any of the following types of arrangements would be appropriate in light of their respective commercial objectives:

- A supply agreement for goods or services;
- A distribution or agency agreement;
- A license or franchise agreement;
- A research and development or cooperation agreement;
- A 100% acquisition; or
- The establishment of a wholly owned subsidiary without participation from another party.

The Transaction Matrix in **Table 1(b)** uses the Transaction Continuum from Table 1(a) to depict broadly the levels of commitment, integration and control generally associated with these different types of relationships, and how transaction complexities can vary.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 1(b) Transaction Matrix



The Comparison Chart in **Table 1(c)** compares in greater detail some the basic characteristics of:

- A contractual joint venture;
- An equity joint venture; and
- The establishment of a wholly owned subsidiary.

It should be noted that, even in situations where the participants believe that the creation of contractual collaboration is sufficient and appropriate for the opportunity under consideration, local laws may impact on the relationship, and may imply obligations between the parties on the basis of agency or partnership as a matter of law which the parties themselves have not expressly addressed. As such, potential participants should always consider the possible effect of local laws from the outset and at the high level planning stage.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 1(c) Comparison of Typical Contractual Joint Venture, Equity Joint Venture and Establishment of Wholly Owned Subsidiary

	Contractual Joint Venture	Equity Joint Venture	Wholly Owned Subsidiary
Structure	• Contract between the parties.	• Separate legal entity, jointly owned by foreign party and local party.	• Separate legal entity, 100% owned by foreign investor.
Entry into Market	• Faster. • Foreign party benefits from local party's customers, connections, knowledge of competitors, local laws and practices.	• Faster. • Foreign party benefits from local party's customers, connections, knowledge of competitors, local laws and practices.	• Slower. • Foreign investor has to grow business from scratch (e.g., hire employees, build demand, obtain sales).
Start-up costs	• Lower.	• Lower to moderate. • Costs of establishing and maintaining joint venture vehicle can be shared.	• Higher. • Costs of establishing and maintaining corporate entity borne solely by foreign investor.
Resource Commitment	• Lower. • Foreign party may, e.g., license intellectual property or supply goods. • Licensee/purchaser pays royalties/ cash.	• Lower to moderate. • Foreign party often contributes management expertise, intellectual property and know-how. • Local party often contributes employees, customers, plant and facilities.	• Higher. • Foreign investor must hire local employees and/or transfer expatriates, purchase raw goods, etc.
Intellectual Property Risk	• Higher. • Potentially sharing or giving away IP to other party (i.e., a competitor).	• Higher. • Potentially sharing or giving away IP to local party (i.e., a competitor).	• Lower. • IP less exposed to a competitor because subsidiary is wholly owned.

	Contractual Joint Venture	Equity Joint Venture	Wholly Owned Subsidiary
Return on Investment	• Lower. • Royalties generally yield lower returns than equity.	• Moderate to higher. • Equity generally yields higher returns than royalties, but returns are shared with other joint venture party. • Foreign party may have licensed intellectual property to the joint venture vehicle in exchange for royalty payments.	• Higher. • Equity generally yields higher returns than royalties.
Market Presence	• Lower. • Foreign party not present in local market except through local party.	• Moderate to higher. • Foreign party has direct access to local market through local party.	• Higher. • Foreign investor has direct presence in local market.
Political Risk	• Lower. • Foreign party (licensor) does not bear risk of entry into volatile market.	• Moderate. • Foreign party bears partial risk of politically volatile market, government interference, expropriation.	• Higher. • Foreign investor bears full risk of politically volatile market, government interference, expropriation.
Competition Law Risk	• Moderate to higher. • Collaboration of competitors may trigger competition law obligations and issues.	• Moderate to higher. • Participation by competitors in joint venture vehicle may trigger competition law issues.	• None. • No collaboration with a another party, therefore no competition law concern.
Control over Strategy	• Lower. • Minimal integration of foreign party and local party's global strategy.	• Moderate. • Certain degree of control over joint venture vehicle's global strategy • Dependent upon strategic objectives of local party and ability of both parties to adhere to agreed strategy for the duration of the joint venture.	• Higher. • Complete control over wholly owned subsidiary's global strategy.

 © Baker & McKenzie all rights reserved

	Contractual Joint Venture	Equity Joint Venture	Wholly Owned Subsidiary
Complexity of Corporate Governance	• Lower. • No joint corporate control.	• Higher. • Conflicting strategic visions, different management/ cultural styles, unequal capital investments, and other material differences often require complex corporate governance mechanisms.	• Lower. • Foreign investor can exercise full control over wholly owned subsidiary.
Market Feedback	• Lower. • No stand-alone entity for customers to identify with.	• Moderate to higher. • Joint venture vehicle may provide a direct identity and presence in the market.	• Moderate to higher. • Wholly owned subsidiary provides direct identity and presence in the market.
Formality	• Moderate. • Need appropriate contracts. • No need to form an entity.	• Higher. • Need a joint venture agreement and must form joint venture entity. • Possible ancillary agreements (e.g., intellectual property license, management services, shareholder rights agreement).	• Moderate. • Need to establish wholly owned subsidiary.
Complexity of Documentation	• Moderate to higher. • Negotiation of license may be complex.	• Higher. • Negotiation of profit-sharing, management, etc., may be complex.	• Lower. • No counterparty or joint venture partner.
Termination Risk	• Moderate to higher. • May be difficult to obtain market intelligence and transfer jointly-developed products out of joint venture (i.e., cost and ownership issues).	• Moderate to higher. • May be difficult to obtain market intelligence and transfer jointly-developed products out of joint venture (i.e., cost and ownership issues). • Potential for conflict over intellectual property developed during course of joint venture. • Buy-out or termination procedures can be expensive and time-consuming.	• Lower/none. • Foreign investor owns 100% of subsidiary and, therefore, all of its assets.

 © Baker & McKenzie all rights reserved

Section 2

Diligence

1. Local Risk Assessment

An international joint venture implies an ongoing relationship in a market that may be unfamiliar to at least one of the parties. Especially where the joint venture will conduct business in an emerging market, the diligence exercise should thus include an assessment of the particular risks that are unique to that local market, including political, business, legal, and cultural risks. The Local Risk Assessment Checklist in **Table 2(a)** is designed to assist the analysis of these types of risks.

2. Compatibility Assessment

A joint venture also implies a degree of cooperation between the parties. An important aspect of the joint venture diligence exercise should be an evaluation of factors that may indicate compatibility between the prospective parties to assess the prospects of a successful joint venture. The Compatibility Assessment Checklist in **Table 2(b)** is intended to identify specific operational and non-operational areas for review in this regard. This checklist can also be used to help monitor the relationship throughout the life cycle of the joint venture.

Bear in mind, however, that:

- many of these factors can only be assessed through frank discussions between the parties;
- the parties may not be forthcoming until they know the transaction is likely to proceed; and

 © Baker & McKenzie all rights reserved

- cultural sensitivities may impact the level and nature of the diligence exercise,

and so a compatibility assessment is often easier said than done. Nevertheless, it is critical to include in the diligence process those individuals who will ultimately be involved in the management of the joint venture so they can begin to develop a working relationship and head off potential problems early in the joint venture's life cycle.

The information and tools included in this section are not intended to be static, and the levels of importance of the individual factors will undoubtedly vary depending on the particulars of the party proposing to enter into the joint venture, and its objectives for the specific opportunity.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 2(a) Local Risk Assessment Checklist

Political and Business Risks

Risk	Issue	Possible Solutions
Stability of Local Government	• Be clear as to what form of government is in place and how stable it is (e.g., new or mature democracy/ oligarchy/dictatorship/single party state/absolutist monarchy or other form of government, separation of powers, civilian controls, free press, freedom of association/conscience, recent history of instability)? • Consider any possible reputational risks (in addition to financial and legal risks) that may arise on entering into business in unstable regions/with unsavory regimes (see Reputation Risk Considerations in **Table 2(b)** below).	• One way to assess stability is to examine country studies prepared by government agencies, including those of the US Department of State, the CIA World Fact Book, as well as global or local media such as the BBC's Country Profiles, The Economist's World in Figures and local newspapers. • Minimize capital investment (reserve) in the joint venture entity. • Delay until stability increases.
Corruption and Anti-Corruption Regulation	• Is corruption common? • If so, can the joint venture effectively operate its business without participating in corruption?	• A good starting point to assess country corruption is to consult Transparency International's Corruption Perception Index (see also **Appendix D - OECD Convention & Signatories, FCPA and UK Bribery Act 2010 Summaries** for overviews of some of the key anti-bribery and corruption regimes which have extra-territorial applicability). • Establish and implement a meaningful compliance program that contains strict internal policies against corrupt practices. This requires effective communication to the joint venture's employees, as well as on-going monitoring. • Include appropriate representations and covenants in the joint venture agreement and impose penalties that align the joint venture parties in the outcome. • Conduct private investigation of the potential partner and key employees.

Risk	Issue	Possible Solutions
Currency Risk	• Is the local currency convertible? • If the currency cannot be converted directly, do alternative means of conversion exist? • Is the currency market (or currency system) stable? • Do the exchange control/currency laws of the jurisdiction restrict the payment of dividends or movement of capital? Does the joint venture entity form restrict the payment of dividends? Are there any ways to overcome the restrictions?	• Hedge currency risk with derivatives. • Obtain exemptions as a condition to investment. • Conduct joint venture in convertible currency.
Local Business Risks	• Does the local economy have a history of stability or volatility? • Could manufacturing and/or labor costs, increase drastically? • Are labor unions generally recognized in the jurisdiction? If yes, how powerful are they? • Is local consumer behavior/preference susceptible to drastic change? • Are there existing or potential local competitors to whom the local government can give special privileges?	• Buy insurance policies for country risks. • Assess local business risks in detail and use realistic or modest discount rates. • Venture with politically savvy local partner. • Work with local business, labor and political leaders to obtain investment and other local support.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Legal Risks

Risk	Issue	Possible Solutions
Rule of Law	• Does the target country have well-established rules of law in general or do officials have significant discretion with respect to interpretation and enforcement?	• Select governing law and dispute resolution forum of a jurisdiction with well-developed and flexible legal system.
Enforceability of Contractual Safeguards in Joint Venture Documents	• Is the choice of law and forum valid and enforceable? • Are penalty clauses valid and enforceable? • Is an injunction order to enforce contractual rights available? • Can local courts enforce specific performance? • Are local courts strictly impartial or do they tend to exhibit bias (towards local entities)? • Are judgments of local courts predictable? • How long will it usually take to obtain and enforce a judgment? • Does the local government have strict enforcement procedures? • Is the local country party to international treaties for the enforcement of foreign money judgments and arbitral awards?	• Provide for arbitration in the joint venture agreement. • Select governing law and forum of a jurisdiction with well-developed and flexible legal system.

Risk	Issue	Possible Solutions
Selection of Entity	• Identify available corporate forms for joint ventures (e.g., corporation, limited liability company, partnership)? • Which of these entity types is customarily/normally used for joint ventures? • Which of these offer greatest flexibility of management? • Which of these is permissible under antitrust/competition law? • Does local law require a minimum capital contribution? • Are contributions in-kind allowed? Are contributions subject to an independent valuation? • Can the corporate form pay dividends at any time or are there any timing restrictions? Can distributions be made out of capital or only out of profits? Are there mandatory reserves? • Are interests in the particular kind of entity assignable? • Are limitations on the right to assign/transfer (such as requiring management consent, right of first refusal, or right of first offer) legal and binding? • Does a member have any right to withdraw and have its interest redeemed by the company? Can members dissolve the company in case of deadlock? Is an agreement concerning such a withdrawal or dissolution binding and enforceable? • Does the local entity provide limited liability to its equity owners? What is the risk of "piercing the corporate veil"? • Does the local country or the country where the party/entity is located recognize the corporate form as a pass-through entity for tax purposes? Are there any limitations on such recognition? Will contributions to the corporate form be taxed? • Is the corporate form well-recognized in the local business community for the type of business being contemplated?	• If there is no corporate form suitable for a joint venture, contractual arrangements without establishing a corporate form can be a solution (e.g., joint marketing, distribution or supply arrangement, licensing arrangement). • To reduce the risk of direct liability of the equity owners, consider interposing holding companies. • See **Section 3 (Structure)** for further discussion of potential entity forms.

Risk	Issue	Possible Solutions
Intellectual Property	• Does the local government have well-established intellectual property laws and are they regularly enforced? • Are cross-border transfers of intellectual property by assignment or licensing subject to government review/ control? • What are the mandatory rules regarding employee ownership in inventions (e.g., in some countries, inventors are entitled to a certain level of compensation for successfully exploited inventions which may increase intellectual property development costs)? • Does local law have moral rights for authors/creators of copyright works which cannot be waivered or assigned?[3] • Does local law prohibit or limit the right of a contributor to receive an automatic assignment or license-back of improvements made by a licensee (i.e., the joint venture)? • Does local law require that intellectual property developed using governmental funds/sponsorship remain under the ownership of a local entity? (This could impact intellectual property ownership upon termination or exit). • Does local law require that a registered IP right, (such as trademarks) can only be registered by an entity located and/or doing business locally?	• Implement a business structure where proprietary information will not be disclosed to the local party. • Establish and implement strict internal confidentiality policies for the joint venture entity. • Factor into on-going contributions and distributions any required compensation arising as a result of employee-owned inventions. • Establish the joint venture in a jurisdiction with favorable intellectual property laws.

[3] Some jurisdictions (e.g., the United Kingdom) have moral rights for the authors or creators of copyright works (e.g., to be recognized as the author) even if the right itself has been assigned to a third party.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Risk	Issue	Possible Solutions
Antitrust	• What are the key product/service sectors in which the parties are active? • Where will the joint venture make sales or provide services? • What is the structure of the market in which the joint venture will operate? • Does the joint venture involve competitors? If so, what are their market shares? • What structure will the joint venture utilize? • Does the local government have well-developed antitrust regulations and are they regularly enforced?	• Consider early on whether merger control notifications will be required/advisable. • If competitors are involved, consider early on whether the market shares of the parties will preclude the joint venture. • Choose a joint venture structure that will not violate applicable antitrust laws.
Foreign Investment Laws	• Do investments by a foreign person require prior approval of any governmental authorities? If not, is there an option to voluntarily notify, and is this advisable? • Does local law allow a foreign person to own a majority of the shares in a company?	• Consider early on whether foreign investment filings will be required/advisable. Even a minority foreign investment may require foreign investment law approval.
Regulation (Licensing)	• Are foreign companies allowed to have a license to do business without the participation of the local party? • If the majority of shares in the joint venture are owned by a foreign company, is the joint venture allowed to have such a license?	• Consider early on whether participation of local party is required.
Accounting & Compliance	• Does local corporate law specify accounting rules for the particular entity types or are the parties free to choose? Is there any limitation on the ability of the non-local party to require the use of its own accounting standards? • Are any specific compliance requirements of the non-local party acceptable locally? • Is the financial reporting of the joint venture subject to the requirement that one or both parties maintain adequate internal controls?	• Require the joint venture entity to adopt accounting standards that are as close as possible to the non-local party's (e.g., same fiscal year). • Require financial statements to be prepared in accordance with IFRS, GAAP or other applicable accounting standards. • Retain personnel at the joint venture who are versed in applicable securities and accounting requirements with respect to internal controls over financial reporting.
Management	• Are there specific legal risks to individuals in management positions? (See **Appendix A - Overview of D&O Duties and Liabilities in Foreign Entities**).	• Buy D&O Insurance.

Cultural Risks

Risk	Issue	Possible Solutions
Language/Society	• What is the primary language spoken by people in the country? How prevalent is the use of English as the language of commerce and business? • What is the predominant religion in the country? • Are interactions between members of society based upon wealth? Class? Ethnicity? Seniority? Family Relations?	• Cultural briefing for the non-local party representatives negotiating the joint venture. • Cultural training program for expatriate employees of the non-local party. • Cultural training program (including communications training, problem-solving and cultural awareness) for local employees. • Hire local manager to represent the non-local party in the joint venture. • Appoint joint venture team representatives who ideally speak the local language or otherwise are locally trained. • Regular training programs on practices and standards of the non-local party. • Hold meetings frequently in the local jurisdiction and in the home jurisdiction of the non-local party (e.g., board meetings, business meetings, employee retreats).
Business/Cultural Practices	• Do people communicate with each other explicitly or implicitly? • Is the culture hierarchical or flat? • Are business relations and communications commonly adversarial or collaborative? • What are the important dos and don'ts of doing business in the local jurisdiction? Shaking hands? Smiling? Handing out business cards? Being early/late? Treating men and women differently? Tipping for service?	
View of Foreign Countries	• Is there an anti-foreign investment sentiment in the country? • Has such a sentiment historically existed in the country? • What are the key historical events of the country involving the non-local party's home country? • What is the level of influence of foreign business, culture, entertainment, etc., in the local country?	

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 2(b) Compatibility Assessment Checklist

Operational Considerations

Risk	Issue	Discussion
Alignment of Goals	• Are the goals of the potential joint venture parties complementary and aligned toward the success of the joint venture?	• This analysis requires a clear understanding of the goals of each party, usually obtained through frank discussions between the parties. These data must then be compared and carefully considered. In some instances, goals may be complementary and a prospective joint venture party may identify opportunities for aligning goals. • In other cases, a prospective party may determine that its goals and the goals of the potential partner are simply not aligned.
Business Cultures	• Are the business cultures of the potential joint venture parties compatible? Factors to consider include: » how does the potential partner make decisions (e.g., employee empowerment or rigid top-down style)? » how are results rewarded? » how much value does the potential partner place on lifestyle (e.g., valuing employees as people as well as workers)?	• Business culture can play a key role in several aspects of business process, including fostering innovation, decision-making and risk-taking. Information as to a party's business culture can be gleaned from frank discussions not only between the prospective managers of the joint ventures, but, ideally, also with the rank and file employees. Outside consultants, including human resource and other business consultants, may be able to assist with this assessment. This information may then be compared to the non-local party's business culture and formal business processes to determine the level of compatibility. **The Local Risk Assessment Checklist in Table 2(a)** contains additional discussion regarding general cultural risks that may be present in the local jurisdiction that could impact the success of the joint venture.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Risk	Issue	Discussion
Financial Resources	• Will the parties be able to meet the funding needs of the joint venture?	• Parties that are not strong financially may lack the resources to commit to a successful joint venture operation. Financially strong parties may be better able to meet their funding and operational commitments to the joint venture. The financial strength of the potential partner may be determined through publicly available information, credit checks and from other sources supplied by the potential partner. This information should also be used to craft appropriate requirements and protections with respect to on-going capital contributions.
Operational Savvy	• Does the potential partner have the desired operational and performance capabilities?	• Information about operational and performance capabilities may be derived through reviews of a potential partner's strength in its particular markets, an analysis of the partner's potential market weaknesses and the partner's historical operating and financial performance. This information may be identified through interviews and discussions with key managers, business clients and associates of the potential joint venture partner. A review of a potential partner's operational savvy should also take into consideration the competitive environment in the markets in which it does business. It is also helpful to consider the extent of the potential partner's experience in cooperative arrangements of the sort contemplated, or with similar partners (e.g., other multinationals).

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Risk	Issue	Discussion
Leadership Commitment	• Will the parties commit the necessary internal leadership to the success of the joint venture?	• This includes an examination of the prospective party's own leadership support for any particular joint venture and the leadership support of the potential partner. This analysis should include identification of the leaders from each party that are committed to the joint venture's success (including their titles and roles within their respective organizations), the degree to which any performance evaluations of these individuals will be tied to the success of the joint venture (i.e., internal accountability for the joint venture), and the role that these individuals will play in the joint venture.
Business Plan	• Do the parties have a clear and well-developed business plan for the joint venture?	• A clear and well-developed business plan that aligns the goals of the potential parties is valuable in guiding the parties toward a successful relationship. The key data element for this analysis is the preliminary draft business plan and its relationship to the goals of the parties. In many instances, potential parties will be hesitant to expend considerable resources developing a detailed business plan before believing that the venture will proceed. • At a minimum, however, the parties should agree on the basic outline of the fundamentals of the business plan, including economic interests with respect to profits (i.e., distributions vs. reinvestment in the joint venture), before agreeing to move forward together as business partners.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Non-Operational Considerations

Risk	Issue	Discussion
Reputation	• Does the potential partner have a good reputation in the local and global business community?	• A prospective party should consider the obvious potential downsides of aligning itself with disreputable businesses and business practices, particularly if the relationship with the disreputable business could damage it or its brand image in the local or wider world market. Information about business reputation may be identified through public press releases as well as through interviews and discussions with business clients and associates of the potential joint venture partner. In addition, engaging a private investigation firm can provide additional insight.
Legal Compliance	• What is the potential party's legal track record?	• Not only should the prospective party inquire as to the potential partner's track record for legal compliance and the processes and procedures that the potential partner has in place for ensuring compliance with applicable laws, but it should also consider the general legal compliance landscape for the jurisdiction in which the joint venture may operate (e.g., established rules of law, effective and consistent enforcement of those laws and sophistication of judicial system). This information is often obtained through traditional due diligence requests and searches of publicly available litigation records.
Ongoing Disputes	• What is the nature and extent of any ongoing legal disputes that involve the potential partner?	• While disputes involving the potential partner (even if unrelated to the potential joint venture) may not directly impact its reputation or compliance history, significant disputes may distract leadership attention from the success of the joint venture. Legal disputes may be identified through public reporting sources or from direct inquiry of appropriate personnel within the potential partner.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Risk	Issue	Discussion
Organizational Compatibility	• Is the potential partner structured and organized to interact properly?	• The prospective party should assess the potential partner's organization and structure in light of its own organization and structure to determine whether personnel with similar responsibilities within their own organizations will be working and communicating on similar levels at the joint venture. This information is often obtained through traditional due diligence requests and interviews with management.
Geographic Stability	• How stable is the political, business and legal landscape in the relevant jurisdictions?	• **The Local Risk Assessment Checklist in Table 2(a)** is designed to assist the analysis of various political, business and legal risks that could impact the success of a joint venture. This information should be analyzed with respect to both the potential partner's home jurisdiction and the jurisdiction in which the joint venture entity will operate. This information may be identified through public sources or may be identified through non-public sources available to the potential party.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Section 3

Structure

There are a number of business, legal and tax considerations that any prospective party should take into account when determining how a joint venture should be structured. These include, but are not limited to:

- Tax planning considerations;
- The jurisdiction of organization of the joint venture vehicle;
- What corporate structure to use in order to own its interest in the joint venture;
- What type of equity ownership and management control is required. This will include questions about capital and financial interests, equity participation, management control and director and officer liability.

1. Tax Strategies

A detailed discussion of tax planning strategies is outside the scope of this handbook; however, it is essential to involve tax specialists and seek their input at the earliest stages of joint venture planning. Some of the key tax areas to consider when planning a joint venture structure include the following taxes and duties applicable to the future business (which are common to most jurisdictions):

- Income/profit taxes;
- Value added tax (VAT)/general sales tax;
- Real and personal property taxes;

- Stamp duties and transfer taxes;
- Capital duties imposed upon contributions to capital;
- Employee-related taxes;
- Customs duties;
- Tax holidays;
- Withholding taxes;
- Exit taxes;
- Double taxation treaties; and
- Marketplace transfer pricing regulations applicable for goods and services.

Section 5.1: Other Key Considerations - Tax describes in more detail some of the most crucial considerations with respect to these tax items.

2. Structure of the Operating Vehicle

If the parties do create a new local joint venture operating entity, they will need to consider what entity form is appropriate to the particular joint venture. For further details of the type of corporate entity most frequently used to incorporate a joint venture vehicle, and the formalities required in a number of key global jurisdictions, see **Appendix B - Illustrative Comparison Summary Table of Entity Establishment, Directors Appointment, Share Capital, Shareholders' and Cash Repatriation Issues in Various Jurisdictions**.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

3. Jurisdiction in which to Organize the Ownership Vehicle

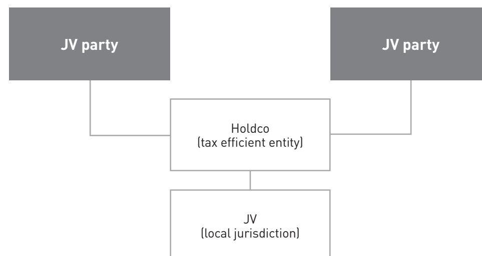
Consideration should always be given to the jurisdiction where the direct jointly owned entity should be organized. A number of issues should be considered when making this decision. For example, it may well be beneficial from a tax perspective for the parties to form an entity outside the jurisdiction in which the joint venture operates, which will then own the local joint venture operating entity. However, consideration should also be given to organizing the joint venture vehicle, if possible, in a jurisdiction in which: (i) there is a well-tested corporate law regime, (ii) specific performance is available as a remedy (this is particularly important with respect to enforcing provisions in the joint venture agreement on equity transfers), and (iii) the parties are able to limit the potential liabilities of the representatives who sit on the joint venture board.

4. Ownership Structuring

The criteria listed above may not be met in many emerging markets, and so a prospective party should consider establishing a holding company in a well-established legal jurisdiction, utilizing a joint venture agreement governed by the laws of the jurisdiction in which the holding company is established, and operating the joint venture through a company that is wholly owned by the holding company.

A simple diagram of a holding company structure is:

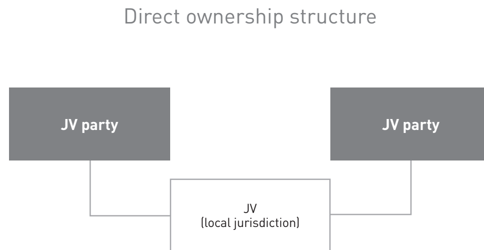
Holding company structure



If it is not possible to establish a joint venture vehicle outside the jurisdiction where the joint venture will conduct its business, the prospective party will need to examine the different local entity types and available flexibility with respect to tax, equity, management, transfers of interest, and accounting/auditing issues in the jurisdiction in which the joint venture will operate.

A simple diagram of a direct ownership structure is:

Direct ownership structure



The following are among the questions that should be asked when determining the appropriateness of a given local entity type:

Entity Type

- What are the available entity types in the local jurisdiction? Are they similar to a models with which the parties are familiar in their home jurisdictions, e.g., corporation, limited liability company, partnership or hybrid vehicles?
- Which of these entity types may legally be used for a business of the kind contemplated for the joint venture? Which are normally/commonly used (as a matter of local practice) for the kind of business contemplated for the joint venture?
- Which types of entities provide limited liability for the equity owners?

Tax

- What tax rates will be applicable to the joint venture vehicle?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Can the joint venture entity be taxed differently (e.g., in the United States for US federal income tax purposes and foreign purposes)?
- What are the corporate income tax and non-income tax reporting obligations of the joint venture entity?
- What other taxes will be applicable to the non-local party as a foreign shareholder in the joint venture vehicle (e.g., withholding or other taxes on dividends, royalties, or payment for products or services)? Do applicable double taxation treaties reduce these taxes and will the joint venture entity be eligible for tax treaty benefits?
- Will the non-local party owner subject itself to taxation or corporate income tax filings in the jurisdiction via the activities of the joint venture vehicle?
- Are there local tax incentives available?
- What are the rules permitting deduction and set-off of losses and expenses?
- Are there thin capitalization rules or debt to equity limitations?
- Will special taxes apply upon equity funding of the joint venture vehicle?
- Will flow through treatment from a US federal income tax perspective be available, if desired?
- The percentage ownership of each party may impact characterization of the entity as a controlled foreign corporation in certain countries which implicates specific tax considerations and planning issues.
- What are the exit taxes for termination of the joint venture?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Equity

- Does the local law distinguish between legal and equitable forms of ownership? If so, what are the ramifications of this for the local and non-local parties?

- How is the equity interest in the joint venture vehicle determined (e.g., by number of shares or units, or by specified percentages)?

- If equity participation is expressed in shares or units, to what extent is it possible to have shares or units with special preferences, such that some shares or units carry a preferred allocation of profits, preferred return or a preference on dissolution?

- Are there restrictions on majority ownership by a non-resident entity? Is the non-local party in any way prohibited from owning a majority interest? Are shares/units of the same class capable of being held by more than one person?

- May the voting power of each share/unit be different from one vote per share/unit? May the entity have non-voting shares/units?

- If it is possible to express the equity interest of the parties in percentage terms:

  » may a party's share of profits be different from its share of assets on dissolution?

  » may there be special allocations of profits to one or another party (including a preferred return to one party)?

  » may a party's voting percentage be different from its percentage interest in profits or asset distributions on dissolution?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Management

- May the parties manage the entity directly, without directors, managers or officers? If so, must one vote attach to each share/unit or is it possible to vary the number of votes that attach to the shares/units?

- Are there any matters for which a supermajority vote is required as a matter of law?

- Are the parties free to agree on a requirement of unanimity or supermajority for certain specified decisions? Are these types of provisions specifically enforceable as opposed to merely legal and binding?

- What notice and quorum requirements apply to board/shareholder meetings? What will happen if a quorum does not exist? Will it be possible to hold meetings on short notice or to take actions by written resolution? Must meetings be held within the local jurisdiction?

- Is it customary or possible to utilize a board of directors? If so, may the parties each appoint a specified number of directors? If so, is it possible to have two (or more) classes of directors, each with the same voting power but each class appointed by one of the joint venture parties? If not, is it mandatory that each joint venture party have a vote for director equal to its number of shares/units? Are there any residency or nationality requirements for directors or officers?

