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Trade Law series



*ITC Contractual Joint Venture  
Model Agreements*

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ITC Contractual joint venture model agreements

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Model for joint venture agreements where the parties organize their cooperation on a contractual basis without forming a corporate body – presents model contracts applying to three-or-more-party joint ventures, as well as those applying to two-party joint ventures only; for each contract provides checklist of options, fill-ins, time limits, ancillary documents and user's guides.

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# Foreword

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It is our pleasure to introduce the text of the first genuinely international contractual joint venture model agreements.

An international joint venture is a structured cooperation between two or more companies from different countries in which the members combine some of their resources for a common undertaking while remaining economically independent.

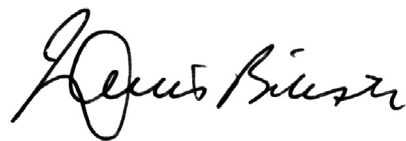
The ITC Contractual Joint Venture Model Agreements are the result of a meeting of minds of experienced practitioners from some fifty countries representing the widest possible spectrum of economic backgrounds and legal cultures. Their knowledge has been built upon the cumulative experience of joint venture agreements, which since the 1950s have gradually evolved into a typical form of cooperation between companies. This sizeable experience was crucial in generating contractual provisions that could be understood, accepted and applied universally. The model agreements therefore do not merely reflect compromise solutions in which participants often get what none of them wanted. Instead, they reflect tested, workable, options.

International trade rules are becoming exceedingly complex and refined. This sophistication is in stark contrast with the demand for harmonization of rules and processes on behalf of hundreds of thousands of small and medium-sized enterprises entering into the international arena. Fair, balanced and workable cross-border norms are in high demand in all sectors of trade. The ITC Contractual Joint Venture Model Agreements present these features and therefore will certainly be widely used.

Finally, we feel that it is fitting to record here that this work was done by the Committee members essentially on a pro-bono basis, in the form of significant contributions of time, travel and other costs. This can be seen as an expression of their trust in the pertinence of creating harmonized and balanced contractual standards to facilitate and inject as much fairness as possible into world trade.



Professor Pierre Lalive



J. Denis Bélisle  
Executive Director  
International Trade Centre



# Acknowledgements

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\* The following members of Lalive & Partners also participated in the preparation of the model agreements: Arthur E. Appleton (*White & Case, Geneva*), Christophe Léchaud, Philippe Gilliéron, Jonathan Curci-Staffler, Luigi Capucci.



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# Introduction

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## A. Background

The ITC *Contractual* Joint Venture Model Agreements (as well as their next-of-kin: the ITC *Incorporated* Joint Venture Model Agreements) were drawn up in response to high demand from the trade sector, especially small and medium-sized enterprises, for reliable, balanced and universally applicable international model contracts.

In 1998, the International Trade Centre (ITC) conducted a worldwide survey on trade contracts. Over 245 trade promotion organizations from 125 countries responded. One of the main purposes of the survey was to identify the type of contracts needed most by companies. Joint venture contracts came in second place (78.1%) just behind demand for sales and purchase contracts (88.3%). This prompted ITC to draft a model contract for the international commercial sale of perishable goods (1999) and, in answer to industry specific requests, a series of model contracts for the publishing and printing industry (2001).

Since the mid-1980s, ITC has been involved in various international South-South trade promotion programmes that encourage intra- and inter-regional trade transactions, for example between Asia and Africa or among companies in South America. While thousands of international contracts were entered into in the course of buyers-sellers meetings held in these programmes in various sectors (including textiles, fishing industry, pharmaceuticals, leather, and services), there were constant comments on the need for an international model for strategic alliances between two or more companies. Further studies by ITC legal staff confirmed the absence of a universal model for joint venture contracts.

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## B. ITC Pro-bono Committee on International Joint Venture Contracts

In 2001, a Pro-bono Committee composed of lawyers and legal specialists from the private sector with experience in joint venture agreements from some 40 countries was set up; several international and regional organizations, were also represented. (The complete list of members of the Pro-bono Committee can be found in the acknowledgement pages of this publication.) A drafting team was constituted and drafts were circulated for comments. Two plenary sessions of the Committee were held in Geneva, in September 2002 and January 2003. Organizational steps were taken to ensure that views from emerging economies were fully taken into account throughout the drafting process and that the result would reflect a consensus from specialists representing a wide range of professional, cultural and legal backgrounds.

At the outset, two major decisions were taken which defined the ensuing work: the first was a general agreement on the advisability and feasibility of proposing model joint venture contracts that would be used on an international scale, as opposed to simply providing guidance notes; the second recognized the need to draft two distinct model contracts, one for *Contractual*, and another for *Incorporated*, joint ventures.

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## C. *Contractual and incorporated joint ventures*

ITC is publishing two separate model agreements and user's guides on contractual and incorporated joint ventures. (As will be seen below, there are two forms for each agreement, one for three-or-more-party joint ventures and the other for two-party joint ventures.) Briefly stated, the difference between the two basic types can be described as follows: with an incorporated joint venture, a new company is created, being organized as a corporation under a national legal system; this does not occur with a contractual joint venture. The present book is concerned with 'contractual' joint venture agreements. Differences between the two approaches should be clearly understood.

### **Incorporated joint ventures**

An incorporated joint venture takes the form of a new legal entity (occasionally several entities), organized as a corporation or any other business organization provided by company law. Once the corporation is formed, the joint venture agreement may be replaced by the corporate instruments. In some cases, the agreement nevertheless survives, for instance, if the new corporation is traded publicly and the joint venture parties wish to preserve an instrument for their privileged relationship. For parties wishing to create an incorporated joint venture, the ITC Incorporated Joint Venture Model Agreement is a preparatory instrument, laying the ground for a corporation to be formed.

### **Contractual joint ventures**

In a contractual joint venture, cooperation between joint venture parties does not necessarily lead to the creation of a new corporation with a specific form imposed by national law. The parties to a joint venture simply organize their cooperation on a contractual basis, without forming a new corporate body. This type of cooperation is described as a contractual joint venture. A contractual joint venture is generally characterized by two important features: greater flexibility and greater exposure of the parties to liability.

- **Flexibility:** in most legal systems, contract law allows considerable freedom for the parties to regulate contractual relationships, including contractual joint venture relationships, which are not governed by the more stringent company law regulations. Contractual joint ventures can thus be structured and adapted to the particular needs of the parties.
- **Liability:** since a contractual joint venture does not lead to the creation of a new legal entity, it cannot shield the parties to the joint venture contract from being directly liable for the debts and losses of the joint venture. Generally, parties to a contractual joint venture are jointly and severally liable.

## **Tax issues**

One of the reasons for selecting the contractual structure rather than the incorporated joint venture structure relates to avoidance of double taxation. Schematically, the difference between incorporated and contractual joint ventures with regard to double taxation can be explained as follows: incorporation creates a new legal entity that will normally be taxed separately, tax being imposed on an entity basis. An incorporated joint venture thus creates the conditions for double taxation: first on the corporate profits of the joint venture company, and second on the dividends transferred to the joint venture parties.<sup>1</sup> In the context of a contractual joint venture, no new corporation is created. Profits and losses of the joint venture arise directly with the parties, and are taxed there. In practice, matters are of course more complex and the parties are well advised to consult a tax specialist before choosing the legal form for their joint venture and determining its structure.

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## **D. The ITC Contractual Joint Venture Model Agreements**

### **Number of parties to the contractual joint venture**

Two different contractual joint venture model agreements and user's guides have been drafted: the first for joint ventures composed of at least three parties (CJV – three or more Parties); the second, for a two-party cooperation (CJV – two Parties).

### **Type of parties to the contractual joint venture**

There is no restriction with respect to the type of parties entering into the joint venture. Individuals may be party to a joint venture as well as corporations. While it is expected that the model agreements will be most useful to small and medium-sized enterprises (SMEs), there is nothing that should prevent larger corporations from using the model agreements as well. Joint venture agreements with State-owned enterprises are often subject to special regulations. The model agreements may be used in these cases, too; but some of their provisions may have to be adapted.

### **Type of joint venture activities**

The ITC contractual joint venture model agreements (and the ITC incorporated joint venture model agreements) are designed for medium-term or long-term cooperation, as opposed to short-term or single-activity operations such as the tender for and performance of a construction contract. They are not sector-specific and may thus be used for a wide range of activities including production, distribution, research and development, exploration of natural resources, or operation of a facility. Users of the model agreements are best placed to adapt these models to the needs of their specific type of cooperation.

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<sup>1</sup> There are some 1,500 double taxation treaties (between two States) worldwide. They are designed to reduce the risk of double taxation and the disincentive to investment that occurs when the same income is taxable in two States. These agreements relate to underlying tax, the tax paid by subsidiary companies on the profits out of which they pay dividends.

## **Universal scope**

The model agreements were drafted without reference to any particular legal system as using one system would have risked making them ill adapted in the context of another system; and in many cases would have created difficulties for at least some of the parties. It was therefore decided to draft model agreements that could be compatible with all major legal systems that are likely to be applied in international commercial relations.

## **Options and time limits**

The model agreements provide a general legal framework for a great variety of situations. When they are used for the purpose of a specific type of cooperation, great care must be taken to ensure that the agreements express the intention of the parties correctly. Before adopting the text of a model agreement as it stands, the negotiating parties are invited to examine the contractual provisions and decide whether the solutions provided meet their particular needs.

In this connection, the model agreements offer a number of options under several provisions. These options do not give a complete picture of all possible alternatives, but lay down the basic ones. Other solutions are mentioned in the Article-by-Article remarks. When using a model agreement, negotiating parties should bear in mind that an option will apply only if it is specifically selected. Otherwise, the text of the contract without the option remains applicable.

As for time limits and time periods, the drafters of the model agreements have chosen what appeared to them to be a suitable solution; but they recommend that the parties consider their own requirements and determine whether the solution in the model agreements suits them. A checklist of options and time limits is included in this guide.

## **Legal advice**

While great care has been taken to take into account differences between legal systems so that the model agreements can be used in all countries, it is recommended that the parties seek legal advice when using a model agreement.

*PART ONE*

*ITC Contractual Joint Venture  
Model Agreement  
(three parties or more)*

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## ITC CONTRACTUAL JOINT VENTURE MODEL AGREEMENT (three parties or more)

*Note:* the passages in this agreement identified as ‘options’ are binding on the Parties only if they have been specifically retained in each case.

between

Party 1

[Specify for individuals: ..... {surname and first name}, ..... {status},  
residing at ..... {address}, ..... {profession}, ..... {nationality}, .....  
{identity card or passport number}.]

[Specify for corporations: ..... {name of company}, ..... {legal form (e.g.  
limited liability company), country of incorporation, trade register number}, having its  
seat at ..... {address}, represented by ..... {surname and first name, address,  
position}.]

and

Party 2

and

Party 3

etc....

## Recitals

Party 1: is active in [*specify field of activity*];

has at its disposal [*mention if appropriate one or several distinctive assets, abilities, specific know-how, or intellectual property rights necessary to its activity and/or to the Object of the Joint Venture*] which it is prepared to place at the disposal of the joint development;

has the following objectives [*specify the objectives which this Party seeks to promote by the Joint Venture*];

is interested in [*describe the development that the Party expects from this Agreement; its contractual expectations*].

Party 2: ....

Party 3: ....

In the light of their activities, abilities and objectives, as described above, the Parties wish to jointly [*specify in general terms the proposed activity of the Joint Venture*].

