Protecting the Entrepreneur: Special Drafting Concerns for International Joint Venture Contracts

International joint ventures expose investors to the precariousness of international and foreign law. Normal contract execution and enforcement are threatened by the capacities and weaknesses of international law institutions, as well as by the legal-political system of the host state. This comment discusses the importance of specific contract clauses, and suggests a two-step drafting approach, conflict avoidance and risk minimization, to protect the investor.

INTRODUCTION

International joint ventures long have been characterized by business expediency and entrepreneurial spirit.[1] Their usual goal is the greatest profit at the smallest risk. A carefully drawn contract[2] minimizes downside risks by avoiding conflicts, defining

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[1] For a discussion of the modern rise of the joint venture, see Jaeger, *Joint Ventures: Recent Developments*, 4 WASHBURN L.J. 9 (1964). For comprehensive treatment of the subject, see 1-4 G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (rev. ed. 1980); JOINT INTERNATIONAL BUSINESS VENTURES (W. Friedmann & G. Kalmanoff eds. 1961).

[2] The contract may be express or implied, written or oral. However, a legitimate businessman trying to establish an international business venture without a written document is probably courting disaster, especially if he needs to resort to the evidentiary value of the contract. A writing is required in most jurisdictions to establish most types of business enterprises, generally for the protection of third parties. An example is found in the French Act on Business Associations, Law of July 24, 1966, [1966] LOI SUR LES SOCIÉTÉS COMMERCIALES [LSC] 66-537 art. 2 (Fr.) D.S.L. 265; [1966] J.C.P. III 32197, *as amended*, (published in present form in Code de Commerce Dalloz (Paris 1971-1972) 850-943). This law implies the necessity of a writing for both a partnership and a limited partnership by requiring that the form, duration, business name, head office, business objective and amount of partnership capital be set out in the agreement. According to the Decree on the Commercial Register, the lack

the bargain and providing a means for what can be, at best, uncertain enforcement.[3] The contract thus becomes an "indispensable instrument of the entrepreneur."[4]

As the essence of a joint venture[5] is a contract,[6] the essence of the international joint venture contract is the protection of expectation interests threatened by distance and performance anxiety.[7] These two factors introduce complexity into what can be an otherwise simple agreement. As a result, several contract clauses become critically important in delineating the international bargain. These clauses include governing language, governing law, forum selection or arbitration, and provisions con-

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of a written document prevents entry of the enterprise into the commercial register, and thus may ultimately nullify the partnership or limited partnership. Decree of March 23, 1967, [1967] RELATIF AU REGISTRE DU COMMERCE 67-237 art. 45 (Fr.) J.O. 2870. *See also* note 120 *infra*.

[3] Problems relating to enforcement arise throughout the lives of international joint ventures. An example is that many foreign jurisdictions require reciprocity as a condition of enforcing American judgments. The Commissioners on Uniform State Laws have promulgated the UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, *reprinted in* 13 UNIFORM LAWS ANNOTATED 419 (West 1980), to provide a mechanism for encouraging and publicizing such reciprocity. Currently 11 states, including California and New York, have adopted the Act. *See* Kulzer, *The Uniform Foreign Money-Judgments Recognition Act*, in STATE OF NEW YORK, THE JUDICIAL CONFERENCE, THIRTEENTH ANNUAL REPORT, LEG. DOC. No. 90, at 194 (1968); Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236 (1957). *See also* note 75 and accompanying text *infra* for a discussion of the enforcement of arbitration awards; note 24 *infra* for a discussion of the Foreign Sovereign Immunities Act of 1976.

[4] Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401, 401 (1979).

[5] A joint venture has been traditionally defined as: "an association of two or more persons based on contract, who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture." 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 318, at 554 (3d ed. W. Jaeger 1959). Other definitions are found in W. Friedmann & G. Kalmanoff, *supra* note 1, at 6; R. ROBINSON, INTERNATIONAL BUSINESS POLICY 147 n.3 (1964).

[6] As stated in Hyman v. Regenstein, 258 F.2d 502, 512 (5th Cir. 1958), "The *sine qua non* of joint venture is a contract purposefully entered into by the parties."

[7] The threat to normal contract execution stems from language and sociological barriers, as well as from legal obstacles arising from the agreement's contact with more than one country, the vagaries of conflict laws and the parties' ability to forum shop.

cerning government approvals and renegotiation and stability. Civil law notarial form requirements may also be crucial to the validity of the contract.

"Joint venture" as used in this comment encompasses any contractual arrangement which combines the resources of the parties for the achievement of a specific goal which will yield anticipated profits,[8] where the parties share both profits and control. The discussion assumes the business decision[9] to utilize the joint venture as the appropriate form of organization,[10] and suggests consideration of drafting techniques that may be useful irrespective of whether the venture takes the corporate form[11] or

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[8] This definition is consistent with those of other authors who use the flexible concept of the international joint venture as a vehicle to discuss legal craftsmanship. *See, e.g.*, W. FRIEDMANN & J. BÉGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES 412 (1971); Birrell, *International Joint Ventures*, in PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975, at 241 (V. Cameron ed. 1976).

[9] Arrangements relating to control of the venture are assumed to be a part of this decision, and are beyond the scope of this comment.

[10] There are many forms suitable for organizing joint ventures abroad.

> The typical civil law business forms include the corporation (*société anonyme, sociedad anónima, or Aktiengesellschaft*); the limited liability company (*société á responsabilité limitée, sociedad de responsabilidad limitada,* or *Gesellschaft mit beschränkter Haftung [GmbH]*); the limited partnership (*société en commandite simple, sociedad en comandita simple,* or *Kommanditgesellschaft*); the limited partnership with shares (*société en commandite par actions, sociedad en comandita por acciones,* or *Kommanditgesellschaft auf Aktien*); and the general partnership (*société en nom collectif, sociedad colectiva,* or *offene Handelsgesellschaft*). In addition, contractual joint ventures [which form the basis of this comment] are generally possible. . . .
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> In those countries whose legal systems have English roots . . . the available business forms include . . . the public company or corporation . . . the various types of partnership and contractual joint ventures utilized in the United States, [and] the so-called private company. . . .

W. Friedmann & G. Kalmanoff, *supra* note 1, at 214.

[11] Forming a corporation or a company pursuant to local law is sometimes the only means of doing business in a country. This often happens where local law demands that nationals or the government own a certain percentage of the enterprise. Or it may be necessary where the government denies certain activities, such as the exploitation of natural resources or banking, to a branch of a foreign corporation. The reason for these restrictions is usually to prevent vital public services from passing into the control of foreigners. *See* LEGAL ASPECTS OF FOREIGN INVESTMENT 746, 955 (W. Friedmann & R. Pugh eds. 1959). *See*

that of a less formal business association.[12] The structure of each venture will be determined by policy goals and local requirements. The focus here is on specific and practically universal contract problems that, as litigated cases indicate,[13] have not received the attention they merit. The conclusion is that the ingenerate flexibility that makes the joint venture useful as an international investment vehicle[14] must be tempered, in the contract, to provide maximal protection of the investors.[15]

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also Ross, *The Foreign Joint Venture Corporation: Some Legal and Business Considerations,* 45 DEN. L.J. 4 (1968); Note, *Joint Venture Corporations: Drafting the Corporate Papers,* 78 HARV. L. REV. 393 (1964), for discussions of corporate joint ventures.

[12] The advantages of a non-incorporated joint venture may include escape from activity restrictions mentioned in note 11 *supra,* and freedom from corporate formalities including those relating to profit sharing. The lack of a formal corporate structure also enhances management flexibility. *See* W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 414-15.