- Is it possible for the joint venture parties to adopt a voting agreement pursuant to which they agree to vote for the individual directors nominated by the other party? Is such an agreement specifically enforceable (i.e., would a court step in and appoint a director nominated by a party even if the other party refused to vote for the director)? May directors grant proxies?

- Is a two-tier board with supervisory and managing levels appropriate or applicable under local law?

- Is it permissible or mandatory for the joint venture vehicle to have officers (i.e., persons given a specific function in the conduct of the day-to-day business of the entity, with specified powers)? If so, how are officers appointed (e.g., by the board of directors)?

- Does local law require information with respect to the names and authority of officers and directors to be filed publicly?

- Are limitations on the authority of an officer or director valid and binding on third parties? Is there a way under local law to notify third parties of any such limitations (e.g., commercial register)?

- What are the rules with respect to removing officers and directors? Can a party revoke its own appointment, or is a shareholder or board vote required?

Transfers of Interests

- Are interests in this kind of entity transferable? Are there distinctions between transfers of legal and equitable ownership? If so, how is a transfer accomplished (e.g., delivery of a certificate, entry on the entity's register)?

- Are complete prohibitions on transfers and assignments valid? If not, are limitations on the right to transfer/assign (e.g., right of first refusal or requiring shareholder or management consent) legal and binding? Are these types of restrictions binding on third parties? Are there any formal requirements for these restrictions to be binding, such as a notation on a certificate or a notation in the commercial register?

- If transfer restrictions are binding on third parties, are both the entity and the other party nonetheless required to recognize any rights in an assignee/transferee if interests are transferred in violation of such a restriction?

- Does an assignee/transferee who has acquired an interest in violation of a restriction nonetheless have economic

rights as against the entity (e.g., rights to profit and/or asset distributions)?

- Does a party have any right to withdraw and have its interest redeemed by the entity? If so, how is the redemption price determined?

Accounting/Auditing

- Does local law require the entity to name a statutory (or other) auditor or commissaire? What are the specific functions of this office? Is any financial information required to be publicly filed?

- Does local law specify accounting rules for the entity or are the joint venture parties free to choose themselves?

- Are there any limitations (including requirements that may be imposed by local lenders) on the ability of the non-local party to require the use of its own accounting standards? Do the non-local party's accounting and auditing standards conform to relevant local law?

5. Capital and Financial Interests

Fundamental to the establishment of a joint venture is identifying the contributions that the parties will make to the venture. These contributions may be both tangible and intangible and the parties will have to agree on their respective valuations. The nature and value of these contributions will in turn be reflected in some manner in the degree of ownership of each of the parties in the joint venture. Further, while ownership will typically reflect each party's financial interest in the venture, it also is likely to impact the degree of control over the venture by each party and the management structure through which that control will be exercised.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Capital Contributions

Subject to local law considerations, the parties' contributions may be in a variety of forms, including cash, tangible property (including real property) know-how or other intellectual property, and other intangibles. In some cases, one or another of the parties will be contributing a going concern to be continued by the joint venture. The following questions should be considered with respect to capital contributions in connection with the proposed joint venture structure:

- Are there restrictions under local law on the percentage amount that can be owned by a non-resident?

- May a joint venture party's share of profits be different from its share of assets on dissolution?

- May there be special allocations of profits to one or another party (including a preferred return to one party)?

- May a party's voting percentage be different from its percentage interest in profits or asset distributions on dissolution?

- Are there any minimum capital requirements? Does a capital contribution need to be registered with any governmental authorities?

- Are there any rules or restrictions on in-kind contributions (e.g., contributions of assets necessary to conduct the business of the joint venture)? Is there a required ratio under local law of cash versus in-kind contributions? What type of valuation is required for in-kind contributions (e.g., by independent firm or governmental authorities)?

- How, and when, are in-kind contributions to be valued? Will one party conduct due diligence on in-kind contributions of the other party? Will the contributing party give any representations and warranties with respect to assets being contributed?

- Are any third party consents or notices required for any in-kind contributions?

- If assets are being contributed and those assets are located in a separate jurisdiction, is a separate conveyancing document required under the laws of that jurisdiction?

- Are any transfer taxes or duties applicable to in-kind contributions?

- Can the entity be capitalized through loans? Does local law regulate debt-to-equity levels? Are there any tax or other advantages to funding through debt rather than equity, or vice versa?

- Will the joint venture business require ongoing funding (e.g., for working capital, expansion)? If so, will each party be required to contribute to future calls for funding pro rata to its initial investment? Will the commitment to fund be capped or open-ended? What should happen if any ongoing funding obligation is not met?

- What are the requirements for reducing capital (e.g., approval of commercial court)?

Ongoing Financing Needs

If a joint venture is sufficiently capitalized and is organized as a stand-alone entity, it may be able to obtain financing on its own to meet its ongoing operational needs. Frequently, however, substantial financing will have to depend upon the support of the parties themselves, including in the form of additional capital contributions. If the parties are to provide loan financing in addition to capital contributions, this should be determined at the outset. As an alternative, the parties may prefer to have the joint venture obtain financing locally but supported by the parties' guarantee. Financial institutions will generally prefer that these guarantees be joint and several, that is, that each party be responsible for the full amount of any loans issued in reliance on the guarantees. On the other hand, if the parties have differing financial

standing, this may as a practical matter more significantly expose the stronger party in the event that the joint venture fails, e.g., in a joint venture between parties from mature and emerging markets respectively, the former party or parties may feel more exposed simply because it will be easier for the financial institution to enforce the guarantee in their home jurisdiction. In this case, the parties may wish to negotiate for several (and not joint) guarantees, under which each party is responsible only for its pro rata share of any financing of the venture.

Profit Distribution

In addition to planning for the financing needs of the joint venture, the parties also must address their plans with respect to profit distribution. As a threshold matter, the parties should agree on whether, and to what extent, profits will be reinvested in the business of the joint venture. This goes to the parties' overall goals for entering into the relationship and it should be assessed during the diligence phase. Beyond that, tax planning will be a crucial element for structuring the joint venture in a way that enables the parties to extract profits in an economically efficient manner. The following questions should be considered in this regard:

- What are the rules for declaring dividends and distributing profits? If the parties have developed a plan for the payment of dividends, does their plan conform to relevant local law? For example, are the parties free to determine when voluntary distributions can be made and by whom? Are there tax or regulatory constraints on the distribution of profits? Will it be necessary to establish a special structure for the effective distribution of profits (e.g., an income access structure)?

- Can distributions be made out of capital or only out of profits under local law? Are there requirements for mandatory reserves?

- Is it possible to provide for "special allocations" of profits (e.g., allocation of profits from one aspect of the business to one of

the parties in a ratio different from the allocation of profits from another aspect of the business)?

Consolidation

Financial Accounting. Parties to a joint venture frequently need or at least want to be able to treat their interest in the venture on a consolidated basis for financial accounting purposes. The accounting rules relating to consolidation vary from country to country.

In some jurisdictions, it is necessary for a party to a joint venture to “control” the venture in order to consolidate under generally accepted accounting principles. Control is generally present where the party owns more than 50% of the voting shares or equivalent equities in the joint venture. A more difficult situation arises where the ownership of the joint venture is split 50/50. Here, it is sometimes possible for a party to be considered in “control” by having the right to decide something of considerable importance without the agreement of the other party (e.g., the right to appoint or remove the majority of the board of directors or other governing body, or the power to direct their votes). The nuances of determining whether control is present are beyond the scope of this handbook but it is vital that parties contemplating a joint venture take into account these issues—and issues such as anti-corruption risk exposure arising from consolidation—as early as possible.

Consolidation is particularly important to a party contributing a business to the venture. If the contributing party can consolidate, it can report the financial results of the venture on a line-item-by-line-item basis. Thus, the party’s share of the sales, costs and earnings of the venture will be reported as part of the sales, costs and earnings of the party. If the results cannot be reported on a consolidated basis, only the net profit can be reported.

Tax. Separate from the analysis of consolidation for financial accounting purposes is whether the joint venture entity can be included in a consolidated income tax filing or share profits and losses among group members based on local regimes (e.g., *Organschaft* in Germany, UK group loss relief election). Each jurisdiction differs in the

application of the consolidation regime but often these consolidation arrangements offer certain advantages. As an example, subject to certain limitations, there are several advantages of filing a consolidated tax returns for US federal income tax purposes but this alternative may not always be available based on the deal structure and the joint venture vehicle of choice. For example, except with very limited exceptions, most foreign corporations are not eligible to be part of a US consolidated tax group. Additionally, to be part of a US consolidated tax group, the common parent of the group must hold stock that is equal to at least 80% of the total voting power of stock and at least 80% of the total value of the corporation. In many instances these requirements may not be available based on the joint venture arrangement between the parties. To the extent it is possible to establish a US consolidated tax group, some of the advantages include:

- offsetting operating losses of the joint venture against the controlling party's profits;
- offsetting capital losses of the joint venture against the controlling party's capital gains;
- avoidance of tax on distributions from the joint venture to the controlling party;
- deferral of income on transactions between the joint venture and the controlling party; and
- use by the controlling party's corporate group of the excess of the joint venture's foreign tax credit over its limitation.

Disadvantages of filing consolidated tax returns for US federal income tax purposes include the following:

- deferral of losses on transactions between the controlling party and the joint venture;
- additional bookkeeping required to keep track of deferred transactions between the controlling party and the joint venture;

- monitoring of transactions to prevent triggering gains upon transfers of the interest in the members of the group.

Internal Controls Over Financial Reporting

In the United States, Section 404 of the Sarbanes-Oxley Act of 2002 requires each annual report of a public company to include a report by management assessing the company's internal control over financial reporting as of the end of the fiscal year. Section 404 also requires for most filers that their auditors attest to, and report on, management's assessment of the effectiveness of the company's internal control over financial reporting. Management is responsible for establishing and maintaining an adequate internal control structure and procedures for financial reporting. In the joint venture context, therefore, for a US public company, careful and thorough up-front due diligence as well as on-going monitoring and periodic review of controls are typically necessary to assess the risk of a particular joint venture party, wherever it is located, with respect to compliance with this provision of the Sarbanes-Oxley Act.

Even if the US public company does not consolidate or otherwise control the joint venture vehicle, internal control issues still arise to varying degrees, depending on such factors as the level of the US company's ownership, the materiality of the investment to the US company, and the level of control that the US company exerts. For example, where a US public company is a minority partner in a joint venture, it may not need to expressly certify and obtain an audit report with respect to the internal control of the joint venture, but it will need to do so with respect to its own financial statements and various line items which contain financial information with respect to the joint venture. Also, companies that are subject to the accounting provisions of the US Foreign Corrupt Practices Act will need to exercise good faith efforts to cause the joint venture to devise and maintain a system of internal accounting controls consistent with those companies' own obligations under that Act. Accordingly, a joint venture party who is subject to the Sarbanes-Oxley Act will typically need to ensure that the joint venture maintains an appropriate level of internal control over financial reporting.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

6. Equity Participation

When determining how a joint venture will be controlled, a prospective party must consider both the equity interest that each joint venture party will own in the joint venture, and what each joint venture party's role will be in the management and decision-making of the joint venture.

There are generally three options for structuring the equity ownership of a joint venture: (i) 50/50 equity ownership split between the prospective party and its joint venture counterpart; (ii) the prospective party owning a majority equity interest; and (iii) the prospective party owning a minority equity interest. The Equity Participation Considerations chart in **Table 3(a)** compares these options.

7. Management Control

Management of a joint venture will typically consist of a board of directors (or similar body) that makes extraordinary decisions on behalf of the joint venture as well as a number of officers or managers who oversee the day-to-day business of the joint venture. Typically, the level of management control held by a joint venture party will correspond to its level of equity ownership. However, subject to any local law limitations, it is possible for joint venture parties to establish a management structure in whatever form they think is most beneficial, even if the allocation of management control does not correspond with each joint venture party's equity interest.

There are generally three options for structuring the management of a joint venture: (i) 50/50 management control; (ii) non-local party with a stronger management role; and (iii) non-local party with a weaker management role. The Management Control Considerations chart in **Table 3(b)** compares these options. A prospective party should analyze each joint venture individually to determine what management structure best suits its particular set of circumstances.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

8. Director and Officer Liability

Another area to consider when determining the structure of the joint venture is the potential exposure to liabilities at the director and officer level, particularly where the parties envision a joint venture vehicle in a foreign jurisdiction.

The exact nature and scope of the duties of a director of a foreign entity will vary depending on the laws of the country in which the joint venture entity is incorporated. In addition, the laws of another jurisdiction could become applicable if the joint venture was listed on a foreign stock exchange. Individuals who are asked to serve as a director of a foreign entity should familiarize themselves with the broad range of issues that they are likely to face while serving in that capacity in any given country and should be prepared to address them, if and when they arise. They should remain fully informed of the company's activities and monitor the company's compliance with the legal requirements of that jurisdiction.

Appendix A – Overview of D&O Duties and Liabilities in Foreign Entities provides a brief overview of the duties, risks and potential civil and criminal liabilities of a directors of foreign entities.

Similarly, several key pieces of legislation, such as the US Foreign Corrupt Practices Act, the UK Bribery Act, and those relating to money laundering, trade and investment sanctions, export controls and anti-boycott regulations have extra-territorial applicability and thus may impact the joint venture potentially exposing it, its directors and the joint venture parties to liability. **Appendices A1 - Overview of Applicable US Laws Impacting D&O Liability** and **D - OECD Convention & Signatories, FCPA and UK Bribery Act 2010 Summaries** briefly summarize these laws and provisions.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 3(a) Equity Participation Considerations

50/50 ownership structure	Non-local party majority	Non-local party minority
• Equal incentives: gives each joint venture party an equal financial incentive to maximize the success of the joint venture. • Problematic for dissimilar joint venture parties: can be problematic where two joint venture parties are not matched in terms of culture, financial strength or capabilities. To force dissimilar joint venture parties into an equal ownership arrangement could result in a great deal of conflict. • Potentially more work for the parties: can mean more intense work and a greater time commitment for both joint venture parties—as compared to a majority or minority situation—in order to keep a workable balance between the joint venture parties.	• Maintain control: by owning a majority of the joint venture, the non-local party can better implement its business plan and strategy for the joint venture. • Control exposure of intellectual property and know-how: can help prevent the premature exposure of technological or other know-how to the local party and might prevent the local party from gaining a competitive advantage in the joint venture's industry. • May result in lack of motivation by local joint venture partner: where multinational corporations maintain control over a joint venture, they often have a tendency to run the joint venture as a subsidiary enterprise. The disadvantage of this approach is that the multinational corporation could lose the expertise of its local joint venture partner and run the risk that the local joint venture partner will lose its motivation to maximize the success of the joint venture. One way to counteract this problem is to reinvest the profits back into the joint venture, which can result in increased goodwill and less concern about any potential devaluation of the local currency.	• Consider restrictions on foreign investment: acquisition targets may not be available in a country and some countries restrict the level of equity ownership by a non-resident entity; therefore, the non-local party may have no choice but to hold a minority interest in some jurisdictions. • Passive investment: allows the non-local party to test out a market, often with a lower initial investment of capital and other resources. • May result in premature exposure of intellectual property and know-how: may increase the risk of premature exposure of technological or other know-how to the local party and possibly lead to the local party gaining a competitive advantage in the joint venture's industry. • Loss of control: an important disadvantage of this structure is that the non-local party loses a significant amount of control over the operations of the joint venture. However, there are some strategies by which the non-local party could increase its equity ownership in a joint venture or otherwise protect its minority interest, including the following: » right to trigger the sale of the joint venture upon a material breach by the local joint venture party; » right to purchase additional shares; » put option; » drag-along rights; » management control or other rights to appoint key managerial personnel.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 3(b) Management Control Considerations

50/50 management control	Non-local party stronger control	Non-local party weaker control
• Equal incentives: can maximize trust and mutual cooperation between two joint venture parties because each will have an equal voice in the management of the joint venture. • Deadlock: relies heavily on cooperation between the parties. However, there is a possibility that the joint venture parties may reach a deadlock on particular issues. There are certain corporate governance mechanisms that can be crafted to help break a deadlock if one arises, including the following: » give chairman of the board a tiebreaking vote; » give independent, non-executive director a tiebreaking vote; » refer deadlock matters to an independent third party (e.g., an industry expert or arbitrator) for resolution; » refer deadlock matters to the joint venture parties' respective senior management to attempt resolution; » trigger buy-sell option. • Allows for local expertise: sharing control with its local joint venture partner can assist the non-local party in learning from the experience of its local joint venture partner with respect to the local business and economic climate as well as unfamiliar bureaucratic circumstances (e.g., local systems of labor management and regulatory authorities).	• May be required for purposes of consolidation: a dominant management role might be required for purposes of establishing "financial control" of the joint venture in order for the non-local party to include the joint venture on a consolidated basis in its financial statements. • May be advantageous to the joint venture: there is some empirical evidence that a joint venture will be more successful where one party has dominant control because the joint venture will be run with one voice, one business strategy and one management style. • Consider the expense of maintaining control: maintaining control over a joint venture can be very expensive, especially where the joint venture is geographically distant from the dominant joint venture party, and can include the following costs: » providing the technology for the joint venture; » providing all support not otherwise covered by a contract between the non-local party and the local party; and » maintaining expatriate managers for the joint venture. • Consider appointing local managers: one way for a non-local party to retain a high level of control and oversight is to maintain control of the board of directors as well as specifically delineated matters, but appoint local managers to run the day-to-day operations of the joint venture.	• Allows for local expertise: it can be beneficial to let the local party maintain control over the management of the joint venture where the local party brings greater critical resources and relevant business and industry expertise to the joint venture. • Trusting the local joint venture partner: the non-local party, having less managerial control over the joint venture, must rely heavily on the discretion and management decisions of its local partner. Therefore, it is important for the non-local party to know its local joint venture partner and maintain a high level of trust in the joint venture partner. • Consider providing for a veto right: the non-local party should consider requesting that it be provided with veto power with respect to specifically delineated "extraordinary" decisions — e.g., the issuance of additional shares by the joint venture or the sale of a substantial portion of the joint venture's assets. • Consider providing for cumulative voting: this would increase the non-local party's ability to impact decisions of the board of directors.

50/50 management control	Non-local party stronger control	Non-local party weaker control
• Consider role of management: can be beneficial where two joint venture parties bring different skills to the joint venture, e.g., one party brings manufacturing technology and expertise and the other party brings knowledge of, and access to, local markets. Under this scenario, each party could be responsible for certain decisions and might even have sole decision-making authority for those decisions. However, the joint venture agreement could provide that certain key decisions require approval by both parties. • Consider local law restrictions: for example, does local law require: » supermajority approvals under certain circumstances? » a chairman of the board of directors? » a "one share, one vote" structure? Where local law does not allow for departures from a "one share, one vote" structure, consider having the joint venture agreement governed in a jurisdiction which does. This will allow greater flexibility in deciding how the joint venture should be governed. • In addition, consider whether local law provides for: » specific enforcement for voting arrangements between joint venture parties? or » any other requirements or limitations on the management structure of a joint venture?	• Consider providing for a veto right: the non-local party may consider providing the local party with veto power with respect to specifically delineated "extraordinary" decisions — e.g., the issuance of additional shares by the joint venture or the sale of a substantial portion of the joint venture's assets. • Consider providing for cumulative voting: In order to maximize the local party's incentives, consider providing for cumulative voting, which would increase the local party's ability to impact decisions of the board of directors. • Consider local law restrictions: These are generally the same considerations as those described under the 50/50 approach. • Higher responsibility: With "control", the non-local party is likely to have a higher level of responsibility with respect to, e.g., improper conduct of the joint venture entity.	• Consider appointing key management personnel: if the non-local party does not maintain majority control over the joint venture's board of directors, it could consider appointing key management personnel, such as a financial controller, that will be involved in the day-to-day management of the joint venture. This approach can increase its participation and influence in the joint venture and can be especially effective where the non-local party is geographically distant from the joint venture because it physically places its managers at the site of the joint venture. However, there are certain financial and relational costs involved in sending expatriate managers to help manage a joint venture — e.g., the financial cost of maintaining expatriate managers in another country and the implication to local management that oversight is required from the non-local party. One way to avoid this outcome but achieve the same ends is to work with the local joint venture party in connection with training and developing the joint venture's employees, including local managers. • Consider local law restrictions: these are generally the same considerations as those described under the 50/50 approach.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Section 4

Exit and Termination

Where the joint venture is intended to have a fixed duration or a specific and limited purpose, termination issues are often dealt with early in the negotiations. Where the joint venture is intended as a long-term relationship, however, the parties may be reluctant to discuss terminating their relationship while negotiating the joint venture documentation. Nevertheless, it is always possible that one or both of the parties will wish no longer to participate in the joint venture for some reason.

Even where the termination provisions of the joint venture agreement are not strictly followed (especially where the joint venture has been in existence for many years), they nevertheless provide a context within which the parties can negotiate an appropriate exit. Accordingly, careful attention should be paid to drafting appropriate termination provisions in the joint venture agreement.

Generally speaking, when the parties contemplate a long-term relationship, a prospective party's first choice for an exit mechanism is often the transfer of the joint venture interests, then the sale of the entire company, and then the dissolution of the company. These topics, as well as various post-termination and transition issues, are addressed in checklist format in the remainder of this section. In addition, the Sample Term Sheet included as **Table 6(a)** includes provisions and detailed commentary with respect to many of these issues.

Under each of the topics listed below, consider the extent not only to which the prospective party desires a particular right, but also the extent to which it would be willing to permit the local partner to have the reciprocal right. If the non-local party is unwilling to grant a particular right to the local partner, it will be difficult to obtain that right for itself.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

1. Transfer of Interests

The broad categories for the transfer of interests are: (i) third party transfers; (ii) transfers to a joint venture party or to the joint venture vehicle itself; and (iii) withdrawal or exit. The following questions should be asked with respect to any transfer of interest:

- What bases for the right to transfer are enforceable under local law for:
  - deadlock?
  - failure to reach certain milestones?
  - change in control of a party to the joint venture?
  - completion of a particular project?
  - expiration of initial lock-in (e.g., 10 years)?
  - insolvency of a party to the joint venture?
  - voluntary desire to terminate?
  - material breach?
  - failure to agree on capital expenditures for more than e.g., 3 consecutive years?
  - other?
- In the event of a withdrawal from, or sale to, the joint venture vehicle, would the joint venture vehicle have the financial resources to be able to pay cash up front for the exiting party's interest?
- Are interests in this kind of entity assignable? If so, how is an assignment accomplished (e.g., delivery of a certificate, entry in a public register, other formal process)?

- Are complete prohibitions on assignment and transfer valid?
- If not, what transfer restrictions are enforceable under local law?
  - management consent?
  - other party's consent?
  - right of first offer?
  - right of first refusal?
  - other?
- Are these transfer restrictions binding on third parties?
- Are there any formal requirements for these restrictions to be binding against the joint venture parties or third parties, such as a notation on a certificate or a notation in the commercial register?
- If transfer restrictions are binding on third parties, are both the joint venture vehicle and the joint venture parties nonetheless required to recognize any rights in an assignee/transferee if interests are transferred in violation of the restrictions?
- Does an assignee/transferee who has acquired an interest in violation of a restriction nonetheless have economic rights as against the joint venture vehicle (e.g., rights to profit and asset distributions)?
- Are there local law rules on how the interests are to be valued, or are the parties free to determine a mechanism? Price-to-earnings ratio? Discounted cash flow analysis? Net asset test? An offer from a bona fide third party? A valuation by an independent expert?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Will partial transfers be permitted, or will the exiting party be required to sell (or the remaining party be required to buy) all of the exiting party's shares?
- Will the parties permit intra-group transfers without prior consent from the other joint venture party? Or without triggering any rights in the other joint venture party (e.g., right of first refusal)?
- Will the minority party have tag-along rights?
- Will the majority party have drag-along rights?
- Will the parties have buy-sell rights?
- Should the obligations of the exiting joint venture party be required to be assumed by a transferee (e.g., guarantees)?
- Should any loans payable by the exiting joint venture party be required to be paid upon exit or should they be required to be assumed by a transferee?
- Consider including a provision in the joint venture agreement requiring the parties to refinance (e.g., reinsertion of capital/ reinvestment into the joint venture), whether by agreement or as required by local law, and, in the event a party fails to do so, the joint venture may be terminated by the other party.
- At times there can be exit taxes if the joint venture will be terminated or if one of the owns intends to transfer its interest. Consider exit strategies from a tax perspective prior to entering into the joint venture.

2. Intellectual Property Considerations

When negotiating the termination provisions of the joint venture agreement, the parties should establish what will happen upon termination to their respective intellectual property, as well as the

intellectual property developed during the term of the joint venture. The following issues should be addressed:

- Should the joint venture be required to change its corporate name if the name includes the trademark or brand of the exiting joint venture party? If so, a time limit should be established for this requirement. This may also impact other registrations such as domain names and social media accounts. Consideration should be given at the outset what trademark and branding should be used and contemplate the consequences upon termination.

  Consideration should also be given to whether, and on what terms, the joint venture would be permitted to continue using the trademark or other intellectual property of the exiting joint venture party. In addition, if co-use of a trademark is contemplated by parties upon termination, consideration should be given as to whether this will de-value the trademark and put the trademark at risk of cancellation.

- The joint venture agreement should address what happens to the intellectual property developed by the parties during the course of the joint venture. For example, the parties may each be free to use and exploit this "joint" intellectual property after the termination of the joint venture.

- The joint venture agreement should address the effect of termination on any intellectual property license agreements between the joint venture and the exiting joint venture party. If the joint venture entity survives (e.g., because the exiting party has exercised its put rights), the other party will want to make sure that the exit does not destroy the viability of the business itself. If a long-term joint venture is contemplated the parties could provide that the license survives but then becomes a royalty-bearing license (if it is not already structured that way). If the license does not survive, the parties may want to understand in advance, however, whether the scope of any licensed intellectual property, or the contributing party's retained rights to that intellectual property, should change upon an exit. These

issues should be considered closely in conjunction with any non-competition commitments applicable to the exiting party as described in the following sub-section.

3. Covenants Not to Compete

An initial question upon formation of the joint venture is whether the parties agree not to compete outside of the joint venture and, if so, for what products or services.

It also may be appropriate for the parties to implement a cooling-off period upon withdrawal of one of the joint venture parties, during which the exiting party and the joint venture vehicle agree not to compete.

In either event, the following questions should be asked:

- What is an appropriate duration of the non-compete? (Under EU merger control rules, a non-compete provision between the parents and the joint venture can be permissible for the lifetime of the joint venture; under US law a non-compete is only permissible if there is a business interest/investment to protect for a reasonable period of time).

- What is the appropriate product scope and geographical scope of the non-compete?

- How should the business to which the non-compete covenant relates be defined?

- Will the confidentiality provisions of the joint venture agreement continue after the termination of the joint venture? If so, for how long?

- What should be the procedure for the return of confidential information upon termination of the joint venture?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

The next chapter of this handbook contains further discussion of non-compete arrangements in the joint venture context. In particular, see **Section 5.4 (Other Key Considerations – Covenants Not to Compete)**.

4. Other Transition Issues

If one party is permitted to exit the joint venture but the joint venture will continue to operate, the remaining party may want to secure transitional services from the exiting party. This will depend upon the extent of the exiting party's contributions to the joint venture (e.g., services, assets, employees) and whether a transition period is needed to minimize business interruptions. The specific transitional services may be difficult to anticipate at the time of entry into the joint venture, in which case the parties may need to negotiate a transitional services agreement in connection with the exit. In this regard, the parties may agree at the time of entry into the joint venture that an exiting party will agree to continue to provide certain transitional services at the time of exit for a specified period of time. The following questions should be asked:

- What services or assets are required from the exiting joint venture party? What are the fees for these services? What is the duration of the transition period?
- Will there be an option for the remaining party to extend the duration of the transitional period? Will there be an option for the remaining party to increase the scope of services provided by the exiting party or change the location where the services are provided?
- Will the exiting party be required to disclose information and know how to the remaining party? How much assistance will be required by the employees of the exiting party?
- What agreements are appropriate to document the provision of transition services?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Will any consents from or notices to third parties (e.g., customers) be required due to a change of control in the joint venture? Which party is required to obtain that consent?

- What other issues arise as a result of the termination of the joint venture that require the cooperation of the exiting party and remaining party in order to ensure a smooth transition for the joint venture business?

Section 5

Other Key Considerations

This section contains discussion and checklists of other key considerations that should be addressed by any prospective party during the joint venture process. It assumes that a decision has already been made to establish an equity joint venture (i.e., a jointly owned vehicle), as opposed to entering into a contractual joint venture (i.e., a contract under which the parties agree to the terms of their commercial relationship without any sharing of profits and losses).

1. Tax

As mentioned previously, although a detailed discussion of tax strategies and considerations is outside the scope of this handbook, the section below offers a brief high level checklist of some items to consider in connection with the formation, operation and termination of an equity joint venture entity (JVE).