In consideration of the above, the Parties agree as follows:

## Article 1 Contractual definitions

The following terms shall have the meanings set out below:

- (a) 'Agreement': the present Contractual Joint Venture Agreement and all subsequent amendments, agreements and decisions of Meetings of the Parties concerning the Joint Venture and the rights and obligations of the Parties pursuant to it;
- (b) 'Annual Accounts': the annual accounts of the Joint Venture as defined in Article 9.3;
- (c) 'Arbitral Tribunal': the dispute resolution body provided by Articles 32.4 to 32.7, i.e. an arbitral tribunal, or the courts, if that alternative is chosen by the Parties;
- (d) 'Auditors': the external auditors of the Joint Venture, having in particular the duty of auditing the accounts (see Article 9);
- (e) 'Contributed Assets': the total of the individual contributions made by the Parties pursuant to Article 3.1 and 3.2;
- (f) 'Deadlock': the inability of two successive meetings (be it of the Parties or of the Management Committee) to reach a decision by reason of the non-attendance of a Party (when there is a requirement of minimum attendance) or lack of agreement (as more fully described in Article 30);
- (g) 'Exit Date': the date at which the exclusion or withdrawal of a Party becomes effective (Article 19.1);
- (h) 'Financial Year': a year as defined in Article 9.2;
- (i) 'Force Majeure': an Impediment of Performance as defined in Article 27;



- (j) 'Independent Expert': the expert appointed with respect to any disputes relating to questions of valuation as defined in Article 32.8;
- (k) 'Joint Venture': the Parties collaborating together for the Object and activities described in this Agreement;
- (l) 'Joint Venture Agreement': see 'Agreement';
- (m) 'Management Committee': the executive body of the Joint Venture (see Article 8);
- (n) 'Meeting of the Parties': the principal authority of the Joint Venture (see Article 7.1);
- (o) 'Object of the Joint Venture': the object of the Joint Venture as defined in Article 2;
- (p) 'Party': each of the Parties (whether an individual or a corporation) being signatories to this Agreement and those adhering to it subsequently;
- (q) 'Share in the Contributed Assets': the proportion in which a Party has made contributions to the Joint Venture (in accordance with Article 3.1);
- (r) 'Voting Rights': The number of votes held by a Party or a Party's share in the total votes allocated to the Parties (Article 7.5).

## **Article 2      Object of the Joint Venture**

Under this Agreement, the Parties hereby agree to pool their resources and efforts as described in Articles 3 and 5 below to:

- (a) develop [*specify*];
- (b) exploit [*specify*];
- (c) research [*specify*];
- (d) produce [*specify*];
- (e) distribute [*specify*].

[*Complete or modify the list as required.*]

## **Article 3      Contributions of the Parties**

3.1 The Parties to the Joint Venture shall make the following contributions, in cash, real estate, personal property – including machinery and tools – intellectual property, services, or other in-kind contributions (the 'Contributed Assets') and they have agreed on their corresponding Shares in the Contributed Assets as follows:

Party	Contributions	Value (amount/currency)	Share in the contributed assets (voting rights)
(a) <i>[specify]</i>			
(b) <i>[specify]</i>			
(c) <i>[specify]</i>			

[Complete the list as required.]

**{Option:}** *The Parties to the Joint Venture shall make the following contributions, in cash, real estate, personal property – including machinery and tools – intellectual property, services, or other in-kind contributions (the Contributed Assets):*

Party	Contributions
(a) <i>[specify]</i>	
(b) <i>[specify]</i>	
(c) <i>[specify]</i>	

[Complete the list as required.]

*The contributions of each Party are deemed to be equivalent in value and the Parties have equal Shares in the Contributed Assets.*

3.2 The Management Committee may call for additional contributions, over and above those made in compliance with Article 3.1, as required for the development of the Joint Venture or for making up its losses. The Parties shall (unless otherwise agreed by all Parties) make such contributions in proportion to their Shares in the Contributed Assets as per Article 3.1.

**{Option:}** *A new contribution in cash or otherwise may be required by a unanimous vote of the Meeting of the Parties, in accordance with Article 7.7 below.*

3.3 If a Party objects to a call for additional contributions or fails to make an additional contribution decided by the Management Committee **{option: the Meeting of the Parties}**, the other Parties may make the contribution of the objecting or defaulting Party. In that case the Shares in the Contributed Assets shall be adjusted to take account of the difference in contributions and, if differentiated voting rights have been provided in the Agreement, these rights shall be adjusted accordingly.

**{Option 1:}** *A Party which does not intend or is not able to make any additional contribution decided by the Management Committee may withdraw from the Joint Venture pursuant to Article 18.*

*{Option 2: A Party which objects to the additional contribution decided by the Management Committee, or fails to make it, shall be deemed to be in breach of its obligations as per Article 13 and may be excluded from the Joint Venture pursuant to Article 17.}*

3.4 Any dispute concerning the valuation of non-pecuniary Contributed Assets (or any adjustment to Shares in Contributed Assets under Article 3.3) shall be resolved pursuant to Article 32, with the valuations (or any adjustments) being made by the Independent Expert pursuant to Article 32.8.

## **Article 4 Liability for contributions**

4.1 Each Party represents and warrants that the contributions described in Article 3 and relevant Ancillary Agreements:

- (a) Are at its free disposal and that it is entitled to contribute them to the Joint Venture for the agreed use;
- (b) Are of the described quality; and
- (c) May be used for the purpose and duration provided or implied in the contribution.

4.2 If the use of all or part of a contribution by the Joint Venture is materially restricted or rendered impossible due to defects, claims by a third party or for other reasons due to the fault of the contributing Party, the contributing Party shall replace the contribution and provide to the Joint Venture other contributions which meet, as closely as possible, the needs of the Joint Venture for which the contribution was intended. A failure to replace such a contribution shall be treated as a Breach of Obligations as per Article 13.2. The replacement contribution shall be treated as a contribution and all representations and warranties shall apply to it as they did to the replaced contribution.

4.3 If the value of the replacement contribution is different from that of the replaced contribution and a replacement contribution of equal value cannot be made, the Share in the Contributed Assets, as shown in Article 3.1 or otherwise agreed for the purposes of the Joint Venture, shall be adjusted by agreement of the Parties or, failing such agreement, as valued by the Independent Expert as per Article 32.8; it being understood that, irrespective of the estimated value of the replacement contribution, an increase in the Share in the Contributed Assets shall be provided only if all other Parties agree to it.

4.4 The contributing Party shall compensate the Joint Venture for all loss and damage suffered as a result of any defects in the contributions and any restrictions affecting their use contrary to the representations and warranties of that Party. It shall indemnify the Joint Venture against any claims by third parties if the use of the contributions interferes with their rights contrary to the representations and warranties in Article 4.1 and the relevant Ancillary Agreement.

## **Article 5 Technical or commercial commitments of the Parties**

5.1 The Parties agree respectively to perform the following technical or commercial commitments in relation to the activities of the Joint Venture:

- (a) Party 1 shall ... *[specify]*.
- (b) Party 2 shall ... *[specify]*.
- (c) Party 3 shall ... *[specify]*.

*[Complete the list of commitments as required.]*

5.2 Performance of the technical or commercial commitments shall be additional to any in-kind contributions required to be made under Article 3. Such technical or commercial commitments shall be performed free of charge *{option: on such terms, including payment, as shall be approved by the Management Committee}*.

5.3 Each Party shall use reasonable care and skill in performing such technical or commercial commitments.

5.4 A Party's failure to comply with its technical or commercial commitments shall be treated as a Breach of Obligations pursuant to Article 13.

## **Article 6 Organization and management**

The Joint Venture shall be governed by:

- (a) The Meeting of the Parties; and
- (b) The Management Committee.

## **Article 7 Meeting of the Parties**

7.1 The Meeting of the Parties is the principal authority of the Joint Venture.

7.2 The Meeting of the Parties has the non-transferable authority to take the following decisions:

- (a) Change in the Object of the Joint Venture;
- (b) Defining the strategy and common goals;
- (c) Appointment and removal of the Management Committee and the Auditors;
- (d) Appointment and removal of ad hoc Committees;
- (e) Approval of the yearly accounts;
- (f) Admission of new Parties, replacement of Parties, exclusion of a Party, deferral of a Party's withdrawal;
- (g) Acquiring an interest in other companies or acquisition of assets to be jointly owned by the Joint Venture;
- (h) New alliances; and
- (i) Termination of the Joint Venture.

7.3 The Meeting of the Parties may be called by any Party, by addressing prior notice to all other Parties at least two weeks before the meeting. The notice shall include the Agenda of the meeting, specifying the items to be decided at the meeting. Each Party may add further items by notifying the other Parties.

7.4 The Meeting of the Parties may be held only if all Parties attend or are represented.

*{Option 1: provide for a quorum (minimum attendance requirement).}*

*{Option 2: no requirement for the attendance or representation of the Parties.}*

Parties may attend Meetings of the Parties by electronic means, including telephone and videoconferencing, provided precautions are taken to ensure continued communication throughout the meeting.

7.5 The Voting Rights are proportional to the Share in the Contributed Assets of the Parties.

*{Option: each Party has one vote.}*

7.6 Each Party may be represented by another Party or by a third party, provided a proxy is submitted in writing (which may include electronic mail).

7.7 All decisions producing a change in the Object of the Joint Venture, or in the contractual rights and/or duties of the Parties, require unanimity of all Parties, unless otherwise provided in the present Agreement.

*{Option: qualified majority to be defined, for example two-thirds.}*

7.8 All other decisions require the majority of all Voting Rights.

*{Option 1: the majority shall be calculated by reference to the Votes of all attending or represented Parties.}*

*{Option 2: qualified majority to be defined, for example two-thirds; or unanimity required.}*

7.9 Minutes shall be taken of the Meetings of the Parties. The Minutes must reflect all decisions taken. These Minutes shall be sent to each Party within a period of two weeks after the meeting.

## **Article 8 Management Committee**

8.1 The management of the Joint Venture is entrusted to a Management Committee, comprising representatives of each of the Parties. The members of the Management Committee are appointed by the Meeting of the Parties for a period of one year. Their terms are renewable.

*{Option 1: entrust the management of the Joint Venture to a Managing Party.}*

*{Option 2: entrust the management of the Joint Venture jointly to all Parties.}*

*{Option 3: entrust the management of the Joint Venture to one or more third parties.}*

8.2 The Management Committee is responsible for all activities necessary for the operation of the Joint Venture, provided that these activities are not reserved to the Meeting of the Parties as per Article 7.2 or are not otherwise delegated pursuant to this Agreement, in particular by virtue of a technical or commercial commitment of a particular Party pursuant to Article 5. Activities necessary for the operation of the Joint Venture include:

- (a) Representation of the Joint Venture (e.g. in relations with clients and suppliers);
- (b) Billings and collection of payments;
- (c) Accounting;
- (d) Market studies and communication;
- (e) Production planning and coordination.

*[Complete the list of activities as required.]*

8.3 The Management Committee may delegate all or part of the day-to-day management to one or the other of the Parties *{option: or to a third party}*, on an individual or a collective basis. The Management Committee shall inform the Meeting of the Parties of such a delegation.

8.4 The Meeting of the Parties may, at any time, remove one or all persons entrusted with the management of the Joint Venture.

8.5 The Meeting of the Parties shall decide the remuneration (if any) of the persons entrusted with the management of the Joint Venture.

8.6 The Management Committee shall meet as often as required by the affairs of the Joint Venture, or at the request of one of the Parties or one of its members.

8.7 The Management Committee may take decisions only if all members attend or are represented.

*{Option: fix a participation quorum instead of requiring the presence of the entire Management Committee.}*

With the consent of all members of the Management Committee, decisions may validly be taken by exchange of correspondence (including fax) or by electronic mail.

The members of the Management Committee may attend the meetings of the Management Committee by electronic means, including telephone and video-conferencing, provided precautions are taken to ensure continued communication throughout the meeting.

8.8 Decisions of the Management Committee shall be taken by majority of the votes of all members, including those not in attendance.

*{Option 1: majority of the votes of the attending members.}*

*{Option 2: unanimous decisions.}*

8.9 The chairperson of the Management Committee shall be appointed by the members of the Management Committee *{option: shall be appointed by [specify Parties]}*. Unless otherwise specified in the present Agreement, the chairperson shall not have *{option: shall have}* a second or casting vote.

8.10 Minutes shall be taken of the meetings of the Management Committee. They must record the decisions taken.

## **Article 9      Accounts**

9.1 The Joint Venture shall keep accounts in compliance with the laws and regulations applicable at its principal place of business. The books of account and records shall be preserved at this place in a manner accessible to the Parties.

9.2 The accounting period shall be the year according to the Gregorian calendar, ending on 31 December of each year (the 'Financial Year').

9.3 At the latest three months after the end of each Financial Year, the Joint Venture shall prepare the Annual Accounts, including the balance sheet of the Joint Venture at the end of the Financial Year and the profit and loss statement for the Financial Year.