[13] *See, e.g.,* notes 31 & 53 *infra.*

[14] The many advantages of using a joint venture as an international investment vehicle include the ability to: (1) Combine diverse technical abilities; (2) Develop a dependable new source of raw materials; (3) Develop a new market for the materials; (4) Provide on-the-job training of local labor and management; (5) Stimulate "demonstration effects" on the larger business community; (6) Raise capital and spread risk of losses; (7) Acquire existing production facilities; and (8) Promote local political support. *See* W. Friedmann & G. Kalmanoff, *supra* note 1, at 6. *See also* M. STOKES, INTERNATIONAL CONSTRUCTION CONTRACTS 15 (2d ed. 1980). A common example of a joint venture enterprise is a long-term construction project, where a capital-exporting country provides the management personnel, equipment, technical knowledge and perhaps long-term loans; and the recipient country contributes the land, labor, perhaps local building materials, and the "administrative conditions" necessary for the successful completion of the project. *Id.*

[15] This comment is not intended to be comprehensive, nor to exhaust the concerns that should be borne in mind by the draftsman. Some areas critical to international joint venture agreements have been deliberately ignored, among them taxation, antitrust, and problems relating to currency provisions. Survey treatment of these areas is found in NEW YORK UNIVERSITY ANNUAL INSTITUTE ON FEDERAL TAXATION (H. Sellin ed.); W. STRENG, INTERNATIONAL BUSINESS TRANSACTIONS: TAX AND LEGAL HANDBOOK (1978); 16I BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION (J. von Kalinowski ed. 1979); Brodley, *Joint Ventures and the Justice Department's Antitrust Guide for International Operations,* 24 ANTITRUST BULL. 337 (1979).

I. PRELIMINARY CONSIDERATIONS

A. American vs. Foreign Approach to Drafting

Negotiating and drafting contracts between American and non-American parties may generate special problems. Difficulties might arise simply because of training and cultural differences of the parties' counsel.[16]

In general, American lawyers reason inductively. They plan for contingencies, assume a role equal to that of the parties in planning the enterprise, and have as their objective the avoidance of litigation.[17] Civilian lawyers, on the other hand, tend to reason deductively. They cast their agreements in broad legal principles, confine their participation in the enterprise to translating intent into a legal document, and generally seek to facilitate the agreement process.[18]

These doctrinal differences can be substantial, and may lead to misunderstandings during negotiations.[19] Awareness of them should enable the drafting lawyers to range each other's approach, and thus to minimize formation-stage conflict.

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[16] These differences have been widely publicized. *See, e.g.*, van Hecke, *A Civilian Looks at the Common-Law Lawyer*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 5 (W. Reese ed. 1962).

[17] Warren, Monahan & Duhot, *The Role of the Lawyer in International Business Transactions*, 58 A.B.A.J. 181, 182 (1972).

[18] This approach manifests great confidence in the ability of the civil law courts to define the original intent of the parties, and to assign responsibility for problems which have arisen between them. The underlying assumption is that if the parties had to agree on every detail before executing the agreement, no contract would be reached. *Id.*

See also Massel, *The Lawyer's Role in International Trade*, in LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENT 1, 10 (C. Shaw ed. 1962), in which it is noted that American lawyers involved in setting up a foreign business operation discovered that an agreement which would provide a firm basis for litigation would actually interfere with working relationships. Consequently, the ensuing agreement was drafted as a general charter, dependent upon mutual confidence and good will.

[19] This is true despite the Americanization of international contracts, which has occurred over the past few decades. Americans' insistence on contingency planning has probably been a positive force in that it compels the contracting parties to think through their expectations and to minimize future conflicts. Insistence upon planning yields obvious benefits to the parties at the formation stage, and guides them in arranging their relationship to achieve the base level of certainty which is an "indispensable element of international trade." *See* Delaume, *What is an International Contract? An American and a Gallic Dilemma*, 28 INT'L & COMP. L.Q. 258, 271 (1971).

B. Foreign Government as Partner

Certain unique considerations arise when an American client chooses or accepts[20] a foreign government as a venture partner. First, basic negotiations may prove difficult, for the goal of the government will generally be broader than that of the private party, encompassing long-range economic ideals.[21] Second, party autonomy in choice of law may be affected because of the different status of the parties: one is a sovereign power, and the other a national of another state.[22] Third, the power wielded by a government can be either a blessing or a liability, depending upon whether it is used to promote the venture or to obstruct it. The latter could occur if the government exercised its right to unilateral renegotiation[23] or claimed sovereign immunity.[24]

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[20] Government participation in business enterprises is a fact of modern life in the vast majority of nations, both developed and less developed. W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 18-19.

[21] These ideals can include development or modernization of a particular industry, job creation, a more favorable balance of payments, or revenue to government coffers. Thus concern for the venture's profits, as such, will be secondary. For the investor, however, profits are of primary importance. *See* notes 87 & 88 and accompanying text *infra;* W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 2-3.

[22] The traditional view was that contracts between international and private persons had to be governed by a specific municipal law. The current trend, however, seems to encourage free choice of law to accommodate the transaction. For example, under art. 42 of the International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), *opened for signature* Aug. 27, 1975, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, the parties to foreign investment contracts have full autonomy in choosing municipal or international law, or both. *See* note 71 *infra.*

[23] Sanctity of contract has never been immutable in any of the major legal systems. The civil and common law systems recognize that in contracts with governments, renegotiation at the request of the government and, in some cases, unilateral modification by the government in exercise of its sovereign rights, can be acceptable. Asante, *supra* note 4, at 402-08. *See also* notes 98 & 101 and accompanying text *infra.*

[24] In a contract with a foreign government, even if there is a waiver of sovereign immunity, the investor might be denied a forum capable of enforcing (or willing to enforce) a choice of law clause or a judgment against a host state. Although the American party might invoke the jurisdiction of a U.S. district court, 28 U.S.C. § 1330(a), (b) (1976), pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976), the host government may successfully assert the act of state doctrine, which leaves sacrosanct the effectiveness of many acts of foreign sovereigns. This is precisely what happened in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F.

The drafting lawyer can only pinpoint the original terms of venture agreements made between private and international persons. Besides changes in circumstances,[25] what is frequently at issue, particularly when dealing with governments of less developed countries (LDCs),[26] is whether traditional notions of private contract theory will govern an agreement made between an American multinational corporation and the modern equivalent of an African tribal chief.[27] The traditional contract ideals of private bargain, equal bargaining strength and free will may well be missing from these international joint venture agreements.[28]

II. Specific Clauses

A. Governing Language

"The problem of language[29] is by its nature introductory to all

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Supp. 1175 (D.D.C. 1980), *appeal dismissed,* No. 801207 (D.C. Cir. Mar. 20, 1981). *See Judicial Decisions,* 75 Am. J. Int'l L. 148 (1981).

[25] For a discussion of the impact of changed circumstances on international joint venture agreements, see notes 98 & 101 and accompanying text *infra.*

[26] LDCs often require direct equity participation by one of their own public agencies. This investment can take place via development corporations (*e.g.,* the Chilean Corporación de Fomento de la Produccción (Corfo)), or specialized agencies of the government (*e.g.,* Mexico's Petróleos Mexicanos), or directly by the government itself. Foreign contribution may, however, be limited to technical assistance or capital investments. *See* W. Friedmann & G. Kalmanoff, *supra* note 1, at 118-24. In any case, civil servants on the board of directors can be very helpful in stabilizing strained relations between the contracting host state and the investor.

[27] This unsettling comparison was drawn by Asante, *supra* note 4, at 403. The article points out that the multinational company is usually going to have better negotiating skills, greater knowledge, and far more bargaining chips, and that the "private bargain" will often involve the only development of a major natural resource of the host country.

[28] This was especially true of colonial agreements, in which metropolitan companies were given inequitably favorable terms for investing in the colonies.

[29] This section addresses the international joint venture contract written in more than one language. This will usually be the case, for although contracts written in a single language ensure one, definitive text, they do not necessarily reflect full understanding by both parties. This leads to questions of the validity of acceptance at the formation stage. *See* 3 A. Ehrenzweig & E. Jayme, Private International Law 45-46 (1977).

In practice, one language will often be stipulated as controlling, but appropriate translations will be made for the parties not conversant in that language. For a sample clause, see 2 R. Goldscheider, Eckstrom's Licensing in Foreign and Domestic Operations 11-19 (3d ed. rev. 1980).

problems of party autonomy in international law."[30] If there is no governing language clause, the language risk may well fall on the nonconversant party.[31]

In the event of a dispute, the language of the contract document will be looked to first to determine the rights and obligations of the parties, for it is most likely to define the parties' intent as to their agreement. However, the legal language of the *forum* can govern de facto, in spite of the controlling language of the document, or even of the law chosen by the parties.[32] This is because any judicial decision must be based on documents, proof, assertions and reasoning presented in the legal language of the forum. In these circumstances, the governing language clause could be given the effect of a choice of law clause when dealing with issues of interpretation.[33]

Nevertheless, the English-speaking American party should insist that the English language version of the agreement will control, regardless of whether a translation is made for the foreign party.[34] If the contract and related documents are written in

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[30] deVries, *Choice of Language in International Contracts*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 14, 14 (W. Reese ed. 1962).