A. Preliminary Tax Structuring Considerations

- **Choice of Entity.** Consider the JVE that serves the optimal market penetration and balance the local tax compliance obligation of the entity. To the extent the business requires operations in other jurisdictions, review whether the planned activities of the JVE require a local taxable presence via an entity or whether a sales branch accomplishes the business objective. The tax reporting compliance often differs for each. Although many countries place limitations on the activities of a branch, the tax compliance for operating a branch may be less burdensome than a JVE. Consider whether the JVE may be:
    - » taxed in more than one jurisdiction; and

  - classified differently in two different jurisdictions (e.g., flow through for US federal income tax purposes but corporate status for foreign purposes or vice versa)

and the impact of such classification in each jurisdiction.

- **Taxable Presence.** Determine the residency of the JVE for income tax and indirect tax purposes. Analyze whether the JVE may be treated by the local tax authorities as a tax resident for corporate income tax or indirect tax (e.g., value added, goods and services tax) purposes. The threshold for the establishment of a taxable presence for value added tax/goods and services tax/consumption or similar taxes is ordinarily lower than the threshold for a corporate income tax presence. Additionally, it is equally important to consider all of the tax registrations that are required for the JVE in the local jurisdiction.

- **Tax Incentives.** Investigate whether there are tax incentives, tax holidays or beneficial regimes offered in the jurisdiction where the JVE will be organized based on the type of investment or industry.

- **Treaty Benefits.** Consider whether the JVE may qualify for Treaty Benefits and consider a jurisdiction that has a strong Treaty network.

- **Vote, Value, Interest Matters.** The rights associated with each party's interest in the JVE impact the tax consequences arising for each party in connection with the operations of the JVE. Different classes of stock/shares may be taxed differently and the relationship of vote and value may trigger other tax provisions under local law. For example, in the United States, the ownership by a US person of more than 50% of the total combined voting power of all classes of stock entitled to vote or the total value of a foreign corporation characterizes the foreign entity as a controlled foreign corporation (CFC). This classification has an impact of how the income of that entity is characterized and reported by the US person. Several

other jurisdictions also have CFC legislation that impacts the recognition of income and operations of the entity.

- **Funding.** Funding via debt or equity accomplishes different objectives. Understand the limitations placed on interest deductions and thin capitalization requirements in the jurisdiction.

- **Functional Currency.** Review intended transactions of the JVE and consider which functional currency to select for the JVE. If the JVE engages in transactions with parties in different currencies, potential foreign currency gain or loss may be a cost to consider and allocate among the JVE parties.

B. Operations, Acquisitions, Dispositions and Reorganizations

- **Understand the Operations.** On an ongoing basis, monitor the activities of the JVE and review the activities of employees, contractors, distributors, resellers and any other contractual relationships to understand the tax implications of those relationships. Interview employees that may travel outside of the jurisdiction where the JVE is organized to ensure that they do not create a taxable presence in another jurisdiction. Understand the type of activities that may trigger a taxable presence outside of the jurisdiction of incorporation.

- **Transfer of Assets.** Review whether the most appropriate method to transfer assets into the JVE is via a license, sale, exchange, lease. The type of asset exchanged and manner of the transfer impacts whether the transaction may be viewed as taxable or tax-free and how the income will be taxed. Consider whether there are tax deductions available with respect to any payment for the asset that was received by the JVE. Consider the reporting requirements associated with the transfer.

- **Expansions and Divestitures.** The JVE structure should take into consideration the future expansion needs of the business. The structure for joint venture parties that wish to pool resources to implement acquisitions across the global is different than the

structure for joint venture parties that do not intend to invest beyond a single business opportunity. It is also important to discuss the method of expansion as well as the steps necessary to divest business ventures that may no longer complement the overall strategy. Each such acquisition, disposition or reorganization of the business carries with it tax considerations to analyze.

- **Exit Strategies and Considerations.** As briefly mentioned previously, a joint venture arrangement may be long term or short term. Any party that enters into such an arrangement should also consider the tax implication of exiting out of such a relationship. It is important to consider the exit strategy at the time that the entity is formed to achieve greatest amount of flexibility and minimize tax exposure upon an exit. Many countries tax liquidations, transfers of property and distributions that are required to wind up the JVE. It is useful to discuss the long term business goals of the JVE with your tax advisor to optimize the long term goals and ensure that all tax laws are satisfied upon an exit. As part of any such discussion, it is critical to understand all tax compliance obligations with respect to tax return filings, tax registrations, notices that must be provided to tax authorities upon an exit such that there is no taint for the former owner of a JVE.

As a final note, although there are several other tax considerations to review in any joint venture relationship, one point to emphasize is the need for a detailed joint venture agreement with specific tax language. It is vital to draft these agreements specifically to identify the obligations of each party with respect to tax filings, reporting of transactions, cooperation on tax issues, and compliance with tax laws. For example, a US person should include language that the JVE will make a tax election under US federal income tax principles to treat the entity as a flow through, if and when desired. If parties do not carefully draft provisions to address all the rights and obligations in connection with tax items, then upon an audit or an assessment, the parties are disadvantaged *vis-à-vis* the tax authorities because there is no clear authority on how to address such tax contests and no protection to prevent a party from creating a tax liability.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

2. Dispute Resolution

Despite careful evaluation of the potential joint venture partner and detailed formulation of the business plan and other key commercial terms, the parties will inevitably have differences of opinion concerning some aspects of the operation of the venture. Accordingly, the joint venture agreement should provide a thoughtful mechanism for resolving disputes before they threaten to impact the long-term prospects of the relationship. The following questions should be asked in this regard:

- If the parties cannot agree on an issue which is fundamental to the joint venture, how should matters be resolved? Specifically, in what circumstances will deadlock arise:
  - on all material issues?
  - on certain issues determined by the parties when the joint venture is established?
  - on issues designated as deadlock issues by one of the parties at the time they arise?
- Will deadlock issues be referred to the respective chief executive officers of the parties in the first instance? Will alternative mechanisms to resolve deadlock be used, such as:
  - the joint venture chairman's tie-breaking vote?
  - reference to an independent director?
  - reference to an independent third party?
- Will different deadlock issues be resolved by different methods? Should an alternative dispute resolution procedure be developed?
- What rights will a party have on a deadlock? For example, will a party be able:

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

  » to require the termination of the joint venture and either a winding up or sale?

  » to exercise a "buy-sell" option requiring the other party to sell or purchase its interest in the joint venture?

Generally speaking, the parties will prefer issue resolution by senior management personnel, as most joint venture disputes concern business issues, not legal issues. Since arbitration awards are often easier to enforce than foreign court judgments, the parties may wish to consider that the joint venture documentation provide for arbitration in the event that senior management is unable to resolve disputes. The following questions should be asked in this regard:

- Where will the non-local party most likely want to enforce the various provisions of the joint venture agreement?
- What are the standard dispute resolution practices for joint ventures in the local jurisdiction? Is it appropriate from a local perspective to hold arbitration outside the local jurisdiction?
- Is there an advantage to the non-local party to have arbitration in or outside of the jurisdiction where the joint venture vehicle is organized?
- How can the party holding relevant intellectual property best enforce its rights?
- How can the parties best enforce the confidentiality and non-compete covenants?

3. Methods for Contributing Assets

When the parties are contributing assets to the joint venture they will need to consider precisely how to make those contributions.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Intellectual Property

From the intellectual property perspective, it may be a no-brainer as to whether one or both parties possess the relevant intellectual property, but it is a separate question to decide how that intellectual property is contributed and how the ownership of the intellectual property is structured and shared, e.g., by way of license or assignment.

License. With a license structure the contributing party maintains ownership and control of the asset and grants the joint venture the right to use the intellectual property. The licensor can insist on a right to terminate the license in the event of a breach by the joint venture. A license may make particular sense where the contributing party also uses the intellectual property outside the scope of the joint venture and where the contributing party does not have sufficient control over the management and direction of the joint venture. The contributing party also maintains control over the prosecution and maintenance of the intellectual property registration and is often the only party that can enforce the intellectual property rights against third party infringers.

Assignment. With an assignment, by contrast, the joint venture controls the asset. This can help ensure that the joint venture is not at the mercy of the contributing party for its intellectual property rights (and the proper maintenance and enforcement of those rights). If the joint venture will have marketing rights, ownership is helpful in that it encompasses the right to sue third party infringers without the need to join the contributing party as a plaintiff in the action (thus mitigating the contributing party's own potential exposure). This structure may be a natural choice where the joint venture is formed upon the divestiture by the contributing party of a subsidiary or stand-alone business unit, or where most of the creative talent associated with the intellectual property will be transitioned to the joint venture. In addition, by owning outright its key assets, the joint venture may be a more viable entity where, for example, the exit strategy is an IPO or other scenario where the parties may ultimately become passive participants over time.

Bear in mind, however, that these are rarely mutually exclusive choices and there will likely be a need for both assignments and licenses as part of the final deal documents. If a contribution is made

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

by license, for example, the contributor may want an assignment of any improvements made by the joint venture or other party. If a contribution is made by an assignment, then one or both of the participants may want a license-back if for no other reason than to ensure their continued freedom to operate.

Other Assets

Similar issues arise with respect to contributions of any real property which the joint venture will occupy to conduct its operations. If one party is to contribute real property, will that contribution be made by way of a sale, lease or license, and will any parent or other guarantee be required in connection with the payment of any related purchase price or lease/license payments or satisfaction of other contractual obligations?

Likewise, even where it is clear which party will be providing human resources to an equity joint venture, that contribution can be in the form of a transfer of employees, secondment, or services agreement. **Section 5.7 (Other Key Considerations – Employee Transfers and Benefits)** discusses employee transfer issues in greater detail.

4. Covenants Not to Compete

In most joint ventures, it will be understood that the parties will engage in other business activities. In fact, the joint venture may represent a relatively small part of the overall activities of a given party. Competing with the joint venture is an entirely different matter, however, and it is not at all unusual for joint venture agreements to prohibit competition during the term of the joint venture.

These prohibitions may take a variety of forms. In certain cases, it would be intended that the joint venture engage broadly in a given line of business, in which case the parties may be prohibited from engaging at all in that line of business. All opportunities within the scope of that business will be reserved to the joint venture. On the other hand, if the joint venture is intended to have a more limited objective, the parties may merely be prohibited from directly competing with those defined

activities. The joint venture agreement may also provide that no party may solicit business, or even do business, with a customer or client of the joint venture or seek to employ anyone that has been employed by the joint venture, all subject to appropriate time periods.

There may also be restrictions on the parties' ability to use or disclose any confidential information regarding the venture. It is also important for the parties to reach some agreement as to the ownership of any confidential information of the joint venture upon termination of the joint venture or upon withdrawal of one of the parties to the joint venture.

In many jurisdictions (including the US and the EU), the enforceability of non-competition agreements generally, depends to a large extent on the reasonableness of the restrictions and, where competitors or potential competitors are involved, the market shares of the parties to the joint venture. Although non-competition standards vary from jurisdiction to jurisdiction, it is generally considered reasonable to restrict direct competition at least within the geographic area and range of business activities in which the joint venture actually engages (unless the parties enjoy a large market share in the products or services of the joint venture). If the joint venture involves an acquisition, a non-competition undertaking may be enforced even more broadly since the undertaking will be seen as a means of ensuring that the joint venture will receive the full benefit of the acquired business. Again, however, these laws vary from jurisdiction to jurisdiction, and it is important to involve local counsel in assessing the enforceability and impact of non-compete provisions which the parties seek to impose.

5. Competition/Antitrust Law

Regardless of whether the parties intend to directly impose non-competition provisions, they will be required to assess and comply with relevant merger control, competition or antitrust laws with respect to the formation of the joint venture. See also **Appendix C - Broad Principles of Information Exchange and 'Gun-Jumping'** and **Appendix C1 - Overview of EU Merger Control Provisions**.

Merger Filings

Joint ventures will be required to file a merger notification with appropriate antitrust agencies if the relevant merger filing thresholds are met. For example, in the US if the joint venture involves an acquisition of assets or voting securities, the formation of a for-profit joint venture may require a filing with the US antitrust agencies if certain thresholds are met. Since a filing is likely to be required prior to closing and implementation of the venture, it is important to determine all merger filing requirements prior to closing and to consider whether the joint venture is likely to raise any competitive concerns. This should be considered from the outset as the merger control process can have a significant impact on timing, even if there are no substantive antitrust issues.

The following questions should be asked in this regard with respect to filing requirements with antitrust or competition authorities:

- Are there any merger filing requirements for the joint venture and, if so, in which countries or jurisdictions?
- If the relevant thresholds are met, are there any available exemptions?
- If there are no available exemptions, are the parties required to make a filing or give notification before or after the closing or implementation of the joint venture? What is the relevant waiting period or likely time frame before the parties can expect to receive approval from the authorities?
- What are the specific documentary requirements for the relevant filings or notifications?
- What are the relevant standards of review by the relevant authorities?
- Are any industry-specific approvals required?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Are any sensitive industries involved such that governmental approval or notification (e.g., Exon-Florio in the US, media mergers in the UK) is advisable?

Impact on Competition

Even if no merger filing is required, a joint venture between competitors or potential competitors can trigger antitrust or competition law concerns. In that event, it is important to consider the structure of the venture, its purpose, the market in which it competes, and any restrictions that it imposes on the parties. Whilst many joint ventures are procompetitive and can generate efficiencies, the parties need to take care that they do not contain any anti-competitive restrictions, such as price-fixing or market sharing.

Although joint ventures vary significantly, most involve one or more business activities (e.g., production, marketing, sales, research and development, or group buying). Of these, the most likely to cause competitive harm and therefore to be challenged on antitrust or competition grounds is a marketing and sales joint venture between competitors, particularly if there is little integration or economic risk-sharing to justify any covenants not to compete or restraints on price or territories. On the other hand, joint ventures involving production, research and development or purchasing are typically more procompetitive in that their purpose is usually to lower prices, improve quality, enhance service or create a new product. Generally, these ventures do not present an antitrust or competitive risk so long as neither the venture nor the parties to the venture have a large market share or a dominant market position in the market in which the venture competes.

In addition, any competition restrictions must be limited to the joint venture and not extend beyond the joint venture. Thus, parties to a production joint venture may jointly set the price for the products produced by the venture but not the price of products outside the venture. Similarly, parties to a co-development agreement may restrict research on the products that are the subject of the agreement but not with respect to other unrelated products.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Accordingly, the following questions should be answered regardless of whether there is a merger filing:[4]

- What is the business purpose of the joint venture?
- Is the joint venture between competitors or potential competitors? If so, what are the respective market shares of the parties, and what is the projected market share of the venture?
- Will the parties to the venture be allowed to compete with the venture? If not, what is the extent of the covenant not-to-compete?
- What is the term of the venture? Can either of the parties terminate the venture?
- What is each party contributing to the venture?
- What is the structure of the joint venture (e.g., contract, equity), and what are the parties' ownership and management rights?
- Are the parties going to share the profits and losses of the venture? If so, on what basis?
- What are the likely consumer benefits resulting from the venture? Is the venture likely to reduce prices, improve quality, enhance service or create any new products or services? If so, how is this likely to be accomplished?
- To what extent will the venture be able to set prices, divide territories or customers or otherwise restrict the parties to the venture from competing?

[4] For further information with respect to competitive issues in the US, see FTC/DOJ Antitrust Guidelines Coordination Among Competitors available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Have the parties agreed to any restrictions beyond the scope of the venture? If so, what are these restrictions?
- Have either of the parties or the venture itself been the subject of any prior investigation, review or enforcement action by an antitrust or competition authority or a defendant in antitrust litigation by a private party?

6. Foreign Ownership Restrictions

Domestic regulation of foreign ownership is broad-ranging and can be sector specific, reflecting the different challenges and priorities confronted by each jurisdiction in protecting domestic interests and developing local economy. It is important for a non-domestic joint venture party to understand the restrictions under the relevant domestic law and practice on its ability to own, manage and otherwise participate in the joint venture business.

Foreign Investment Filings

Parties should consider what foreign investment regulatory approvals may be required for the non-local party's participation in the joint venture vehicle. For each relevant jurisdiction, consider the length of time the approval procedure will take and the specific requirements of the application. In certain jurisdictions even a minority foreign investment may require foreign investment law approval.

Where a foreign investment regime exists, the process of notifying or obtaining approval from the relevant foreign investment authority is likely to be mandatory if the thresholds or other requirements prescribed by the relevant authority are met (for example, in Canada, India, Japan, Mexico, Morocco, The Philippines, Saudi Arabia and Taiwan). In certain jurisdictions it is possible to voluntarily notify a transaction for clearance. For example, in the United States, parties may voluntarily notify the US Committee on Foreign Investment of the United States (CFIUS) of proposed transactions that will result in a non-US entity having a controlling interest in a US entity. CFIUS is an inter-agency federal committee that reviews the national security

 © Baker & McKenzie all rights reserved

implications of foreign investment in US companies or business operations.

Other restrictions

The parties to the joint venture should also consider:

- Are there any central bank or exchange control requirements for the non-local party's participation in the joint venture vehicle? For its expatriation of profits? For any payments by the joint venture vehicle to the non-local party for products, services or management fees?

- Will the local party contribute real property to the joint venture? Are there any restrictions on ownership by the joint venture vehicle of real property, taking into consideration the non-local party's participation in the joint venture vehicle? Is the real property owned by the government?

- Will the non-local party be contributing intellectual property or know-how to the joint venture? Are there any restrictions on its ability to do so? For example, are there any tax implications or exchange control restrictions on royalty payments from the joint venture vehicle to the non-local party for use of the know-how?

- Will it be possible to enforce and protect the non-local party's intellectual property rights in the local jurisdiction?

7. Employee Transfers and Benefits

When two companies engage in a joint venture, there are a number of significant employee, management, and employee benefit issues that result. The majority of employee transfer issues will flow from the structure of the transaction, namely, how the joint venture is established and from which joint venture party the employees will come. These issues should be addressed early in the negotiation stage because they can greatly impact the timing of the formation of the joint

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

venture. The following are the types of questions that should be asked in this regard:

Employee Transfer Issues

- Who are the employees who will be employed by (that is, directed and controlled by) the joint venture?
- How will the employees transfer to the joint venture? Corporate spin-off? Offer/acceptance? Automatic transfer of employment? Right of employees to oppose automatic transfer?
- Are any approvals or consultations required to transfer employees to the joint venture? If so, which party is obligated to secure them?
- Are employee notices required prior to transfer? If so, which party is obligated to provide them? Are there any minimum statutory periods for employee notices/employee oppositions?
- Is employee consent required to transfer the employees to the joint venture?
- What terms and conditions of employment will apply to the joint venture employees?
- Are employment contracts required for some or all joint venture employees?
- Does seniority transfer?
- Are joint venture employees entitled to severance/termination indemnities or change in control payments when transferring to the joint venture? If so, who is liable for payment?
- What happens to employees who do not transfer to the joint venture? If they are terminated, are they entitled to severance? If so, who is liable?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- Will joint venture employees be subject to restrictive covenants (e.g., non-competition, non-disclosure)? Existing agreements may not protect the rights and interests of the co-venturer, so new agreements may be required. What is enforceable in the local jurisdiction?

- Will any expatriates transfer to the joint venture? If so, who will be their employer? Will they be tax-equalized or tax-protected? What employee benefits will they receive? How can the non-local party best minimize the expatriate's and its own tax liabilities?

- Will the managers be employees of the joint venture vehicle, or will they be retained as consultants? What are the tax and employment law implications of each type of relationship?

- What are the employment, immigration and tax law implications of using seconded employees?

Employee Benefits Issues

- What employee benefits will cover the joint venture employees? E.g.,

  » retirement plans?

  » incentive plans?

  » equity compensation plans?

  » health and other welfare benefit plans?

  » pension plans?

- Will the joint venture establish its own plans or will employees remain in existing plans?

- If the joint venture establishes its own plans, will there be a transfer of assets/liabilities to the joint venture plans?

- Will the joint venture retirement plans be fully funded? If so, at what funding level?

- Will the joint venture employees have the same/similar/ substantially similar employee benefits as they enjoyed prior to transfer to the joint venture?

- Will the joint venture replicate the employee benefit plans the joint venture employees participated in prior to transfer?

- Will the joint venture plans be in place at the commencement of the joint venture?

- Will current employee benefit plans need to cover the joint venture employees during a transition period?

- If the joint venture employees participated in equity compensation plans prior to transfer, will the joint venture create a new equity compensation plan for those employees? If so, will equity of the joint venture or one of the joint venture parties be used?

- Will the joint venture need transitional services (e.g., payroll, HR administration, benefits administration, and so forth)? If so, for how long and at what cost to the joint venture?

- Will the joint venture employees receive service credit under the joint venture plans for their service prior to transfer to the joint venture?

- What steps are required to establish plans for the joint venture employees? How long will these steps take?

- Consider tax implications of services performed by employees in countries outside of the jurisdiction where the joint venture is organized.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Local Legal Regulations

- What local rules apply to the transfer of employees to the joint venture (e.g., in the United Kingdom, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE))? Will any other termination, transfer or relocation laws (e.g., in the United States, the Worker Adjustment and Retraining Notification Act (WARN Act)) have an effect on the joint venture?

- What local rules apply to the employment relationship (e.g., statutory severance, wrongful dismissal)?

- Are there any collective labor agreements that cover the joint venture employees?

- Will the joint venture have one or more works councils?

- What non-discrimination, workplace safety, privacy, and other similar rules apply to protect the joint venture employees?

- Are restrictive covenants (e.g., non-competition, non-disclosure) enforceable against employees or former employees?

- What is the role, strength and influence of the unions, if any?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Section 6

Documentation

As the potential joint venture participants assess the business and legal issues that are likely to have a significant impact on the joint venture and decide whether and under what terms to proceed with the venture, it will be necessary to memorialize their understandings and responsibilities at various stages of the process and to ultimately execute binding agreements governing the formation, operation and management of the joint venture.

This section includes basic draft documentation, checklists and accompanying discussion of material issues designed to assist in successfully negotiating and drafting the joint venture documents.

At the highest level, the following are the documents which one would expect to be entered into and the general issues which they typically address:

1. Confidentiality Agreement

At the outset of discussions, it will be in the parties' interests to ensure that their deliberations (and any due diligence information that they may disclose to each other) are kept completely confidential. Accordingly, some form of confidentiality agreement should be entered into before any confidential information is shared by the parties. It should be noted, however, that confidentiality agreements are notoriously difficult to enforce and it is wise to retain any information that is very sensitive until the last possible moment.

In addition, the exchange of confidential information between competitors can amount to a serious breach of competition law, with exposure to fines, so extreme care should be taken to ensure that the disclosure of information in a joint venture context does not breach

competition law. If the joint venture is subject to merger control rules and been notified to one or more competition authorities, the parties must also take care not to implement the venture prior to obtaining merger clearance as in many jurisdictions, penalties can be imposed or the joint venture can be nullified. This is commonly referred to as "gun-jumping". See **Appendix C - Broad Principles of Information Exchange and 'Gun-Jumping'** for more detail.

2. Term Sheet

A Term Sheet (which may also be called Heads of Agreement, a Memorandum of Understanding or a Letter of Intent)[5] may be used when the parties to a prospective transaction have reached a basic level of agreement. It generally contains a statement of the proposed key terms of the transaction and it is intended to serve as the basis for negotiating the joint venture agreement. **Table 6(a)** contains a sample term sheet and a supplement containing detailed commentary. Care should be taken in relation to any statements of obligation to negotiate in good faith, and in particular to the governing law which may apply to the term sheet or letter of intent, since in some jurisdictions an "agreement to agree" may be enforceable and a duty to negotiate in good faith could be triggered not only upon entering into a term sheet or letter of intent, but also with respect to the negotiation of the term sheet or letter of intent itself.

3. Joint Venture Agreement

The joint venture agreement is the core document to be executed between the parties which will govern the formation of the joint venture vehicle and any applicable conditions precedent, the running of the joint venture vehicle, its funding and distribution policies, transferability of shares, termination and exit. This document will vary considerably depending on the objectives of the parties and, accordingly, is not included in this handbook. However, **Table 6(b)**

---

[5] A letter of intent is sometimes used in place of or in addition to a term sheet, but either document can be drafted to contain the appropriate provisions.

contains a general issues checklist to consider when establishing a joint venture, including items that are typically addressed in the joint venture agreement.

4. Company Formation Documents

These will vary considerably depending on where the joint venture vehicle is to be formed and, for that reason, are not included in this handbook. Consideration should be given to the relationship between the rules established in any constitutional/charter documents, and the obligations set out in the joint venture agreement.

5. Ancillary Agreements

The parties will often need to enter into various ancillary documents to enable the joint venture to conduct its business. Again these documents will vary depending on the precise nature of the deal and templates are not included in this handbook. Typically, they will include the following:

- **IP assignments/licenses.** It would be unusual for the parties not to contribute a certain amount of intellectual property to the joint venture vehicle to enable it to exploit the parties' combined resources. These documents will need to address what, if anything, will happen to the intellectual property assigned or licenses granted in the event of termination of the joint venture.

- **Secondment agreements.** Often, these will be standard templates to cover any employees of either party who are agreed to be seconded to the joint venture vehicle. These agreements should also address such matters as the ownership of any intellectual property developed during the course of the secondment. Moreover, secondment agreements give rise to complex corporate income tax and payroll/wage withholding tax issues and need to be structured appropriately to minimize exposure for the employees and the entities involved in the secondment arrangement. Competition law considerations

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

may also be relevant here - in particular, if the parties are competitors, safeguards may be necessary to prevent the exchange of competitively sensitive information via any secondees.

- **Services and supply agreements.** These will cover the sourcing of any required services and products required by the joint venture from either party.

Table 6(a) Sample Term Sheet
(50/50 Joint Venture – Initial Discussion Draft)

Commentary: This term sheet is intended for use as an initial discussion draft in negotiating a joint venture in which the non-local party initially will take a 50% equity interest and roughly share management responsibility with the local joint venture partner. This term sheet assumes that all major management decisions will need to be taken initially with the agreement of both parties, and so it does not focus on which decisions need to be taken by a supermajority versus a simple majority. If the non-local party is able to negotiate a clear path to an increased equity position, care should be taken in considering which decisions will require a supermajority and in establishing an appropriate supermajority threshold. If the non-local party seeks initially to possess a greater degree of control, the "Majority Position Considerations" in the Commentary and Alternative Provisions Supplement (the "Supplement") to this term sheet should be considered in negotiating the term sheet and subsequent joint venture agreement. If the non-local party initially will take a minority position in the joint venture, the "Minority Position Considerations" in the Supplement similarly should be considered in negotiating the term sheet and subsequent joint venture agreement. This term sheet assumes that the non-local party will not enter into a 50/50 joint venture without either (i) a clear path to control or (ii) a clear exit right. See the discussion regarding exit rights in the Supplement.

TERM SHEET

This Term Sheet summarizes the principal terms with respect to the potential formation of a joint venture ("**JV**"). In consideration of the time and expense devoted and to be devoted by the parties with respect to this transaction, the Expenses provision of this Term Sheet shall be binding on the parties whether or not the JV is consummated. No other legally binding obligations will be created until definitive agreements are executed and delivered by the parties. This Term Sheet is not a commitment to invest or to proceed with a transaction, and is conditioned on the completion of due diligence, legal review and documentation that is satisfactory to the parties. This Term Sheet shall be governed in all respects by the laws of [**jurisdiction**].

Parties:	______________________ ("Non-local Party") and ______________________ ("JV Partner")
Structure:	JV will be established as a [**form of entity**] in [**jurisdiction**].

Purposes:

JV will be organized for the purpose of ______________________ (the "Joint Venture Purpose"), and all other activities that are necessary in furtherance of the Joint Venture Purpose. JV will not engage in any other activity.

Term:

The term of the JV will be indefinite, unless terminated earlier in accordance with the definitive written agreement providing for JV (the "Joint Venture Agreement").

Territory:

The geographic scope of the JV's business will be limited to [**country/region**] (the "Territory").

Business Plan:

The parties will draft and agree on, prior to the formation of the JV, a written business plan (the "Business Plan") for the first [**three**] years of operation of the JV.