## **Article 10     Auditors**

10.1 The Joint Venture's Auditors shall be independent of the Parties and the members of the Management Committee.

10.2 The Auditors shall be appointed by the Meeting of the Parties for one Financial Year with the possibility of renewal from year to year.

10.3 The Auditors shall verify the accuracy of the Annual Accounts and prepare a report for submission to the Meeting of the Parties.

## **Article 11     Representation**

11.1 The Joint Venture shall be represented in its dealings with third parties by any member of the Management Committee.

*{Option: by two members of the Management Committee acting jointly.}*

11.2 Commitments contracted on behalf of the Joint Venture by a member *{option: two members}* of the Management Committee shall bind the Parties, provided the members have specified that they acted for and on behalf of the Joint Venture and the commitment is within the Object of the Joint Venture.

11.3 The Parties are not bound towards third parties by acts performed by the members of the Management Committee outside their powers of representation or by acts of persons other than the members of the Management Committee (unless the Parties have expressly ratified such acts for the Joint Venture or have created or entertained with the third party the appearance of such powers of representation). The Party or other person acting without or outside such powers is solely obligated to the third party and is liable for any damage caused to the Joint Venture, the Parties and/or any third party.

11.4 When a member of the Management Committee is removed, his or her legal authority to bind the Joint Venture thereafter is terminated.



## Article 12 Liability

12.1 Unless otherwise provided in the law governing the Joint Venture, the Parties shall be liable jointly and severally towards any third parties for any debt, commitment or other liability of the Joint Venture.

12.2 As between the Parties, each Party shall bear the Joint Venture's liabilities proportionately to its Share in the Contributed Assets as per Article 3.1, unless otherwise provided in this Agreement.

12.3 A Party who is pursued on the grounds of a liability of the Joint Venture shall notify the other Parties and the Management Committee and shall proceed as directed by the Management Committee. It shall be indemnified promptly by the other Parties proportionately to their Shares in the Contributed Assets for any loss and expense which it may have had to bear on account of the Joint Venture.

12.4 The liability of a newly admitted Party or of a Party having left the Joint Venture is governed by Articles 16 to 21 below.

12.5 Each Party shall be solely liable for any taxation payable in respect of its share of any profits of the Joint Venture. Nothing in this Article 12 shall affect this principle.

*{Option (add): Each Party shall indemnify promptly any other Party who is required to pay to any tax authority any tax attributable to the first Party's share of profits of the Joint Venture.}*

## Article 13 Breach of obligations

13.1 A Party having failed to perform properly its obligations under this Agreement may be notified by the Management Committee of this failure and invited to remedy it within a reasonable period fixed by the Management Committee *{option: specify a period during which the failure must be remedied}*. Any representative of the defaulting Party on the Management Committee shall not be counted as a member for this purpose. If the Party does not remedy the failure within the period fixed, it may be excluded pursuant to Article 17.

13.2 In all cases, the Party having failed to perform properly its obligations under this Agreement shall be liable to the other Parties for the damage resulting from its failure.

13.3 When a Party or the Joint Venture is in delay with a payment obligation, the amount in delay shall bear interest at the average rate of actual borrowing of the Joint Venture during the period of delay. If such average rate cannot be determined, the rate shall be the commercial rate of borrowing available to the Parties of the Joint Venture *{option: provide the rate of an institution in the country of the Joint Venture, such as x points above the Central Bank's discount rate}*. In case of disputes about the applicable rate, it shall be determined by the Independent Expert as provided in Article 32.8, taking into consideration the borrowing costs which the delay by a Party causes to the Joint Venture or the savings which the Joint Venture makes by delaying the payment.



## **Article 14 Share in profits and losses**

14.1 Each Party shares in the profits and losses of the Joint Venture proportionately to its Share in the Contributed Assets.

*{Option: All Parties shall have an equal share in the profits and losses of the Joint Venture. If this option is chosen, all references made in this Model Agreement to the 'Shares in the Contributed Assets' must be reviewed and, where necessary, adapted.}*

14.2 Unless otherwise decided by the Meeting of the Parties, shares in the profits shall be paid out 30 (thirty) days after the approval of the audited Annual Accounts, but not later than six months after the end of the Financial Year. The Meeting of the Parties shall decide whether a Party may receive an advance in respect of its share in the profits.

14.3 Shares in any losses of the Joint Venture shall be settled pursuant to the provisions regarding additional contributions (Article 3.2), it being understood that, at any time, the Management Committee may call for additional contributions to compensate losses that have occurred.

14.4 The share in the profits and losses of a newly admitted Party or of a Party having left the Joint Venture is governed by Articles 16 to 21 below.

## **Article 15 Access to information**

15.1 Each Party has the right to be informed about the business activities of the Joint Venture.

15.2 Specifically, each Party has a right of access to the Minutes of the Meeting of the Parties and to the Minutes of the meetings of the Management Committee and may request a copy thereof.

15.3 A Party may also require access to accounts and records of the Joint Venture, including the legal documents creating rights and obligations of the Joint Venture. The Management Committee may regulate this access so as to avoid disturbances to the orderly conduct of the Joint Venture's business.

## **Article 16 New Parties**

16.1 The admission of a new Party into the Joint Venture requires the approval of all Parties. Admission is (unless otherwise agreed by all Parties) subject to the new Party's unconditional agreement in writing to all the terms of the present Joint Venture Agreement.

16.2 The initial contributions of the new Party, their value and the Share in the Contributed Assets shall be determined in the agreement concerning its admission. Article 3.1 shall apply to these initial contributions. Once admitted, the new Party shall have the same obligations with respect to additional contributions as all other Parties.

16.3 Unless otherwise provided in the agreement concerning admission, the new Party shall enter into all existing rights and obligations of the Parties with respect to the Joint Venture.

16.4 Unless otherwise provided in the agreement concerning admission, the entry of the new Party shall become effective for purposes of financial participation in the Joint Venture at the commencement of the Financial Year following its admission.

## Article 17 Exclusion of a Party

17.1 Apart from Article 17.6 below, the exclusion of a Party from the Joint Venture requires a unanimous decision of the other Parties and may be decided only in the following cases:

- (a) If a Party, duly notified in accordance with Article 13.1, has not remedied the failure to perform within the period fixed;
- (b) If an important change takes place in the control or the ownership of the Party (Article 24); or
- (c) If a Party has been excused for non-performance on grounds of *Force Majeure* for a period exceeding that specified in Article 27.7.

17.2 When a cause for exclusion arises, the Management Committee or any of the Parties may give notice to the Party concerned, with copy to the other Parties, stating the grounds for exclusion and inviting it to present within a reasonable period *{option: specify a period during which the Party may present the reasons to object}* the reasons it may have to object to the exclusion. If no such notice has been given within three months after the cause of exclusion has arisen, the other Parties may no longer avail themselves of this cause (without prejudice to any subsequent right of exclusion for similar cause).

17.3 At the expiration of the period fixed pursuant to Article 17.2, the Management Committee or any of the Parties may call a Meeting of the Parties for the purpose of excluding the Party notified. The Party whose exclusion is proposed shall have the right to attend the meeting and present its position but it shall have no right to participate in the vote on the exclusion.

17.4 The exclusion becomes effective at the date of the meeting at which it has been decided by all the other Parties or at any later date specified in the decision. As of the effective date of the exclusion, the excluded Party ceases to be a Party.

17.5 The exclusion decision may not be revised in proceedings under Article 32. However, if in such proceedings the exclusion is found to be wrongful, the excluded Party may claim compensation for loss of profits and/or other damage caused to that Party as a result of its wrongful expulsion.

*{Option: The exclusion decision is subject to review in proceedings under Article 32. If the Arbitral Tribunal concludes that the exclusion was wrongful, it may decide that the excluded Party be re-admitted to the Joint Venture and treated as if it never left it.}*

17.6 The bankruptcy of a Party or any other act by a court or other public authority which materially restricts that Party's capacity with regard to its rights and obligations in the Joint Venture shall cause that Party's automatic exclusion, effective on the day preceding the act instituting the restriction. An exclusion decision shall not be required. The exclusion shall nevertheless be certified by the Management Committee.

*{Option: omit this paragraph completely, as well as the reference to it in Article 17.1.}*

17.7 When a Party is excluded, the Joint Venture shall continue between the remaining Parties in a manner to be determined by the Meeting of the Parties.

## **Article 18    Withdrawal of a Party**

18.1 A Party may withdraw from the Joint Venture by delivering a written notice to the other Parties at least three months before the end of a Financial Year.

18.2 Within 30 (thirty) days following the receipt of the notice under Article 18.1, the Management Committee or a majority of the remaining Parties may object to the withdrawal. In case of such objection, a Meeting of the Parties shall be held at which the withdrawal is discussed.

18.3 If the withdrawal risks causing serious difficulties to the Joint Venture, the remaining Parties may defer the withdrawal by no more than one year. The decision on such deferral shall be taken by the Meeting of the Parties at which the withdrawing Party shall be heard but at which it shall have no vote. The decision is not subject to revision. However, the withdrawing Party shall be entitled to compensation for loss of profits and/or other damages caused to that Party if, in the opinion of the Arbitral Tribunal as per Article 32, the deferral was not justified in the circumstances and caused damage to the withdrawing Party.

18.4 Unless otherwise agreed by the Parties, the withdrawal shall become effective at the time identified in the withdrawing Party's notice or, in case of a deferral, at the expiration of the deferral period. At the effective date, the withdrawing Party ceases to be a Party.

18.5 When a Party withdraws, the Joint Venture shall continue with the remaining Parties in a manner to be determined by the Meeting of the Parties.

## **Article 19    The amount due to a Party leaving the Joint Venture**

19.1 Within 60 (sixty) days of the date at which the exclusion or withdrawal has become effective (the 'Exit Date'), the other Parties shall prepare financial statements (balance sheet and income statement), as per the Exit Date. On the basis of these statements, the other Parties shall specify in their opinion the fair market value of the Joint Venture, assessed as a going concern. This value shall be reviewed by the Auditors of the Joint Venture. When establishing the fair market value of the Joint Venture, a reduction in value of the Joint Venture resulting from the departure of the Party leaving the Joint Venture shall be taken into account.

*{Option: valuation of the net assets of the Joint Venture at book value.}*

19.2 The Party leaving the Joint Venture shall be entitled to receive a share of the value so established which is proportionate to its Share in the Contributed Assets.

19.3 The amount due to the Party leaving the Joint Venture shall be paid to it within six months of the Exit Date, plus interest at the rate specified in Article 13.3 counted from the Exit Date. If and to the extent to which this payment causes severe strain on the financial means of the Joint Venture, it may be deferred for a reasonable period not exceeding two years, provided that instalment payments are made in reasonable intervals decided by the Management Committee, compatible with the financial resources of the Joint Venture.

19.4 Any Party may request that the financial statements pursuant to Article 19.1 (and the valuation of the Joint Venture based thereon) and the conditions for instalment payments pursuant to Article 19.3 be reviewed and, where required, revised by an Independent Expert pursuant to Article 32.8.

19.5 Nothing in Article 19 shall affect any claim which the other Parties may have against the leaving Party for damages for any breach of its obligations.

## **Article 20 Claim to the return of contributions other than cash**

20.1 A Party having a justified interest in a specific asset contribution, which it has made in a form other than cash, may request that, when it leaves the Joint Venture, this contribution be returned to it, the value of the contribution as assessed in the financial statement according to Article 19.1 being credited against the amount due according to Article 19.3.

20.2 If such a contribution is necessary in the opinion of the Management Committee for its continued activity, the Joint Venture may retain it for use not exceeding the level of use made previously and for the period that is reasonably required for finding or developing a substitute. In that case the Joint Venture shall pay adequate compensation for the continued use, either by a lump sum or by instalments.

20.3 Decisions of the Joint Venture concerning a claim to a specific asset contribution may be reviewed by the Arbitral Tribunal according to Article 32.4. The valuation of the contribution and the compensation for its continued use by the Joint Venture may be submitted for determination to the Independent Expert according to Article 32.8.

20.4 The present Article shall apply *mutatis mutandis* to contractual rights granted to the Joint Venture by the Party leaving the Joint Venture.