[31] In Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975), an agreement stipulated that all disputes between the parties, a German corporation and one of its managers, a New York citizen, would be submitted to a German forum. The plaintiff manager argued that since the clause was written in German, a language in which he was not conversant, he should not be bound by the forum clause. The court did not agree and ordered the clause enforced, since the plaintiff had been orally informed of its content and had an opportunity to assess its meaning. *Id.* at 365-68.

[32] Similarly, the use of nontransferable terminology can create an implied choice of law. For example, the use of the phrase "Act of God" has been held to imply that English law was intended to govern the agreement. 68 Reichsgericht in Zivilsachen [RGZ] 203, 209 (W. Ger. 1908); M. WOLFF, PRIVATE INTERNATIONAL LAW 427 (2d ed. 1950). So too, if the language chosen to control a contract is confined to a particular country's territory, such as Finnish or Japanese, the language choice will probably be an important factor in an implied choice of that country's law. deVries, *supra* note 30, at 19.

[33] Note that there may be no freedom to elect. "Documents to be recorded, registered, or filed in governmental or notarial offices, powers of attorney for use in a particular country, corporate documents, normally are subject to a definite language requirement." *Id.* at 16.

[34] The actual language stipulated could be the result of indifference or convenience, as well as the manifest bargaining position of the parties. In the first or second of these circumstances it would not necessarily reflect the true intent of the parties. Nonetheless, the governing language clearly should be that with which clients and counsel are most familiar.

English and interpreted according to English language norms, there is a smaller margin for misunderstanding of terms on the part of the Americans, as well as greater certainty of outcome should the American venturer be forced to test the terms of the agreement in a court or arbitration proceeding. For the greatest degree of certainty, controlling language should also be stipulated for correspondence relating to the negotiations,[35] execution of the agreement, and any procedural notice requirements.

B. Governing Law

There are at least three potential actors in every contract setting. They are the contracting parties themselves and the entity called upon to determine any disputes the co-venturers are unable to resolve. The purpose of the controlling law clause is, again, certainty: it hedges the enforcement bet by trying to predict accurately the outcome of conflicts.[36] This prescription can only be made after careful research and analysis of the domestic

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[35] This is because there are very few exclusionary rules of evidence in civilian law. *See generally* R. SCHLESINGER, COMPARATIVE LAW 397 (4th ed. 1980). The common law parol evidence rule, for example, is not found in the civil law. Thus, matters which occurred prior to or contemporaneously with the signing of the venture agreement are freely admissible. Such documentation could be determinative of the parties' intentions, and thus could affect the outcome of any dispute over contract terms.

For reference to drafting contracts involving the U.S.S.R. and European communist countries, see Hoya & Stein, *Drafting Contracts in U.S.-Soviet Trade*, 7 L. & POL'Y INT'L BUS. 1057, 1057-63 (1975).

[36] This is especially true if the parties have agreed to a stipulation of validity clause. These clauses provide that if any term of the contract is inconsistent with the applicable law, that term will, "to the extent of such inconsistency and no further, be null and void." Such provisions also state that in the event of total or partial invalidity of such a term, the other terms and conditions of the agreement will remain in force. 1 G. DELAUME, *supra* note 1, § 4.15, at 49-50. *See* note 93 *infra*. For a model clause, see R. GOLDSCHEIDER, *supra* note 29, at 14-87.

The German civil code, however, BÜRGERLICHES GESETZBUCH [BGB] § 139 (W. Ger.) provides that partial invalidity of a contract results in total invalidity of the agreement, unless it must be assumed (or proven by the party seeking enforcement) that the parties would have executed the transaction even without the offending clause. There are no mechanical blue-pencil tests in this area of German law, and all of the circumstances surrounding the transaction are considered. Nullity is the usual result. *See* 1 E. COHN, MANUAL OF GERMAN LAW 79-80 (2d ed. 1968).

law with which the transaction is connected.[37]

There are venture situations where any choice of law will be obviated because the circumstances surrounding the agreement dictate the applicable law. This could occur if the host state requires dispute resolution according to its laws, a likely event if it is a venture partner.[38] One way to finesse such a requirement is to draft the contract in a manner which will discourage litigation.[39] The goal is to place the burden of litigation and proof of foreign law on the other party. This becomes both a bargaining chip during negotiations and a stabilizing influence during performance.

The absence of a choice of law clause may indicate the parties' inability to agree.[40] Some joint venture parties actually prefer

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[37] The obvious advantage of stipulating the governing substantive law is to obtain certainty in contracts beset by conflict laws. The connection between the transaction and the stipulated law need only meet the "reasonable relation" standard. The assumption is that parties to international contracts choose their applicable law with care. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, Comment f (1971): "Contracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so." For a discussion of the reasonable relation test, see 1 G. DELAUME, *supra* note 1, § 4.04, at 14, where it is argued that even this requirement has become a "rhetorical question."

[38] *See* M. STOKES, *supra* note 14, at 36. Almost all contracts concluded with the former Shah's government of Iran, or with its agencies, were subject to the law of Iran. This is the case in most Middle Eastern countries. Borden, *Legal Counseling in the Middle East: Particular Lessons from Iran,* 14 INT'L LAW. 545, 548 (1980).

[39] One way to do this is to stipulate that the agreement will be governed by the laws of the host country. This is complemented with a reciprocal venue provision (forum selection) requiring the U.S. partner to bring any cause of action in the host country, and the foreign partner to bring suit in the U.S. This tactic is appealing in its symmetry of rights and obligations; and the consequent expense and inconvenience of foreign litigation, proof of foreign law, and problems relating to the enforcement of foreign judgments provide real disincentives to bringing suit. *See* Berens, *Foreign Ventures—A Legal Anatomy,* 26 BUS. LAW. 1527, 1543 (1971).

Parenthetically, this arrangement can also be used in an arbitration clause, although proof of governing law in an arbitration situation is usually not an issue. This is because arbitrators often seek resolution without resort to a specific municipal law, using instead "general principles" such as commercial or trade customs or usages. *See* van Flecke, *Choice-of-Law Provisions in European Contracts,* in W. Reese, *supra* note 16, at 44, 49. *See also* note 80 and accompanying text *infra.*

[40] *See* M. STOKES, *supra* note 14, at 32. Alternatively, it could point to the parties' reliance on arbitration methods.

not to stipulate any governing law, opting instead to settle any disputes privately.[41] If this proves ineffective, the law governing the contract is inferred from the conduct of the parties and the contract itself.[42]

Express controlling law clauses are generally recognized,[43] albeit with many restrictions as to scope.[44] Public policy may be raised to defeat the choice, however, especially when it was made to avoid the law of the forum,[45] or used in a contract of

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[41] This is especially true in Asian countries, where *inter sese* resolution is of great social and ethical importance. "It is better to be vexed to death than to bring a lawsuit," according to an ancient Chinese proverb. Smith, *Standard Form Contracts in the International Commercial Transactions of the People's Republic of China,* 21 INT'L & COMP. L.Q. 133, 138 (1972). *See also* Hsiao, *Chinese Trade Contracts,* in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 135, 137 (H. Holtzmann ed. 1976).

[42] The law of the forum is often applied, probably, for reasons of convenience. Silence has been construed as an assumption by the parties that forum law will be acceptable. El Hoss Eng'r & Transp. Co. v. American Independent Oil Co., 183 F. Supp. 394, 399 (S.D.N.Y. 1960), *rev'd on other grounds,* 289 F.2d 346 (2d Cir.), *cert. denied,* 368 U.S. 837 (1961). Where the parties do not attempt to prove foreign law, the application of forum law has also been implied. San Rafael Compania Naviera, S.A. v. American Smelting & Ref. Co., 327 F.2d 581, 587 (9th Cir. 1964). U.S. courts seem to favor the forum of the site of contract performance. Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493, 496 (5th Cir. 1973).