Initial Capital Contributions and Ownership:

Upon establishment of the JV, the parties will make the following cash contributions and have the following membership interests in the JV:

Member	Cash Contribution	Membership Interest
Non-local Party	$___________	_____%
JV Partner	$___________	_____%

Additional Contributions

The parties will be obliged to make the following additional capital contributions [in the event of [   ]]:

Member	Amount	Timing
Non-local Party	$___________	_________________
JV Partner	$___________	_________________
_________________	$___________	_________________

Distributions:

Distributions will be made to the parties on the following basis:
[____]

Intellectual Property:

Any IP licensed or contributed to the JV will be licensed or contributed pursuant to a separate IP licensing agreement that will include standard terms and protections for such IP. Any IP licensed to the JV by the Non-local Party, including any goodwill attached to the IP, will remain the exclusive property of the Non-local Party or its licensors. The JV Partner and the JV will not have or acquire any rights in or to such IP except as may be provided in the applicable license or contribution agreement. In the event that the JV Partner or the JV have or acquire any rights in or to any of the Non-local Party's IP, the JV Partner will assign and agree to assign and to cause the JV to assign all such rights to the Non-local Party for no additional consideration. Upon dissolution of the JV all licensed IP will be returned to the respective licensees and all IP owned by the JV will be distributed as follows:
[____]

Management:	The JV will be managed by a board of directors (the "Board") consisting of [**four**] directors. The Non-local Party and the JV Partner will each appoint [**two**] directors to the Board (initially ______ and ______ designated by the Non-local Party, and ______ designated by the JV Partner). The Board will make all decisions with respect to the JV, and the parties will not be entitled to vote on any matters in their capacities as equity holders. All decisions will require a majority vote of all directors, not just of those in attendance at a meeting. The Board will meet at least [**monthly**]/[**quarterly**]. Each director will be entitled to one vote on all matters to be voted upon by the Board. Any director will be entitled to call a special meeting of the Board and [75%] of the directors will constitute a quorum for the transaction of business. An affirmative vote of a majority of the Board will be required to: • establish or modify the Joint Venture Purpose; • establish or modify the Business Plan; • amend the JV's constitutional/charter documents; • appoint and enter into employment agreements with the officers; • consummate transactions or otherwise make expenditures [outside the ordinary course of business]/[in excess of $ _____]; • acquire or divest a business or merge or consolidate with any other entity; • make material loans, borrow material sums, grant security interests, or guarantee the debt of third parties; • approve transactions or other arrangements between or involving the JV and any party or affiliate thereof; • raise capital from the parties; • make any distributions to the parties or repurchase any equity of the parties; • appoint or change[public] accountants; • admit new parties to the JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to the JV.
Officers:	The day-to-day operations of the JV will be run by a [**chief executive officer**] designated by _________________. The Board will also appoint a [**chief financial**] officer designated by _________________.
Deadlock Events:	If a majority of the Board is not able to agree on any material business or management issue arising out of the venture during a ______ month period, a deadlock will be deemed to exist (a "Deadlock"). Upon the occurrence of a Deadlock, the parties will be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution either party will have the right to: • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set out below; • [other specified action].
Buy-Sell Option:	Under a Deadlock [**and [other specified events]**], each party will have the right to exercise a buy-sell option (the "Buy-Sell Option"), whereby the exercising party will be required to designate a price at which it would be willing to sell its interest or to purchase the other party's interest in the JV, and the non-exercising party will have the option to buy or sell such interest at that price.

Commercial Agreements:	The JV will enter into the following commercial agreements with [**Non-local Party and/or JV Partner**], providing reimbursement for agreed upon services and goods provided to the JV on the following basis: • [trademark license agreement] • [patent license agreement] • [sourcing agreement] • [services agreement] • [other agreement(s)]
Compliance:	The Joint Venture Agreement will include provisions requiring the JV to comply with all Non-local Party compliance requirements, including the UK Bribery Act 2010, the Sarbanes-Oxley Act of 2002, the Foreign Corrupt Practices Act of 1977 [**any other relevant compliance legislation**] [**and the Non-local Party code of conduct**].
Exit Rights:	The Joint Venture Agreement will provide the parties with appropriate rights of exit from the JV.
Restrictions on Competition:	Each party and its affiliates will be prohibited from directly or indirectly competing with the JV in the Territory during the term of the JV [**and for ______ years thereafter**].
Representations and Warranties:	The Joint Venture Agreement will contain representations and warranties that are customary for a joint venture transaction.
Tax Treatment	The Joint Venture Agreement will specifically identify the obligations of each party with respect to tax filings, reporting of transactions, cooperation on tax issues, and compliance with tax laws.
Conditions to Closing:	The Joint Venture Agreement will contain customary closing conditions including the approval of the Non-local Party's board of directors for the transaction and the completion of satisfactory due diligence.
Anticipated Documentation:	The Non-local Party will be responsible for preparing first drafts of the following documents: • JV's constitution/charter/formation documents • Joint Venture Agreement • Organizational resolutions of the Board of the JV • Contribution agreements (with representations and warranties appropriate for the contemplated contributions) • Business Plan • [commercial agreements] • [loan agreement] • [other agreements]
Governing Law:	The Joint Venture Agreement and other related agreements will be governed by law.
Dispute Resolution:	The Joint Venture Agreement will provide the parties with appropriate means to resolve disputes.
Expenses:	Each party will bear its own expenses incurred in connection with pursuing or consummating the JV, including any broker's or finder's fees and all fees and expenses of its directors, officers, employees, agents, consultants, advisors, legal counsel or accountants.

Schedule:	The expected time schedule is as follows: **Event** / **Date** First draft of definitive agreements ________________________ Approval by boards of directors ________________________ Regulatory filings ________________________ Signing definitive agreements ________________________ Closing date ________________________

The parties have executed and delivered this Term Sheet as of [**date**].

[**Non-local Party**]
By: ________________________
[**Name**]
[**Title**]

[**JV Partner**]
By: ________________________
[**Name**]
[**Title**]

Supplement to Term Sheet

Commentary and Alternative Provisions

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
General	Commentary: 50/50 structure provides both parties with maximum incentive to make relationship work, but provides little clarity as to who will control. It may also raise some concerns from an antitrust/competition law perspective if competitors or potential competitors are involved.	Commentary: Majority position provides the Non-local Party with positive control allowing it to implement its business strategies with low risk of giving control over its technology and other assets to the JV Partner. The JV Partner, however, has a low incentive to contribute.	Commentary: Minority position may allow the Non-local Party to keep its financial investment in the JV relatively low and to partner with a successful JV Partner that wishes to maintain control. The Non-local Party, however, would have few rights to implement its own business strategies and may risk losing control over its technology or other contributed assets to the JV Partner.
Parties	Commentary: The identity of the entities that ultimately will hold the JV's equity interests will depend on a tax structure that the parties view as the most efficient. If the Non-local Party or the JV Partner does not hold directly the equity interests in the JV, the Non-local Party and/or the JV Partner generally will need to enter into either (i) the Joint Venture Agreement (in addition to its designated affiliate holding the equity interest) or (ii) a separate guarantee.	Commentary: The Non-local Party, as the majority party, is likely to consolidate the JV, but the choice of how it ultimately holds its interest, and what type of entity to use, has implications not only with respect to taxes, but also with respect to exposure to liabilities, ability to extract profits, and how to provide for the joint venture's on-going capital requirements, among other aspects.	Commentary: While it may not consolidate the JV for tax and financial purposes, the Non-local Party should still carefully consider how it should ultimately hold its interest in the JV, and what type of entity to use for that purpose. This has implications not only with respect to taxes, but also with respect to exposure to liabilities, ability to extract profits, and how to provide for the joint venture's on-going capital requirements, among other aspects, whether the Non-local party holds a majority or minority interest.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Structure	Commentary: The JV should be established, if possible, as an entity and in a jurisdiction in which (i) there is a well-tested corporate law regime, (ii) specific-performance is available as a remedy (this is particularly important with respect to enforcing provisions in the Joint Venture Agreement on equity transfers), and (iii) the parties are able to limit the potential liabilities of the representatives who sit on the JV Board. Because these criteria will not be met in some high risk/emerging markets, the Non-local Party should push from the outset for a holding company structure in a well-established legal jurisdiction, the Joint Venture Agreement should be governed by the laws of the jurisdiction in which the holding company is established, and the actual operations in the local company should be run through an operating company that is wholly owned by the holding company. If a holding company structure is not possible, the Non-local Party should consider use of an escrow for the parties' shares in the JV and an irrevocable proxy to guarantee the Non-local Party's rights with respect to equity transfers. See the related handbook **Section 3 (Structure)** for further discussion.	Commentary: With a larger investment and/or share of the profits and losses, the Non-local Party's tax exposure is likely to be more significant in amount. However, consideration should be given to any structural issues that could adversely affect the JV Partner as the JV Partner may require some form of compensation to accept potentially adverse tax consequences.	Commentary: The Non-local Party as the minority party should still pursue a tax-efficient structure and should seek compensation for a tax structure that adversely affects it, whether in the way of special allocations or otherwise.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Purposes	Commentary: It is not uncommon to provide for a broad purposes clause that permits a joint venture entity to engage in all activities permissible under applicable law. However, a narrow purpose clause may be an important provision if the Non-local Party wishes to use the JV to conduct only a subset of the Non-local Party's business - any broadening of the Joint Venture Purpose would require amending the JV's constitutional/charter documents, which may be difficult or time-consuming if neither party holds sufficient votes to effect such an amendment.	Commentary: A broadly defined purpose clause, including all acts permissible under applicable law, would allow the Non-local Party to direct the JV to pursue changing business strategies without requiring the approval of the JV Partner, unless otherwise required in the JV's governing documents. However, if the Joint Venture Agreement provides the JV Partner with potential rights to acquire control of the JV during the Non-local Party's continued participation, the Non-local Party should consider limiting the statement of purpose to ensure that the JV cannot compete with the Non-local Party without its consent.	Commentary: A narrowly defined purpose clause may be particularly important if the Non-local Party wishes to limit the JV's conduct to only a subset of the Non-local Party's business - any broadening of the Joint Venture Purpose would require amending the JV's constitutional/charter documents, which may be difficult or time-consuming if neither party holds sufficient votes to effect such an amendment. In this regard, the Non-local Party should ensure that any broadening of the purpose clause would require the amendment of the JV's constitutional/charter documents and be subject to a Non-local Party veto right based upon supermajority voting requirements, as discussed under "Management" below.
Term	Commentary: The term need not be indefinite and a specified term for the operation of the JV may be appropriate in some cases. A specified term may be particularly appropriate where the JV has a purpose that will be accomplished within a discreet period of time or upon completion of a discreet goal.	Commentary: Appropriate exit and termination provisions go hand in hand with the discussion of the term. See the related handbook **Section 4 (Exit and Termination)** for further discussion.	Commentary: Appropriate exit and termination provisions go hand in hand with the discussion of the term. See the related handbook **Section 4 (Exit and Termination)** for further discussion.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Territory	Commentary: The definition of the Territory will be critical to analyzing whether there are any significant competition or antitrust issues under local law and the enforceability of the non-compete provisions.	See Commentary under General Considerations.	See Commentary under General Considerations.
Business Plan	Commentary: A well-defined business plan can serve several purposes: (i) the business plan (including budgets) can ensure at the outset that there is a meeting of the minds between the parties on several key aspects of the JV including managerial and operational roles and responsibilities, anticipated financing needs, and anticipated distribution policy; (ii) the business plan can define certain "critical targets." If these critical targets are not met, the parties may have recourse to certain "no fault" exit provisions; and (iii) the business plan can provide stability in the event of a deadlock, as the JV may continue to operate under the most recent version of the business plan (with the possibility of applying relevant cost of living adjustments) until the deadlock has been resolved. Generally, the business plan should employ a "rolling" concept under which each year the parties modify the business plan to cover an agreed upon period.	Commentary: The Non-local Party may wish to consider requiring approval of the business plan on a biannual or longer basis to limit the need to negotiate with the JV Partner on an annual basis. Provisions regarding emergency expenditures in excess of the business plan should also be addressed in the Joint Venture Agreement.	Commentary: The business plan can provide the Non-local Party with negative control over the operation of the JV by requiring the Non-local Party's approval of the business plan on an annual basis and/or for significant expenditures not included in the current business plan.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Initial Capital Contributions and Ownership	Commentary: It is critical that the parties' initial capital contributions are spelled out. If the parties are making in-kind contributions, it is critical to confirm whether there are any requirements under applicable law for an independent valuation of the contribution. In addition, if in-kind contributions are anticipated, it is important that the party making those contributions makes the appropriate representations and gives the relevant warranties. To the extent that the Non-local Party anticipates that it and/or the JV Partner will be required to provide financing to the JV, key terms should be agreed to in the term sheet and reflected in the business plan.	See Commentary under General Considerations.	See Commentary under General Considerations.
Additional Contributions	Commentary: Because the business planning process may require a substantial period of time, it may be helpful at the term sheet stage to address any anticipated additional capital contributions, the timing for such contributions, and the effect of any failure to make them.	Commentary: The Non-local Party should seek to provide that it can make required additional contributions if the JV Partner refuses or is otherwise unable to make a required contribution. The Non-local Party should also consider imposing appropriate penalties for failing to make additional capital contributions, particularly when the JV Partner's financial capabilities are in question. These can include the right to terminate the JV, the right to a preferred allocation of future distributions and the right to modify other aspects of the relationship.	Commentary: The Non-local party, as the minority party, should also reserve the right to make additional contributions if the JV Partner refuses or is unable to make the contribution. In addition to the types of penalties discussed under the majority position considerations, a key penalty in the minority party's favor is to increase its control over the management and operations of the JV.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Distributions	Commentary: The parties should specify, to the extent possible, the principles that will be applied in determining what to do with any distributable profits. For example, in the Joint Venture Agreement, the Non-local Party may consider explicitly defining "Net Cash Flow" and requiring regular distributions net of any required tax payments.	See Commentary under General Considerations.	See Commentary under General Considerations.
Intellectual Property	Commentary: Special attention should be paid to any IP that will be contributed or licensed to the JV and to any IP that will be developed by the JV. See the related handbook **Sections 4.2 (Exit and Termination-Intellectual Property Considerations)** and **5.3 (other Key Considerations-Methods for Contributing Assets)** for further discussion of key IP-related issues.	Commentary: All critical Non-local Party IP should be subject to separate IP licensing agreements under which the Non-local Party will retain the rights to the critical IP in the event of a termination. To the extent that the Non-local Party's goal is to acquire local brands and/or other intellectual property, it is important that the Non-local Party has a right to exploit these brands and or other intellectual property upon termination of the JV.	Commentary: The Non-local Party may exert greater control over the JV's operations through separate IP licensing agreements. For example, with respect to trademark licenses, the Non-local Party may require quality control commitments, notice and consent with respect to marketing and promotional campaigns and compliance with branding programs. The Non-local Party may use royalty bearing licenses to extract revenue from the JV or to set a minimum business generation commitment.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Management	Commentary: These management provisions assume that the JV has only one management body. If the JV is required by law to have two management bodies (e.g., board and shareholders meetings; board and supervisory board), it will be important to specify which decisions by law must be made by a decision of the shareholders or supervisory board (as opposed to the board) and whether such decisions must be made by a simple or supermajority. To the extent that the JV utilizes a holding company structure, it will be important to provide that the JV's management will control the management of the operating subsidiary. A simple way to provide for the management of a holding company structure is to provide for a mirrored management structure at the holding company and operating company levels. The management provisions must be viewed carefully in combination with the commercial agreements that the parties may enter into with the JV. If the Non-local Party desires to consolidate the JV for financial reporting purposes, it will be important to look at all of the facts and circumstances that would indicate that the Non-local Party has "control" of the JV (e.g., ability to control the board, right to appoint key managers, ability to control operations through commercial agreements) to determine if consolidation will be possible.	Alternative Provision: The JV will be managed by a board of directors (the "Board") consisting of [five] directors. The Non-local Party will be entitled to designate [three] directors (initially ______, ______, and ______) and the JV Partner will be entitled to designate [two] directors (initially and ______). The Board will make all decisions with respect to the JV and the parties will not be entitled to vote on any matters in their capacities as equity holders. Except for matters requiring a Supermajority vote as described below, decisions will require a majority vote of all directors, not just of those in attendance at a meeting. The Board will meet at least [monthly] [quarterly]. Each director will be entitled to one vote on all matters to be voted upon by the Board. Any director will be entitled to call a special meeting of the Board and 75% of the directors will constitute a quorum for the transaction of business. An affirmative vote of 75% of all directors (a "Supermajority") of the Board will be required to: • amend the JV's constitutional/charter documents; • acquire or divest a business or merge or consolidate with any other entity; • make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties;	Alternative Provision: The JV will be managed by a board of directors (the "Board") consisting of [five] directors. The JV Partner will be entitled to designate [three] directors (initially ______, ______, and ______) and the Non-local Party will be entitled to designate [two] directors (initially ______ and ______). The Board will make all decisions with respect to the JV and the parties will not be entitled to vote on any matters in their capacities as equity holders. Except for matters requiring a Supermajority vote as described below, decisions will require a majority vote of all directors, not just of those in attendance at a meeting. The Board will meet at least [monthly] [quarterly]. Each director will be entitled to one vote on all matters to be voted upon by the Board. Any director will be entitled to call a special meeting of the Board and 75% of the directors will constitute a quorum for the transaction of business. An affirmative vote of 75% of all directors (a "Supermajority") of the Board will be required to: • establish or modify the Joint Venture Purpose; • establish or modify the Business Plan; • amend the JV's constitutional/charter documents; • appoint and enter into employment agreements with the officers;

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Management		• approve transactions or other arrangements between or involving the JV and any party or affiliate thereof; • raise capital from third parties; • repurchase any equity of the parties; • admit new parties to the JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to the JV. Commentary: If the JV is required by law to have two management bodies (e.g., board and shareholders meetings; board and supervisory board), it will be important to specify which decisions by law must be made by a decision of the shareholders or supervisory board (as opposed to the board) and whether such decisions must be made by a simple or supermajority and which management entity may be required to make material decisions regarding the JV.	• consummate transactions or otherwise make expenditures outside the ordinary course of business; • acquire or divest a business or merge or consolidate with any other entity; • make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties; • approve transactions or other arrangements between or involving the JV and any party or affiliate thereof; • raise capital from third parties; • make any distributions to the parties or repurchase any equity of the parties; • appoint or change [public] accountants; • admit new parties to the JV; or • liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to the JV. Commentary: If the JV is required by law to have two management bodies (e.g., board and shareholders meetings; board and supervisory board), it will be important to specify which decisions by law must be made by a decision of the shareholders or supervisory board (as opposed to the board) and whether such decisions must be made by a simple or supermajority and which management entity may be required to make material decisions regarding the JV.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Officers	Commentary: Generally, it is important that the Non-local Party agree with the JV Partner on the roles and responsibilities of each party. Depending on the local law applicable to the JV, it may be possible to ensure that certain officers have wide discretion in various operational or financial areas. Although the business plan will contain the basic agreement of the parties on high-level business issues, the officers of the JV will still need to apply a good deal of discretion with respect to the operational aspects of the JV.	Commentary: It will likely be important to involve the JV Partner in certain decision-making aspects. This is beneficial not only to foster a cooperative spirit, but also to instill in the JV Partner a sense of responsibility and accountability toward the JV. Accordingly, the Non-local Party may wish to allow the JV Partner to hold officer positions with respect to the areas of JV business for which the JV Partner is expected to be responsible.	Commentary: The Non-local Party should negotiate for the right to appoint a key member or members of the management team to provide the Non-local Party with some participation in the management of the JV and to permit the Non-local Party to accurately monitor the JV's operations.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Deadlock Events	Commentary: Generally, disputes should be escalated as high up the executive chain as practically possible to encourage "peaceful" resolution, particularly when the dispute concerns business issues. Arbitration may not be an appropriate vehicle through which to resolve most deadlocks, which typically occur because the parties have a fundamental disagreement with respect to the business or operations of the JV. If the Buy-Sell Option is not generally available as a mechanism for resolving all disputes, a deadlock that persists for longer than a defined period of time could trigger a Buy-Sell Option. Alternatively, the parties could empower the chairman of the board of the JV to cast the tie-breaking vote, which effectively shifts control to the party appointing the chairman. Or, the parties could craft a "swing director" provision that allows them to appoint an independent director who would cast a tie-breaking vote. This independent seat could be kept open and filled only for a limited time to break a deadlock, or it could be occupied at all times. Despite its perceived simplicity, a swing director provision effectively shifts control to an outsider with respect to deadlock events.	Alternative Provision: If a Supermajority of the Board is not able to agree on any material business or management issue arising out of the venture during a ______ month period, a deadlock will be deemed to exist (a "Deadlock"). Upon the occurrence of a Deadlock, the parties will be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution, either party will have the right to: • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set forth below; • [other specified action].	Alternative Provision: If a Supermajority of the Board is not able to agree on any material business or management issue arising out of the venture during a ______ month period, a deadlock will be deemed to exist (a "Deadlock"). Upon the occurrence of a Deadlock, the parties will be required to first seek resolution through management conciliation procedures, and if such procedures do not lead to a resolution, either party will have the right to: • [submit the matter to [binding] arbitration]; • exercise the Buy-Sell Option set forth below; • [other specified action].

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Buy-Sell Option	Commentary: If the JV Partner has strong financial resources, the Non-local Party should consider proposing that the parties have a Buy-Sell Option available generally after an initial lock-in period. This may be preferable because, in practice, it will possible for either party to force a Deadlock in a true 50/50 arrangement. The JV Partner, however, is likely to resist the general availability of a Buy-Sell Option if the JV Partner is in a substantially weaker financial position. In that case, the JV Partner might view such a Buy-Sell Option as a call option in the Non-local Party's favor. If the JV Partner strongly resists the general availability of the Buy-Sell Option, more emphasis should be placed on negotiating a put/call option at an agreed valuation.	Commentary: Even where the JV Partner is in a weaker financial position, the Non-local Party should consider whether the remedy of acquiring a 100% interest in the JV is an appropriate remedy for all disputes, particularly if the JV's operations are heavily dependent on the JV Partner.	Commentary: Where the Non-local Party is the minority party and if it has stronger financial resources than the JV Partner, it may be able to use the Buy-Sell Option as a strategic tool for resolving disputes in its favor.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Commercial Agreements	Commentary: The Non-local Party should consider the extent to which commercial agreements such as trademark and patent licenses, as well as sourcing and services agreements, can be used to increase the Non-local Party's degree of control in the JV. Further, control over commercial agreements may support an argument that the Non-local Party is able to consolidate the JV for financial reporting purposes. Bear in mind that commercial agreements, which are often seen as ancillary to the relationship, can create a crushing dependency of the joint venture on a particular party even though an equity joint venture may be established with the overarching goal of giving the joint venture some measure of independence from the participants.	Commentary: Key considerations for the Non-local Party will include ensuring appropriate protections over its intellectual property rights. See the general considerations discussed above with respect to Intellectual Property.	Commentary: See Commentary under General Considerations and Exit Rights below.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Exit Rights	Commentary: Appropriate exit and termination provisions go hand in hand with the discussion of the term. See the related handbook **Section 4 (Exit and Termination)**. The JV structure allows the parties to tailor these to meet their specific business goals and those of the joint venture itself. When considering exit provisions in general, the parties should give serious consideration to how they plan to deal with trigger events that otherwise may potentially disrupt or damage the business, require it to be valued prematurely before its full value can be realized, or encourage either side to game a particular situation. The exit rights themselves should be drafted to cover the full spectrum of exits (broadly from permitted transfers, through initiation of a buy/sell process, to the ability to force a sale), and specifically to match the relevant right with the appropriate triggering event.	Commentary: See Commentary under General Considerations.	Commentary: See Commentary under General Considerations.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Restrictions on Competition	Commentary: Considerable care should be given to the ultimate definition of the "Territory" and the scope and nature of the JV's business, which should be consistent with the Joint Venture Purpose. Special consideration should be given as to whether specific performance will be available with respect to a breach of the non-compete obligation in the jurisdiction of the JV's operations. If specific performance is not available in the jurisdiction of operations, by utilizing a holding company structure in a jurisdiction in which specific performance is available, a breach of the non-compete obligation could be expressly deemed to be a material breach of the Joint Venture Agreement thus giving rise to remedies under the Joint Venture Agreement, which could include shifting control of the JV to the non-breaching partner. The parties should also ensure that the non-compete obligations are consistent with applicable competition and antitrust laws.	Commentary: This is an important consideration not only during the life of the JV, but also with respect to activities that may be undertaken upon exit or termination of the JV. The Non-local Party should be hesitant to agree to broad reciprocal restrictions on competition, particularly where the geographic scope of its general business is greater than that of the JV Partner, or where it intends to expand the scope of its business.	Commentary: The Non-local Party should seek to impose tight restrictions on the JV Partner's ability to compete as a way to increase leverage with respect to other JV operational aspects. In addition, where the JV represents an initial foray into a particular market and the Non-local Party is ultimately seeking to expand that business (with or without the assistance of the JV Partner), the scope and duration of any post-termination non-compete clause should be limited or an appropriate payment to allow the Non-local Party to compete following termination of the JV should be factored into a buy-out right.
Representations and Warranties	Commentary: Certain basic representations and warranties should be included in the Joint Venture Agreement. If in-kind contributions are anticipated, a separate contribution agreement, with appropriate representations and warranties, should be used.	Commentary: Indemnification provisions often go hand in hand with representations and warranties. Where the JV Partner may not have the financial resources to satisfy claims for breaches of representations and warranties, the Non-local Party should consider alternative remedies, such as rights to preferential distributions.	Commentary: The Non-local party should seek to gain additional control over the management and operations of the JV as a remedy for breaches of representations and warranties.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Tax Treatment	Commentary: Specific tax language must be included to clearly identify the obligations of each party with respect to tax filings, reporting of transactions, cooperation on tax issues, and compliance with tax laws. If provisions addressing all the rights and obligations in connection with tax items are not included, then upon an audit or an assessment, the parties will be disadvantaged *vis-à-vis* the tax authorities because there will be no clear authority on how to address such tax contests and no protection to prevent a party from creating a tax liability.	See Commentary under General Considerations.	See Commentary under General Considerations.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Conditions to Closing	Commentary: Although the Non-local Party may want to move quickly from term sheet to closing, sufficient flexibility should be built into the Joint Venture Agreement to ensure that all compliance (including filings with appropriate governmental authorities), financial reporting and business planning issues, contributions of assets by the Non-local Party, and effectiveness of the JV have been resolved to the Non-local Party's satisfaction prior to key steps such as closing. With respect to due diligence, if the Non-local Party is investing in an existing business, then there should be a unilateral due diligence review of the existing business by the Non-local Party. The Non-local Party, however, may be required to provide diligence information regarding any significant non cash contributions it makes to the joint venture. If the JV is a newly formed business venture, then the due diligence review will be a bilateral endeavor. The parties should limit access to certain personnel, customers and other competitively sensitive information, at least until they are reasonably certain the transaction will proceed.	See Commentary under General Considerations.	See Commentary under General Considerations.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Anticipated Documentation	Commentary: From a project management perspective, it is important to identify as soon as possible the universe of agreements that the partners anticipate will constitute the joint venture. To the extent possible, the Non-local Party should try to control the drafts of all relevant documents.	See Commentary under General Considerations.	See Commentary under General Considerations.
Governing Law	Commentary: Ideally, the governing law of the Joint Venture Agreement and related agreements should be the same as the law governing the establishment and operation of the JV. In this way the Non-local Party may minimize the risk that the JV Partner would try to forum shop or exploit differences in the default rules governing the Joint Venture Agreement and related agreements and JV's operations and governance.	See Commentary under General Considerations.	See Commentary under General Considerations.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Dispute Resolution	Commentary: While parties to a 50/50 joint venture are likely to include a mechanism for resolving deadlocks, the parties may also wish to include in their transaction agreements a general dispute resolution clause for the purpose of enforcing their agreements. The choices in this regard are typically litigation and arbitration, with various levels of negotiation and/or mediation often included as a preliminary step. The parties may also choose not to include a dispute resolution clause, which would leave them free to file a lawsuit in any court which they believe will exercise jurisdiction, but this approach could increase uncertainty over the outcome of disputes. The ultimate decision depends on a consideration of several factors including enforceability of judgments or awards, the length of time required to resolve disputes, the need for discovery, the relative costs of the potential approaches, the need for injunctive or other interim relief, the desire to maintain confidentiality, and the types of damages which potentially could be awarded.	See Commentary under General Considerations.	See Commentary under General Considerations.

Provision	General Considerations	Majority Position Considerations	Minority Position Considerations
Expenses	Commentary: If an expenses provision has previously been included in the confidentiality agreement, make certain that any expense provisions in the term sheet and other subsequent agreements are either consistent with it or expressly supersede it.	See Commentary under General Considerations.	See Commentary under General Considerations.
Schedule	Commentary: Once the parties have reached the stage of negotiating a term sheet, the Non-local Party should determine as promptly as practicable if there is a real possibility to close the deal and whether the Non-local Party is able to work effectively with the JV Partner. A transaction schedule can help in both regards.	See Commentary under General Considerations.	See Commentary under General Considerations.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Table 6(b) Joint Venture Issues Checklist

The following checklist is intended to help formulate the key provisions of the joint venture documents once the parties have already considered the main international issues discussed in this handbook. Cross-references are included to handbook sections that contain relevant preliminary questions to consider under local law.

1. **Preliminary Matters**

1.1. Who are the parties to the joint venture? Are they individuals, companies, partnerships or other entities? Are any of the parties subsidiary or holding companies?

1.2. If a subsidiary is a party, will a parent company guarantee of its obligations be required?

1.3. Do the parties want the principal terms embodied in a term sheet or letter of intent?

1.4. Do the parties wish to have a period of exclusivity during which they are prevented from negotiating with third parties regarding arrangements which may compete with the joint venture business?

1.5. Will confidential information be disclosed during negotiations? If so, the parties should consider entering into a confidentiality agreement that limits the use of such information and provides for the return of such information if the negotiations do not result in an agreement.

1.6. Are there any conditions precedent to the final establishment of the joint venture? For example, is shareholder consent required (this may be necessary if one of the parties is a listed company)?

1.7. Will third party financing need to be obtained?

1.8. Are merger control filings being made? In certain industries, it may also be necessary to obtain governmental or regulatory consent.

2. **Relationship Between the Parties**

Is a joint venture entity appropriate to establish the relationship between the parties? What are the commercial objectives of the parties? Would any of the following alternatives be appropriate:

2.1. A supply agreement for goods or services;

2.2. A distribution or agency agreement;

2.3. A license or franchise agreement;

2.4. A research and development or cooperation agreement;

2.5. A 100% acquisition; or

2.6. Establishment of a wholly owned subsidiary without participation from another party?

3. **Business of the Joint Venture**

3.1. What activities will be carried on by the joint venture? Is the purpose of the joint venture to carry out a specific project or a continuing business?