## **Article 21 Liability of the Party leaving the Joint Venture for debts incurred or discovered after withdrawal or exclusion**

21.1 The withdrawing or excluded Party shall not be liable for any debts incurred after it has left the Joint Venture.

21.2 A Party leaving the Joint Venture remains liable for a period of two years as from the Exit Date for undiscovered debts having accrued while it was a Party.

## **Article 22 Replacement of a Party**

22.1 A Party may advise the other Parties by written notice at least three months before the end of a Financial Year of its intention of being replaced by a third party.

22.2 This replacement is subject to the approval of all other Parties.

*{Option: qualified majority.}*

It may be made subject to conditions or guarantees by the replaced Party.

22.3 Should the replacement be refused, the Party requesting it may withdraw from the Joint Venture. The provisions of Article 18 shall apply.

22.4 Should the replacement be approved, it shall be effective at the commencement of the following Financial Year. The replacing Party shall not be treated as a new Party but shall in all respects be treated as if it had been a Party in place of the replaced Party. Subject to any continuing obligations or guarantees which may be provided in the terms of the replacement, the replaced Party shall cease to be a Party on the effective date. It shall have no claim whatsoever against the other Parties.

## **Article 23    Death of a Party**

23.1 In the event of the death of a Party, the other Parties may decide unanimously to continue the Joint Venture with those heirs who request continuation and unconditionally agree in writing to all terms of the present Joint Venture Agreement.

*{Option 1: decision by an absolute/qualified majority of the Parties to continue the Joint Venture with those consenting heirs who unconditionally agree in writing to all terms of the present Joint Venture Agreement, the votes being counted per head/in proportion to the Shares in the Contributed Assets.}*

*{Option 2: automatic continuation of the Joint Venture with those consenting heirs who unconditionally agree in writing to all terms of the present Joint Venture Agreement.}*

Unless otherwise provided in the agreement with the heirs entering the Joint Venture in replacement of the deceased Party, the entering heirs shall indemnify and hold harmless the Joint Venture against any claims by any person deriving rights from the deceased Party.

23.2 In the absence of an agreement on the replacement of the deceased Party by his or her heirs, the deceased Party's estate shall be treated as a Party having left the Joint Venture and the provisions of Articles 19 to 21 shall apply as appropriate.

## **Article 24    Change in control of a Party to the Joint Venture**

24.1 A Party that is a legal entity must inform the other Parties and the Management Committee immediately of any important change in its control or ownership.

24.2 In case of such a change, the other Parties may decide to exclude the Party concerned from the Joint Venture pursuant to Article 17.

## Article 25 Termination of the Joint Venture

25.1 The Joint Venture is terminated:

- (a) When its Object is achieved;
- (b) When the achievement of its Object becomes impossible; or
- (c) By unanimous decision of the Parties.

{**Option:** consider adding the following grounds for terminating the Joint Venture:

- (d) *In case of death, withdrawal or bankruptcy of one or several Parties;*
- (e) *By expiration of the duration of the Joint Venture;*
- (f) *By unilateral termination of the Agreement by one of the Parties [specify the requirements];*
- (g) *By a decision of the Arbitral Tribunal to dissolve the Joint Venture based on just grounds for dissolution.*}

25.2 Upon its termination, the Joint Venture shall be liquidated. To this effect the Parties shall take in particular the following steps:

- (a) Terminating all legal relationships of the Joint Venture with third parties;
- (b) Selling the assets of the Joint Venture at the best possible price; a Party having a justified interest in the return of a contribution it has made in a form other than cash shall have a right of first refusal to re-acquire this contribution at market value;
- (c) Settling the debts of the Joint Venture;
- (d) Where applicable, refunding the loans made by the Parties.

25.3 At the end of the liquidation, any remaining cash surplus shall be distributed to the Parties according to their Shares in the Contributed Assets.

25.4 If the liquidation of the Joint Venture results in outstanding debts owed by the Joint Venture, the Parties shall bear them proportionately to their Shares in the Contributed Assets.

## Article 26 Hardship

26.1 If events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present Agreement, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations, that Party shall be entitled to request revision of this Agreement.

26.2 The request for revision shall be addressed to the other Parties and the Management Committee. It shall indicate the grounds on which it is based.

26.3 In response to such a request, the Parties shall consult with a view to revising the Agreement on an equitable basis, so that no Party suffers excessive prejudice or burden.



26.4 If the Parties fail to reach agreement on the requested revision, any Party may resort to the proceedings provided in Article 32.2 and 32.3, and to arbitration pursuant to Article 32.4 to 32.7. The Arbitral Tribunal shall have the power to make any revision to this Agreement that it finds just and equitable in the circumstances.

## **Article 27 Relief from performance and liability in case of impediment of performance (*force majeure*)**

27.1 Non-performance by a Party is excused if that Party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the signing of the Agreement or to have avoided or overcome it or its consequences ('an Impediment of Performance').

27.2 Unless otherwise provided in the present Agreement, an Impediment of Performance within the meaning of Article 27.1 does not include the lack of any authorization, licence, entry or residence permit, or of any approval necessary for the performance of the Agreement and required to be issued by a public authority of any kind whatsoever in the country of the Party seeking excuse for non-performance.

27.3 When the impediment is only temporary, the excuse for non-performance shall have effect for such period as is reasonable, having regard to the effect of the impediment on the performance of the Agreement by that Party.

27.4 The excuse for non-performance takes effect from the time of the impediment.

27.5 The Party which fails to perform due to such an Impediment of Performance must give notice to the other Parties and the Management Committee of the impediment and its effect on that Party's ability to perform. If the notice is not received by the other Parties within a reasonable time after the Party which fails to perform knew or ought to have known of the impediment, the failing Party is liable for damages resulting from such non-receipt.

27.6 As soon as notice according to Article 27.5 has been given, the Parties shall consult about the consequences for the operations of the Joint Venture, if necessary by holding a Meeting of the Parties. All Parties shall make their best efforts to overcome any obstacles to the activities of the Joint Venture that may result from the excused non-performance. Such excuse does not relieve the Party concerned from its obligation to assume its share of any financial commitments that may be necessary to overcome the obstacle.

27.7 Nothing in this Article prevents a Party from exercising a right (under any other provisions of this Agreement) to terminate the Agreement or to withhold performance or request interest on money due.

## Article 28 Intangible assets and/or intellectual property rights

28.1 The contribution by a Party of intangible assets and/or intellectual property rights pertaining to technical developments, patents, distinctive signs or get-ups, trademarks, software or other authors' works shall be made by transfer of property and title or by licence agreement (as agreed between the Parties at or prior to signing this Agreement).

*[Attach any licence agreement concluded prior to the present Joint Venture Agreement.]*

*{Option (add): The terms of any licence agreement concluded at or before the execution of the present Joint Venture Agreement are attached as Appendix [2] and shall apply in respect of the contribution by [specify Party] of the intangible assets and/or intellectual property rights therein described.}*

28.2 Intangible assets or intellectual property rights pertaining thereto (whether registrable or not) developed, created or acquired after the date hereof by one or several Parties within the framework of the activities in the Joint Venture or for purposes of the Joint Venture shall become the joint property of all Parties. Any registration of such rights shall be made jointly in the name of all Parties.

28.3 The use of the rights referred to in Article 28.2, outside the activities of the Joint Venture, shall be subject to agreements made in the name of the Joint Venture with the approval of the Management Committee. Upon their request, the Parties shall be given preference in the conclusion of such agreements.

## Article 29 Duty to promote the interests of the Joint Venture and not to compete with it

29.1 This Agreement is concluded with the objective of promoting the Parties' common interests in the field of the Joint Venture. Each Party shall use its best efforts to promote and protect the interests of the Joint Venture.

29.2 The Parties, while pursuing their own respective rights and interests, shall further their common interest in the Joint Venture and its activities. In particular, each Party undertakes to refrain from any personal activity, behaviour or steps which would compete with and/or be otherwise detrimental to the Joint Venture's interests.

*{Option (add as Article 29.3): Upon withdrawal, replacement or exclusion of a Party from the Joint Venture, the leaving Party shall continue to be under an obligation not to compete with the activities of the Joint Venture (as carried on at the Exit Date) for a period of [two] years after the Party's Exit Date.}*



## Article 30 Avoidance and resolution of deadlock

30.1 A Deadlock for the purposes of the present Agreement arises when the Parties as per Article 7 or the Management Committee as per Article 8 are unable at least two successive meetings to reach a decision:

- (a) By reason of the absence of the same Party or the same member of the Management Committee and the resulting failure of the meeting to reach the attendance requirement (referred to as 'Attendance Deadlock'); or
- (b) By the absence of the required majority for a decision.

30.2 If after two meetings of the Parties or the Management Committee a decision cannot be reached for the reasons described in Article 30.1 (a) or (b), the majority of the Parties or of the members of the Management Committee attending (physically, by representation or electronically) may call immediately a new meeting to attempt to resolve the Deadlock.

*{Option (add): In urgent matters requiring a decision before the expiration of the notice period for the new meeting, the majority may take interim decisions which shall be subject to reconsideration at the new meeting. The Minutes of the meeting shall record the reasons why the majority considered the matter as urgent. The question of whether a case of urgency existed and required the interim measures decided can be made subject to a review by the Arbitral Tribunal (Article 32).}*

30.3 The Parties shall refrain from using the provisions on minimum attendance to provoke an Attendance Deadlock and shall see to it that the members of the Management Committee appointed by them shall refrain from such use. The question of whether a Party is in breach of this obligation and the sanctions for such breach are subject to review by the Arbitral Tribunal (Article 32).

30.4 If a Party (not being the Party which has caused an Attendance Deadlock) considers that a Deadlock prevents the Joint Venture from pursuing its Object, it may so notify the other Parties and require that the matter be subject to the provisions of Articles 32.2 and 32.3.

30.5 If, for a period longer than two months after the notice pursuant to Article 30.4 the Deadlock remains unresolved, a Party (other than a Party which has caused an Attendance Deadlock) has the right to withdraw from the Joint Venture pursuant to Article 18.

*{Option (replace Article 30.3 to 30.5 by the following provision): In a case of Deadlock, the presiding Party or the chairperson of the Management Committee shall have, in the third consecutive meeting, an additional vote to break the Deadlock and the provisions on minimum attendance shall not apply.}*

*[Note: If this option is adopted, provisions must be included concerning the appointment and removal of a presiding Party or the chairperson of the Management Committee: see Article 8.9].*

## Article 31 Applicable law and guiding principles

31.1 This Agreement is governed by the laws of [*specify country*].

31.2 The Agreement shall be performed in a spirit of good faith and fair dealing.

31.3 In the interpretation and application of the Parties' rights and obligations under this Agreement, due weight shall be given to applicable practices in international trade. When defining these practices, reference shall be made, *inter alia*, to the UNIDROIT Principles of International Commercial Contracts.

31.4 When consent or approval is required of a Party under this Agreement or in the course of the activities of the Joint Venture, such consent or approval shall not unreasonably be withheld.

31.5 The passages in this Agreement identified as 'options' are binding on the Parties only if they have been specifically retained in each case.

## Article 32 Resolution of disputes

32.1 If a dispute arises between the Parties or some of them with respect to this Agreement or in the course of the activities of the Joint Venture, all Parties shall seek to resolve it amicably.

32.2 In the course of the Parties' attempts at amicable settlement, any Party may request (in writing to the other Parties) that the dispute be brought before the most senior decision-making persons in their respective organizations. If such a request is made, the decision-makers in the organizations concerned shall meet at least once to consider the dispute and possible ways to resolve it.

32.3 If the dispute has not been resolved within one month after the request under Article 32.2, any Party may request that it be brought to mediation or any other form of alternative dispute resolution (ADR). The other Parties shall give constructive consideration to such request but, with the exception of the meeting of senior decision-makers pursuant to Article 32.2 above, no Party shall be obliged to engage in ADR procedures unless (and then only for so long as) it agrees to it.

32.4 If a Party has come to the conclusion that the attempts at amicable resolution are to no avail, it may give notice to the other Parties concerned by the dispute of this failure and, thereupon, may commence Arbitration pursuant to Article 32.5 *et seq.* Except to the extent to which urgent interim measures of protection are required which the Arbitral Tribunal cannot provide effectively and for the enforcement of an arbitral award, the Parties exclude recourse to the courts.