[43] *See, e.g.,* Introductory Law to the CODICE CIVILE [C.C.] (It.) art. 25(1) (1925); CÓDIGO CIVIL (Sp.) art. 10(5) (1974). For comparative surveys, see 1 G. DELAUME, *supra* note 1, at ch. 1; Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach,* 12 HARV. INT'L L.J. 1 (1971) (with references to foreign case law).

For illustrative U.S. cases, see Meltzer v. Crescent Leaseholds, Ltd., 315 F. Supp. 142, (S.D.N.Y. 1970), *aff'd,* 442 F.2d 293 (2d Cir. 1971); B.M. Heede, Inc. v. West India Mach. & Supply Co., 272 F. Supp. 236 (S.D.N.Y. 1967); Boole v. Union Marine Ins. Co., 52 Cal. App. 207, 198 P. 416 (1st Dist. 1921).

[44] Such restrictions include territoriality and vested rights; status and derivative rights (commercial agreements and third party beneficiaries); adhesion contracts; government contracts, including public international law; and international cooperation, including application of general principles regarding comity and conflicts in obeisance. 3 A. EHRENZWEIG & E. JAYME, *supra* note 29, at 19-29.

[45] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971):

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. . . .

A unique feature of international joint ventures is "the frequency with which

adhesion.[46]

Counsel may find severability of contract clauses useful when trying to determine the best governing law for the agreement. Using this approach, a contract may stipulate the parties' choice of applicable law, but remove one or more specific clauses from its scope. For example, corporate authority to act would be determined by the laws of the state of incorporation, not by the stipulated governing law. This segregation of issues, or *depacage,* is common in agreements between private and international persons.[47] Particular issues may also be removed de facto, as when complying with licensing agreements or obtaining government approvals are conditions to concluding the agreement. These tasks must be accomplished in conformance with the regulations of the host state.[48]

C. Choice of Forum

Since conflicts rules are not uniform, choice of law clauses are usually complemented with appropriate forum selections.[49] The chosen forum does not have to be that usually associated with the stipulated governing law,[50] nor must the connection among

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unregistered - and perhaps unenforceable - side agreements are part of [the bargain]." Berens, *supra* note 39, at 1542. These agreements reflect the real, as opposed to the ostensible, understanding between private-for-profit parties, and are necessitated by restrictive host country laws. In states which do not allow equity participation, for example, such as Eastern European countries, a de facto equity share can be arranged by a side agreement providing for a percentage of gross sales to the non-local partner over a period of years. *See* R. KRETSCHMAR & R. FOOR, THE POTENTIAL FOR JOINT VENTURES IN EASTERN EUROPE 103 (1972). Since the purpose of these agreements is often to circumvent host country laws, public policy may be raised to defeat them.

[46] *See* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 206 (2d Cir. 1955), in which it was noted that, in an adhesion contract, there can be no freely chosen applicable law.

[47] 1 G. DELAUME, *supra* note 1, § 1.03, at 12-16.

[48] *Id.* Dépacage is acknowledged in art. 3(1) of the Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, which authorizes the parties to "select the law applicable to the whole or a part only of the contract." 23 O.J. EUR. COMM. (No. L 266) 1, 2 (1980). *See* Bennett, *The Draft Convention on the Law Applicable to Contractual Obligations,* 17 COMMON MKT. L. REV. 269, 269-77 (1980).

[49] For comparative surveys of choice of forum clauses, see generally 1 G. DELAUME, *supra* note 1, at ch. 6; Gilbert, *Choice of Forum Clauses in International and Interstate Contracts,* 65 KY. L.J. 1 (1976).

[50] For example, choosing Germany as a forum does not necessitate choosing

the parties, the transaction and the forum be more than reasonable.[51] Even the United States has come to approve the parties' choice of a neutral forum,[52] one lacking a substantial relationship to the co-venturers.[53] Courts will not, however, enforce forum provisions relating solely to domestic, rather than international, transactions.[54]

The parties' choice of forum, or prorogation, is generally ac-

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German law as the law governing the contract. However, under some systems of law, including that of Germany, a forum selection clause is characterized as a procedural, not a substantive, concern. Thus it is subject to the *lex fori*, at least when the validity or effect of the agreement is disputed in a jurisdiction other than that designated as the proper forum. *See* Pryles, *Comparative Aspects of Prorogation and Arbitration Agreements*, 25 INT'L & COMP. L.Q. 543, 544-45 (1976).

[51] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971):

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . the chosen state has no substantial relationship to the parties or the transaction *and there is no other reasonable basis for the parties' choice*. . . . (emphasis added)

Cf. the famous dictum of Lord Wright in Vita Food Prods. Inc., v. Unus Shipping Co. [1939] A.C. 277, 290 (P.C.): "Connection with English law is not as a matter of principle essential." *But see* CÓDIGO CIVIL (Sp.) art. 10(5) (1974) which requires that the law chosen by the parties have some connection with the legal transaction.

[52] For an historical perspective of American courts' policy toward ouster, see Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49 (1972).

[53] The principal United States case upholding a neutral choice of forum provision is The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). As a compromise, the German and American parties to this contract chose the Courts of Justice in London as their forum. At issue in the case was the validity of an exculpatory negligence clause, a provision clearly void in a United States court, but valid under English law. Since there was no governing law provision, it was clear that the law of the chosen forum would apply. Ignoring the forum selection clause, the American party filed a negligence suit in a U.S. district court. The U.S. Supreme Court ultimately validated the forum selection clause, and upheld the dismissal of the suit. It was an expensive lesson: the amount at issue was $3.5 million. Although *Zapata's* precedent is limited because it is a federal admiralty decision, state courts have been influenced by its persuasive force. *See, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495, 551 P.2d 1206, 1208-09, 131 Cal. Rptr. 374, 376-77 (1976).

[54] *See, e.g.*, Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953 (3d Cir. 1978), in which the court noted that the entire transaction in effect had been performed in the U.S., and thus held that the forum provision (Germany or option of defendant Demag) was unreasonable, and denied the clause effect. *Id.* at 964-65, n.18.

cepted by both civil and common law courts.[55] A more difficult problem arises when the parties attempt to oust other forums which may have concurrent jurisdiction on other bases, such as domicile. Although the majority of civil law courts give effect to these derogation clauses,[56] as does the United States,[57] they are vulnerable to public policy objections.[58] In addition, if the forum clause is found to be oppressive or unfair, the clause may be invalidated on public policy grounds.[59]

The Model Choice of Forum Act, drafted by the National Conference on Uniform State Laws,[60] is an excellent source of information on current forum selection concerns. The Act provides, subject to certain limitations, that a court chosen by a forum selection clause must entertain the ensuing cause of action; and that courts not chosen as the appropriate forum must refuse to entertain the action. The courts are given, however, a wide discretion in following these directives.[61] This synopsis of the Model Act points, again, to the necessity of careful drafting: forum selection clauses should both confer jurisdiction on a selected court and attempt to effectively exclude suits in other tribunals.[62]

D. Arbitration

Another area which should be explored when drafting the in-

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[55] R. SCHLESINGER, *supra* note 35, at 366-69. Also, if the forum clause is exclusive, not giving the parties a second choice, "the effectiveness of the choice of governing law and, within that law, of the economy of the contract, is greatly enhanced." 1 G. DELAUME, *supra* note 1, § 1.01, at 9.

[56] Pryles, *supra* note 50, at 568.

[57] *See* note 53 *supra*.

[58] The parties can neither confer jurisdiction on a court rightfully refusing it, nor take away from a court its rightful adjudicatory power. The as yet unsettled issue is the effectiveness of the forum clause, i.e., whether the court selected will exercise its jurisdiction in the manner desired by the parties. *See generally* Kling, *Greater Certainty in International Transactions Through Choice of Forum?*, 69 AM. J. INT'L L. 366 (1975).

[59] *See* Lagerman, *Choice of Forum Clauses in International Contracts: What is Unjust and Unreasonable?*, 12 INT'L LAW. 779, 785-86 (1978).