3.2. Does the venture have a natural life span?

3.3. Has a feasibility study or business plan been prepared?

3.4. Will there be geographical limitations placed on the joint venture's operations?

3.5. Will any regulatory consents, approvals and/or licenses be required for the joint venture?

3.6. Will any tax clearances be required in connection with either the setting up or the continuing operation of the joint venture?

4. **Financing**

4.1. How will the joint venture be funded? Will any initial investment by the parties be in cash or by the contribution of assets? If cash, will this take the form of loans or equity?

4.2. Will it be necessary for the parties to secure funding from external sources? If so, what security and/or recourse to the parties will the lender(s) require (e.g., guarantees)?

4.3. Will any loans by the parties be interest-free? Will they be secured and, if so, will they be subordinated to any external funding?

4.4. Are there any tax or other advantages to funding through debt rather than equity, or vice versa?

4.5. Will the joint venture require ongoing funding (e.g., for working capital, expansion) to carry on its business? If so, will each party be required to contribute to future calls for funding pro rata to its original investment? Will the commitment to fund by capped or open-ended? What should happen if any ongoing funding obligation is not met?

Key preliminary local law considerations: see **Section 3.5 (Structure – Capital and Financial Interests)**.

5. **Contribution of Assets**

5.1. Are any specific assets to be contributed to the joint venture by any party?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

5.2. If so, will such contribution be by outright transfer or by lease/license to the joint venture? Will such lease/license be for a fixed or an indefinite period?

5.3. Will stamp duty or other tax consequences effect the method of contribution?

5.4. How, and when, are the contributed assets to be valued? Is it necessary to incorporate a mechanism to make adjustments for any shortfall or excess in the relevant funding obligation?

5.5. Are any third party consents required before any assets can be transferred or licensed? If so, should the transfer of the relevant assets be a condition to completion of the joint venture?

5.6. Will any due diligence investigation be carried out on the contributed assets and will any representations and warranties and/or indemnities be given?

Key preliminary local law considerations: see **Section 3.5 (Structure – Capital and Financial Interests)** and **Section 5.3 (Other Key Considerations – Methods for Contributing Assets)**.

6. **Cross-Border/Local Law Issues**

Is it a cross-border joint venture? If so, local law advice should always be obtained. The following issues may be relevant.

6.1. Are there any specific laws relating to joint ventures in the relevant jurisdictions?

6.2. What will be the governing law of the joint venture agreement?

6.3. Where will the joint venture be located? Are there any laws governing foreign ownership or investment?

6.4. Are there any restrictions on the repatriation of profits and/or the payment of dividends? In what currency will payments be made and at what exchange rate will these be calculated?

6.5. Are any local governmental or regulatory consents required?

6.6. What will be the governing language of the joint venture agreement and/or any ongoing information provided to the parties?

7. **Merger Control and Competition Review**

7.1. Will establishing the joint venture trigger any competition or antitrust laws, including:

a. the US Hart-Scott-Rodino Antitrust Improvements Act;

b. the EU Merger Regulation;

c. Article 101 of the Treaty on the Functioning of the European Union; or

d. other relevant local competition or antitrust laws?

7.2. If so, what competition notifications need to be made?

7.3. Are any industry specific approvals required? Are any sensitive industries involved such that government approval or notification (e.g., Exon-Florio in the US) is advisable? What is the business purpose of the joint venture?

7.4. Is the joint venture between competitors or potential competitors? If so, what are the respective market shares of the parties, and what is the projected market share of the venture?

7.5. Will the parties to the venture be allowed to compete with the venture? If not, what is the extent of the covenant not-to-compete?

7.6. What is the term of the venture? Can either of the parties terminate the venture?

7.7. What is each party contributing to the venture?

7.8. What is the structure of the joint venture (e.g., contract, equity), and what are the parties' ownership and management rights?

7.9. Are the parties going to share the profits and losses of the venture? If so, on what basis?

7.10. What are the likely consumer benefits resulting from the venture? Is the venture likely to reduce prices, improve quality, enhance service or create any new products or services? If so, how is this likely to be accomplished?

7.11. To what extent will the venture be able to set prices, divide territories or customers or otherwise restrict the parties to the venture from competing?

7.12. Have the parties agreed to any restrictions beyond the scope of the venture? If so, what are these restrictions?

7.13. Have either of the parties or the venture itself been the subject of any prior investigation, review or enforcement action by an antitrust or competition authority or a defendant in antitrust litigation by a private party?

8. **Structure of the Joint Venture**

8.1. Is the joint venture business to be carried out through a separate vehicle or through a direct contractual relationship between parties? For example, a contractual arrangement may be more appropriate for joint research or marketing projects.

8.2. If the joint venture is to be carried out through a separate vehicle, will it be an existing entity or one specially created?

8.3. What form will the joint venture vehicle take? There are a number of possible forms, including, but not limited to:

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

a. a corporation;

b. a limited liability company;

c. a partnership or limited liability partnership; or

d. a profit pooling or revenue sharing arrangement.

8.4. The structure will be influenced by a number of factors, including:

a. the need to have a separate identity to provide a flexible structure for investment;

b. the need for the vehicle to own assets and incur liabilities that are not on the balance sheet of any parent;

c. publicity and disclosure requirements;

d. tax matters; and

e. antitrust or competition concerns.

8.5. Will the joint venture be incorporated in one jurisdiction or will there be a series of joint venture vehicles in different jurisdictions? Will the joint venture be on or offshore?

8.6. Will the structure provide the best tax treatment for the joint venture itself and for each of the parties?

8.7. Should the joint venture vehicle be party to the joint venture agreement?

8.8. Is an initial public offering of the shares of the joint venture contemplated as an exit strategy? Will it be possible to convert the joint venture vehicle into an appropriate entity form in connection with such an offering without adverse tax or other consequences to the joint venture parties?

Key preliminary local law considerations: see **Section 3 (Structure)**.

9. Accounting

9.1. How will each joint venture participant account for its interest in the joint venture? Does a party intend to treat its interest on a consolidated basis for financial accounting purposes or to file consolidated income tax returns? What are the applicable rules relating to consolidation?

9.2. What accounting policies will be adopted by the joint venture?

Key preliminary local law considerations: see **Section 3 (Structure)**.

10. **Share Capital**

10.1. If the parties contemplate a joint venture vehicle in the form of a corporation with pre-set share capital, what will be the initial authorized and issued share capital? In what currency will the share capital be denominated?

10.2. How will the share capital be split between the parties? Will there by different classes of shares/interests with varying rights (e.g., will any party have preferential dividend rights)? Will shares/interests of the same class be capable of being held by more than one person?

10.3. Will there be an obligation on the parties to subscribe for additional shares/ interests? What should happen if any such obligation is not met?

10.4. Will additional shares/interests be issued on a pro rata basis (no dilution) or a pre-emptive basis (dilution will happen if the pre-emptive offer is not accepted)? Should there be a right of oversubscription if any party does not accept the offer?

Key preliminary local law considerations: see **Section 3 (Structure)**.

11. **Profit Distribution**

11.1. What policy will apply to the distribution of profits? Should a minimum level of profits be retained or distributed every year? Will distribution levels be restricted for an initial period?

11.2. How will changes to the distribution policy be made?

11.3. Are there any tax or regulatory constraints on the distribution of profits? Will it be necessary to establish a special structure for the effective distribution of profits (e.g., an income access structure)?

12. **Transfers of Interests**

12.1. Should there be restrictions on transfers of interests in the joint venture? Should transfers be prohibited within an initial period in order to firmly establish the joint venture? Should the parties be allowed to transfer part of their respective interests?

12.2. If transfers are permitted, should the other parties have pre-emptive rights?

12.3. Should there be exceptions from any pre-emptive provisions for transfers to other group companies or to family members and trusts? If so, consider including an obligation to re-transfer if such relationship is broken.

12.4. How will interests be valued for pre-emption purposes (e.g., market value, fair value)? Will there be a mechanism for valuation by an independent third party?

12.5. If the pre-emptive rights are not exercised, should a party have a right to call for liquidation of the joint venture?

12.6. Is it appropriate to include any of the following transfer mechanisms:

a. "co-sale" rights - the transferor is able to require that a potential purchaser also purchases the interests held by other joint venture partners;

b. "drag-along" rights - the transferor is able to require other joint venture partners to transfer their interests to a potential purchaser; or

c. "buy-sell" or "shoot out" option - a party receiving notice of a potential transfer must elect to either purchase the interests of the other party or transfer its interests to the other party.

12.7. Should all new joint venture partners be required to enter into the joint venture agreement into a deed of adherence, i.e., on the same terms and conditions as the original parties?

12.8. Will the name of the joint venture need to be changed if interests are transferred to a new party? Will arrangements need to be made for the continued use of assets contributed by a selling joint venture partner?

12.9. Will the parties be required to transfer their interests in certain circumstances (e.g., insolvency, breach of the joint venture agreement or a change of control)? How will a change of control be defined? Consider the use of put and call options to cover these events.

12.10. Should the parties be permitted to grant security over their interests in the joint venture?

Key preliminary local law considerations: see **Section 4.1 (Exit and Termination – Transfers of Interests)**.

13. **Board of Directors/Management**

13.1. How many directors will serve on the board? How many directors will each party be entitled to designate?

13.2. What rights will each party have to remove directors? Can the board itself appoint additional directors?

13.3. Is a two-tier board structure with supervisory and managing levels appropriate?

13.4. Will decisions be made by simple majority or will certain directors have weighted voting rights?

13.5. Who will be the chairman and will he/she be entitled to cast a tie-breaking vote? Will the right to appoint the chairman be rotated between the parties?

13.6. Will the directors be able to delegate their power?

13.7. How frequently, and where, will board meetings be held?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

13.8. What notice and quorum requirements will apply for board meetings? What will happen if a quorum is not present? Will it be possible to hold meetings on short notice or to take action by written resolution?

13.9. Who will be entitled to appoint executive officers? Will the shareholders/members have any direct rights with respect to the appointment of particular executives or management positions?

13.10. Will certain matters be reserved for decision at the shareholder/member level?

13.11. What exculpation and indemnification protections will be extended to the officers and directors of the joint venture?

13.12. Will the joint venture enter into employment agreements and confidentially and invention assignment agreements with key employees?

13.13. Will a set of common incentives be established for key management personnel?

Key preliminary local law considerations: see **Section 3 (Structure)**.

14. **Shareholder Meetings**

14.1. Will the shareholders/members have decision-making power?

14.2. If so, what notice and quorum requirements will apply for shareholder meetings? What will happen if a quorum is not present? Will it be possible to hold meetings on short notice or to take actions by written resolution?

14.3. Where will shareholder meetings be held?

14.4. Will any shareholders have weighted voting rights?

14.5. Will the company be required to have an annual general meeting of shareholders?

15. **Minority Protection**

15.1. Will the minority be protected against majority decision on certain matters by:

a. a requirement for a unanimous vote;

b. a requirement for a special majority (e.g., in excess of 50.1%) or, in addition to a majority vote on the relevant matter, a vote in favor by a specified percentage of the minority;

c. veto rights; or

d. shareholder class rights?

15.2. Will any such protection be entrenched at board or shareholder level?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

15.3. When will the minority protection mechanisms apply? For example, the minority protection may apply to:

a. establish or modify the purpose of the joint venture;

b. establish or modify the business plan/major changes in the business activities;

c. amend the joint venture's constitutional/charter documents;

d. appoint and enter into employment agreements with the officers;

e. consummate transactions or otherwise make expenditures outside the ordinary course of business/major items of capital expenditure/entry into and termination of material contracts;

f. acquire or divest a business or merge or consolidate with any other entity;

g. make material loans, borrow material sums, grant security interests, or guaranty the debt of third parties;

h. approve transactions or other arrangements between or involving the joint venture and any party or affiliate thereof;

i. raise capital from the parties;

j. make any distributions to the parties or repurchase any equity of the parties;

k. appoint or change public accountants;

l. admit new parties to the joint venture;

m. liquidate, dissolve, wind up or file voluntary bankruptcy proceedings with respect to the joint venture.

16. **Representations and Warranties**

16.1. What representations and warranties will the parties be required to make?

16.2. Will the parties indemnify each other for breaches of representations and warranties or covenants under the joint venture agreement?

16.3. Will indemnification obligations be subject to limitations based on time, amount, or otherwise?

17. **Restrictive Covenants**

17.1. Will the parties be restricted from competing with the joint venture? If so, what territorial or other limitations will apply?

17.2. Will the parties be required to refer business opportunities to the joint venture?

17.3. To what extent will the parties have access to, or rights over, confidential information belonging to the joint venture? Will the parties be under any confidentiality obligations regarding the other parties?

Key preliminary local law considerations: see **Section 4.3 (Exit and Termination – Covenants Not to Compete)** and, with respect to enforceability, see **Section 5.4 (Other Key Considerations – Covenants Not to Compete)**.

18. **Administration**

18.1. If required, where will the company have its registered office?

18.2. Who will act as the company secretary? What professional advisers will be appointed and by whom?

18.3. What information on the business and performance of the joint venture will be provided to the parties and how frequently?

18.4. What rights will shareholders have to inspect the accounts and records of the joint venture company?

19. **Intellectual Property**

19.1. What intellectual property rights will the joint venture acquire? Will these be transferred or licensed and on what terms? Will the transferring/licensing party retain the ability to use the intellectual property rights?

19.2. Who will own the intellectual property developed by the joint venture?

19.3. What will happen to the intellectual property rights on termination of the joint venture and will this vary depending on the nature of the termination or exit by a particular party?

Key preliminary local law considerations: see **Section 4.2 (Exit and Termination – Intellectual Property Considerations)** and, with respect to enforceability, see **Section 5.3 (Other Key Considerations – Methods for Contributing Assets)**.

20. **Employee Issues**

20.1. How will employees be transferred to the joint venture (e.g., offer/acceptance, automatic transfer)? Is there a transfer of a business to the joint venture? What local rules apply to the transfer of employees to the joint venture (e.g., in the United Kingdom, the Transfer of Undertakings (Protection of Employment) Regulations 2006)? Will any other termination, transfer or relocation laws (e.g., in the United States, the WARN Act) impact the joint venture?

20.2. Will the joint venture have its own employees? What terms and conditions of employment will apply to the joint venture employees? Are service contracts required? What share option and pension arrangements are envisioned?

20.3. Is any particular management structure envisioned?

20.4. Will any of the parties second staff to the joint venture? If so, on what terms?

Key preliminary local law considerations: see **Section 5.7 (Other Key Considerations – Employee Transfers and Benefits)**.

21. **Land**

21.1. What premises will the joint venture occupy?

21.2. On what basis will the joint venture occupy the premises, for example, leasehold, license?

21.3. Is a parent or other guarantee required in relation to the occupation of the premises?

22. **Ancillary Arrangements**

Are any ancillary arrangements required, for example, in relation to the:

a. transfer (sale or contribution) of business assets;

b. supply of goods;

c. transitional arrangements for sharing information technology facilities, including software;

d. provision of technical assistance/know-how/training;

e. secondment of staff; or

f. provision of facilities?

23. **Deadlock**

23.1. If the parties cannot agree on an issue which is fundamental to the joint venture, how should matters be resolved? Specifically, in what circumstances will deadlock arise on:

a. all material issues;

b. certain issues determined by the parties when the joint venture is established; or

c. issues designated as deadlock issues by one of the parties at the time they arise?

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

23.2. Will deadlock issues be referred to the respective chief executive officers of the parties in the first instance? Will alternative mechanisms to resolve deadlock be used, such as:

a. the joint venture chairman's tie-breaking vote;

b. reference to an independent director; or

c. reference to an independent third party?

23.3. Will different deadlock issues be resolved by different methods? Should an alternative dispute resolution procedure be developed?

23.4. What rights will a party have on a deadlock? For example, will a party be able to:

a. require the termination of the joint venture and either a winding up or sale; or

b. exercise a "buy-sell" option requiring the other party to sell or purchase its interest in the joint venture?

24. **Termination**

24.1. Is the joint venture for a fixed term or indefinite in duration? If for a fixed term, can it be renewed and on what basis?

24.2. Are there any circumstances in which the joint venture will automatically terminate (e.g., the insolvency of any party, the destruction of a particular asset, loss of regulatory approval)?

24.3. In what circumstances will a party be entitled to terminate the joint venture (e.g., on a material breach of the joint venture agreement by another party or a change of control of another party)? How will the parties define change of control?

24.4. Will the parties have a right to terminate by notice after an initial period?

24.5. What arrangements will apply on termination in relation to the distribution of assets, the discharge of outstanding contracts, or the assumption or discharge of any other liabilities of the joint venture?

24.6. Will any restrictions on the parties apply after termination of the joint venture?

Key preliminary local law considerations: see **Section 4 (Exit and Termination)**.

Appendix A

Overview of D&O Duties and Liabilities in Foreign Entities

Joint venture parties frequently secure the right to appoint some of their own officers and employees to serve as directors or senior managers of the joint venture entity. Most individuals who are asked to serve in this position perceive this appointment to constitute a commendation of their employer, but may not appreciate the potential burden and personal liability presented by their newly appointed role. Generally speaking, such risks may be acceptable provided everything is running smoothly. The position of a director of a joint venture entity has its pitfalls, however, and a prudent director should be aware of their existence and should watch out for them.

This appendix provides a brief overview of the duties, risks and potential civil and criminal liabilities of a director of an entity that is incorporated or organized outside the United States. The intention is to create a general awareness of the kinds of problems that a director should anticipate, particularly if the entity finds itself in financial difficulty. This summary is not in any way intended to be an exhaustive discussion of all of the relevant issues and potential liabilities that a director of a foreign joint venture entity might face. This summary should also not be construed as legal advice, particularly as the recommended approach will vary according to the issue, the director's actions and the jurisdiction involved.

Position and Duties of a Director

A prospective or current director should have a clear understanding of what the term "director" means in the particular jurisdiction in which the joint venture will be incorporated and operating (if the two jurisdictions are not the same). Unlike the laws of most states of the United States, the laws of other jurisdictions may not recognize a

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

clear distinction between the positions of a "director" and an "officer". For example, in Singapore, the Companies Act defines an "officer" of a company to include any director of the company. In Hong Kong, the Companies Ordinance defines a director to include "any person occupying the position of director (by whatever name called)", so the powers, duties and liabilities, of a director depend on his function in the company, and not whether is called a "director", "manager", "managing director", "chief executive", or other similar title.

On the other hand, many jurisdictions distinguish between a director (i.e., a member of the board of directors) and a managing director. In Sweden, for example, the board of directors is responsible for the management and organization of a limited liability company, whereas the powers of a managing director are restricted to day-to-day management; a Japanese stock company (K.K.) must have at least one director who must serve as a "representative director," carrying on the day-to-day functions of the company; and a Dutch private limited liability company (B.V.) is managed by a "management board" consisting of one or more "managing directors", who can be individuals or companies.

The duties and liabilities of a director may also depend on the type of entity. A French S.A. (stock corporation), for example, may have a "*Président*" (Chairman of the Board), directors (members of the board of directors) and a managing director (*directeur général*). A French SARL (limited liability company), on the other hand, only has a "manager" (*gérant*), who may be held personally liable while acting in his or her managerial capacity.

As noted above, a director's duties vary depending on the position (e.g., member of the board of directors vs. manager), the type of legal entity and the jurisdiction. A director's duties may be defined by statute, common law (in common law jurisdictions) and/or by the articles or bylaws of the company.

A director's general duties can be broadly described as fiduciary. The director has a duty, among other things, to act in good faith and with loyalty to the company, to act prudently and in the best interests of the company, to exercise powers and discharge duties with skill, care

and diligence, not to misuse corporate information or the position for personal gain and to avoid conflict of interest.

An officer or employee of a US corporation should be keenly aware of the potential conflict of interest inherent in his or her service as a director of a joint venture entity in which his or her employer is one of the parties to the joint venture. The appointed director will owe duties to both his or her employer and the joint venture. Most of the time, the interests of the joint venture party and the joint venture entity are in alignment; however, circumstances may arise under which a joint venture party's interest could be adverse to the interest of the joint venture entity. Most notably, this may occur when either of the two entities is in financial difficulty. For example, the joint venture party that is struggling to remain financially afloat may want to take cash out of the joint venture entity, which could render the joint venture entity insolvent. Or, in a situation where the joint venture entity is insolvent, its directors may be required by law to take steps to liquidate it contrary to the wishes of the joint venture parties. These conflicts of interests may be exacerbated by the financial structure of the joint venture and the joint venture parties' interests, such as when only one joint venture party is a creditor of the joint venture or has a preferred form of equity.

In some jurisdictions, even transactions in which such entities' interests are in alignment may be deemed legally problematic (and even void or voidable) where a director has a potential conflict of interest. For example, if a director of a French S.A. is also a director of an entity contracting with the S.A. (e.g., of an affiliated company), the transaction between the two entities is considered a "related party agreement" and is subject to advance authorization by the board of directors of the S.A. and approval by a meeting of its shareholders.

In addition to general fiduciary duties, directors typically have specific duties under applicable foreign corporate laws, including, among others, the preparation and submission to the shareholders of the annual balance sheet and an obligation to call shareholders' meetings. Directors may also be responsible for the company's compliance with other laws and regulations of the foreign country, such as unfair competition laws, environmental laws, labor laws, workplace hygiene

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

and safety regulations and personal data protection laws. Individuals serving as directors of a foreign joint venture entity should make a special effort to ascertain the specific duties of their positions in each jurisdiction where they are serving as a director (and ideally in advance of accepting the role) and endeavor to discharge them with diligence and care.

Civil Liability of Directors

Sources of Potential Liability

As in the United States, most foreign jurisdictions recognize the general principle that corporations and limited liability companies are distinct legal entities, separate from their shareholders and responsible for their own debts and liabilities. Limited partners in limited partnerships may also benefit from principles of limited liability, although often at the expense of giving up managerial rights. Certain exceptions to this general rule exist under the federal and state laws in the US, such as personal liability for failing to pay wages to employees, or failure to withhold or remit required taxes, or where the company fails to follow corporate formalities.

A prospective or current director should be aware of the various circumstances in which directors of foreign entities may become liable not only to the entity itself, but also to its shareholders (i.e., the parties to the joint venture) or to third parties.

Corporate Compliance. One usual source of personal liability for directors is the failure to comply with corporate formalities. For example, under Dutch law, the failure to comply with the formalities of registering a newly incorporated company with the Chamber of Commerce makes the directors liable on the company's obligations to third parties. In Singapore, directors are personally liable for the company's failure to: comply with various corporate and filing formalities in connection with an increase in the company's capital and share allotments; properly maintain the company's registers; hold an annual meeting; have a registered office which is open and accessible to the public (as required by law); and other corporate compliance requirements.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Income and Payroll Taxes. In many jurisdictions, directors may become personally liable for unpaid company tax or social security contributions. For example, a director (*gérant*) of a French SARL may be personally liable for the payment of unpaid corporate tax and penalties if he or she has made tax and penalty assessments and payments impossible, either through fraud or through serious and repeated failure to comply with the company's tax obligations. In Germany, the managing director of a GmbH may become personally liable for payment of social security contributions and administrative fines. The managing directors of a Dutch B.V. may be personally liable, jointly and severally, for the B.V.'s unpaid corporate, social security and pension fund taxes and premiums, if the B.V.'s inability to pay these sums resulted from "obvious mismanagement" or if the managing directors failed to give timely notice to the competent agencies.

Violation of Other Foreign Laws. In addition to corporate and tax laws, directors may also be liable for the company's violation of other laws and regulations of the foreign country in which the entity is organized. For example, under Italian law, directors may become personally liable for failure to comply with data protection laws. In France, a director may be liable for violations of labor law and workplace hygiene and safety regulations. Under Mexican law, a director may be liable to third parties for damages caused by the payment of dividends out of funds other than profits. Similarly, in Singapore, directors may be personally liable to the company's creditors to the extent to which dividends paid to the shareholders (i.e., the parties to the joint venture) exceed the company's profits.

Liability to the Entity. Under the laws of US states and jurisdictions, directors may incur personal liability to the entity itself. The most common source of this liability is breach of fiduciary duties and acting contrary to the best interest of the company. US states recognize the ability of shareholders and other equity holders with standing (and, in certain circumstances, creditors) to assert derivative claims against directors and managers for breaches of their fiduciary duties which, if proven, render the director personally liable to the corporation. Similar risk of personal liability to the entity exists in non-US jurisdictions. Under Argentine law, for example, directors may become personally liable if they undertake business activities that compete with the

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

company. A director of a French S.A. who had a potential conflict of interest in a transaction (i.e., the related party agreement situation) may be personally liable to the S.A. for damages if the related party agreement was not properly approved by the board of directors and by the shareholders of the S.A and has caused a damage to the company. In many jurisdictions, e.g., the UK and Hong Kong, special procedures exist for others e.g., shareholders, to bring derivative claims on behalf of the company and in the company's name against directors for wrongdoing or negligence.

Limiting Exposure

Prevention. A director's first line of defense against liability is, of course, prevention. To avoid liability, a director of a foreign entity should be advised by competent legal counsel and well aware of his or her duties to the company under applicable law and should discharge these duties with care and diligence. The director should act in good faith and avoid conflict of interest. The director should monitor the company's activities, exercise prudent business judgment in pursuing the company's best interests and should seek professional advice in case of doubt. The director should be particularly careful and should monitor the entity's affairs particularly closely when the entity is in financial difficulty.

Indemnification. In general, a director's right to be indemnified for such liability may come from three sources: (i) the statutory right to indemnification and advancement that the individual has as a director, officer or employee of the US entity that owns the interest in the foreign entity; (ii) articles of incorporation, bylaws or other charter documents of the foreign entity (if permissible under applicable foreign law); and/or (iii) indemnification agreements between the director and the foreign joint venture entity or the US entity that is his or her employer that owns the interest in the foreign joint venture entity, or both.

Most US corporations provide certain indemnification and advancement arrangements to protect the directors of their foreign subsidiaries and joint venture entities from liability incurred while serving in such director capacities. The corporate statutes of US states typically authorize a corporation to indemnify any person who was or is a party

to any action or proceeding by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership or joint venture, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by the person in connection with the action, suit, or proceeding. The indemnified person must have acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. In addition, a corporation is permitted to pay such amounts in advance of the final disposition of such action. Similar powers are granted to alternative business entities such as limited liability companies and limited partnerships to indemnify and advance reasonable expenses to members, managers and general partners, among others. Further, many US states provide for mandatory indemnification to the extent that a director or officer has been successful on the merits or otherwise in defense of any action, suit or proceeding, or any claim, issue or matter therein. Where applicable, therefore, a director should therefore confirm that his or her US employer, pursuant to the authority provided under the applicable corporate statute, provides indemnification and advancement for his or her service as a director of the joint venture.

Indemnification and advancement provisions included in the articles of incorporation or other charter documents of the foreign joint venture entity, although frequently permissible, may not provide a sufficient level of protection to the company's directors and, in certain jurisdictions, may be difficult to enforce. The laws of some jurisdictions either prohibit or severely limit the scope of permissible indemnification of directors of entities incorporated in those jurisdictions. In Australia, for example, a company or a related body corporate may not indemnify a director against liability that (i) is owed to the company or a related body corporate; (ii) is a fine or compensation order made under the Corporations Act; or (iii) arises out of conduct that is not in good faith. Australian law also limits the circumstances under which a company may indemnify its directors

for legal costs (although in many cases this type of indemnification is permissible).

In jurisdictions that prohibit or limit the scope of indemnification, an indemnification provision included in the articles of incorporation or other charter document may at worst be void. Similarly, an indemnification agreement between the director and the entity incorporated in such jurisdiction would be of questionable enforceability. A US joint venture party may be able to enter into an enforceable agreement under US law to provide indemnification and advancement rights to a person serving as a director of its foreign joint venture entity even if the joint venture entity itself is prohibited from indemnifying its directors. Directors of foreign joint venture entities therefore should obtain a contractual right to indemnification and advancement by entering into an indemnification agreement either with both the foreign joint venture entity itself and with the US entity that is his or her employer that owns the interest in the foreign joint venture entity.

Although in many cases indemnification agreements should offer adequate protection from liability, there are several pitfalls of which directors should be aware. First, the director should clearly establish who is the indemnitor under the agreement. In the joint venture context, this would typically include the foreign joint venture entity itself and/or the US employer entity that owns the interest in the joint venture entity. If the agreement is with the foreign joint venture entity itself, then the director should confirm that the agreement will be enforceable under applicable law. In addition, the director should make sure that the foreign joint venture entity has complied with all corporate formalities applicable under the laws of the foreign jurisdiction with respect to approval and execution of the indemnification agreement (e.g., board resolution, shareholder approval and signature authority).

The identity of the indemnitor will also affect more practical aspects of obtaining indemnification. If the indemnification obligation is undertaken by the foreign entity itself, the director should evaluate whether that entity is likely to have sufficient funds to meet this obligation. To the extent that a joint venture entity is underfunded or

© Baker & McKenzie all rights reserved

in or near financial insolvency, the director may take greater comfort in an agreement with his or her employer that holds the interest in the joint venture entity and has sufficient assets to provide adequate indemnification. Further, the director should consider alternative sources to fund the indemnification and advancement obligations, including director and officer insurance (see below).