*{Option: If a Party has come to the conclusion that the attempts at amicable resolution are to no avail, it may give notice to the other Parties of this failure and, thereupon, may submit any legal claim in the courts of [*specify place/country*], which shall have exclusive jurisdiction.}*

32.5 The Arbitration proceedings shall be conducted under the rules of [*specify UNCITRAL or other Rules, or an Arbitration Institution (e.g. International Chamber of Commerce)*]. The place of arbitration shall be [*specify*].

32.6 The Party or Parties that commence the Arbitration may require any other Party to this Agreement to participate, on its side or on the side of the Respondent(s), in the formation of the Arbitral Tribunal and the arbitration proceedings. Disputes concerning the necessity for a Party to participate in the proceedings and the side on which it must do so shall be resolved provisionally by the person or institution which, in the absence of agreement by the Parties, appoints the arbitrators and finally by the Arbitral Tribunal.

32.7 In the resolution of the dispute, the arbitrators shall give effect to the letter and the spirit of this Agreement and, where necessary, reconcile conflicting provisions of the Agreement in this spirit. In case of conflict between the Agreement and the applicable law, the arbitrators shall act as *amiable compositeurs* and, subject to public policy, shall give effect to this Agreement and the reasonable intentions and expectations of the Parties.

32.8 In the case of any disputes relating to questions of valuation, any Party may request the appointment of an Independent Expert according to proceedings to be agreed by the Parties. If the Parties fail to agree on the appointment of the Independent Expert and on the applicable rules, the Rules for Expertise of the International Chamber of Commerce's International Centre for Expertise shall apply. The Independent Expert's valuation shall be final and binding on the Parties.

### **Article 33    Miscellaneous provisions**

33.1 If any of the provisions of this Agreement are found to be null and void, the remaining provisions of this Agreement shall remain valid and shall continue to bind the Parties, unless it can be concluded from the circumstances that, in the absence of the provision(s) found to be null and void, the Parties would not have concluded the present Agreement. The Parties, if necessary with the assistance of the Arbitral Tribunal pursuant to Article 32, shall replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

33.2 The rights and obligations of any Party under this Agreement cannot be assigned without the prior written consent of all Parties *{option: the majority of the Parties}*.

33.3 The Parties agree to keep confidential all business and technical information relating to and acquired in the course of their activities connected with the Joint Venture. This obligation is not limited in time, and shall continue after a Party has left the Joint Venture or the Joint Venture has been terminated. The only exceptions to this confidentiality obligation are:

- (a) If the information is or becomes public knowledge (without fault of the Party concerned);
- (b) If and to the extent that information is required to be disclosed by a Party to a regulatory or governmental authority or otherwise by law (in which case that Party shall keep the other Parties informed of such disclosure).

33.4 The Addresses for Notifications and Service of Process are the following:

- 1) *[specify]*.
- 2) *[specify]*.
- 3) *[specify]*.

Unless and until a new address has been notified to the Management Committee and the other Parties, all communications to a Party are validly made when sent to its address as specified above.

33.5 Notices under this Agreement shall be made by registered mail or by fax with confirmation by mail. They may also be validly made by electronic mail provided the sender takes precautions necessary to ensure that the notice has been received.

33.6 This Agreement may be modified only by a written amendment, signed by all Parties, or by a unanimous decision by the Meeting of the Parties. The amendment or decision must be signed by all Parties, on paper or by electronic signature.

The present Agreement is signed in *[specify number]* copies, each of which is an original.

*[Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.]*

## Appendix 1 Ancillary Agreement on real estate

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

AAA

BBB

CCC

[*identify the names of the Parties to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, tenant, lease holder, etc.)*] with respect to the following property (referred to as 'the Property'):

[*describe the property*].

2. The Joint Venture wishes to use the Property for the following purpose:

[*describe the purpose for which the Property is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party places the Property at the disposal of the Joint Venture for the described purpose.

{**Option (add):** *This Agreement does not transfer ownership of the Property to the Joint Venture but gives the Joint Venture solely the right of use as herein specified.*}

4. The use of the Property by the Joint Venture shall be subject to the following terms:

[*specify any particular terms and conditions, e.g. as to rent, compliance with any covenants or planning conditions applicable to the Property, etc.*].

5. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 31 (Applicable Law and Guiding Principles) and 32 (Resolution of Disputes).

[*Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.*]



## Appendix 2 Ancillary Agreement on intangible assets/intellectual property rights

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

AAA

BBB

CCC

[*identify the names of the Parties to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, licensee, assignee, etc.)*] with respect to the following Intangible Assets and/or Intellectual Property Rights (referred to as 'the Rights'):

[*describe the Intangible Assets/Intellectual Property Rights (e.g. invention, patent, industrial designs and models, distinctive designation, get-up, trademark or service mark, software, copyright)*].

2. The Joint Venture wishes to obtain use {**option: ownership**} of the Rights for the following purpose:

[*describe the purpose for which the Intangible Assets/Intellectual Property Rights are to be used/owned*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party grants to the Joint Venture an exclusive {**option: a non-exclusive**} licence to use the Rights within the following territories [*specify*] of the Joint Venture, for the described purpose.

{**Option:** *Instead of granting a licence, the Contributing Party assigns the Intangible Assets/Intellectual Property Rights to the Joint Venture and remains a co-owner.*}

**If the option is chosen, add:**

*In such event, if the Intangible Assets can be registered, the Joint Venture shall undertake all necessary steps for registration, at its cost, of such Intangible Assets in the joint names of the Parties.*}

4. The contributing Party agrees to use all reasonable efforts to maintain the Rights in force in all countries where they are registered {**option: provide a list of countries**}.

5. The Joint Venture agrees to pay all administrative costs, taxes, and fees necessary for the registrations to remain in force in the above-mentioned countries.

*{Option: In the event that the Contributing Party uses the Rights to a greater extent than the Joint Venture, consider a different distribution of the costs.}*

6. If and to the extent that the Contributing Party continues to use the Rights in territories in which the Joint Venture is also active, the Contributing Party shall do so subject to Article 29 (Duty to Promote the Interests of the Joint Venture and Not to Compete with It) of the Joint Venture Agreement.

7. The Parties other than the Contributing Party agree to refrain from exploiting individually the Rights contributed to the Joint Venture.

8. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 31 (Applicable Law and Guiding Principles) and 32 (Resolution of Disputes).

*[Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.]*



### Appendix 3 Ancillary Agreement on know-how

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

AAA

BBB

CCC

[*identify the names of the Parties to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party, as [*identify the nature of the rights (e.g. owner, licensee, assignee, etc.)*], has knowledge and experience in [*describe the Know-How*] (referred to as 'the Know-How').

2. The Joint Venture wishes to use the Know-How for the following purpose:

[*describe the purpose for which the Know-How is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party grants the Joint Venture an exclusive {*option: a non-exclusive*} licence to use the Know-How within the following territories [*specify*] for the described purpose.

{*Option: instead of granting a licence, the Contributing Party assigns the Know-How to the Joint Venture and remains a co-owner.*}

4. If and to the extent that the Contributing Party continues to use the Know-How in territories in which the Joint Venture is also active, the Contributing Party shall do so subject to Article 29 (Duty to Promote the Interests of the Joint Venture and Not to Compete with It) of the Joint Venture Agreement.

5. The Parties other than the Contributing Party agree to refrain from exploiting individually the Know-How contributed to the Joint Venture.

6. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 31 (Applicable Law and Guiding Principles) and 32 (Resolution of Disputes).

[*Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.*]



## Appendix 4 Ancillary Agreement on equipment and production tools

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

AAA

BBB

CCC

[*identify the names of the Parties to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, lessee, lease holder, etc.)*] with respect to the following equipment, machines and production tools (referred to as 'the Equipment'):

[*describe the Equipment*].

2. The Joint Venture wishes to use the Equipment for the following purpose:

[*describe the purpose for which the Equipment is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party places the Equipment at the disposal of the Joint Venture for the described purpose.

4. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 31 (Applicable Law and Guiding Principles) and 32 (Resolution of Disputes).

[*Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.*]



## Appendix 5 Ancillary Agreement on contributions in services

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

AAA

BBB

CCC

XXX

[*identify the names of the Parties to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party is competent and experienced in [*describe the Services*] (referred to as 'the Services').

2. The Joint Venture wishes to benefit from the Services for the following purpose:

[*describe the purpose for which the Services are to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party undertakes to provide its Services to the Joint Venture for the described purpose.

4. The following rules shall govern the Services:

[*describe the general rules that the Services are subject to*].

5. The Party which has made the Services receives no special compensation for this activity. {**Option:** *specify any payment or other terms.*}

6. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 31 (Applicable Law and Guiding Principles) and 32 (Resolution of Disputes).

[*Add place and date;*

*signature by XXX and all Parties to the Joint Venture Agreement.*]



## Checklist of options, fill-ins and time limits

The following list is intended to assist drafters of the Contractual Joint Venture Agreement. It indicates the contractual provisions containing either options, time limits or blanks to be filled.

Cover	Identification and specification of each Party
Recitals	Activities, abilities, objectives and interests for each Party Proposed activity of the Joint Venture in general terms
Article 2	Detailed description of Object of the Joint Venture
Article 3.1	List of contributions of each Party
Article 3.2	Option concerning additional contributions
Article 3.3	Options concerning a Party unwilling to make additional contributions
Article 5.1	Description of technical or commercial commitments of each Party
Article 5.2	Option on payment for technical or commercial commitments
Article 7.3	Time limit
Article 7.4	Options on attendance at Meetings of the Parties
Article 7.5	Option on voting rights at Meetings of the Parties
Article 7.7	Option regarding unanimous decisions of the Meeting of the Parties
Article 7.8	Option regarding attendance Options regarding majority/unanimity vote
Article 7.9	Time limit
Article 8.1	Options on the composition of the Management Committee
Article 8.2	Complete the list of activities of the Management Committee
Article 8.3	Option concerning the day-to-day management
Article 8.7	Option on attendance for decisions of the Management Committee
Article 8.8	Options on majority/unanimous votes in the Management Committee
Article 8.9	Appointment of the chairperson and his/her casting vote
Article 9.2	Time limit
Article 9.3	Time limit

Article 11.1	Option on representation of the Management Committee
Article 11.2	Option on representation of the Management Committee
Article 12.5	Option on liability for taxation
Article 13.1	Option specifying a time limit
Article 13.3	Option fixing rate of interest
Article 14.1	Option concerning share in profits and losses
Article 14.2	Time limits (two)
Article 17.2	Option specifying a time limit
Article 17.5	Option concerning review of exclusion decision
Article 17.6	Option regarding the automatic exclusion of a party
Article 18.1	Time limit
Article 18.2	Time limit
Article 18.3	Time limit
Article 19.1	Time limit
	Option concerning valuation of the Joint Venture
Article 19.3	Time limit
Article 21.2	Time limit
Article 22.1	Time limit
Article 22.2	Option concerning approvals for replacement of a Party
Article 23.1	Options for continuation of Joint Venture upon the death of a Party
Article 25.1	Options on grounds for terminating the Joint Venture
Article 28.1	Option concerning the attachment of a licensing agreement
Article 29.2	Option on the duration of the not to compete obligation
Article 30.2	Option concerning urgent decisions in a deadlock situation
Article 30.5	Time limit
	Option concerning deadlock
Article 31.1	Specify applicable law
Article 32.3	Time limit
Article 32.4	Option for Court jurisdiction (to be specified)
Article 32.5	Specify rules of arbitration
	Specify place of arbitration
Article 33.2	Option concerning assignment of the Agreement
Article 33.4	Specify each Party's address for notifications
Signatures	Specify number of copies
	Specify place and date of signature
	Signature of the Parties



## Documents to be produced prior to or at signing

### A. *The Parties*

#### 1. *With respect to Parties that are corporations or other legal entities: documents to establish the legal existence of the Party and the authority of the person appearing for it*

- Certificate issued by the authorities where the Party is registered, confirming the existence of the legal entity and identifying the organs that may represent it (Board of Directors, etc.);
- Authorization of the Board of Directors to conclude the Joint Venture Agreement;
- If the Party does not act through a person having statutory powers to represent it (as for instance the members of the Board of Directors), the person appearing for the Party should present powers of attorney executed by the competent body in the corporation;
- Certificate of good standing.