[60] The Uniform Law Commissioners' Model Choice of Forum Act, approved in 1968, is reprinted in Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292, 294-96 (1969).

[61] *Id.* at 292.

[62] Pryles, *supra* note 50, at 581. For model forum selection clauses, see 1 G. DELAUME, *supra* note 1, § 6.14, at 41-48.

ternational joint venture agreement is the advisability of providing for arbitration.[63] This means of resolution has become a desirable method of settling international investment disputes because, in a broad sense, it recognizes that things other than obstructive acts of the parties can create conflict.[64] More specifically, arbitration eliminates the possibility of hostility or incompetence in a host country's court system, and can conveniently solve any *ex ante* conflict between the parties in regard to forum shopping. Moreover, use of the arbitration process implicitly recognizes that there is no obvious jurisdiction competent to settle a dispute complicated by status differences, i.e., where the contract is between a sovereign nation and a foreign investor.[65]

Although many international investment contracts provide for arbitration,[66] and the process is favored by the United States judiciary,[67] counsel should be aware of certain disadvantages which inhere in the arbitration process. The first is that arbitration is not necessarily faster than a court decision.[68] Second,

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[63] Analysis of the subject is essentially limited here to current drafting concerns. For survey treatment of arbitration, see 2 G. DELAUME, *supra* note 1, at ch. 13; M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968 & Cum. Supp. 1979).

[64] Arbitration removes the parties from a court system approach, which is geared toward fault analysis and remedies for an irreparably breached contract. Arbitrators, experts in their commercial fields, have a wider discretion in finding solutions than do courts. They are not limited to deciding the case on the issue of the errancy of the parties, but can render what are, in effect, advisory opinions.

[65] A neutral forum in which both the host state and foreign investor can bring claims is the primary purpose of an arbitration clause in an economic development contract. 1 G. DELAUME, *supra* note 1, § 1.13, at 40.

A private American co-venturer might well hesitate to subject his interests to the questionable impartiality of a host state's court system. Conversely, the host state might be reluctant to use its own court system in seeking remedy for an investment dispute for fear that a judgment favorable to it would repel other investors. *See* Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367, 370-71 (1979).

[66] This at least is implied in Schlesinger's observation that there is "a worldwide trend among business concerns increasingly to choose arbitration as the method by which disputes arising in international trade transactions should be settled." R. SCHLESINGER, *supra* note 35, at 436.

[67] "The United States favors arbitration clauses in contracts touching upon international commerce." Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207, 213 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 293 (2d Cir. 1977). *See also* note 75 *infra*.

[68] As Borden notes, citing the example of Middle Eastern countries, getting

there is no appeal from an award.[69] Third, choosing an arbitral forum[70] is a complex decision because, subject to applicable treaties,[71] the validity and effect of the arbitration provision depend on the law of the country where the arbitration is anchored.[72] Thus counsel must research the relevant domestic and conflict of laws rules of the situs,[73] as well as applicable treaties.[74] At issue is whether the courts of the arbitral forum will recognize the validity of the arbitration agreement and, consequently, refuse to entertain a court action. If the answer is affirmative, it must then be determined whether the forum courts will confirm an award and aid in its enforcement.[75]

"bogged down" in arbitration is as slow as going to court. Borden, *supra* note 38, at 559.

[69] Juenger, *supra* note 52, at 51.

[70] An arbitral institution may be stipulated as the situs of an arbitration proceeding. Counsel must then be aware of the rules of the institution. The Rules of the International Chamber of Commerce and the American Arbitration Association, among others, can be found in 2 CORPORATE COUNSEL'S ANNUAL 1226-75 (J. Spires & E. Burchell eds. 1980).

[71] The United States is a party, for example, to the 1965 Convention, sponsored by the World Bank, which established the International Centre for the Settlement of Investment Disputes (ICSID). *See* note 22 *supra*. The avowed purpose of the Convention and the ICSID is to provide facilities for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states. Sutherland, *supra* note 65, at 378. *See also* M. DOMKE, *supra* note 63, at § 18.02.

In addition, treaties of Friendship, Commerce and Navigation (FCN Treaties) are often used to establish the right of nationals of signatories to engage in business or to have access to the domestic courts of other participating states. These treaties, reflecting basic economic policy, have been concluded by most industrial nations "with each of their opposite numbers in trade and other economic affairs." *See* 1 L. LAZAR, TRANSNATIONAL ECONOMIC AND MONETARY LAW: TRANSACTIONS AND CONTRACTS 408-09 (1977).

[72] R. SCHLESINGER, *supra* note 35, at 437.

[73] *Id.* at 438 n.6.

[74] The U.S. Department of State, Office of the Legal Adviser, annually publishes TREATIES IN FORCE, Pub. No. 8968, a listing with précis of treaties and other international agreements to which the United States is a party.

[75] The primary mechanism for enforcement of arbitration awards involving American nationals is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 330 U.N.T.S. 38. The U.S., one of almost 60 participating nations, ratified the Convention as of Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997. Congress implemented it in ch. 2 of the U.S. Arbitration Act. 9 U.S.C. §§ 201-208 (1976) (amended 1980). The Convention "shall be enforced in United States courts in accordance with this chapter." *Id.* at § 201.

Once the relevant arbitration laws have been researched, and the forum chosen, a set of arbitration rules[76] or governing law should be agreed upon.[77] The trend appears to be the stipulation of host country law.[78] It is customary to apply the selected law as it exists from time to time, and not merely as it stood at the time of the contract.[79] "Internationalizing" the contract, i.e., providing that arbitrators will base their decisions on equity and the general legal principles recognized by civilized nations, appears to be losing favor with drafting lawyers.[80]

This language was cited in Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1973). *Scherk* involved a contract between an American company and a German citizen, and provided for arbitration of disputes in Paris. A dispute arose, but arbitration was resisted by Alberto-Culver. In enforcing the arbitration clause, the Supreme Court stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . .

Id. at 516-17, *cited in* Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207, 214 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 293 (2d Cir. 1977).

[76] The ICSID Arbitration Rules are often invoked in disputes over international joint venture agreements, although they may not be used to supersede specific contract provisions. *See* Sutherland, *supra* note 65, at 391.

[77] For a complete survey of current arbitration rules and arbitral forums, see *International Arbitration: A Symposium*, 5 N.C. J. INT'L L. & COM. REG. 170-245 (1980).

[78] 1 G. DELAUME, *supra* note 1, § 1.13, at 38.

[79] *See generally* Spiro, *The Incidence of Time in the Conflict of Laws*, 9 INT'L & COMP. L.Q. 357 (1960). This is not true, however, of international contract disputes settled under French law, a municipal system indifferent to conflict niceties and greatly interested in strict performance of contract terms. For further discussion of the impact of changes in applicable law on the validity of contracts, see notes 92-102, especially note 100, and accompanying text *infra*.

[80] 1 G. DELAUME, *supra* note 1, § 1.13, at 38. *But see* note 39 *supra*. Although a stipulation of this kind would give great flexibility to the arbitrators in decision making, and ostensibly promote fairness by not favoring any specific municipal law, consensus on the inclusive principles might be difficult to achieve, and accurate prediction of the outcome of disputes would be extremely difficult. Also, because of conflict laws discussed in text accompanying notes 72 & 73 *supra*, a "denationalizing" clause would not always be effective

The scope of the arbitration clause must also be decided upon. Arbitration should be provided for both disputes arising out of the contract,[81] and for disputes regarding the validity of the contract itself.[82] Counsel might also consider and provide for specific situations where arbitration will be mandated, as where the shareholders are deadlocked, or where the venture itself is threatened by or suffering irreparable injury. Finally, attention should be given to whether the arbitrators[83] will have the authority to order the dissolution of the venture.

E. Government Approvals

Whether the other party to the international joint venture is a private foreign concern or a foreign government, official state approval is usually prerequisite to beginning performance. This is almost universally the case in LDCs.[84]

During negotiations with the officials of the local government, the American party, again, should recognize that the objectives of the private-for-profit venture and the host government may not be the same *vis-à-vis* the business enterprise.[85] Given the probability of political and legal change, especially in developing

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to remove the contract from domestic law. *See* 1 G. DELAUME, *supra* note 1, § 1.13, at 51.