The director should review the draft indemnification agreement carefully and obtain advice from competent counsel before signing it. For one thing, the director should make sure that his or her right to indemnification is not subject to a burdensome condition that could make indemnification unfeasible, such as approval by the joint venture entity's board of directors or shareholders or the parties to the joint venture as that approval may not be easily obtained in certain circumstances. The director should also carefully consider the substantive provisions of the indemnification agreement and should have a clear understanding of the scope of liabilities that are indemnifiable under the agreement, which are often further subject to various contractual limitations and exclusions. Of great importance is also the director's right to advancement of litigation expenses, without which many directors would not be able to fund their defense. Directors should endeavor to provide express rights to advancement in any agreement, and should not assume that advancement rights are encompassed in broad references to indemnification rights.

Director and Officer Insurance. Traditional director and officer insurance (commonly called "D&O insurance") policies offer two types of coverage. The first covers individual directors and officers for losses not indemnified by the corporation; the second reimburses the corporation for the amount it spends indemnifying directors and officers for their losses. A different form of D&O insurance not only covers the director or officer as the insured, but also provides protection for the corporation itself (so-called "entity coverage"). In the joint venture context, if D&O insurance is purchased by a joint venture party, its joint venture director appointees should confirm that the policy covers his or her actions as director of that foreign joint venture entity. Most foreign jurisdictions allow a company to procure D&O insurance, even if that jurisdiction does not permit indemnification provisions.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

A director of a foreign entity should carefully review and obtain advice from competent counsel on the terms, scope of coverage and sufficiency of any applicable D&O insurance policy – particularly the exclusions and endorsements contained in it. For public policy reasons, most D&O insurance policies contain a dishonesty exclusion that eliminates coverage of dishonest or criminal acts by an officer or director. Another typical exclusion concerns claims brought by regulatory agencies. Endorsements may enhance or diminish coverage and can often be negotiated with the insurer, possibly with an increased or reduced premium.

Statutory Indemnification of Employees. When an employee of a US corporation is asked to serve as director of the corporation's foreign joint venture entity, service in that capacity becomes part of his or her employment duties. To the extent that such director's liability is incurred within the course and scope of his or her employment by the US corporation, the individual may be protected by the statutory indemnification provisions of the applicable state employment law or by common law principles of agency. For example, the California Labor Code requires an employer to indemnify an employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful". This requires an employer to indemnify an employee who is sued by third parties for conduct by the employee in the course and scope of his or her employment. In addition, in Illinois, general principles of agency law provide that employees in the private sector are entitled to indemnification from their employer for all losses incurred by the employee while acting in good faith within the scope of their employment. "Scope of employment" is understood broadly: an employee's conduct is within the scope of his or her employment where it is a lawful action undertaken at the direction of and for the benefit of the employer. The employee's right to indemnification under general agency principles is fairly broad. However, an employee will not be indemnified for conduct that is illegal, even if performed pursuant to the express direction of the principal.

Criminal Liability of Directors

Sources of Potential Liability

A director of a foreign entity may potentially face criminal liability in two types of situations: (1) criminal liability arising from intentional, willful or knowing misconduct of the individual director while in office; and (2) criminal liability arising from the foreign entity's acts in contravention of the applicable foreign law where the director did not act intentionally, willfully or knowingly.

As a matter of common sense, most individuals realize that certain acts (e.g., corruption, fraud, forgery and theft) are clearly dishonest, improper and/or criminal. In the corporate context, such offenses may take the form of paying bribes, providing false information or making untrue statements to regulators, authorities or shareholders, intentional destruction of financial records, or other improprieties. Most directors recognize the illegality of such acts and understand that they may give rise to criminal liability.

There are, however, less obvious sources of criminal liability under the laws of non-US jurisdictions, to which a director of a foreign entity may expose himself or herself inadvertently, for example by signing a document on behalf of the entity without being aware that this causes the entity to violate local criminal laws. These "hidden" sources of criminal liability may be associated with corporate compliance, tax or other laws of the foreign jurisdiction, which may criminalize a broader range of conduct than that typically deemed criminal under US federal or state laws.

Corporate Compliance. A company's violation of corporate compliance requirements may give rise to criminal liability for the directors responsible for the company's compliance. For example, in Japan, a director is criminally liable for an illegal distribution of dividends in the absence of adequate distributable profit. It should be noted that it is not a defense that the joint venture parties authorized the act. If convicted, the director could face a significant fine and/or imprisonment.

Tax. Criminal liability may also be imposed on directors for corporate tax violations including tax evasion, failure to pay taxes, making a false entry in a tax return and destroying records.

Other Foreign Laws. Directors may also be held criminally liable for the company's violations of numerous statutes of general applicability, such as consumer protection legislation and for the company's violations of laws including environmental protection laws, antitrust laws, copyright laws, patent and trademark laws and stock exchange listing rules.

Past Violations. In some countries, a director may also be criminally liable for past violations of law by the company of which he or she becomes director. If upon election to the board of directors, the director becomes aware of a continuing or ongoing failure of the company to comply with its legal obligations, the director could be criminally liable if he or she failed to take corrective action.

Limiting Exposure

Some defenses to potential criminal liability exist. For example, a director who takes all reasonable steps to secure compliance with a particular provision and endeavors to correct any irregularities of which he or she might become aware is more likely to avoid criminal liability. Evidence in support of this e.g., board minutes recording the director's comments and voting, will be useful.

Indemnification agreements may provide for indemnification from criminal liability; however, in some jurisdictions these provisions may be considered contrary to public policy and therefore unenforceable. Most indemnification agreements exclude indemnification for liability incurred by a director through gross negligence, intentional misconduct or fraud. Similarly, D&O insurance policies typically exclude dishonest or criminal acts committed by a director or officer. In the event that a director is found to have committed such an act, the terms of the insurance policy can require them to reimburse any financial support they have received e.g., legal expenses.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Director Liability in Connection with a Subsidiary's Insolvency/Bankruptcy

Sources of Potential Liability

The improper or faulty management of a company before or after it finds itself in financial difficulty represents a source of potential liability of which directors of foreign entities should be particularly aware. It is noteworthy that in certain jurisdictions, who falls within the net of potential liability may extend beyond the scope of those appointed and registered publicly as directors to include de facto or shadow directors and, in some jurisdictions, lenders.

In general, absent mismanagement, a director is not personally liable for the company's financial failure, particularly when such failure results from general market conditions. In many jurisdictions, however, a director may be exposed to potential liability if he or she fails to exercise reasonable business judgment regarding the financial status of the company and, either expressly or implicitly through inaction, allows a company's position to deteriorate (or fails to take steps to avoid this) where the company is or is likely to become insolvent. A director of a bankrupt company may incur personal liability, in various jurisdictions, including in some of the following circumstances: (i) in instances of mismanagement (defined broadly and often by case law), if the mismanagement leads to a worsening of the net asset position; (ii) if the director has not ensured that the company's taxes and social security contributions have been paid; (iii) if the director has abused his or her position or committed fraud; (iv) if the director has permitted misappropriation of assets; or (v) if the director intentionally fails to commence bankruptcy proceedings within a specified period of time once the company becomes insolvent. These latter obligations warrant additional discussion.

In certain jurisdictions, a director of a company has an affirmative duty to assure that the company does not trade or conduct business while it is insolvent. Insolvency for these purposes can either mean illiquidity on a cash flow basis or balance sheet insolvency. Civil liability may also be imposed on a director of a company that becomes insolvent where the director knew or ought to have concluded that there was no

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

reasonable prospect that the company would avoid going into insolvent liquidation and the director failed to take every step he or she ought to have taken to minimize the potential loss to the company's creditors. Furthermore, in many jurisdictions, a director also has an affirmative duty to notify shareholders (i.e., the parties to the joint venture) if the company becomes insolvent or overindebted and to initiate liquidation or bankruptcy proceedings within a specified period of time after it is determined that the company will not be able to meet its current financial obligations on a continued basis. The timeframe for initiating these proceedings is relatively short in many countries.

The threshold requirements for determining whether voluntary liquidation or involuntary bankruptcy proceedings must be initiated vary from jurisdiction to jurisdiction, and a director anticipating that the company may soon meet with financial difficulty should seek specific advice in advance regarding the company's options. The decision with respect to the type of winding up procedure to pursue should be based on analysis of accurate and up to date financial statements including cash flow requirements.

Limiting Exposure

Directors should take care to avoid "surprises" regarding the financial situation of the company. The timely and accurate preparation of financial accounts on a regular (i.e., monthly and quarterly) basis (in addition to annual filings) should assist the directors in assessing the financial condition of the company. If the company's financial situation is beginning to deteriorate, it is advisable to increase the frequency of management accounts in order to monitor the situation as closely as possible. The directors should seek timely professional advice regarding their specific duties in connection with the company's possible insolvency in that particular foreign jurisdiction and should ensure that there is a very clear paper trail of all decision-making processes (particularly any decision made out of the ordinary course of business) and that decisions are made by reference to contemporaneous financial information, on advice and with regard (in the case of disposals) to independent valuations.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

If the company experiences financial difficulties, and the directors have determined that the company is, or is about to become, insolvent, they should immediately notify the shareholders (i.e., the parties to the joint venture) of this situation. There may also be additional requirements in situations where the joint venture entity is listed on a stock exchange. The shareholders may rectify the situation through an infusion of funds. Thus, in the joint venture context, so long as the company remains funded by the joint venture parties and is therefore able to meet its debt obligations as they fall due (thereby avoiding insolvency), directors may not need to take action to wind up the company. They should, however, remain vigilant regarding the company's financial situation and exercise due care with regard to any asset transfers or contractual engagements, so as not to incur new liabilities or debts that could lead to charges of fraudulent trading.

Conclusion

Serving as a director of a foreign entity is not a risk-free proposition. The general duties and responsibilities that apply to a director of a US corporation will most likely apply to a director of a foreign entity. The law of the jurisdiction in which the foreign entity is incorporated determines the potential civil and criminal sanctions that may be imposed on a director (if the entity is listed on a stock exchange, the laws of the jurisdiction of that stock exchange will also be applicable). The scope and severity of the failure to comply with local law and the associated consequences can vary widely, as discussed in this brief overview and can, in some jurisdictions, impact on the ability of the director to take or retain appointments with other companies. Individuals serving as directors can take some steps towards reducing their liability exposure, notably by requesting indemnity agreements and confirming the level of D&O or entity insurance in effect. These steps may not be options in all jurisdictions, particularly in those which may consider such actions to be void as against public policy. In any event, indemnities and insurance are not a substitute for diligent performance and observance of one's duties as a director.

The guiding principle for any director, in addition to any available indemnification or insurance, is to be constantly aware of the company's business and financial situation and to confirm that all

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

corporate formalities, tax filings and required annual reports and filings are attended to in a consistent and timely manner, with due regard to the need to obtain financial support in the event that the company's going concern status is in doubt. The director should also ensure that any board minutes accurately reflect board discussions and voting, as the risk of a successful challenge to any director's conduct will be taken with the benefit of hindsight and is likely to be mitigated where minutes can be referenced as evidence of appropriate discharge of duties.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix A1

Overview of Applicable US Laws Impacting D&O Liability

If a US party is contemplating entering into a joint venture in a foreign jurisdiction, the directors of the joint venture must be prepared to identify activities or transactions at the joint venture level that may create the risk of civil or criminal liability under US and local laws, and adopt and implement a compliance program to mitigate the risk of violating these laws. Regardless of whether a US party controls the joint venture, (through equity ownership, management control or otherwise), activities and transactions at the joint venture level may expose the joint venture, its directors personally and the joint venture parties to civil and criminal liability under US or local laws, in addition to potentially seriously damaging the joint ventures parties' brands and business reputations. Misconduct that could most seriously so impact the joint venture, its directors and its joint venture parties includes:

- making improper payments to local government officials to obtain an unfair business advantage;
- partnering with a local company which is funded by, or receiving the proceeds of, illegal activities;
- engaging in anti-competitive discussions with competitors; and
- entering into agreements that contain provisions supporting boycott activities.

In addition, acts that ratify or otherwise indicate the intent of the joint venture, its directors or its joint venture parties to aid and abet or conspire to violate US or local laws could expose the joint venture, its directors personally or the joint venture parties to liability under US or local laws. For example, if the joint venture directors are present at

meetings at which the payment of bribes to government officials are discussed, or if the US party accepts dividends from a joint venture that are derived from revenues from contracts procured by bribery, then both the joint venture directors and any joint venture party subject to US jurisdiction could face both criminal and civil liability under US laws. Moreover, if a US party subject to US jurisdiction continues to invest in a joint venture after having knowledge (e.g., through its joint venture board representatives) of improper activities or transactions by the joint venture or the other party to the joint venture, the US party may be deemed to have acquiesced or ratified in, been involved with, or aided and abetted or conspired in the underlying misconduct.

US Laws That Expose the US Party, the Joint Venture and its Directors to Liability

Some US laws prohibit activities and transactions that occur outside the United States, even if a US entity does not wholly own or control the non-US entity. Further, although certain US laws, such as the money laundering laws, apply if only a sufficient jurisdictional nexus with the United States exists, such as if part of a transaction occurs in the United States, this requirement may be interpreted quite expansively by US law enforcement and regulatory authorities, including if a wire transfer is made through a US bank account and, thus, touches the United States only momentarily.

In particular, joint venture directors and parties should be mindful of and monitor the following laws:

- the US Foreign Corrupt Practices Act (FCPA), which prohibits bribes to foreign government officials, political parties or political candidates, and imposes accounting and internal control requirements on the US party;

- money laundering and Bank Secrecy Act reporting and recordkeeping requirements, which prohibit transactions with funds sourced from illegal activity;

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

- trade and investment sanctions, which generally restrict the ability of US individuals and companies to engage in any transactions with countries such as Cuba, Iran, Sudan and Syria;
- export controls, which regulate the export and re-export of so-called "US-origin items";
- US anti-boycott regulations, which prohibit or penalize certain activities and agreements in connection with foreign boycotts that are not sanctioned by the United States, such as the Arab League boycott of Israel;
- antitrust and competition laws; and
- certain other criminal laws, such as mail and wire fraud, conspiracy, aiding and abetting, and other vicarious liability theories, all of which could be used by US authorities to prosecute the joint venture, its directors or the US party itself in appropriate circumstances, for customs fraud, foreign tax evasion and other fraud committed against foreign governments.

Discussion

The following is a brief summary of each of the above-listed US laws that could expose a joint venture, its directors and joint venture parties to liability.

Improper Payments to Foreign Government Officials

The FCPA contains both anti-bribery and accounting provisions. The FCPA's anti-bribery provisions prohibit "issuers", US "domestic concerns", and certain other persons from corruptly offering to pay, gifting, paying, promising to pay or authorizing the payment or giving of money or "anything of value" directly or indirectly to a foreign official, foreign political party or official thereof, or political candidate in order to influence any act or decision of any of those persons in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. Further, the FCPA prohibits payments made to "any person, while knowing that all or a portion of such money or

thing of value will be offered, given, or promised, directly or indirectly" to a foreign official, and thus encompasses bribes paid directly as well as indirectly, such as those paid through third parties including local agents, distributors or consultants.

The anti-bribery provisions of the FCPA apply to three categories of persons and entities:

- **issuers**, which are companies with a class of securities, including depositary receipts, registered under certain US securities laws for trading on a US exchange, or that are otherwise required to file periodic and other reports with the US Securities and Exchange Commission, and those companies' officers, directors, employees, agents and shareholders;

- **domestic concerns**, which includes any individual who is a citizen, national, or resident of the United States, and any corporation, partnership, alternative business entity, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, or that has its principal place of business in the United States, as well as those companies' officers, directors, employees, agents and shareholders; and

- **certain other persons and entities** that engage in any act in furtherance of a corrupt payment while in the territory of the United States.

Even where a company appears to be neither an 'issuer' nor a 'domestic concern' within the meaning of the FCPA and there is no apparent US nexus, it can be difficult to exclude completely the possibility that there may have been some act with a sufficient US connection that the US Department of Justice would argue as constituting a basis for jurisdiction. The FCPA has been aggressively enforced against non-US companies on the basis of an expansive interpretation of its jurisdictional reach; indeed, many of the ten largest fines and penalties for violating the FCPA were imposed against non-US companies. Under the FCPA's anti-bribery provisions, a bribe may take the form of money or "anything of value". "Anything

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

of value" is interpreted broadly, and includes gifts, excessive travel and entertainment expenses, promises of future employment, internships, and shares/securities.

Significantly, "foreign officials" to whom bribes are prohibited under the FCPA include among others any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization (such as the World Bank and the International Monetary Fund). What constitutes a foreign instrumentality is not always clear, and US courts employ a multifactor test to determine whether an organization or enterprise qualifies as a foreign instrumentality. Foreign instrumentalities generally include state-owned enterprises (SOEs) and state-controlled enterprises (SCEs). Common examples of SOEs and SCEs include public hospitals, publicly-funded schools, national oil and gas companies, and airports, train/railroad stations and other public transportation facilities.

Under the FCPA, a person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result if the person is aware that he is engaging in such conduct, that such a circumstance exists, or that such result is "substantially certain" to occur; or the person has a firm belief that such a circumstance exists or that a such result is "substantially certain" to occur. Thus, a person has the requisite knowledge when that person is aware of a high probability of the existence of such circumstance, unless that person actually believes that such a circumstance does not exist. This means that a business can be held liable for bribes paid by, for example, its local agents, distributors or consultants even if it did not actually know of them – in other words, having reason to know of bribery conduct may be enough to establish liability under the FCPA. To be clear, under the FCPA's knowledge standard and its prohibition of indirect as well as direct bribery, a third party's payment of a bribe does not shield a party subject to the FCPA from potential criminal or civil liability.

The FCPA applies only to payments intended to induce or influence foreign officials to use their positions 'in order to assist ... in obtaining or retaining business for or with, or directing business to, any person'. This requirement is generally known as the "business purpose test" and it is broadly interpreted to apply to almost any payment which

achieves or is designed to achieve an unfair business advantage for the payer. Such unfair advantages may include procuring required licenses or permits, or avoiding tax or customs obligations. Bribes offered or paid to foreign officials and/or intermediaries to obtain concessions so the payor can expand its operations may violate the FCPA and local anti-bribery laws.

In addition to its anti-bribery provisions, the FCPA has accounting provisions that, along with the US securities laws, may regulate the accounting and internal controls system. Under these laws, parties that are US publicly-traded companies or that otherwise qualify as "issuers" as that term is defined by the FCPA must meet various standards as to the accuracy of financial statements and internal controls of consolidated joint ventures, minority interest joint ventures and joint ventures or alliances that perform certain "outsourcing" functions. Significantly, if a joint venture party holds more than 50% of the voting power of the joint venture, then under the FCPA the joint venture party is responsible for the joint venture's compliance with the FCPA's accounting provisions. In contrast, if the joint venture party holds 50% or less of the voting power of the joint venture, then the joint venture party must use good faith efforts to cause the joint venture to devise and maintain a system of internal accounting controls consistent with the joint venture party's own obligations under the FCPA.

The FCPA can apply to the joint venture, its directors and the joint venture parties, in appropriate circumstances, depending on the level of general and specific involvement in the improper payments and factors supporting US jurisdiction. A joint venture director or party may have direct responsibility for the FCPA violation based upon his, her or its knowledge of and involvement in the underlying misconduct and the scope of FCPA jurisdiction. In this regard, a joint venture party deemed to exercise significant control over the joint venture may be exposed to criminal and civil liability for bribery conduct even though the joint venture party owns a minority interest in the joint venture. Further, to the extent any act is committed in the United States in furtherance of an activity prohibited by the FCPA, such as wire transfer through US banks of monies used for a bribe to a government official, the joint venture, its directors and the joint venture parties may be subject to

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

jurisdiction under the FCPA. Criminal and civil penalties for violations of the anti-bribery and accounting provisions of the FCPA include substantial fines, disgorgement of benefits obtained, imprisonment, in addition to the potentially serious damage to a party's brand and business reputation. Substantial non-monetary sanctions, such as suspension and debarment and monitorships, may also be imposed.

Joint venture directors should not, in their individual capacities, be liable for improper payments made by the joint venture or joint venture parties if the joint venture directors do not have knowledge of, and are not willfully blind or deliberately ignorant to, any improper payments made by the joint venture or joint venture parties, or by third parties on their behalf. However, directors must remember that actual knowledge of bribery conduct is not required under the FCPA. Rather, a person's state of mind is "knowing" under the FCPA with respect to conduct, a circumstance or a result if such person: (i) is aware that such person is engaging in such conduct, or that such result is substantially certain to occur; or (ii) has a firm belief that such circumstance exists or that such a result is substantially certain to occur. If the joint venture directors obtain such knowledge, then they and, by US rules of corporate criminal liability, their joint venture party may also be exposed to potential liability. Officials of the US Department of Justice have confirmed in 2015 speeches and its September 2015 policy, "Individual Accountability for Corporate Wrongdoing" (commonly referred to as the "Yates Memorandum"), that the US Department of Justice is seeking to bring more prosecutions and will examine the specific knowledge of directors, officers and employees of a joint venture regarding alleged bribery conduct. In addition, individuals may be liable for falsifying an issuer's books and records or knowingly circumventing the issuer's internal controls.

Joint venture parties and directors subject to the FCPA should undertake certain practical steps to mitigate the risk of criminal or civil liability for bribery conduct and accounting violations at the joint venture entity level or by third parties of the joint venture, including among other things:

- conducting an appropriate amount of anti-corruption and financial due diligence on the other joint venture parties and

the joint venture that targets the principal drivers of potential bribery conduct and FCPA liability based on the jurisdictions in which the joint venture entity does business, its industry, business model and specific practices, the number and identities of its third parties intermediaries and partners, and the nature of its touch points with government agencies, departments and instrumentalities (including state-owned or state-controlled companies);

- confirming that none of the other joint venture parties are or are owned by, and none of the joint venture's directors, officers or employees are, foreign government officials, relatives to foreign government officials, a foreign government, or an agency, department or instrumentality thereof such as a state-owned and state-controlled enterprise;

- evaluating the internal controls of the joint venture entity to determine any weaknesses and deficiencies in those controls and their adequacy to satisfy the standards set forth in the FCPA;

- including in appropriate agreements and governing documentation: (i) covenants permitting compliance audits of the joint venture and prohibiting conduct that would violate the FCPA or local anti-corruption laws; (ii) comprehensive representations and warranties establishing compliance with the FCPA and local anti-corruption laws; and (iii) conditions to closing an investment in or future fundings of the joint venture based upon satisfaction of permitting any additional due diligence, compliance with anti-corruption representations, warranties and covenants, and the absence of any facts or circumstances constituting a reasonable likelihood of a violation of the FCPA or local anti-corruption laws;

- providing for indemnification and advancement rights (including cost of reasonable attorneys' fees for any investigation and/ or legal action) for the joint venture party and its appointed directors;

- establishing ongoing governance mechanisms and compliance practices that cause and demonstrate a continuing commitment

to anti-corruption compliance by the joint venture, including potentially: (i) covenants requiring that the joint venture design, adopt and implement internal controls and compliance program and procedures that satisfy designated standards; (ii) training of directors, officers, employees and appropriate third parties of the joint venture; (iii) auditing by the appropriate party of the joint venture's books and records; (iv) appointment of a chief compliance officer; (v) adoption of a code of conduct and a separate, stand-alone anti-corruption policy; and (vi) reporting hotlines and other mechanisms that comply with local laws; and

- providing for veto rights over certain transactions and arrangements, and exit rights in favor in the event of any breach of the representations and warranties and covenants noted above, with such exit potentially involving a penalty provision against the offending party or appropriate put and call rights.

Further, any time a joint venture is dealing with government officials or employees of government-owned entities, the joint venture directors should ask appropriate questions at board meetings and oversee and monitor the joint venture's activities to ensure that improper payments and gifts are not promised, offered or made, and that all contracts are obtained on the merits and in good faith. The specific corruption risk mitigation steps to be undertaken is highly contextual and depends on, among other things, the specific nature of the joint venture's corruption risks, the jurisdictions in which the joint venture operates, and the joint venture's industry and business model.

Engaging in Transactions with the Proceeds of Illegal Activity

The US money laundering laws, generally speaking, prevent persons from entering into financial transactions where knowledge of, or being willfully blind or deliberately ignorant to, the fact that the funds involved in the transaction are the proceeds of unlawful activities. These laws can apply in appropriate circumstances to the joint venture, its directors and the US party, even if the relevant conduct takes place outside the United States or if the conduct occurs only in part in the United States, such as wire transfers to or from US banks. Under the US money laundering laws, the joint venture, its directors and

joint venture parties may be liable for criminal money laundering violations if they knowingly transmit funds or enter into transactions with funds that are derived in whole or in part from the proceeds of illegal activity—such as foreign tax evasion and the bribery of foreign government officials—knowing that the funds involved in the transmission or transaction represented the proceeds of some form of unlawful activity. Certain types of criminal money laundering also require that the prosecution establish that the defendant knew that the transmission was designed in whole or in part to conceal or disguise the nature or source of the proceeds of the wire fraud.

A joint venture party may be deemed to have aided and abetted or conspired to participate in a money laundering violation if dividends sourced from the joint venture's illegal activities are paid in the United States, and the joint venture directors knew or failed to ask questions in the face of red flags that the joint venture's dividends were sourced from violations of law, or that payments made by the joint venture funded terrorist activity. In addition, joint venture directors also may have recordkeeping obligations relating to foreign joint venture bank accounts under the US Bank Secrecy Act and/or the US Patriot Act.

Penalties for violations of the US money laundering and related laws include civil and criminal fines, imprisonment and forfeiture. Regardless of actual legal exposure, however, any involvement by the joint venture in money laundering or terrorist financing is likely to cause significant damage to the US party's business reputation. Joint venture directors should among other things ensure that the joint venture does business and enters into financial transactions only with known, and vetted reputable business partners who are sourced in funds generated from wholly legal activities and routed through reputable banking centers, and that the joint venture entity's compliance program and internal controls were designed and have been implemented to address specific forms of money laundering schemes prevalent in the joint venture's industry or jurisdiction.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Entering into Agreements with Sanctioned Persons or Countries, including Cuba

A US joint venture party may not be involved in or facilitate offshore transactions involving countries or persons that have been sanctioned by the United States. The United States currently maintains comprehensive sanctions against Cuba, Iran, Sudan, Syria and the Crimean region of Ukraine; maintains more limited sanctions against Burma (Myanmar), North Korea and Russia; and certain targeted sanctions against individuals and entities deemed to be foreign policy concerns, such as narcotics traffickers or terrorists. These trade sanctions apply to US joint venture parties and to joint venture directors, officers, employees, etc., who are US citizens and green card holders. The trade sanctions generally would not apply to a foreign joint venture itself unless the US party owns or controls the joint venture. More expansive rules apply in the case of Cuba and Iran, and a US party should be especially vigilant with any activities relating to these countries. Violations of trade sanctions are punishable by civil and criminal penalties and imprisonment in some cases.

Examples of improper activities include a US party's review or approval of prohibited transactions, or purchase of capital equipment earmarked for the joint venture's business with sanctioned countries. If the joint venture entity discusses expansion plans that involve countries, individuals or entities that are sanctioned by the US, joint venture directors may be liable for US trade sanctions violations. It is likely that large sales or investment transactions contemplated by a joint venture may require approval or guarantees by the joint venture partners. If sanctioned countries or persons are involved, the US party may not provide its approval or guarantee, and could not specifically delegate that responsibility to others.

Joint venture directors who are US citizens or green card holders are fully subject to the trade sanctions, even if they are overseas or on temporary assignment to the joint venture. All such joint venture directors should recuse themselves from activities or transactions with sanctioned countries or sanctioned persons that are permissibly entered into by the joint venture. The joint venture directors and joint venture parties should design, adopt and have the joint venture

implement a robust compliance program aimed at preventing agreements and transactions that violate these sanctions laws and rules.

Monitoring for Export Controls and Export License Requirements

Exports or re-exports by a joint venture involving US-origin items or foreign items with US content generally are restricted to certain countries and regions, such as Cuba, Iran, Sudan, Syria and the Crimean region of Ukraine. In addition, exports or re-exports might trigger certain licensing requirements (e.g., the US party may supply computers or encryption software to the joint venture that are subject to US export license requirements), even if the foregoing countries or regions are not implicated. Accordingly, joint venture directors must be certain they are instructed on export controls before entering into transactions on behalf of the joint venture. In addition, there are somewhat technical exceptions for de minimis levels of US content.

It is important to note that a company found to be in violation of export controls, in addition to the normal civil monetary penalties can have its export privileges denied by the US Department of Commerce. A denial of export privileges could have very serious implications for the regular exports from the United States of the joint venture party's other products.

Transactions With the Middle East Involving the Arab Boycott of Israel

The United States prohibits and/or penalizes participation in or compliance with foreign boycotts against countries that are considered "friendly" to the United States and that are not the object of any form of boycott under US laws or regulations. These anti-boycott laws are particularly relevant for companies doing business in the Middle East, where the Arab League boycott of Israel is still actively maintained, or with other countries that boycott Israel.