#### 2. *With respect to physical persons*

- Passport or other document identifying the person appearing.

#### 3. *Group relationship of corporations*

- Document outlining the detailed structure of the holding entity and of the Group;
- Articles of incorporation and organizational by-laws of all companies of the Group;
- Yearly accounts of the Parties and/or their Groups, and possibly consolidated accounts of the Group;
- Shareholders' register or list of the Parties and/or Parent entities;
- Shareholders' resolution/agreement approving the Agreement;
- Minutes and decisions of the Shareholders' Meetings and Board of Directors' Meetings; etc.

#### 4. *Solvency*

- Confirmation by a bank of the existence of funds (bank reference).

**B. Contributions**

- Valuation, by expert opinion or otherwise, as agreed by the Parties, of contributions other than cash (*such valuations may also be attached to Ancillary Agreements as per Appendices to this Model Agreement*).

**C. Guarantees between the Parties**

- Guarantee by parent company, bank guarantee, comfort letter, etc.

**D. Agreements (as may be required for the Joint Venture activity)**

- Licence agreements and assignment of trademark and/or service mark;
- Distribution agreements;
- Sales agreements;
- Confidentiality agreements;
- Agreements for the assignment of company shares; etc.

## USER'S GUIDE

# ITC CONTRACTUAL JOINT VENTURE MODEL AGREEMENT (three parties or more)

### Description of the Parties

It is important that the Parties to the Agreement are correctly identified and that those representing them have the powers to do so for the purpose of concluding the Agreement. The legal issues that arise in this context relate primarily to the personal status of the Parties, their capacity, and the powers of their representatives to enter into an agreement on behalf of their company. Normally these issues are subject not to the law applicable to the Joint Venture Agreement but to the 'personal law' of each Party, which is generally the law where each Party has its residence or place of business, or the law of a company's incorporation.

### Recitals

The recitals provide the background to the cooperation: information on the Parties, their fields of activities, and their interests and expectations.

The recitals do not directly create obligations for the Parties, but they may be important for the interpretation of the obligations set out in the body of the Agreement.

### Article 1 Contractual definitions

The Model Agreement uses a number of terms that have a specific meaning. These terms are written with capital initials throughout the Model Agreement. For ease of reference, the defined terms are grouped in this article, with a reference to the article where the term is defined (where relevant).

The terms are defined in such a way as to apply to the options proposed in the Model Agreement. For instance, Article 8 provides for a Management Committee comprising three Parties, but also makes it possible for Parties to entrust the management to a single Managing Party. If the Parties choose the latter option, the contractual definition of a 'Management Committee' is still valid (a one-person 'executive body'). Parties could change the term 'Management Committee' to 'Manager' throughout the Agreement, but they need not do so.

### Article 2 Object of the Joint Venture

The Agreement distinguishes between the objectives which motivate each Party, taken individually, to enter into the Joint Venture (in this case the term 'objectives' is used) and those which the Parties jointly pursue as part of their Joint Venture (in this case, the expression 'Object of the Joint Venture' is used). The objectives of each Party are set out in the Recitals while the Object of the Joint Venture is defined in Article 2.

It is important that the Parties give careful consideration to the Object of the Joint Venture and the methods by which this Object is to be pursued. The definition of the Joint Venture Object provides some protection to a minority shareholder. However, this definition should not be used to create undesirable constraints on the evolution of the Joint Venture activities.

Where applicable, it could be wise to define the territorial scope for the activity of the Joint Venture, for instance in a joint venture contract concerning the distribution of goods.

If the Joint Venture is limited in time, the duration should be specified in this Article. In that case, the option 'expiration of the duration of the Joint Venture' should be introduced in Article 25 (Termination of the Joint Venture).

When the Parties have chosen a name for the Joint Venture and intend to trade under this name, it could be specified in this Article.

### **Article 3 Contributions of the Parties**

It is an essential feature of any Joint Venture that the Parties make contributions in the interest of achieving the common Object of the Joint Venture. These contributions may be in the form of money or in any other form, such as real estate, technical know-how, access to a market, a brand name or services.

When it comes to valuing the contributions, a fundamental choice has to be made between two approaches:

- First approach: the Parties may fix a value for each of their respective contributions and allocate their shares in the Joint Venture accordingly.
- Second approach: the Parties may see to it that their contributions are approximately equivalent and decide that they all have equal shares. This approach is simpler in some respects and is suitable especially in joint ventures where the investment in money or other contributions is less important. It does, however, risk creating tensions if during the course of the joint venture's development changes occur in the value of the contributions.

The present Model Agreement has chosen the first approach, that of a detailed valuation of the respective contribution of the Parties, where the value of the contributions determines the share in the Joint Venture. The second approach is offered as an option.

In any event, whether the Parties opt for the first or for the second approach, it is important to keep in mind that the Share in the Contributed Assets has a critical function in the Model Agreement. It determines in particular:

- Voting rights (Article 7.5);
- Obligations to make additional contributions (Article 3.2);
- A Party's share in the profits and losses (Article 14.1);
- The extent of liability of the Parties in their relationship with each other (Article 12.2).

**3.1** In this provision (first approach), the Parties specify and determine the value of their respective contributions. Depending on their nature, the contributions may require the conclusion of separate agreements; models for these agreements are attached to the Model Joint Venture Agreement in the form of Ancillary Agreements.

The option refers to the second approach as described above.

**3.2 to 3.4** Additional contributions: Article 3.2 states that the Management Committee may call for additional contributions. There are various other ways to address the issue of additional funding of the Joint Venture. Two alternate constructions are briefly described here.

- (a) Based on their assessment of the market, the Parties could define a 'preliminary stage' of their project for which 'initial contributions' are required. At the end of that 'preliminary stage', the Parties will reconsider the situation and decide what further investments may be necessary. If it is decided that 'additional contributions' are needed, those who are unwilling or unable to contribute may leave the Joint Venture or have their share reduced.
- (b) Another possible option would be to plan the successive stages of the development of the Joint Venture in such a manner that the need for additional funding at each stage is determined from the outset. In such a case, the Agreement may either require that all Parties must make their respective shares in the additional funding as and when required, or leave the choice to each Party whether or not to participate in a stage of the development. In this latter case, only those that have participated will bear the risk of loss or share the profits resulting from that stage of development. This requires special accounting arrangements for identifying the losses and profits allocated to such a stage. If a Party is allowed to opt out of a certain stage, the Agreement might provide a possibility for it to opt back in at a later date, presumably by settling any differences in the contributions and possibly by compensating the other Parties for the risk assumed. Arrangements of this nature can be found, for instance, in joint operation agreements of the oil industry.

## **Article 4 Liability for contributions**

The Model Agreement is based on the premise that a Party making a contribution is liable to the other Parties on the terms that would apply if a third party provided the contribution. The Parties may be of the view that, among members of a joint venture, where all Parties have a common goal and are affected accordingly by defective contributions, such strict standards of liability may not be appropriate. In that case they could limit the liability of a Party to gross negligence and wilful damage.

## **Article 5 Technical or commercial commitments of the Parties**

Commitments made according to this provision are similar to the contributions regulated in Article 3. However, the commitments according to Article 5 are generally not a contribution made once and for all, but contributions on a continuing basis, such as the commitment to perform certain tasks, to deliver products, to manufacture components, to market or manage services, or to distribute products.

Article 5.2 makes it clear that these are additional commitments beyond the contributions under Article 4, and that they are to be performed free of charge, unless the option is selected.

Where applicable, this Article should be coordinated with Article 8.2, which deals with the activities undertaken by the Management Committee for the operation of the Joint Venture.

## **Article 6 Organization and management**

The Model Agreement is based on the premise that the Joint Venture is composed of at least three parties. (For two-party contractual joint venture contracts, please refer to the 'CJV – two Parties' form.) This justifies the provision that the Joint Venture be managed by a Management Committee. In cases where the Joint Venture is formed of two (or possibly three) Parties, simpler forms of organization may be adopted, providing for instance that:

- Decisions are taken in agreement between all Parties, by exchange of correspondence where need be;
- Each Party is entitled to represent the Joint Venture/its Parties in accordance with decisions made;
- Each Party reports to the others regarding current management and representation activities.

## **Article 7 Meeting of the Parties**

**7.1 and 7.2** Important decisions in a Joint Venture must be made by all Parties. In larger Joint Ventures, this decision-making process must be organized and, since for efficient management some powers must be delegated to the management body, the authority and powers reserved to the Parties themselves must be defined. Apart from the Management Committee, larger joint ventures may wish to create ad hoc committees with authority in specified areas, such as financing, certain operations, or research and development.

**7.3** If decisions may validly be made at a meeting where all Parties are not present, Article 7.3 is particularly important, as it requires that an agenda of the meeting be distributed to the Parties before the meeting and that no decision be taken on matters not expressly mentioned on the agenda.

Article 7.3 includes, in addition to ordinary rules for convening and holding meetings, provisions on electronic communication for the purpose of the meeting. Parties are advised to use appropriate methods in order to provide certainty as regards the identity of the participant and authenticity of any electronic correspondence and signature.

The validity of the provision on attendance by electronic means should be checked under the applicable law. Because technology is constantly evolving, the Model Agreement makes reference to electronic communications only in a general manner. Whatever means are being used, the main risk will be the inability of one Party to communicate with the others (due to technical interruptions or disruptions). It should be incumbent upon the Party who suffered any disruption to inform the others immediately about the nature of the occurred disruption, by e-mail, phone call, fax, or any other technological means at its disposal at that time. A Party neglecting to inform the others immediately would be treated as if it had been present.

**7.4 Attendance requirements.** The requirement that all Parties attend Meetings of the Parties, personally or by representation, might complicate the operation of the Joint Venture. Nevertheless, this rule has been provided in the Model Agreement as a means of protection against surprise decisions. Some flexibility may be required, depending on the usual residence of the Parties and their representatives and on the type of activity performed by the Joint Venture. To achieve flexibility, two options are proposed in the Model Agreement: providing for a quorum (attendance requirement – option 1), or, providing for decisions to be taken without regard to the number of participants (no attendance requirement – option 2).

**Quorum.** The quorum is a minimum attendance requirement so that a Meeting of the Parties may make valid decisions. It can be expressed either by way of a minimum number of Parties that must be present or represented at the Meeting, or by way of minimum Shares in Contributed Assets.

If the quorum is less than the majority of all voting rights, then Article 7.8 must be adapted (see commentary below).

Providing for a quorum requires that consideration be given to the risk of deadlock. The Model Agreement deals with this question in Article 30.

**7.5 Voting Rights.** As explained above (see comments under Article 3), the Model Agreement provides for voting rights proportionate to the Share in the Contributed Assets. An alternative would be to grant each Party one vote.

A two-tier system may also be contemplated, in which each Party has one vote and a Party contributing more than a certain proportion (e.g. 10%) has the option of requesting a proportional vote.

The Parties may wish to provide in the Agreement that a Party may not take part in votes on all matters that relate to any claim, business, agreement or dispute between the Joint Venture and that Party. An example of a case in which a Party may not be allowed to vote is its own exclusion (see Article 17.3).

**7.7 Major decisions.** The unanimous vote contemplated here is that of all Parties (i.e. all Parties to the Joint Venture), and *not* a unanimous decision of the Parties attending the meeting. This must be borne in mind in particular when the Parties have adopted one or the other option provided in Article 7.4. It may be desirable to consider introducing a clause to avoid abuse of the minority voting rights in those matters where a unanimous decision is required.

If a unanimous decision is not required, it may nevertheless be desirable to require the consent of any Party having made a substantial contribution for certain important business decisions (to be defined; e.g. major acquisitions, significant capital expenditure, third party borrowings above a certain limit, key management appointments, major joint ventures or alliances).

In any event, a decision to dissolve the Joint Venture should require unanimity of all Parties.

An exception to the unanimity rule for '*decisions producing a change ... of the contractual rights and/or duties of the Parties*' is provided in Article 3.2, which confers on the Management Committee, and not the Meeting of the Parties, power to call for additional contributions. If the parties wish to preserve the unanimity rule for additional contributions, they must select the option proposed under Article 3.2.