[81] The clause should cover probable friction points, ranging from questions concerning obligations to the resolution of outright disputes. For a sample arbitration clause, see 1 R. GOLDSCHEIDER, *supra* note 29, at 11-73.

[82] Fales, *International Arbitration of Private Disputes - The Draftsman's Dilemma*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 313, 330 (V. Cameron ed. 1971).

[83] The arbitration clause should also, of course, provide the number and identities of the arbiters. The parties may concur in the choice of a single arbitrator. Alternatively, the issue can be referred to two arbitrators, one to be appointed by each party. Usually, the arbitrators will then choose and appoint an umpire. Many arbitration clauses specify the nationality of the single arbitrator or umpire. *See* 3 H. STITT & M. MEEK, INTERNATIONAL TRANSACTIONS 475 (O'Brien's Encyclopedia of Forms, 10th ed. n.d.) This is because in some forums, foreign citizenship of an arbitrator justifies judicial refusal to confirm an award. Bayitch, *Treaty Law of Private Arbitration*, 10 ARB. J. 188, 192 (1955).

[84] "Every government has the means to lay down the terms of approval of a foreign investment. . . ." W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 381. The necessity for and mechanics of obtaining government approvals have been widely publicized. For specific examples, see W. Friedmann & G. Kalmanoff, *supra* note 1, at 187-257.

[85] *See* note 21 and accompanying text *supra*.

states,[86] the negotiating investor needs concessions and guarantees from the host government regarding the continuation of the venture.[87] These agreements can be directly related to the required approvals. For example, it has been suggested that for ventures in countries where economic and political turmoil might erupt, such as that recently experienced in Iran, a special government approval may be necessary. This would entail stipulating that the local contracting party or government agency must acquire the necessary approvals for the foreign partner to expatriate its profits.[88]

The more common approvals may include official authorizations of venture activity at the national, provincial, or municipal level. They can entail seeking permission from the appropriate council (such as the council of ministers), ministry (for example the ministry of industry and commerce), and any foreign exchange institute of the host state.[89] Because they may be both costly and time-consuming to obtain, responsibility for their acquisition should be specifically assigned in the contract.[90] The agreement may be held in abeyance and its effective date

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[86] *See* W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 410; and note 94 *infra*.

[87] These will be in regard to, among other things, taxation; taxation of dividends and proceeds flowing from the liquidation of assets; import and export restrictions if the subject matter of the international joint venture is a product; government regulation of expatriates, including those affecting work permits and personal taxation; dispute resolution; changes in legislation; and expropriation in the case of nationalization of the venture. These special guarantees must often be ratified by special legislation of the national assembly. Warren, Monahan & Duhot, *supra* note 17, at 184. They may also be covered by treaty or convention. *See* notes 71 & 74 *supra*.

[88] The agreement might also provide that the local concern will assume any damages the foreign company suffers if the requisite approvals are not granted. Borden, *supra* note 38, at 555-56.

[89] In the People's Republic of China, for example, authorization for a joint venture must be obtained from the Foreign Investment (Control) Commission. Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, July 1, 1979, art. 3. If authorized, the venture must be registered with the General Administration for Industry and Commerce. Reynolds, *The Joint Venture Law of the People's Republic of China: Preliminary Observations*, 14 INT'L LAW. 31, 37 (1980).

The International Chamber of Commerce, international industry trade groups or a civil law notary may be able to provide a listing of the necessary approvals. *See also* note 107 and accompanying text *infra*.

[90] For a model government approvals clause, see R. GOLDSCHEIDER, *supra* note 29, at 14-85.

delayed until such approvals are secured.[91]

F. Renegotiation and Stability

Another contract clause that may protect the entrepreneur is one providing for periodic renegotiation of contract terms. Renegotiation provisions are becoming a typical feature of contemporary large-scale and long-term investment contracts involving natural resources.[92] These provisions are analogous to a circuit breaker in an electrical system, for while darkness may descend temporarily, the structure itself will be spared.[93]

Contemplation of a renegotiation clause arises most often when dealing with international joint ventures in LDCs.[94] It becomes especially germane when the transaction involves the long-term exploitation[95] of a major natural resource or use of a

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[91] One method of ensuring performance by the party responsible is to stipulate that the other party at its sole option may terminate the agreement if the appropriate approvals are not obtained from the host government. Alternatively, acquisition of government approvals may be set out as a condition precedent in the contract. The agreement will thus stipulate that the contract will become binding and effective only after appropriate authorizations have been obtained. *See* 3 H. STITT & M. MEEK, *supra* note 83, at 476.

[92] *See* Asante, *supra* note 4, at 416-17.

[93] This raises the issue of validity, discussed in note 36 *supra*. In many international joint venture contracts, a primary consideration will be whether an offensive term, if stricken, renders the contract valueless or merely restricts its sphere of operation. Strict adherence to a stipulation of validity clause might force continuation of a contract whose balance of rights and obligations has been fundamentally altered. In practice, especially where intent cannot be determined, courts show an inclination to uphold a contract hobbled by an obnoxious clause. *See* O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS 93 (1937).

[94] This is due to the innate instability of developing countries, which results from constantly changing political, economic and social conditions. Bargaining positions change. Examples include the Middle Eastern countries, such as Saudi Arabia, where the discovery and extraction of petroleum reserves has produced amazing changes in the former economic and political order. For discussion of renegotiation clauses in contracts with developing nations, see Comment, *International Natural Resource Exploitation Contracts, Can They Be Drafted to Survive in Developing Nations?*, 7 WILLAMETTE L.J. 305 (1971).

[95] Given the huge capital investment often required to finance this type of venture, most companies would be loathe to risk a short-term contract. Governments of developing nations have apparently found that joint ventures are an "efficient means" of asserting permanent sovereignty over their natural resources. W. FRIEDMANN & J. BÉGUIN, *supra* note 8, at 410.

vital national utility,[96] common nuclei of international joint ventures. In such circumstances, the agreement is no longer a creation of the marketplace, but an instrument of public policy.[97] As such, the host government may feel free to attempt rectification of the contract on the ground of inequity.[98]

To prevent this, many foreign investors insist upon a stipulation of stability clause. This freezes the essential provisions of the agreement by precluding any legislative or administrative act which would otherwise alter the terms of the agreement or the legal environment of the transaction.[99] The memorialized

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[96] Typical examples of this sort of development venture involve electrical power and telecommunications, as well as the extraction of natural resources. Of course, where the means of production are owned by the state, there is no uncertainty about future nationalization; the business is already "nationalized." R. KRETSCHMAR & R. FOOR, *supra* note 45, at viii.

[97] Asante, *supra* note 4, at 403. *See also* Zakariya, *Changed Circumstances and the Continued Validity of Mineral Development Contracts*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 263, 264 (K. Hossain ed. 1980).

[98] In seeking to change the terms of an existing international joint venture, a host state can resort to the internationally accepted legal principle *clausula rebus sic stantibus*, which allows the revision of international agreements on the basis of a fundamental change in circumstances. J. BRIERLY, THE LAW OF NATIONS 335-39 (6th ed. 1963). *See* note 23 *supra*. This unilateral change may not be advantageous to the private foreign investor, although the assertion of sovereign right to change contract terms might provide an incentive for renegotiation. If it does not, the economic relationship between the parties will surely deteriorate.

International joint venture agreements should not necessarily be construed as "international contracts," and thus automatically subject to the principles and traditions surrounding international law. Although capital-exporting interests are also quite fond of elevating their agreements to international status to take advantage of the fundamental international tenet of *pacta sunt servanda* (agreements must be kept at all costs), this contract remedy is often unacceptable in its rigidity, and can be countered by *rebus sic stantibus*, discussed in this note *supra*. *See generallly* INTERNATIONAL AND COMPARATIVE LAW CENTER, SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTORS (1964).