A US joint venture party is fully subject to the US anti-boycott rules, limited to the extent of its knowledge of or actual involvement, such as specific authorization or direction, in the joint venture's boycott-

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

related acts. Boycott-related participation or cooperation by the joint venture also could have negative tax consequences for the US party. In that regard, any boycott action taken by the joint venture, such as agreeing to enter into a contract or set up a store with terms that are favorable to the boycott of Israel, will be subject to US anti-boycott rules. Any time the joint venture does business with Middle Eastern countries, the joint venture directors should ensure that all underlying documentation, including seemingly innocent or standard boilerplate terms, do not, in fact, support the Arab League boycott of Israel.

Prohibited Communications with Competitors and Other Anti-Competitive Behavior

Antitrust and anti-competitive conduct by a foreign joint venture or its directors, such as exchanging information with competitors, price fixing or acting as a monopoly, can be charged under US criminal and civil antitrust laws if there are certain harmful effects on US commerce. The joint venture, its directors and potentially the US party can be exposed to civil and criminal antitrust claims in this regard.

Related US Criminal Laws

In addition to the federal laws described above, the joint venture, its directors and the US party may under certain circumstances be charged by law enforcement authorities with mail fraud and wire fraud, conspiracy or aiding and abetting as well as under other theories of vicarious liability for fraudulent and improper acts taken by the joint venture with the requisite knowledge and/or involvement of the joint venture directors or joint venture party. Situations that can arise might include the joint venture's involvement in failing to comply with local requirements relating to taxes, currency controls or customs duties.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix B

Illustrative Comparison Summary Table of Entity Establishment, Directors Appointment, Share Capital, Shareholders' and Cash Repatriation Issues in Various Jurisdictions

1 Entity Establishment

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
a	**What type of corporate entity in your jurisdiction is typically and most frequently used to incorporate a joint venture vehicle?**	A *sociedade por ações*, or corporation, is the most frequently used corporate entity when incorporating a joint venture vehicle. A *sociedade limitada* or limited liability company may also be used, but this form of entity is more common for wholly owned subsidiaries. The choice of whether to use a corporation or a limited liability company will always depend on a case by case analysis.	Limited liability company in the form of Sino-Foreign Equity Joint Venture ("EJV") or a Wholly Foreign-Owned Enterprise ("WFOE"). Both are types of foreign invested enterprises ("FIEs").	A *Gesellschaft mit beschränkter* Haftung or limited liability company ("GmbH").	A private company limited by shares.	A *kabushiki kaisha* ("KK"), sometimes referred to as a "joint stock corporation", is typically and most frequently used when incorporating a joint venture vehicle. A *godo kaisha* ("GK") is sometimes used particularly where checkability for US tax purposes is desired (but not as commonly used for joint ventures).	A private company limited by shares.	Either a corporation, or a limited liability company ("LLC").

1 Entity Establishment

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
b	**How long does the incorporation process usually take?**	Registration with the Commercial Registry takes approximately 10 business days. However, the entity will also need to apply for the licenses and registrations required for its operations, which will vary depending on the activities that it will carry out. Companies with foreign equity holders also need to be registered with the electronic system of the Central Bank of Brazil (SISBACEN).	Assuming no specific license/ operating permit is required, an FIE incorporation usually takes 6-8 weeks.	The incorporation process for a GmbH takes 3-4 weeks once all information is provided. Most of this time is required for the setting-up of a bank account.	Paper applications for incorporation usually take approximately 4 days. New companies incorporated online are done on a "same day" basis but can only be incorporated by registered users.	Allow 4 weeks from completion of incorporation checklist to completion of registration of the company at the Legal Affairs Bureau.	Most new companies are incorporated on-line, on a "same day" basis. Paper applications off-line can take up to 7 days.	The incorporation process can be completed in one day.

1 Entity Establishment

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
c	**Are there restrictions on the choice of name of a company?**	Yes: The expression "S.A." or "*Companhia*" must be included in the name. Also, the name must include a word or expression in the Portuguese language evidencing the main activity that the corporation will perform. The corporation's name must not be confusingly similar with another already existing company's name.	Yes: The official name of the company must be in Chinese, which must not contain any Roman characters, Arabic numerals, or other symbols or signs that are not Chinese characters. A company is allowed to use a corresponding English (or other foreign language) name of its choice in its business operation, but such name is neither registrable nor official. A company name should be composed of four parts: administrative region, trade name, industry indicator and company form. Example: Shanghai Lotus Trading Co., Ltd. Additional conditions apply if the company intends to adopt the use of certain characters, such as "China", "national" "international", etc.	Yes: The expression "*Gesellschaft mit beschraenkter Haftung*" or the abbreviation "*GmbH*" must be included in the name. Any name is permitted (unless protected as a trademark) provided that (i) it is suitable to identify the company and distinctive in general and with respect to other companies already existing and registered in the commercial register of the same court district; and (ii) it is not misleading.	Yes: Regulations restrict the use of any name that is prohibited, is too similar to an existing name on the Register of Companies, or is sensitive or misleading. Regulations also prohibit the use of certain specified characters, signs and symbols in a name.	Yes: The name must include the words "*kabushiki kaisha*" in Japanese. Otherwise, the rest of the name can be in Japanese or English and can include Arabic numerals, ampersands, apostrophes, commas, hyphens and periods. Use of a name identical or similar to that of another company should be avoided in order to mitigate the risk of breaching unfair competition rules under the Unfair Competition Prevention Act.	Yes: The name must end with the expression "Limited" or "Ltd". Regulations restrict the use of any name that is prohibited, is too similar to an existing name on the Register of Companies, or is sensitive or misleading. Regulations also prohibit the use of certain specified characters, signs and symbols in a name.	Yes: Certain designated endings are required to be used (e.g., "LLC" or "Inc."). There are also rules prohibiting the use of a name not distinguishable from others registered with the relevant state.

2 Directors Appointments & Issues

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
a	**Is there a maximum and/or minimum number of directors?**	A minimum of two officers (i.e., statutory managers responsible for the day to day management and representation of the corporation before third) is required. The corporation may have a board of directors (i.e., statutory body responsible for making certain decisions set forth in the law and bylaws, with no powers to represent the corporation before third parties) with a minimum of three members. The board of directors is mandatory only in specific cases (e.g., for publicly held corporations).	An FIE may have one Executive Director, which is the minimum, and in such a case no board of directors is formed. Alternatively, the FIE may form a board of directors comprising a minimum of 3 and maximum of 13 members. In the case of an EJV, it is more common to have a board of directors.	The company must have one or more managing directors.	A private company must have at least 1 director (no maximum number is stipulated) and at least 1 of the directors must be natural persons. The articles of association may stipulate a minimum and maximum number of directors.	A KK with a board of directors must appoint at least three directors. Otherwise, one will suffice.	A private company must have at least 1 director (no maximum number is stipulated) but the articles of association may stipulate a minimum and maximum number of directors.	For corporations, there must be at least one director. The number of directors may be specified in the articles of incorporation or bylaws and, if not prohibited by the articles of incorporation or bylaws, may be increased or decreased by the board of directors. LLCs may, but are not required to, have a board of directors.

2 Directors Appointments & Issues

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
b	**Can the entire board be comprised of foreign nationals?**	Officers of a corporation need to be Brazilian resident individuals. Members of the board of directors need to be individuals, Brazilian resident or not. In order to be invested in the position of director, a non-Brazilian resident individual needs to appoint a Brazilian resident attorney in fact with powers to receive services of process on behalf of the director in lawsuits filed against him/her with grounds on the corporate law. The power of attorney shall be valid for the entire term in office and for at least three years thereafter.	Yes: The entire board may be comprised of foreign nationals.	Yes: The entire board may be comprised of foreign nationals.	Yes: The entire board may be comprised of foreign nationals.	Yes: The entire board may be comprised of foreign nationals	Yes: The entire board may be comprised of foreign nationals.	Yes: The entire board may be comprised of foreign nationals.

 © Baker & McKenzie all rights reserved

2 Directors Appointments & Issues

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
c	**How are directors appointed (and is shareholder approval required)?**	Officers are appointed by the board of directors meeting, if the corporation has a board of directors. If not, officers are appointed by the shareholders' meeting. Directors are appointed by the shareholders' meeting. The officers and directors need to sign a term of investiture in order to take office, declaring, among others, not to be prevented to hold the relevant position. The minutes of the meeting electing the officers or directors need to be registered with the State Commercial Registry and published in the press.	Directors are appointed by shareholder by way of appointment letters in accordance with the articles of association.	Managing directors are appointed by shareholder resolution (unless a co-determination act requires otherwise). The appointment becomes effective upon passing the resolution and acceptance by the managing director. Following the appointment, an application for registration of the new director must be filed with the Commercial Register.	Subject to the articles of association, directors may be appointed by decision of the board or by the members (whether by way of a members' resolution or by an informal notice to the company). Once appointed, the new director must sign the relevant Companies Registry Form which must then be filed with the Companies Registry and the company's Register of Directors must be updated.	Directors are appointed by shareholder resolutions passed either at a shareholders meeting or by way of written shareholder consent(s) and recorded minutes.	Subject to the articles of association, directors may be appointed by decision of the board or by the members (whether by way of a members' resolution or by an informal notice to the company). With effect from October 2015, the traditional requirement for a company to obtain the written consent of a new director to act will be replaced with a requirement for the company to notify Companies House that the appointee has consented to act and the company's Register of Directors and Register of Directors' Residential Addresses must be updated.	Directors are appointed by means of shareholder approval; if an LLC is manager-managed, the member(s) appoint manager(s).

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

2 Directors Appointments & Issues

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
d	**How are directors removed (and is shareholder approval required)?**	An officer of a corporation is removed upon approval of the board of directors' meeting, if the corporation has a board of directors. If not, the officers will be removed upon approval by the shareholders' meeting. A director of a corporation is removed upon approval of the shareholders' meeting. The minutes of the meeting that approved the removal of the officer or director must be registered with the State Commercial Registry and published in the press. An officer and a director may resign. The resignation will be effective *vis-à-vis* the corporation upon written notice to the corporation and, *vis-à-vis* third parties, upon registration of the resignation with the State Commercial Registry and publication in the press.	Directors may resign by notice to the company, or may be removed by the shareholder by way of written notice in accordance with the articles of association.	Managing directors are removed by shareholder resolution. The removal becomes effective upon passing the resolution and receipt of notice of such removal by the managing director or publication of the removal in the commercial register. Following the removal, an application for registration of the removal must be filed with the Commercial Register.	Subject to the articles of association, a director may resign by notice to the company or may be removed from office in accordance with a power in the articles for the board or members to remove him. A more elaborate default statutory procedure also exists for the removal of a director by a majority resolution of the members but that procedure can be disapplied by a corresponding procedure in the articles. Once removed, the relevant Companies Registry Form must be filed and the company must update its Register of Directors.	Directors are removed by shareholder approval.	Subject to the articles of association, a director may resign by notice to the company or may be removed from office in accordance with a power in the articles for the board or members to remove him. A more elaborate default statutory procedure also exists for the removal of a director by a majority resolution of the members but that procedure can be disapplied by a corresponding procedure in the articles. Once removed, the relevant Companies House Form must be filed and the company must update its Register of Directors and Register of Directors' Residential Addresses.	For a corporation, directors can only be removed by a shareholder resolution; for an LLC, governance structure is flexible.

2 Directors Appointments & Issues

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
e	**Are there requirements for a minimum number, and location, of board meetings to be held in each year?**	The board of directors' meeting shall be held at least once a year to discuss and propose the approval (or not) of the accounts and financial statements prepared by the board of officers for the fiscal year ended and to elect the officers (when that is the case). The law does not impose requirements for a minimum number of meetings of the board of officers. The bylaws may contain rules with respect to the minimum number of meetings of the board of directors and board of officers. Usually, the meetings are held at the head office of the corporation and the participation by video conference or conference call is permitted.	For WFOEs, subject to the articles of association, no, there is no statutory requirement for a minimum number, and location, of meetings to be held in each year. For EJVs, legally there must be at least one board meeting a year. Generally the board meeting should be held at the location of the EJV. The articles of association may provide otherwise.	German law does not provide for a Board of a GmbH; thus there is no requirement for a board meeting. The general business will be run by the managing directors who are authorized to represent the GmbH. One annual shareholders' meeting is required in order to approve the annual accounts and resolve on the distribution of profits (if any).	Subject to the articles of association, no. The location of board meetings or proceedings may be relevant for determining the main jurisdiction for tax liability of the company.	Only minimum number: every three months so that the representative director can report to the board as required under the Companies Act.	Subject to the articles of association, no. The location of board meetings or proceedings may be relevant for determining the main jurisdiction for tax liability of the company.	No. However, a meeting of directors should be held after a meeting of shareholders. Additionally, it is recommended that at least one in-person meeting or written consent occur during each calendar year.

3 Share capital and shareholders

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
a	**Is there a minimum or maximum level of share capital for a private company?**	There is no minimum or maximum share capital requirement for a Brazilian corporation, except for those that operate in regulated sectors, e.g., insurance, financial institutions. At least 10% of the capital subscribed upon the incorporation of the corporation must be paid up as a condition for the registration of the corporation before the State Commercial Registry.	An FIE's capital is not divided by shares. Hence for FIEs, the relevant concept is "registered capital" rather than "share capital". There is no minimum or maximum capital requirement for FIEs in general. However, there may be industry-specific capital requirements. When approving the establishment of an FIE, the FIE must have registered capital that is commensurate with the FIE's business activities.	The minimum share capital of a GmbH is EUR25,000. An "Entrepreneur Company", which does not constitute a separate legal form but is regarded as a variation of the GmbH for small businesses which might not be in a position to immediately raise the regular minimum capital requires a minimum capital of EUR1 only.	All private limited companies will have at least one share in issue. Subject to that requirement, there is no maximum share capital requirement.	There is a minimum requirement only of JPY1.	All private limited companies will have at least one share in issue. There is no maximum share capital requirement.	No.

3 Share capital and shareholders

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
b	**Is any capital duty payable on the issue or transfer of shares?**	Capital duty is not payable on the issue or transfer of shares. Capital gain taxes may apply on the transfer of shares, at different rates, depending on whether the seller is an individual, legal entity or investment fund and on the jurisdiction where the seller is domiciled.	Yes: In case of a capital increase, stamp duty at 0.05% of the increased portion is payable by the company. In case of an equity transfer, stamp duty at 0.05% of the contract value is payable by both purchaser and seller (i.e., total 0.1%). In addition, Income Tax on capital gain is payable at 10% by non-resident corporate sellers (unless otherwise reduced or exempted under the applicable tax treaty), or 20% by individual sellers (resident or non-resident alike), or 25% by resident corporate sellers.	No.	No: Capital duty is not payable on the issue of shares. On the transfer of shares, stamp duty is generally payable at a rate of 0.2% of the higher of the price paid or the value of the shares being transferred.	Yes, on issue only: JPY150,000 or 0.7% of the amount of increase in registered share capital, whichever is higher.	No: Capital duty is not payable on the issue of shares. On the transfer of shares, stamp duty is generally payable at a rate of 0.5%.	No: However, transfers can be taxable events based on the structure of the transfer and whether the transfer is internal to a consolidated group for US tax purposes.
c	**Are there any statutory restrictions on the number of shareholders of a private company?**	There are no restrictions on the maximum number of shareholders of a Brazilian corporation, but the company must have at least two shareholders (except in case of corporations incorporated as wholly owned subsidiaries - *subsidiárias integrais*, which may have a single shareholder).	A private company must have at least one shareholder. The maximum number of shareholders of a private company is 50.	No.	A private company must have at least one shareholder. The maximum number of shareholders of a private company is 50.	No.	A private company must have at least one shareholder. There is no restriction on the maximum number of shareholders.	No.

3 Share capital and shareholders

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
d	**Is the identity of a company's shareholders publicly disclosed?**	No. The identity of a Brazilian corporations' shareholders is not publicly disclosed, in that they are included only in the share registry book of the corporation and, in case of foreign resident shareholders, registered with the Central Bank of Brazil. Shareholders of publicly held corporations may have to disclose their identity and the number of shares they hold (among other information) to the corporation and the market, depending on their shareholdings percentage.	Yes.	Yes: The application for registration of a company must be accompanied by a list signed by the managing directors which sets forth the name, date of birth and domicile of each shareholder as well as the number and the nominal amount of the shares such shareholder has subscribed to. This shareholder list is updated whenever shares are transferred.	Yes: Every company is required to make an annual return to the Companies Registrar. For a private limited company, the annual return must include: - the name of every person who was a member of the company at the return date; and - the number of shares of each class held by each member at the return date. The annual return is a publicly available document.	For a KK, no. For a GK, the company's equity holders (or members) are identified as part of the GK's commercial registration.	Yes: Every company is required to make an annual return to the Registrar of Companies. For a private limited company, the annual return must include: - the name of every person who was a member of the company at any time during the return period; - the number of shares of each class held by each member at the return date; and - the number of shares of each class transferred during the return period by each person who was a member and the date of registration of those transfers. With effect from April 2016, companies will be obliged to investigate the identity of beneficial owners of their shares who exercise significant control, to maintain a statutory register of the details of those beneficial owners, and to make that information publicly available at Companies House. The annual return is a publicly available document.	No.

3 Share capital and shareholders

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
e	**Are there requirements for a minimum number, and location, of members' meetings to be held in each year?**	Yes, the shareholders shall meet at least annually, within four months after the end of the fiscal year, to: (i) discuss and approve the accounts of the administrators and the financial statements for the year ended, (ii) decide on the allocation of the net profits and the distribution of dividends, and (iii) elect the administrators and the members of the audit committee (*conselho fiscal*), if that is the case.	Subject to the articles of association, no.	One shareholders' meeting is required every calendar year. This meeting can be held in writing and does not require physical presence.	Subject to the articles of association, no.	For a KK, an ordinary general meeting must be held within three months after the close of each financial year. There is no requirement as to location. For a GK, there are no requirements.	Subject to the articles of association, no.	Corporations: As a preliminary point, corporations do not have members; rather, they have shareholders. Delaware law requires an annual shareholder's meeting for the election of directors on a date and at a time designated by or in the manner provided in such corporation's bylaws. Unless the certificate of incorporation says otherwise, corporations may also act by written consent to elect directors in lieu of having a meeting. If the written consent electing directors is not unanimous, there are additional rules relating to the election of directors. In addition, Delaware law also requires shareholder consent for any actions affecting shareholder rights, including, for example, changes in the number of directors, amendment to the certificate of incorporation, sale of all or substantially all of the corporation's property or assets. This is not an exhaustive list, and that written

3 Share capital and shareholders

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
e	**Are there requirements for a minimum number, and location, of members' meetings to be held in each year?**							consent may be substituted for a meeting unless the certificate of incorporation says otherwise. LLCs: There are no requirements for a minimum number and location of meetings under Delaware law. Unless otherwise provided in the company operating agreement, agreement all actions requiring the approval of either members or managers may be taken by written consent signed by the number of member or members necessary to take such action at a meeting.

4 Cash Repatriation

		Brazil	China	Germany	Hong Kong	Japan	UK	USA
a	**Is there a minimum or maximum level of share capital for a private company?**	Yes, subject to certain requirements and limitations imposed by law.	For FIEs, at least 10% of after tax profits shall be allocated to the statutory reserve fund, until the aggregated amount of the statutory reserve fund reaches 50% of the registered capital. Shareholders/Directors are free to determine whether to make allocation to any discretionary reserve funds. Dividends normally are distributed on an annual basis in practice.	Shareholders are free to dissolve and repay (not distribute) capital reserves or to distribute profits for corporate and for financial accounting purposes.	Specific procedures apply to return capital to shareholders (e.g., reduction of capital supported by a solvency statement, a share buyback out of capital (both of which must receive 75% shareholder approval) or reduction of capital by way of a court order). Directors are generally free to distribute distributable profit as dividends (subject to any limitations in the articles of association).	No, they must comply with the requirements of the Companies Act which limit the amount which can be returned to shareholders by reference to the company's retained earnings (plus or minus adjustment items in accordance with the Corporate Accounting Rules), as determined in its most recent financial statement, or alternatively by interim financial statements approved by an extraordinary shareholders meeting.	The return of profits to the members is effected by the payment of an interim/declaration of a final dividend. The repayment of capital reserves by a private company limited by shares usually involves undertaking a reduction of capital or a share buyback out of capital (both of which must be authorized in advance by a resolution of the members passed by at least 75%). Different statutory procedures apply to those corporate acts.	Corporations: The board of directors of a corporation is able to declare and pay dividends upon the shares of its capital stock either (i) out of its surplus or (ii) out of its net profits for either the fiscal year in which the dividend is declared and/or the previous fiscal year. If a corporation has more than one class of shares, it is possible that dividends must be paid to certain preferred shareholders before any dividends are paid to the remaining shareholders. Dividends may be paid in cash, in property, or in shares of the corporation's capital stock. LLCs: Distributions of cash or other assets of a limited liability company must be allocated among the members in the manner to the extent provided in the company operating agreement and at the times or upon the happening of events specified in the company operating agreement.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix C

Broad Principles of Information Exchange and 'Gun-Jumping'

A joint venture may be subject to review by antitrust/competition authorities locally or around the world (if the relevant merger filing thresholds are met), and because discussions between competitors or potential competitors can be misconstrued, it is important that the parties take extensive precautions to comply with all applicable antitrust/competition laws as they negotiate the joint venture agreement and between signing and closing.

1. Creating Documents About the Transaction

1.1. All notes, minutes and other documentation of any kind whatsoever created by the parties to a transaction, their affiliates and consultants in connection with a transaction are likely to be reviewed by those competition authorities whose consent is required to implement the transaction.

1.2. For example, both the US[6] and EU[7] pre-merger notification forms require production of all studies, surveys, analyses, and reports prepared by or for an officer or director for the purpose of evaluating or analyzing the transaction, including market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Accordingly, all documents that have been prepared that might fall within

[6] Item 4(c) of the Notification Form required to be submitted by parties to transactions satisfying the notification thresholds of the US Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").

[7] See 5.4 of Form CO relating to the Notification of a Concentration pursuant to Regulation (EC) No 139/2004.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

the scope of this requirement should be identified for submission and new documents that might fall within the scope of the requirement should be prepared in 'draft' so they can be reviewed by counsel before finalization.

1.3. Furthermore, participants in negotiation and implementation task forces should recognize that any notes they take or emails or memos they write during the course of negotiations about the transaction agreement or between signing and closing can be obtained by antitrust authorities in the course of their review of the transaction. Given that they may be inaccurate or misconstrued, notes should be kept to a minimum and should not address issues that are competitively sensitive.

2. Coordinated Activities by the Parties

2.1. Under antitrust/competition laws, parties who are competitors are required to act as competitors until any transaction between them is closed.

2.2. The period before closing of a transaction usually involves three business stages: negotiations; due diligence; and transition (or integration) planning. Because parties who are competitors are expected to act as competitors until the transaction is closed, the permissible scope of coordinated activities between the parties is limited during the pre-closing period.

2.3. There are two antitrust principles to bear in mind when negotiating transactions and taking implementing steps before closing. First, pre-closing coordination between the parties (whether they are competitors or not) may violate the merger control laws of those countries where clearance is required before closing. Most merger control regimes provide for a period which prohibits the parties from integrating their operations before the antitrust/competition review has been completed or before a waiting period has expired. Penalties for non-compliance

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

(commonly referred to as "gun-jumping") often include substantial fines.[8] Second, any joint activities between the parties will be subject to review under applicable competition laws that prohibit contracts, combinations and conspiracies that unreasonably restrain trade. As the parties should remain competitors until the transaction has closed, any restrictive agreements between them could be illegal. The laws prohibiting anticompetitive agreements remain applicable until closing.

2.4. As a general rule, prior to closing the parties should act as independent entities and not make any joint business decisions until the transaction has closed. Similarly, neither party should base any of its independent business decisions on competitively sensitive information, discussed more fully below, that is obtained from the other party in the course of negotiations, due diligence or transition planning. Where European authorities suspect that these rules have not been respected, they can and do carry out unannounced inspections or 'dawn raids' to verify the nature of any infringement.

3. Exchanging Competitively Sensitive Information

3.1. The exchange of competitively sensitive information between competitors should be carefully structured and monitored to avoid any illegal conduct and to minimize the risk that such information will be used inappropriately if the transaction is aborted.

3.2. The parties to a proposed transaction typically exchange a wide variety of information when negotiating a transaction, conducting due diligence, and planning the integration of operations. Access to competitively sensitive information

[8] In the US fines for so-called 'gun-jumping' activity are adjusted for inflation and are up to USD16,000 for each day the parties are in violation. In the EU, the European Commission may impose penalties of up to 10% of the aggregate turnover of the parties involved.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

is often necessary for planning and valuing the transaction, but, as a general rule, the exchange of such information between competitors or potential competitors can raise antitrust/competition issues even if the parties do not engage in joint business activities prior to closing the transaction. The more information the parties exchange about their prices, costs, customers, strategies, etc., the more likely it is that competition may be reduced in the interim between negotiations and closing. The antitrust/competition authorities have expressed concern that such exchanges can enable the parties to coordinate their pre-closing activities without any express agreement. They have also expressed concern that the parties might use such information in an anticompetitive way if the transaction is ultimately abandoned.

3.3. Given these concerns, some safeguards are necessary to allow the parties to agree and implement their transaction within the letter and the spirit of the antitrust/competition laws. Such safeguards are intended to ensure the parties do not exchange competitively sensitive information and reduce the risk that either party would use any information to influence its interim operations or to harm the other party if the transaction is aborted.

3.4. The parties should limit the information that they exchange to what is relevant and necessary to negotiating the transaction agreement, the due diligence process, and transition planning, in order to avoid any suggestion that the transaction is a 'sham' attempt to engage in collusive behavior.

3.5. The parties should limit the collection, exchange and dissemination of competitively sensitive information to those employees responsible for negotiating the transaction. Ideally, none of those employees should be responsible for the day-to-day business decisions or oversight of the overlapping business, thus reducing the risk of anticompetitive use of such information.

3.6. The parties can minimize the antitrust/competition risk by using an independent third party (e.g., a consulting firm) to collect, filter, and assess competitively sensitive information without disclosing such information to the other party. If necessary and relevant to the transaction, such information can be provided on a confidential basis subject to a confidentiality agreement with an independent third party for analysis and review. While the third party may not then exchange the information with the parties, it could provide a summary or redacted version of the information and advise the parties based on that information.

3.7. The parties should request advice from legal counsel when difficult situations arise. There is often a way to achieve the parties' goals without creating undue antitrust/competition risk.

4. Communicating with the Media

4.1. Discussion in the media of the proposed transaction by representatives of the parties can have extremely negative implications on the antitrust/competition analysis of the transaction unless carefully structured in consultation with legal counsel. The specific concern is that statements may be attributed to the transaction participants which might draw undue attention from antitrust/competition authorities, or more significantly, contradict an antitrust position that the parties may wish to assert. Accordingly, all media contact should be vetted by legal counsel.

5. Other Safeguards

5.1. Legal counsel need not be present at each meeting between the transaction participants, nor does legal counsel need to be consulted with respect to each joint activity. However, any questions regarding the scope of permissible information exchange and coordinated activity should be brought to the attention of legal counsel

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

immediately. Safeguards, additional to those referred to in these guidelines, can be designed in consultation with legal counsel to limit the antitrust/competition law exposure within the context of proposed transactions.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix C1

Overview of EU Merger Control Provisions

1.1. **Introduction**

EU Regulation 139/2004 (the Regulation) provides for mergers, acquisitions and joint ventures (which the Regulation refers to as 'concentrations') between economic entities (referred to in EU law as 'undertakings') with an EU dimension, subject to investigation by the European Commission. To a large extent, this ousts the competence of national merger control authorities in dealing with such concentrations. The Regulation also applies to the other EEA member states, namely Iceland, Norway and Liechtenstein.

1.2. **Timing and Procedure**

Under Article 4(1) of the Regulation, concentrations with an EU dimension must be notified to the Commission before their implementation. Notification may be made at any time provided the parties demonstrate to the Commission in good faith their intention to conclude an agreement, for instance, based on a letter of intent.

The obligation to notify falls on the controlling parent companies in the case of a joint venture. Failure to notify may result in the imposition of a fine of up to 10% of the notifying party's aggregate turnover.

Notifications must be made on a prescribed form (Form CO). Preparation for a notification should begin well in advance of signing (preferably 6–8 weeks prior). A large amount of information must be supplied to the Commission. It is standard practice to engage in pre-notification discussions with the Commission to ensure that the proposed transaction does not raise insurmountable concerns and that the final notification is in all material respects complete (see below). The parties must also consider, at an early stage, whether to request a

pre-notification referral to the Commission or to one or more member states (see paragraph **1.5 Referrals to and from Member States** below).

Phase I review

Where the proposed concentration does not pose any competition problem, the Commission must announce its decision to this effect within 25 working days (Phase I). This will be extended to 35 working days if a member state has requested a referral of all or part of the notified concentration to that member state or if the parties to the concentration submit commitments to the Commission to obtain clearance at this first phase.

Phase II investigation

Where the proposed concentration may adversely affect competition, the Commission will decide within Phase I whether to initiate full proceedings with respect to the proposed transaction (Phase II).These proceedings last for up to a further 90 working days.