**7.8 Other decisions.** A majority is above 50% of the voting rights. A qualified majority is a higher number of voting rights (e.g. two-thirds, 75%).

Article 7.8 defines the majority required for ‘*other decisions*’, i.e. decisions which do not ‘*produce a change of the Object of the Joint Venture, or of the contractual rights and/or duties of the Parties*’. By requiring the ‘*majority of all voting rights, including those of Parties not attending or represented*’, Article 7.8 spells out a condition whose consequences are quite similar to a quorum requirement inasmuch as a meeting which is attended by less than a majority of all voting rights cannot take any decision.

If the Parties choose to have a quorum (option 1 of Article 7.4) which is less than the majority of all voting rights, then Article 7.8 must be adapted so that decisions can be taken.

**Abstentions and blank votes.** The Model Agreement does not specifically deal with the matter of abstentions and blank votes. Parties may wish to add a provision on this with regard to decisions taken by the Meeting of the Parties and the Management Committee. The first point to decide is whether abstentions and blank votes are counted in the number of votes cast (in certain jurisdictions, an abstention is not a ‘yes’ or a ‘no’ vote but a refusal to vote). Where they are indeed considered in the number of votes cast, the second point to decide is whether they should be counted as ‘no’, ‘yes’ or ‘neutral’ votes.

**Deadlock.** The avoidance and resolution of a Deadlock is dealt with in Article 30.

## Article 8 Management Committee

**8.1** The decision to create a Management Committee depends on the needs and size of the Joint Venture.

The Model Agreement provides for the formation of a Management Committee, a solution more appropriate for large and medium sized joint ventures. In more complex operations, the Joint Venture may wish to hire professional managers on a full time basis (option 3). In the case of smaller joint ventures with simpler management tasks, day-to-day management can be in the hands of one of the Parties (option 1) or all of them jointly (option 2).

Members of the Management Committee would normally be individuals – as appointed representatives of the Parties – rather than the Parties themselves.

**8.3** The provision should be aligned with Article 8.1. If the management is entrusted to one of the Parties, Article 8.3 should clarify whether that Party may delegate the management in full or in part. As a matter of principle such sub-delegations should be limited to specific tasks and the Managing Party should remain fully responsible towards the other Parties for the management of the Joint Venture.

**8.4** The clause deliberately does not require the Meeting of the Parties to give reasons for removal of the persons entrusted with the management of the Joint Venture. Management is a matter of confidence and, if that is missing, the Joint Venture should be able to remove the person in question without having to engage in a debate about the reasons. This does not exclude that, according to the law governing the employment contract of a non-Party manager, reasons must be given and notice periods must be respected.



**8.6** In larger structures, the Management Committee may wish to adopt regulations for its operations. The Joint Venture Agreement may require such regulations to be approved by the Meeting of the Parties.

**8.7** The clause requires the presence of all members of the Management Committee for taking valid decisions. Depending on the circumstances and the residence of the members, this may be an unnecessarily cumbersome requirement. A quorum and the requirement of prior notice with an agenda may be sufficient protection against surprise decisions.

As explained in the context of the Meeting of the Parties (above, at Article 7.3), if the Parties provide for attendance at Management Committee Meetings by electronic means, they should use appropriate methods in order to provide certainty as regards the identity of the participant and the authenticity of any electronic correspondence and signature.

**8.8** It can be expected that the management decisions will be taken by consensus, without the need for a formal vote. If a vote is necessary, the requirement for a unanimous decision would not seem to be justified. In any event, matters of fundamental importance are reserved for the Meeting of the Parties (Article 7).

**Deadlock.** The avoidance and resolution of a Deadlock is dealt with in Article 30.

## **Article 9      Accounts**

Keeping proper accounts is a basic requirement for any business and its proper management. Accounting standards at the Joint Venture's principal place of business should be respected. Since the Model Agreement applies to international cooperation, the use of International Accounting Standards (IAS) or other standards and practices accepted internationally and/or in the relevant industry is recommended.

## **Article 10     Auditors**

In international joint ventures, where one or several Parties invariably come from a country other than that where the Joint Venture is active, verification of the Joint Venture's accounts by an independent auditor is an important means for preserving trust, ensuring that accounts are reliable and protecting Parties that are not directly involved in the management of the Joint Venture.

## **Article 11     Representation**

**11.1** Representing the Joint Venture, in a contractual joint venture with no legal personality as proposed in the present Model Agreement, means representing the Parties taken collectively (see Article 1 under 'Joint Venture').

Article 11.1 provides that any member of the Management Committee alone may represent the Joint Venture. An alternative solution, proposed in the option, is to provide that two signatures are necessary for engaging the Joint Venture. A third possibility is to state that the signature of one member of the Management Committee alone is sufficient for commitments up to a specified amount and that the joint signature of two members of the Management Committee would be required beyond that threshold.

The authority to bind the Joint Venture should be expressed in writing and, where compatible with the requirements of the applicable law, include the provisions of Article 11.2 to 11.4.

**Article 11.2 to 11.4** This provision regulates certain aspects of the relations with third parties. Obviously, the effect of this provision depends essentially on the law applicable to the relationship with the third party.

## Article 12 Liability

**12.1** This provision confirms the principle that, in a contractual joint venture, generally all Parties are jointly and severally liable. If Parties wish to provide for a more limited liability, Article 12 must be adapted accordingly. The validity of any restriction on liability towards third parties depends not only on the law governing the Joint Venture and/or the Joint Venture Agreement, but also on the law governing the relationship with third parties

**12.2 to 12.4** While Article 12.1 concerns liability towards third parties dealing with the Joint Venture, the remainder of Article 12 regulates the relations between the Joint Venture Parties with respect to situations arising from such joint and several liability of the Parties.

Parties should consider whether they need protection against the risk resulting from commitments which one of the Parties, in the exercise of its activities for the Joint Venture, may create for all of them jointly and severally. For this purpose one might consider a bank guarantee, an insurance policy, or a security from a parent company.

**12.5** *Tax issues.* This contractual joint venture may well amount to a 'partnership' in law in many jurisdictions. One particular consequence may be that a tax authority could, in theory, hold each of the Parties jointly liable for tax. The wording of Article 12.5 and the proposed option to be added to it makes it clear that each Party is liable for its own tax. This provision may have to be reviewed by a tax expert.

## Article 13 Breach of obligations

**13.1** A Party in breach of its obligations shall first be invited to remedy its failure. The Model Agreement does not determine a time period in which this has to be done. It would be difficult to fix such a period in the abstract. This is why the Agreement leaves it to the reasonable judgement of the Parties to determine an appropriate period. The reasonableness of the period so fixed may be reviewed by the Arbitral Tribunal.

The exclusion procedure may commence only if the Party invited to remedy a failure to perform fails to do so. This procedure, regulated under Article 17, provides that another notice must be given before the exclusion can be pronounced.

**13.2** In all cases, i.e. even if the failing Party remedies the breach immediately, the Parties having suffered losses from the failure may claim damages.

**13.3** A separate clause is provided to deal with delay in payments. At the level of the Model Agreement, it is practically impossible to fix a rate that is appropriate for the great variety of situations that may exist in different countries or at various times. However, the Parties, when they enter into their Joint Venture Agreement, may be able to do so in light of the circumstances then known to them. Instead of fixing a specific rate, e.g. 7%, the Parties may be better advised to fix a reference rate (e.g. the

three months discount rate of the national bank in the country of the Joint Venture's principal place of business). It is important that the Parties ascertain that this reference actually exists and that it operates as they expect.

In all cases, the benchmark for determining the rate of interest should be the costs that the Party entitled to the payment incurs by reason of the delay.

## **Article 14 Share in profits and losses**

**14.1** The basic choice to be made, as explained above (under Article 3), is whether to allocate profits and losses between the Parties in equal shares or in proportion to their Shares in the Contributed Assets. The Model Agreement has adopted the latter solution for Joint Venture Agreements between three or more Parties. The 'equal shares' solution is offered as an option.

Other arrangements are also possible, such as allocating an agreed amount of profits in equal shares and distributing the remaining profits by reference to specific criteria. One may also consider, in particular in the context of financing operations, awarding to certain Parties, or to third parties, a share of the profits only, without the corresponding risk of losses.

**14.2** The time for distribution of any profits depends on a number of considerations, in particular the availability of liquid assets.

Parties may wish to include provisions requiring that a certain part of the profits must be re-invested or retained as reserves.

## **Article 15 Access to information**

**15.1** Access to information about the business of the Joint Venture is a fundamental right of each Party. For those Parties that are not involved in the management of the Joint Venture, it is an essential prerequisite for the exercise of their right to control what is going on.

In certain circumstances, restrictions might be necessary in order to protect a Party's trade secrets. The validity of such restrictions under the applicable law must be checked.

**15.2** The right of the Parties to receive copies of the Minutes of Meetings of the Parties is expressed in Article 7.9. It is repeated here in a more general manner.

The Agreement may also provide that any request made by a Party to correct or amend the Minutes must be considered by the Meeting of the Parties and that a decision must be taken on such a request.

## **Article 16 New Parties**

**16.1** The founding Parties often create a joint venture without having any intention of increasing the number of Parties. However, even in such cases, circumstances may arise in which the entry of new Parties may be desirable or necessary. The Model Agreement requires unanimity for the decision on the admission of a new Party. Various other rules may be provided, such as requiring a majority decision on the admission or granting special entry privileges to companies affiliated to the Parties.

**16.4** For practical purposes, the Model Agreement provides that the entry becomes effective only at the commencement of the next Financial Year. Providing entry at a different date is, of course, possible but requires special arrangements with respect to the annual accounts and allocation of profits and losses.

## **Article 17 Exclusion of a Party**

The Model Agreement provides for the possibility of excluding one of the Parties to the Joint Venture. This is not self-evident. Depending on the nature of the relationship between the Parties, it might well be considered that exclusion should not be admitted. If this principle were adopted and a situation arose where continuation of the Joint Venture with a particular Party seemed no longer possible or bearable, the Parties would then have no other alternative but to terminate the Joint Venture, possibly creating a new one without the Party with which they no longer wish to cooperate. In order to avoid the disruption caused by such liquidation and re-creation, the Model Agreement provides for the possibility of exclusion.

If the Parties do not wish to provide for the possibility of exclusion, they may simply delete this Article. However, they should still consider providing for exclusion in case of bankruptcy, as regulated in Article 17.6.

**17.1** The Model Agreement provides for three grounds of exclusion which require a decision by the Meeting of the Parties and one situation in which exclusion occurs automatically (Article 17.6). In each of the three cases listed under Article 17.1 (a) to (c), the other Parties should consider whether the failure to perform, the change in control, or the non-performance on grounds of *Force Majeure* is materially detrimental to the success of the Joint Venture.

Exclusion on the grounds of general loss of mutual trust might be considered in cases such as abuse or misuse of rights, fraud or dishonesty, or more generally the loss of cooperative spirit among the Parties. In such cases work in the Joint Venture may well become unproductive and exclusion may be a suitable solution. However, this type of grounds for exclusion is difficult to define and the possibility of exclusion on such grounds may give rise to arbitrariness and abuse. For this reason, the Model Agreement does not provide for it.

**17.2 and 17.3** The Model Agreement provides for the decision on exclusion to be taken by the Meeting of the Parties. This solution appears preferable to exclusion by a decision of an Arbitral Tribunal or a State court. However, the validity of the solution that is chosen should be checked under the applicable law.

If the exclusion decision requires unanimity, as is the case in the Model Agreement (see Articles 7.2 (d) and 7.7), the Party whose exclusion is proposed cannot be permitted to vote; consequently it also should not be counted when establishing the quorum at the meeting.

**17.5** In order to avoid abuse of the right to exclude, there must be some possibility for review of the exclusion decision. The Model Agreement provides that if the competent jurisdiction (normally the Arbitral Tribunal, according to Article 32.4 to 32.7) finds that the exclusion was wrongful, it may award damages to the excluded Party but may not revise the exclusion; in other words, it may not reinstate the excluded Party. This approach has been chosen, first of all because reinstatement of an excluded Party, whether retroactively or not, is a difficult operation. Moreover, by

their decision, the other Parties have expressed that they consider continued cooperation with the excluded Party impossible. It would seem difficult to accept that such continuation should be imposed on them by an Arbitral Tribunal.