[99] A private investor, before committing substantial resources to the business venture, will frequently insist that the host government detail the full range of fiscal impositions probable or contemplated by the host state, to ensure stability and predictability. The stipulation of stability clause is the most common mechanism for these desired cast-iron guarantees. Of particular concern to the drafting lawyer is the prohibition of tax rate increases or amendments to corporation or tax laws; fiscal changes in the general industrial or commercial sectors; and expropriation, nationalization or any other form of in-

time is usually the date the agreement is executed.[100]

This rigid arrangement, for all of its attractiveness to the investor, cannot realistically be expected to forestall renegotiation given the fluidity of the current international economic, political and legal environment. Reality dictates that change is a normal feature of transnational business ventures. By providing for periodic renegotiation, the foreign investor can save his business venture from abrogation or nationalization, especially if changed economic conditions have rendered the agreement patently inequitable.[101] Clearly, renegotiation[102] will usually be preferable to nationalization.

III. Notarial Form Requirements

A final consideration, important in both the formation and the

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tervention in the business venture. Asante, *supra* note 4, at 409.

[100] For a sample clause prohibiting "government interference," see 1 R. Goldscheider, *supra* note 29, at 14-75. Stabilization clauses in contracts between a sovereign and a private foreign investor provide the exception to the general rule that the applicable law applies as it exists over time, not as it stands at the formation off the contract. 1 G. Delaume, *supra* note 1, § 1.01, at 2. *See also* text accompanying note 79 *supra*.

[101] Absent a renegotiation clause, the investor is under no legal obligation to revise the agreement. Asante suggests that this gives the advantage to the investor when the host government requests renegotiation, because the investor is under no legal obligation to comply, and can drag out the renegotiations interminably. Asante, *supra* note 4, at 412. The apparent counterargument is that governments have an internationally recognized unilateral right to change the terms of existing agreements. *Id.* at 406-07. *See also* notes 23 & 98 *supra*.

[102] Some investment agreements use general review and renegotiation clauses, providing conditions under which the entire bargain may be renegotiated. A stipulation of good faith review is an integral part of such clauses. For example, the renegotiation clause in the 1974 agreement between the Government of Papua New Guinea and Bougainville Copper Ltd. provided:

> That the parties would meet at intervals of seven years to consider in good faith whether the Agreement was operating fairly to each of them and, if not, to use their best endeavors to agree upon such changes to the Agreement as may be requisite in that regard.

Item IDV of the Heads of Agreement of June 6, 1974, *reprinted in* Asante, *supra* note 4, at 416-17.

Renegotiation could also be required by making provision for review, at the request of either side and after stated intervals, of various clauses in the agreement. Specific contingencies, such as change in the financial and economic circumstances of the venture, or changes in its operating or marketing conditions (which materially affect the economic basis of the agreement), would trigger the review.

execution of international joint venture contracts, is the notarial form requirement present in most civil law countries.[103] Notarial requirements can easily be overlooked by American counsel, who is unlikely to be aware of the three major duties of the civil law notary: authenticating signatures on a private writing,[104] counseling the parties in regard to a transaction, and drafting instruments in the form prescribed by the state.[105] It is the last of these, the protocol, which is of particularly grave importance to the venture participants, for the sanction for noncompliance is invalidity[106] of the agreement.

Before examining this consequence directly, however, it is useful to clarify the notary's advisory function, which is a mandatory part of the notarial service, and leads to the execution of the protocol. In his counseling capacity, the notary is under an affirmative duty to advise all parties to the transaction of its legal, tax and personal consequences.[107] If one of the parties is unsophisticated or lacks experience, the notary must prevent any overreaching.[108] Although such advice and assistance

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[103] Notarial form is usually required when the document serves as the basis for entry in one of the continental public registers such as the commercial register; for long-term financial commitments; and for transfers of title to land. Such a protocol is usually required for the formation of a corporation, as well as to effectuate charter amendments and actions taken at shareholder meetings. *See* R. SCHLESINGER, *supra* note 35, at 19, 757.

[104] Authenticating signatures is not unlike the service offered by American notaries. The general manager of a GmbH, for instance, must sign his name in the presence of a notary. Since German corporations do not use seals, "everything depends on the signature(s) of person(s) representing the company." R. TROTT, GERMANY: PRACTICAL LEGAL GUIDE ON COSTS AND FEES, COURT PROCEEDINGS AND COMMERCIAL LAW 118 (1977).

[105] Drafting notarial protocols is a practice unknown to the common law. In France, this activity is an *acte notarie*, and the document an *acte authentique*. CODE CIVIL [C. CIV.] art. 1317 (Fr.). In Germany, the act is a *notarielle Urkunde* and the documents are *oeffentliche Urkunde*. BGB § 415 (W. Ger.).

[106] The meaning of the words invalid, void and voidable vary markedly among legal systems and languages. Rather than attempting to force strict common law constructs on their foreign counterparts, counsel may best be served by thinking in terms of *unenforceability* of contracts lacking the requisite notarial form.

[107] One of the counseling functions of the civil law notary is to advise the parties whether any third party or public authority approvals are required. R. SCHESINGER, *supra* note 35, at 20. *See also* notes 84-91 and accompanying text *supra*.

[108] R. SCHLESINGER, *supra* note 35, at 20.

are of obvious benefit to the venturers, the civil law considers them an invaluable safeguard of the state's interest in promoting actual compliance with the relevant statutes and regulations.[109] The combination of counseling and protocol works to ensure that this interest is met.

It is largely for this reason that the sanction for noncompliance is severe.[110] As stated, the penalty for contracts not made in notarial form is that they are void.[111] Similarly, failure to have secured notarial form may be a defense to enforcement of

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[109] The policy reasons behind the requirement are given in Schlesinger, *The Notary and the Formal Contract in Civil Law,* in 1941 REPORT OF THE NEW YORK LAW REVISION COMMISSION 403, 407 app.:

> The *reasons* for which legislators in civil law countries have prescribed that formality and have made it a prerequisite for the validity of provability of certain types of transactions, rarely appear on the face of the statutes. But courts and scholars agree that nearly always one of the following rationes, or sometimes a combination of several of them, leads to the requirement of an acte authentique:
>
> (1) To assure due deliberation and liberty of decision.
>
> (2) To prevent the parties from entering into certain types of transactions without legal advice.
>
> (3) To compel the parties to have certain types of documents drawn up by a properly qualified person.
>
> (4) To preclude certain defenses by the creation *and preservation* of a special kind of evidence.
>
> (5) To facilitate execution.
>
> (6) To assure certainty and sometimes publicity in the public interest, particularly in those frequent cases where the document is to serve as the basis for an entry in a public register.
>
> (7) To assume the fulfilment of certain fiscal duties.

[110] For example, in Germany, foreign transaction and notarization of a GmbH shareholder resolution have been declared invalid. The decisions were based on the lack of competence of foreign notaries to advise on matters peculiar to German law. R. TROTT, *supra* note 104, at 116. *See also* note 116 *infra.*

The policy reason behind this requirement is to limit freedom of transferability. *See* note 118 *infra.* This can pose problems for an American investor wanting to sell or assign his shares in a GmbH. To do so requires a notarial document, specifically a protocol by a German notary. Besides the great inconvenience, the cost can be considerable. *See* note 125 *infra.*

[111] *See, e.g.,* BGB § 125 (W. Ger.); E. COHN, *supra* note 36, at 78.

In the U.S.S.R., Civil Code [RSFSR] art. 47 (1964) provides that failure to observe notarial form when it is mandated by law will invalidate the legal transaction. J. HAZARD, W. BUTLER & P. MAGGS, THE SOVIET LEGAL SYSTEM 418, 421 (3d ed. 1977); SOVIET CIVIL LEGISLATION 13 (W. Gray ed. 1965).

the contract.[112] Some courts, however, will refuse to defeat a contract on "non-substantive" grounds as a matter of public policy.[113]

A few jurisdictions will waive the notarial form requirement, if the contract at issue meets the standards of the place of its execution or of its performance.[114] Most jurisdictions, however, are heavily dependent upon the policing capacity of their highly trained notaries,[115] and are inimical to foreign notarization.[116]

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[112] Under Belgian law, for example, failure to comply with form requirements such as publication provides a defense to legal proceedings, at least as regards third parties. *See* Heenen, *Partnership and Other Associations for Profit*, in XIII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 51 (A. Conrad ed. 1975). Publication requirements may be satisfied by entry in the appropriate register, which usually requires a notarial protocol. *See* note 103 *supra*.