The Commission must decide within the Phase II period to declare the proposed transaction either compatible or incompatible with the EU merger rules. If it is incompatible, the Commission will prohibit the transaction and may order appropriate remedial action.

1.3. **Scope of Merger Control – The Meaning of 'Concentration'**

A joint venture will be a 'concentration' for the purposes of the Regulation if two or more undertakings acquire joint control, and if the joint venture is 'full-function': i.e., performing (on a lasting basis) all the functions of an autonomous economic entity. Joint ventures that are not 'full-function' are not notifiable, but need to be assessed in accordance with the criteria of Article 101, paragraphs (1) and (3) of the Treaty on the Functioning of the European Union.

'Control' is defined as the ability, by whatever means, to exercise decisive influence on an undertaking by the ownership of or the right to use the assets, or rights or contracts conferring decisive influence on the composition, voting or decisions of the undertaking's organs.

Effective control may, therefore, be acquired even where less than half of the voting rights are acquired. The Commission will take an individual decision in each case as to whether decisive influence may be exercised by the purchaser in accordance with the Commission's guidelines set out in its Notice on the concept of a concentration. For example, in one case, the Commission held that a 39% holding in a company whose remaining shares were widely dispersed, and where the next largest shareholder had a 4% shareholding, was sufficient to give decisive influence. In another case, an increase in a shareholding from 20.94% to 25.96% was found to confer decisive influence, as it would result in the shareholder having more than 50% of the vote in the shareholders' meetings, since more than half the shareholders were small investors who did not exercise their voting rights.

The Commission has also held that moving from joint control of a joint venture to sole control will constitute a new concentration.

1.4. **The Meaning of 'EU Dimension'**

If a concentration is found to exist, it will be necessary to decide whether it has a EU dimension. If it has, the Regulation will apply; if not, the EU rules are inapplicable, but national merger control laws may apply. A concentration is assessed in terms of worldwide turnover, EU turnover and geographical distribution of turnover. Under Article 1.2 of the Regulation, concentrations have a EU dimension where the undertakings concerned have a combined aggregate worldwide turnover of more than EUR5 billion, the aggregate EU turnover of each of at least two of the undertakings concerned is more than EUR250 million, and all the undertakings concerned achieve more than two-thirds of their Community-wide turnover in one and the same member state.

Under Article 1.3 of the Regulation, concentrations also have a EU dimension where:

i. the undertakings concerned have a combined aggregate worldwide turnover of more than EUR2.5 billion;

ii. in each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million;

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

iii. in each of the three member states included in (ii) above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR25 million;

iv. the aggregate community-wide turnover of each of at least two of the undertakings concerned is more than EUR100 million.

Purely national Concentrations are excluded: if each of the undertakings concerned achieves more than two-thirds of its aggregate community-wide turnover in the same member state, the concentration will not fall within the scope of the Regulation.

1.5. Referrals to and from Member States

1.5.1. Pre-notification referrals requested by the parties

Under the Regulation, the parties to the concentration can request a pre-notification referral of the whole or part of a concentration from the Commission to one or more member states if the concentration may significantly affect competition in a distinct market within a member state (Art. 4(4), the Regulation). The parties can request a referral to the Commission if a concentration that does not have a Community dimension is nonetheless capable of being reviewed under the national laws of three or more member states (Art. 4(5), the Regulation).

A request under Article 4(4) or 4(5) must be made to the Commission in the form of a detailed 'reasoned submission', called 'Form R/S'. The Commission must forward the request to the relevant member states without delay. The member states have 15 working days from receipt of the request to veto it.

If, under Article 4(4), no member state vetos the request, the Commission has 25 working days from receipt of the request to decide whether to grant it. If, under Article 4(5), there are no vetos from any member states, the Commission will automatically have jurisdiction to review the concentration. However, a veto from one member state will result in the request being refused in its entirety.

1.5.2. Post-notification referrals requested by the member states

The Regulation gives flexibility to the member states to request a post-notification referral of the whole or part of a concentration from the Commission to the member state (Art. 9, the Regulation), or from the member state to the Commission (Art. 22, the Regulation).

A member state may make an Article 9 request within 15 days of receipt of a copy of the notification. The Commission has 35 working days from notification to examine the request. If the Commission agrees with the member state that the concentration threatens to affect significantly competition within a distinct market within that member state, it may refer all or part of the case to the member state. If the Commission finds that all or part of the concentration affects competition in a distinct market within the requesting member state, which does not constitute a substantial part of the Common Market, the Commission must refer the case to the member state. One or more member states may request an Article 22 referral within 15 working days of the date on which a Concentration is notified or otherwise made known to the requesting member state. This is provided that the Concentration does not have a Community dimension, but affects trade between member states and threatens to significantly affect competition within the territory of the requesting member state. The Commission may also invite one or more member states to make an Article 22 request. The Commission must inform the parties and the other Member States of an Article 22 request without delay. Other member states can join the initial request within 15 working days of being informed of it. The Commission then has to decide within 10 further working days whether to accept a referral. The requesting member states' national time-limits are suspended while the Commission examines the request.

1.6. Criteria for Evaluating Concentrations

The Commission will assess concentrations with a EU dimension by considering their effect on market structures and competition in the EU. Concentrations which will significantly impede effective competition in the EU or a substantial part of it, in particular as a

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

result of the creation or strengthening of a dominant position, will be declared incompatible with the EU, and will be prohibited.

Full-function joint ventures are evaluated in the same way as all concentrations, that is, whether they will significantly impede effective competition. However, joint ventures may also lead to the coordination of the competitive behavior of the parents. Such cooperative effects are appraised within the same procedure as the Concentration, but in accordance with the criteria of paragraphs (1) and (3) of Article 101 of the Treaty on the Functioning of the European Union. This means that the test will be whether the cooperative effects afford the undertakings concerning the possibility of eliminating competition in respect of a substantial part of the products or services in question. The Commission takes into account whether two or more of the joint venture's parents retain activities in the same market to a significant extent as the joint venture or in a market which is upstream, downstream or neighboring that market.

1.7. **Remedies**

Prohibition: the Commission can prohibit a transaction. It also has power to order divestiture or other appropriate action, if a transaction has been completed.

Fines: the Commission can impose fines of up to 10% of turnover on parties who give effect to a concentration either during the suspensory period or after the Commission has issued a decision prohibiting the transaction and also on parties who fail to divest a business or take other action which the Commission has ordered them to take.

Commitments: the parties may try to avoid a decision prohibiting the transaction by offering appropriate commitments to the Commission. In practice, commitments have involved, for example, selling off interests in competing businesses; severing links with a major purchaser and reorganizing exclusive distribution networks. Commitments may be offered during either Phase I or II.

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Appendix D

OECD Convention & Signatories, FCPA and UK Bribery Act 2010 Summaries

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The Organization for Economic and Cooperative Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was signed on 17 December 1997 and entered into force on 15 February 1999. It has been adopted by all 34 OECD member countries in addition to five non-member countries.

OECD States			Non-members
Australia	Hungary	Poland	Argentina
Austria	Iceland	Portugal	Brazil
Belgium	Ireland	Slovak Republic	Bulgaria
Canada	Israel	Slovenia	Russia
Chile	Italy	Spain	South Africa
Czech Republic	Japan	Sweden	
Denmark	Korea	Switzerland	
Estonia	Luxembourg	Turkey	
Finland	Mexico	United Kingdom	
France	Netherlands	United States	
Germany	New Zealand		
Greece	Norway		

Signatory nations are required to adopt 'such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

or other advantage [...] to a foreign public official'. The definition of 'foreign public official' is broad, covering 'any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function or involved in a public agency or public enterprise; and any official or agent of a public international organization',[9] but it does not encompass private sector corruption.

It should also be noted that the OECD Convention is exclusively focused on active, transnational bribery. It does not address passive bribery (i.e., the requesting or receipt of bribes). The OECD Convention includes a carve-out for facilitation payments.

2. US Foreign Corrupt Practices Act

The FCPA contains both anti-bribery and accounting provisions. For a summary of the FCPA's anti-bribery and accounting provisions, see **Appendix A1 - Overview of Applicable US Laws Impacting D&O Liability** above.

3. UK Bribery Act 2010

The UK Bribery Act 2010 has a broad jurisdictional reach and scope. It is therefore important to consider whether companies with a connection to the United Kingdom fall within the jurisdiction of the Bribery Act 2010.

The Act's main offenses can be committed in relation to active bribery (i.e., offering or paying bribes) and passive bribery (i.e., requesting, agreeing to receive or receiving bribes) in both the public and private spheres. Unlike the equivalent rules in many other jurisdictions, the Bribery Act 2010 provides no exemption for facilitation payments. As well as applying to the activities of UK companies, the main offenses also apply to acts of non-UK companies that take place within the United Kingdom.

---

[9] Art. 1(4)(a), OECD Convention.

Importantly, the Bribery Act introduced a strict liability corporate offense of failure to prevent bribery by employees or other associated persons. The only defense to the corporate offense is for the company to prove that it had implemented 'adequate procedures' to prevent such acts of bribery. A company will be caught by the corporate offense where an 'associated person' (e.g., an employee, agent, consultant or other person deemed to be performing services on behalf of the company)[10] bribes another person with the intent to obtain or retain business for the company or a business advantage (as under the FCPA, 'business advantage' has a broad meaning and includes required licenses or permits, or favorable tax agreements). There is no need for the company to be involved in or have any knowledge of the conduct. Further, there is no need for the associated person to have been individually prosecuted or within the jurisdiction of the Act.

The territorial scope of the corporate offense is extensive, applying to not only UK companies but equally to 'any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the [United Kingdom]'. Though this test has not yet been subject to judicial interpretation, it is clear that it is meant to be interpreted broadly and could catch companies on a number of different bases. While no definite view can be reached, it is apparent that jurisdiction may potentially be established over a corporate entity on the basis that it makes sales into the United Kingdom, has a branch office in the United Kingdom, or exercises management and strategic control over business in the United Kingdom. It is unlikely that a mere listing on a UK stock exchange would, in of itself, be enough. Once jurisdiction is established over a company, all of its acts are caught by the corporate offense, even if they take place wholly outside the United Kingdom.

As under the FCPA, what may constitute a bribe is defined broadly, meaning that a bribe may be comprised of money or any other advantage given directly or indirectly (including hospitality, gifts, travel, charitable and political donations).

---

[10] 'Associated person' is not exhaustively defined and it is possible that it may capture other persons such as distributors, joint venture partners, or subsidiaries.

Appendix E

Baker & McKenzie Offices Worldwide

Offices denoted with asterisks are associated firms.

Argentina - Buenos Aires

Baker & McKenzie Sociedad Civil
Avenida Leandro N. Alem 1110, Piso 13
Buenos Aires C1001AAT
Argentina
Tel: +54 11 4310 2200
Fax: +54 11 4310 2299

Australia - Brisbane

Baker & McKenzie
Level 8
175 Eagle Street
Brisbane QLD 4000
Australia
Tel: +61 7 3069 6200
Fax: +61 7 3069 6201

Australia - Melbourne

Baker & McKenzie
Level 19
181 William Street
Melbourne VIC 3000
Australia
Tel: +61 3 9617 4200
Fax: +61 3 9614 2103

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Australia - Sydney

Baker & McKenzie
Level 27, A.M.P. Centre
50 Bridge Street
Sydney, NSW 2000
Australia
Tel: +61 2 9225 0200
Fax: +61 2 9225 1595

Austria - Vienna

Diwok Hermann Petsche Rechtsanwälte
LLP & Co KG
Schottenring 25
1010 Vienna
Austria
Tel: +43 1 24 250
Fax: +43 1 24 250 600

Azerbaijan - Baku

Baker & McKenzie - CIS, Limited
The Landmark Building
96A Nizami Street
Baku AZ1010
Azerbaijan
Tel: +994 12 497 18 01
Fax: +994 12 497 18 05

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Bahrain - Manama

Baker & McKenzie Limited
18th Floor
West Tower
Bahrain Financial Harbour
P.O. Box 11981
Manama
Kingdom of Bahrain
Tel: +973 1710 2000
Fax: +973 1710 2020

Belgium - Antwerp

Baker & McKenzie CVBA/SCRL
Meir 24
2000 Antwerp
Belgium
Tel: +32 3 213 40 40
Fax: +32 3 213 40 45

Belgium - Brussels

Baker & McKenzie CVBA/SCRL
Louizalaan 149 Avenue Louise
11th Floor
Brussels 1050
Belgium
Tel: +32 2 639 36 11
Fax: +32 2 639 36 99

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Brazil - Brasília*

Trench, Rossi e Watanabe Advogados
SAF/S Quadra 02, Lote 04, Sala 203
Edificio Via Esplanada
Brasília - DF - Brasil - CEP 70070-600
Brazil
Tel: +55 61 2102 5000
Fax: +55 61 3323 3312

Brazil - Porto Alegre*

Trench, Rossi e Watanabe Advogados
Av. Borges de Medeiros, 2233 - 4º andar
Porto Alegre - RS - Brasil - CEP 90110-150
Brazil
Tel: +55 51 3220 0900
Fax: +55 51 3220 0901

Brazil - Rio de Janeiro*

Trench, Rossi e Watanabe Advogados
Av. Rio Branco, 1 - 19º andar - (Ed. RB1 - Setor B)
Rio de Janeiro - RJ - Brasil - CEP 20090-003
Brazil
Tel: +55 21 2206 4900
Fax: +55 21 2206 4949

Brazil - São Paulo*

Trench, Rossi e Watanabe Advogados
Rua Arquiteto Olavo Redig de Campos
105 - 31 floor - (Ed. EZ Towers - Torre A)
São Paulo - SP - Brasil - CEP 04711-904
Brazil
Tel: +55 11 3048 6800
Fax: +55 11 5506 3455

Canada - Toronto

Baker & McKenzie LLP
Barristers & Solicitors
Brookfield Place
Bay/Wellington Tower
181 Bay Street, Suite 2100
Toronto, Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275

Chile - Santiago

Baker & McKenzie Ltda.
Nueva Tajamar 481
Torre Norte, Piso 21
Santiago
Chile
Tel: +56 2 2367 7000
Fax: +56 2 2362 9876

China - Beijing

Baker & McKenzie
Suite 3401, China World Office 2
China World Trade Center
1 Jianguomenwai Dajie
Beijing 100004, PRC
China
Tel: +86 10 6535 3800
Fax: +86 10 6505 2309

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

China - Hong Kong - SAR

Baker & McKenzie
14th Floor, Hutchison House
10 Harcourt Road, Central
Hong Kong SAR
Tel: +852 2846 1888
Fax: +852 2845 0476

China - Shanghai

Baker & McKenzie
Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC
China
Tel: +86 21 6105 8558
Fax: +86 21 5047 0020

Colombia - Bogota

Baker & McKenzie S.A.S.
Avenue 82 No. 10-62 6th Floor
Bogota
Colombia
Tel: +57 1 634 1500 / 644 9595
Fax: +57 1 376 2211

Czech Republic - Prague

Baker & McKenzie, s.r.o., advokátní kancelár
Klimentská 46
110 02 Prague 1
Czech Republic
Tel: +420 236 045 001
Fax: +420 236 045 055

Egypt – Cairo

Helmy, Hamza & Partners
Nile City Building, North Tower
21st Floor 2005C, Cornich El Nil
Ramlet Beaulac
Cairo
Egypt
Tel: +20 2 2461 9301
Fax: +20 2 2461 9302

France - Paris

Baker & McKenzie SCP
1 rue Paul Baudry
75008 Paris
France
Tel: +33 1 4417 5300
Fax: +33 1 4417 4575

Germany - Berlin

Baker & McKenzie
Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB
Friedrichstraße 88/Unter den Linden
10117 Berlin
Germany
Tel.: +49 30 2 20 02 810
Fax: +49 30 2 20 02 81 199

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Germany - Dusseldorf

Baker & McKenzie
Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB
Neuer Zollhof 2
40221 Dusseldorf
Germany
Tel: +49 211 3 11 16 0
Fax: +49 211 3 11 16 199

Germany - Frankfurt

Baker & McKenzie
Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB
Bethmannstrasse 50-54
60311 Frankfurt/Main
Germany
Tel: +49 69 2 99 08 0
Fax: +49 69 2 99 08 108

Germany - Munich

Baker & McKenzie
Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB
Theatinerstrasse 23
80333 Munich
Germany
Tel: +49 89 55 23 80
Fax: +49 89 55 23 8 199

Hungary - Budapest

Kajtár Takács Hegymegi-Barakonyi
Baker & McKenzie Ügyvédi Iroda
Dorottya utca 6.
1051 Budapest
Hungary
Tel: +36 1 302 3330
Fax: +36 1 302 3331

Indonesia - Jakarta*

Hadiputranto, Hadinoto & Partners
The Indonesia Stock Exchange Building
Tower II, 21st Floor
Sudirman Central Business District
Jl. Jendral Sudirman Kav. 52-53
Jakarta 12190
Indonesia
Tel: +62 21 2960 8888
Fax: +62 21 2960 8999

Italy - Milan

Studio Professionale Associato a
Baker & McKenzie
Piazza Meda, 3
Milan 20121
Italy
Tel: +39 02 76231 1
Fax: +39 02 7623 1620

Italy - Rome

Studio Professionale Associato a
Baker & McKenzie
Viale di Villa Massimo, 57
Rome 00161
Italy
Tel: +39 06 44 06 31
Fax: +39 06 4406 3306

Japan - Tokyo

Baker & McKenzie
(Gaikokuho Joint Enterprise)
Ark Hills Sengokuyama Mori Tower, 28th Floor
1-9-10 Roppongi, Minato-ku
Tokyo 106-0032
Japan
Tel: +81 3 6271 9900
Fax: +81 3 5549 7720

Kazakhstan - Almaty

Baker & McKenzie - CIS, Limited
Samal Towers, 8th Floor
97 Zholdasbekov Street
Almaty Samal-2, 050051
Kazakhstan
Tel: +7 727 330 05 00
Fax: +7 727 258 40 00

Luxembourg

Baker & McKenzie
10 - 12 Boulevard Roosevelt
2450 Luxembourg
Luxembourg
Tel.: +352 26 18 44 1
Fax: + 352 26 18 44 99

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Malaysia - Kuala Lumpur*

Wong & Partners
Level 21, The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
Kuala Lumpur 59200
Malaysia
Tel: +603 2298 7888
Fax: +603 2282 2669

Mexico - Guadalajara

Baker & McKenzie Abogados, S.C.
Av. Paseo Royal Country 4596
Torre Cube 2, 16th Floor
Fracc. Puerta de Hierro
Zapopan, Jalisco 45116
Mexico
Tel: +52 33 3848 5300
Fax: +52 33 3848 5399

Mexico - Juarez

Baker & McKenzie Abogados, S.C.
P.O. Box 9338 El Paso, TX 79995
P.T. de la República 3304, Piso 1
Juarez, Chihuahua 32330
Mexico
Tel: +52 656 629 1300
Fax: +52 656 629 1399

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Mexico - Mexico City

Baker & McKenzie Abogados, S.C.
Edificio Virreyes
Pedregal 24, Piso 12
Lomas Virreyes / Col. Molino del Rey
Mexico, D.F. 11040
Mexico
Tel: +52 55 5279 2900
Fax: +52 55 5279 2999

Mexico - Monterrey

Baker & McKenzie Abogados, S.C.
Oficinas en el Parque
Torre Baker & McKenzie Piso 10
Blvd. Antonio L. Rodríguez 1884 Pte.
Monterrey, N.L. 64650
Mexico
Tel: +52 81 8399 1300
Fax: +52 81 8399 1399

Mexico - Tijuana

Baker & McKenzie Abogados, S.C.
P.O. Box 1205 Chula Vista, CA 91912
Blvd. Agua Caliente 10611, Piso 1
Tijuana, B.C. 22420
Mexico
Tel: +52 664 633 4300
Fax: +52 664 633 4399

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Morocco - Casablanca

Baker & McKenzie Maroc SARL
Ghandi Mall - Immeuble 9
Boulevard Ghandi
20380 Casablanca
Morocco
Tel: +212 522 77 95 95
Fax: +212 522 77 95 96

Myanmar - Yangon

Baker & McKenzie Yangon
1203 12th Floor Sakura Tower
339 Bogyoke Aung San Road
Kyauktada Township
Yangon
Myanmar
Tel: +95 1 255 056
Fax: +95 1 255 057

The Netherlands - Amsterdam

Baker & McKenzie Amsterdam N.V.
Claude Debussylaan 54
1082 MD Amsterdam
P.O. Box 2720
1000 CS Amsterdam
The Netherlands
Tel: +31 20 551 7555
Fax: +31 20 626 7949

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Peru - Lima

Estudio Echecopar
Av. De la Floresta 497
Piso 5 San Borja
Lima 41
Peru
Tel: +51 1 618 8500
Fax: +51 1 372 7171/372 7374

Philippines - Manila*

Quisumbing Torres
12th Floor, Net One Center
26th Street Corner 3rd Avenue
Crescent Park West
Bonifacio Global City
Taguig City 1634
Philippines
Tel: +63 2 819 4700
Fax: +63 2 816 0080

Poland - Warsaw

Baker & McKenzie Krzyzowski i Wspólnicy Spólka Komandytowa
Rondo ONZ 1
Warsaw 00-124
Poland
Tel: +48 22 445 3100
Fax: +48 22 445 3200

Qatar - Doha

Baker & McKenzie
Al Fardan Office Tower
8th Floor
Al Funduq 61
Doha, PO Box 31316
Qatar
Tel: +974 4410 1817
Fax: +974 4410 1500

Russia - Moscow

Baker & McKenzie - CIS, Limited
White Gardens
9 Lesnaya Street
Moscow 125047
Russia
Tel: +7 495 787 2700
Fax: +7 495 787 2701

Russia - St. Petersburg

Baker & McKenzie - CIS, Limited
BolloevCenter, 2nd Floor
4A Grivtsova Lane
St. Petersburg 190000
Russia
Tel: +7 812 303 9000
Fax: +7 812 325 6013

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Saudi Arabia - Jeddah*

Legal Advisors in Association with
Baker & McKenzie Limited
Bin Sulaiman Center, 6th Floor,
Office No. 606
Prince Sultan Street and Rawdah Street Intersection
Al-Khalidiyah District
P.O. Box 128224
Jeddah 21362
Saudi Arabia
Tel: + 966 12 606 6200
Fax: + 966 12 692 8001

Saudi Arabia - Riyadh*

Legal Advisors in Association with
Baker & McKenzie Limited
Olayan Complex
Tower II, 3rd Floor
Al Ahsa Street, Malaz
P.O. Box 4288
Riyadh 11491
Saudi Arabia
Tel: +966 11 265 8900
Fax: +966 11 265 8999

Singapore

Baker & McKenzie.Wong & Leow
8 Marina Boulevard
#05-01 Marina Bay Financial Centre Tower 1
Singapore 018981
Singapore
Tel: +65 6338 1888
Fax: +65 6337 5100

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

South Africa – Johannesburg

Baker & McKenzie Johannesburg
1 Commerce Square
39 Rivonia Road
Sandhurst
Sandton
Johannesburg
South Africa
Tel: +27 11 911 4300
Fax: +27 11 784 2855

South Korea - Seoul

Baker & McKenzie LLP
Foreign Legal Consultant Office
17/F, Two IFC
10 Gukjegeumyung-ro
Yeongdeungpo-gu
Seoul 150-945
South Korea
T +82 2 6137 6800
F +82 2 6137 9433

Spain - Barcelona

Baker & McKenzie Barcelona S.L.P.
Avda. Diagonal, 652
Edif. D, 8th floor
Barcelona 08034
Spain
Tel: +34 93 206 0820
Fax: +34 93 205 4959

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Spain - Madrid

Baker & McKenzie Madrid S.L.P.
Paseo de la Castellana, 92
Madrid 28046
Spain
Tel: +34 91 230 4500
Fax: +34 91 391 5149

Sweden - Stockholm

Baker & McKenzie Advokatbyrå KB
P.O. Box 180
Vasagatan 7, Floor 8
Stockholm SE-101 23
Sweden
Tel: +46 8 566 177 00
Fax: +46 8 566 177 99

Switzerland - Geneva

Baker & McKenzie Geneva
Rue Pedro-Meylan 5
Geneva 1208
Switzerland
Tel: +41 22 707 9800
Fax: +41 22 707 9801

Switzerland - Zurich

Baker & McKenzie Zurich
Holbeinstrasse 30
Zurich 8034
Switzerland
Tel: +41 44 384 14 14
Fax: +41 44 384 12 84

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Taiwan - Taipei

Baker & McKenzie, Taipei
15/F, 168 Tun Hwa North Road
Taipei 105
Taiwan
Tel: +886 2 2712 6151
Fax: +886 2 2712 8292

Thailand - Bangkok

Baker & McKenzie Ltd.
25th Floor, Abdulrahim Place
990 Rama IV Road
Bangkok 10500
Thailand
Tel: +66 2636 2000
Fax: +66 2636 2111

Turkey - Istanbul

Baker & McKenzie Consultancy Services Attorney Partnership
Ebulula Mardin Cad., Gül Sok. No. 2
Maya Park Tower 2, Akatlar-Beşiktaş
Istanbul 34335
Turkey
Tel: + 90 212 339 8100
Fax: + 90 212 339 8181

Ukraine - Kyiv

Baker & McKenzie - CIS, Limited
Renaissance Business Center
24 Bulvarno-Kudriavska (Vorovskoho) Street
Kyiv 01054
Ukraine
Tel: +380 44 590 0101
Fax: +380 44 590 0110

United Arab Emirates - Abu Dhabi

Baker & McKenzie LLP - Abu Dhabi
Level 8, Al Sila Tower
Abu Dhabi Global Market Square, Al Maryah Island
P.O. Box 44980
Abu Dhabi
United Arab Emirates
Tel: +971 2 612 3700
Fax: +971 2 658 1811

United Arab Emirates - Dubai

Baker & McKenzie Habib Al Mulla
Level 14, O14 Tower
Al Abraj Street, Business Bay
P.O. Box 2268
Dubai
United Arab Emirates
T +971 4 423 0000
F +971 4 447 9777

and

Level 3, Tower 1
Al Fattan Currency House, DIFC
P.O. Box 2268
Dubai
United Arab Emirates
Tel: +971 4 423 0005
Fax: +971 4 447 9777

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

United Kingdom - London

Baker & McKenzie LLP
100 New Bridge Street
London EC4V 6JA
United Kingdom
Tel: +44 20 7919 1000
Fax: +44 20 7919 1999

United States - Chicago

Baker & McKenzie LLP
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601
United States
Tel: +1 312 861 8800
Fax: +1 312 861 2899

United States - Dallas

Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
United States
Tel: +1 214 978 3000
Fax: +1 214 978 3099

United States – Houston

Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, Texas 77002
United States
Tel: +1 713 427 5000
Fax: +1 713 427 5099

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

United States - Miami

Baker & McKenzie LLP
Sabadell Financial Center
1111 Brickell Avenue
Suite 1700
Miami, Florida 33131
United States
Tel: +1 305 789 8900
Fax: +1 305 789 8953

United States - New York

Baker & McKenzie LLP
452 Fifth Avenue
New York, New York 10018
United States
Tel: +1 212 626 4100
Fax: +1 212 310 1600

United States - Palo Alto

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, California 94304
United States
Tel: +1 650 856 2400
Fax: +1 650 856 9299

United States - San Francisco

Baker & McKenzie LLP
Two Embarcadero Center, 11th Floor
San Francisco, California 94111
United States
Tel: +1 415 576 3000
Fax: +1 415 576 3099

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

United States - Washington, DC

Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, District of Columbia 20006
United States
Tel: +1 202 452 7000
Fax: +1 202 452 7074

Venezuela - Caracas

Baker & McKenzie SC
Centro Bancaribe, Intersección
Avenida Principal de Las Mercedes
con inicio de Calle París,
Urbanización Las Mercedes
Caracas 1060
Venezuela
Tel: +58 212 276 5111
Fax: +58 212 993 0818; 993 9049

Venezuela - Valencia

Baker & McKenzie SC
Urbanización La Alegria
Postal Address: P.O. Box 1155
Valencia Estado Carabobo
Venezuela
Tel: +58 241 824 8711
Fax: +58 241 824 6166

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Vietnam - Hanoi

Baker & McKenzie (Vietnam) Ltd.(Hanoi)
Unit 1001, 10th floor, Indochina Plaza Hanoi
241 Xuan Thuy Street, Cau Giay District
Hanoi 10000
Vietnam
Tel: +84 4 3825 1428
Fax: +84 4 3825 1432

Vietnam - Ho Chi Minh City

Baker & McKenzie (Vietnam) Ltd. (HCMC)
12th Floor, Saigon Tower
29 Le Duan Blvd.
District 1
Ho Chi Minh City
Vietnam
Tel: +84 8 3829 5585
Fax: +84 8 3829 5618

Law stated as of 1 September 2015 © Baker & McKenzie all rights reserved

Baker & McKenzie has been global since inception. Being global is part of our DNA.

Our difference is the way we think, work and behave – we combine an instinctively global perspective with a genuinely multicultural approach, enabled by collaborative relationships and yielding practical, innovative advice. Serving our clients with more than 4,200 lawyers in more than 45 countries, we have a deep understanding of the culture of the business the world over and are able to bring the talent and experience needed to navigate complexity across practices and borders with ease.

www.bakermckenzie.com

© 2015 Baker & McKenzie. All rights reserved. Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.