[113] That the form of a contract should not militate against its validity, at least as between the parties, is recognized in most Latin American countries. In many of these countries, where a private contract was used instead of the required public document, both contract parties are under an obligation to "elevate the instrument to the proper status" by appearing before the appropriate government official. *See* Folsom, *Choice-of-Law Provisions in Latin-American Contracts*, in W. Reese, *supra* note 16, at 59; and 3 A. EHRENZWEIG & E. JAYME, *supra* note 29, at 49.

[114] The acceptance of a foreign notarial form often depends upon whether it merely authenticates a signature on a document or is actually a protocol of the declarations of the parties before the notary. In the former case, foreign notarization is generally acceptable. In the latter, it is not. American notarization generates severe problems in this respect, because of the lack of legal education and status of the American notary. *See generally* R. SCHLESINGER, *supra* note 35, at 820. Waiver may be allowed in the Soviet Union. The Acceptance by USSR State Notarial Offices of Documents Drawn Up Abroad, Law of the USSR Supreme Soviet, [Vendomosti SSSR] July 19, 1973, no. 30, item 393, § iv, art. 29, provides:

> Documents drawn up abroad with the participation of foreign authorities or emanating from them shall be accepted by USSR state notarial offices on condition they are legalized by agencies of the USSR Ministry of Foreign Affairs. Without legalization, such documents shall be accepted by USSR state notarial offices in those instances when such has been provided for by USSR or union republic legislation or international treaties and agreements in which the USSR or union republic participates.

THE SOVIET LEGAL SYSTEM 272-73 (W. Butler ed., trans. 1978).

[115] A Dutch notary, for example, is a highly trained legal professional, comparable to the English solicitor. Rosendaal & Westendorp, *Corporate and Tax Law in the Netherlands*, 14 INT'L LAW. 693, 697 (1980). A German notary must have completed law school, a subsequent traineeship of about two and one half years, and an official examination. R. TROTT, *supra* note 104, at 8.

The subject matter of the contract may be determinative, for it is the most important types[117] of transactions that require the notarial protocol.[118]

Since notarial form serves an evidentiary purpose,[119] it may be wise to have important documents notarized in civilian jurisdictions even if there is no legal necessity to do so.[120] The notary may be relied upon to set forth the commercial expectations of

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[116] In Germany, despite BGB Introductory Law, art. II (W. Ger.) recognition that it is usually sufficient to observe form requirements of the lex contractus, waiver will not be allowed. Given the state's great interest in limiting the transferability of shares of a GmbH, for instance, the formal validity of the assignment is governed by German law, even though it was executed in a jurisdiction such as New York where state law grants notaries public all of the powers of their foreign counterparts. N.Y. EXEC. LAW § 135 (McKinney 1972).

The reluctance on the part of German courts to recognize such notarizations stems from the Law Concerning Public Documents, the Beurkundungsgesetz of Aug. 28, 1969 (BGB*l* I 1513), § 17 (W. Ger.) which places the German "notar" under a duty to advise the parties as to the legal effects of their proposed agreements. Only a person trained in German law would be competent to do this. *See* Oberlandesgericht [OLG] Hamm, Decision of Feb. 1, 1974; OLG Karlsruhe, Decision of April 10, 1979, which preclude other *civil law* notaries from performing functions reserved to a "notar" when dealing with transactions governed by German law. *See also* note 110 and accompanying text *supra*.

[117] *See* note 103 *supra*.

[118] The requirement could include both the international joint venture agreement and documents relating to the ventures. In Germany, notarial form is required for the articles of association of a GmbH. R. TROTT, *supra* note 104, at 9. It is also required for the transfer of shares of a GmbH, and for contracts in which a party obligates himself to make such a transfer. Decision of March 24, 1954, Bundesgerichtshof in Zivilsachen [BGHZ], 13, 49. *See* R. SCHLESINGER, *supra* note 35, at 783.

[119] In Italy, no contract, will, charter of incorporation or affidavit is admissable in evidence if prepared without the assistance and services of a notary. Del Russo, *Notary Public in the Civil Law of Italy*, 20 GEO. WASH. L. REV. 524, 524 (1952). In the U.S.S.R., a notarially authenticated contract constitutes prima facie evidence of the identity and capacity of the parties, and of the truth of any facts contained in the contract. E. JOHNSON, AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM 237 (1969). For a discussion of the evidentiary value of an *acte authentique*, see Brown, *The Office of Notary in France*, 2 INT'L & COMP. L.Q. 60, 65-66 (1953).

[120] This may be useful in France, for instance, where partnership agreements need only be expressed in writing, again for purposes of pre-constituted proof. H. DE VRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 388 (1975). This is also the case under the Dutch Provision on Commercial Business Associations, CODE DU COMMERCE [COMM.C.] I.IX art. 22 (Neth.) which requires a partnership to be expressed in writing, notarized or not, for purposes of evidentiary proof. Heenen, *supra* note 112, at 50.

the parties clearly and concisely,[121] a preventative move well worth its effort should a dispute disturb the agreement between the parties.[122]

Securing notarial form is a separate act from obtaining needed government approvals or filing and registering documents with the appropriate government unit.[123] This bureaucratic maze may be shortened by the notary's participation and advice, however, for he is often a *persona grata* with the local government.[124]

Given the importance of notarial form requirements to the validity of the international joint venture agreement, there is every reason to provide for these services in the contract. If compliance with either statute or discretion dictates the necessity of a notary's services, the responsibility for obtaining them should be delegated to one of the parties by a provision in the contract. The provision should also assign responsibility for compensating the notary.[125]

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[121] Rollin, *Notary in Germany,* 117 SOLICITORS' J. 610, 610 (1973).

[122] This is because the original protocol is preserved in perpetuity, often in the national archives. Thus the parties are protected against any amendments to or alterations of the agreement between them. R. SCHLESINGER, *supra* note 35, at 20. The notary may be of limited utility so far as actual dispute resolution is concerned, however. In Mexico a notary cannot be an arbitrator, however informally, by intervening in disputes between the parties, unless the parties actually appoint him as such. Margadant, *The Mexican Notariate,* 6 CAL. W. L. REV. 218, 229 (1970). In France, on the other hand, he is expected to mediate any disagreements of the parties before him. Brown, *supra* note 119, at 68.

[123] Although the notary will advise the parties regarding these formalities, *see* note 107 *supra,* he may also advise the appropriate government authorities of the impending venture. In socialist countries, for example, the notary must inform the government of the transaction. This at least is implied in G. GUINS, SOVIET LAW AND SOVIET SOCIETY 110, 116, 128 (1954).

[124] *See* Margadant, *supra* note 122, at 232.

[125] In many jurisdictions, notarial fee schedules are set by statute. It is not an inexpensive service. In Germany, for example, the fee schedule is set out in detail in the statute Kostenordnung [Kosto]. The fee is calculated according to a degressive scale (*i.e.,* the greater the value of the subject of the protocol, the smaller the percentage of the value-measuring fee) pegged to the share capital of the business association. Fee arrangements for these services are not allowed under German law. In 1977, the notary fee for drafting the articles of association for a GmbH with DM 100.000,— share capital totaled DM 490,—. This included writing costs, disbursements, and the value-added tax. Notarizing an application for the commercial register, along with its various required signatures, came to DM 130,—. A DM was approximately U.S. $0.47 in March 1981. *See* R. TROTT, *supra* note 104, at 8, 126.

Conclusion

International joint ventures expose investors to the precariousness of international and foreign law. Because of the almost limitless range of events that could impact an international joint venture agreement, these contracts have an enhanced survival requirement. This comment suggests ways for the drafting lawyer to try and meet that demand by focusing on seven contract areas that may be critical to the ultimate success of the venture. The approach offered involves two steps. First, counsel should seek to avoid conflicts by being aware of cultural dichotomies and by carefully researching both domestic law and conflicts rules at the formation stage of the agreement. Second, counsel should try and minimize risk by drafting contracts to ensure a reasonable prediction of outcome in the event of dispute. By using this two-step process, conflict avoidance and risk minimization, the venture is given the best chance for survival, and the entrepreneur the best chance for realizing a return on an investment.

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