**17.6** The bankruptcy of one of the Parties or any other restrictions on its capacity to exercise its rights and obligations may cause the operation and management of the Joint Venture to be seriously impaired. Since a decision on exclusion may be more difficult if it is taken after bankruptcy has been declared, the Model Agreement provides for automatic exclusion, effective on the day preceding the declaration of bankruptcy or any other act instituting a restriction. It should be noted that this provision is not necessarily effective in all legal systems.

For Parties who are individuals, a provision by which incapacitation or a criminal conviction also triggers automatic exclusion might be considered.

**17.7** The continuation of the Joint Venture with the remaining Parties is the objective of the entire article. However, it may be that the excluded Party is of such importance for the operation of the Joint Venture that it would not make much sense to continue the Joint Venture without it. In such a case, the Parties may resort to termination under Article 25.

## **Article 18    Withdrawal of a Party**

The Model Agreement is based on the premise that the composition of the Joint Venture may change. Consequently, the possible withdrawal of a Party is also foreseen, with the restriction that a Party cannot leave during an initial period. If the Parties prefer an approach to their agreement which does not allow change in the composition of the Joint Venture, the provisions of Article 18 must be replaced by simply stating that withdrawal from the Joint Venture is not permitted.

Some protection must be provided for the remaining Joint Venture Parties in those cases where the withdrawal occurs at an inconvenient time and is detrimental to the Joint Venture. In such a situation two means of protection are provided. On the one hand, the remaining Joint Venture Parties may defer the departure for a limited period of time; the Model Agreement fixes this period at one year, but Parties should consider whether other periods are more suitable. On the other hand, a balance must be struck between the interest of a Party leaving the Joint Venture in having certain assets returned to it, and the interest of the Joint Venture in continuing to use these assets.

If of the Parties withdraws, the Joint Venture continues with the remaining Parties, who may decide to terminate the Joint Venture in accordance with Article 25.

## **Article 19    The amount due to a Party leaving the Joint Venture**

When leaving the Joint Venture, a Party is entitled to its share in it. The present clause assumes that the Joint Venture continues after the departure. The Model Agreement therefore proposes that the valuation of the share to which the leaving Party is entitled be based on the fair market value of the Joint Venture on the date of departure (the Exit Date) as a going concern. Valued in this manner, the share of the leaving Party may be above or below its Share in the Contributed Assets. A Party intending to leave the Joint Venture should have no incentive to do so when the business of the Joint Venture produces losses, nor should it be penalized if the business of the Joint Venture develops well.

**19.1** Article 19.1 sets the principles of valuation. Valuation at ‘fair market value’ is a well-established practice with accepted rules. However, depending on the place of business or the type of activity, it may be difficult to identify the relevant market. Therefore, the Parties should examine whether the proposed method of valuation is the most suitable one for their Joint Venture.

Since the departure of a Party may have detrimental effects on the business of the Joint Venture, the Party leaving it should bear its share in the decrease of value. The last sentence of Article 19.1 provides for this sharing in the reduction of value.

**19.3** Since the value of the leaving Party’s share is determined at the Exit Date, it does not benefit from any later revenue or profit of the Joint Venture. However, interest must be paid on that share from the Exit Date until actual payment. This payment, as a matter of principle, should be made within six months. If the payment causes severe strain on the financial means of the Joint Venture, it may be deferred. Here a balance must be found between the interest of the Party leaving the Joint Venture and those remaining behind. Payment in instalments may be the proper solution in some circumstances.

## **Article 20 Claim to the return of contributions other than cash**

As a matter of principle, the Party leaving the Joint Venture receives only its share in the fair market value of the Joint Venture. However, this Party may have made contributions, such as real estate, a brand name, equipment or other assets, with respect to which it has a justified interest in their return.

**20.1 and 20.2** These provisions seek to strike a balance between the interests of the Party leaving the Joint Venture and those remaining in the Joint Venture. Where there is a justified interest in the return of a contribution, the Party leaving the Joint Venture may claim the return of the contribution, but the Joint Venture may retain it if the contribution is necessary for its continued activity.

The use of the contribution by the Joint Venture has some limits: the level of use may not exceed that before the departure of the Party having made the contribution, and it is not unlimited in time. In addition, the Joint Venture must pay a reasonable compensation for the use of the contribution.

Disputes arising in this context are subject to arbitration, with the exception of questions of valuation which may be submitted to an Independent Expert as provided in Article 32.8.

## **Article 21 Liability of the Party leaving the Joint Venture for debts incurred or discovered after withdrawal or exclusion**

Since it is no longer a Party, a Party having left the Joint Venture is not liable for debts accruing after its departure. However, it remains liable for undiscovered debts that accrued during the time when it was a Party. This liability is limited in time. The Model Agreement provides for a period of two years; other periods may be stipulated.

The period starts running at the date when the Party leaving the Joint Venture ceases to be a Party (the Exit Date). However, in some jurisdictions, the period of liability for undiscovered debts runs from the date when the cause of the debt is discovered.



Unless the periods provided by the law are mandatory, the solution adopted in the Model Agreement seems to have the advantage of creating clarity after the stipulated period.

In some countries, the liability of a Joint Venture Party in employment and taxation matters is mandatory, irrespective of any contractual provisions.

## **Article 22 Replacement of a Party**

In accordance with the principle that the composition of the Joint Venture may change, the Model Agreement provides that a Party may be replaced, subject to the consent of all other Joint Venture Parties. Such consent could be given with the proviso that guarantees will be offered by the Party leaving the Joint Venture.

## **Article 23 Death of a Party**

Since it cannot be presumed that, after the death of a Party, the remaining Parties would be pleased to find themselves in a Joint Venture with persons or entities which they have not chosen, the Model Agreement requires the consent of all remaining Parties to the entry of the heirs into the Joint Venture.

This provision of the Model Agreement, which restrains the heirs' rights to enter the Joint Venture, may conflict with mandatory laws on succession and estate, particularly in civil law jurisdictions. This is why the Model Agreement proposes two options under Article 23.1. Option 1 requires a decision by an absolute or qualified majority of the Parties to continue the Joint Venture. Option 2 may be more suitable in situations where the automatic entry of the heirs into the Joint Venture is expected. It requires no additional decision from the other Parties; all that is needed is a simple certification by the Management confirming the continuation with the consenting heirs.

In cases where the identity of the heirs is not clear or where some heirs enter the Joint Venture and others do not, the Joint Venture may be exposed to claims from other heirs or third parties concerning their rights with regard to the deceased. The heirs entering the Joint Venture must indemnify the other Parties for such claims.

## **Article 24 Change of control of a Party to the Joint Venture**

Change of control over a Party may be a justified cause of serious concern for the other Parties, in particular when a Party is taken over, directly or indirectly, by a competitor or when, because of a change in control, the Party concerned (and with it the Joint Venture) can no longer muster the support of a group of companies that is crucial for the business of the Joint Venture. For this reason, the Model Agreement provides for the possibility of exclusion under Article 17.1.

No attempt has been made in the Model Agreement to define what is meant by change of control or ownership, nor is there an indication of a threshold above which a change becomes 'important'. Because there are many ways to exercise control, it was thought that the fairness of an exclusion would best be determined by the other Parties under Article 17, on a case-by-case basis, or by an Arbitral Tribunal under Article 32.

In practice, there is a case for including a more specific definition of change of control (e.g. a third party acquiring, directly or indirectly, more than 50% of the

voting rights in the Party concerned). The Parties may wish to clarify this in the Agreement, given their familiarity with the specific circumstances of the companies forming the Joint Venture.

Exclusion of the Party in respect of which the change occurred may not be the best solution. It may be preferable to find some other arrangement with the Party affected by the change, and the group to which it belongs, that will enable the Joint Venture to cope with the new situation in an acceptable manner.

## **Article 25 Termination of the Joint Venture**

At the time when they draft their Joint Venture Agreement, Parties are normally optimistic about the future of their cooperation; often they do not give sufficient attention to the possibility that their expectations may not materialize. It is therefore important to consider the circumstances in which the Parties may wish to see the Joint Venture terminated.

The Model Agreement contains three cases for termination, including the case where the achievement of the Object of the Joint Venture, as defined in Article 2, becomes impossible, for instance because a necessary permit is not delivered or a main product is no longer available for distribution. In addition, a number of other possible grounds for termination are listed as options. This list is not exhaustive.

## **Article 26 Hardship**

Situations may arise which, although not making performance of an obligation impossible, make its continued performance excessively burdensome. This problem may happen in a particularly acute form in long-term contracts. Legal systems differ in their willingness to alleviate the burden of the disadvantaged party. In some long-term contracts, clauses providing for adjustments in case of hardship are more frequent than in others. In joint venture agreements, such clauses seem to be less frequent. Nevertheless, the Model Agreement includes such a clause. The provision of Article 26 has been inspired by the corresponding clauses in the UNIDROIT Principles of International Commercial Contracts (see Article 6.2 of the UNIDROIT Principles).

In a situation of hardship, parties are usually under the obligation to renegotiate their contract in good faith, possibly with a mechanism providing for an adjustment if their negotiations fail. This is the solution adopted by the Model Agreement. If a case of hardship arises, the Parties must negotiate in good faith. Since this is no guarantee for success, attempts at mediation may be made and, in the last resort, recourse made to the Arbitral Tribunal or to the courts (if that is the option chosen in Article 32).

It must be pointed out that the power of a court or an Arbitral Tribunal to adjust a contract is not accepted in all legal systems; some systems consider that the function of the courts is to interpret the contract and not to make or remake it. Therefore, the validity of the hardship clause in the Model Agreement should be determined by reference to the law governing the Joint Venture Agreement and to the powers of the decision-making body under Article 32. For this reason, the Model Agreement expressly provides that the Arbitral Tribunal shall have the power to make any revision to the Joint Venture Agreement that it finds just and equitable in the circumstances. This provision may not be sufficient to overcome the objections in some jurisdictions; but it is believed that in most cases an Arbitral Tribunal with this power will accept the task of making the necessary adjustments.



## Article 27 *Force majeure*

*Force majeure* clauses are a regular feature of international contracts. Despite the French expression generally used to describe it, *force majeure* is not just a civil law concept but is used equally in international contracts in common law practice. The clause as proposed in this Article of the Model Agreement follows in its principal features the standard approach to the matter, as contained for instance in the United Nations Convention on Contracts for the International Sale of Goods (1980, Article 79), the UNIDROIT Principles of International Commercial Contracts (Article 7.1.7) and the International Chamber of Commerce Model *Force Majeure* Clause (2003).

The clause proposed here differs however from most standard *force majeure* clauses because it does not merely provide an excuse for non-performance but emphasizes that all Parties must make efforts to overcome the obstacles that the excused non-performance has put in the way of the Joint Venture activity.

**27.1** The main feature of *force majeure* is the occurrence of an ‘impediment’ that prevents a Party from performing its obligations. Subject to certain conditions, the occurrence of an impediment excuses the non-performance of the Party affected by it.

There are different techniques for drafting a *force majeure* clause. In common law practice, preference is normally given to an enumeration of preventing events. In civil law practice, the events are usually defined generically. Since it would be very difficult to provide an exhaustive list of *force majeure* events that are relevant for all circumstances under which the Model Agreement is likely to be used, the latter technique has been chosen.

In order to qualify as an excuse for non-performance, the *force majeure* event must be unforeseeable, unavoidable and beyond the control of the Party exposed to it. These requirements can be found, with some variations, in most *force majeure* clauses. They are the subject of frequent commentaries and of some case law in different jurisdictions and international arbitration cases.

**27.2** Commercial activities are subject to many public regulations which may require various sorts of authorizations, licences etc. The Model Agreement assumes that it is for each Party to obtain such authorizations for its own commitments. The other Parties should not have to bear the consequences, if a Party is unable to obtain them. Therefore, it is important for each Party to examine whether there are any public authorizations necessary for it to perform its obligations. If it feels that it cannot bear the risk of such authorizations not being granted, it must point this out to the other Parties and provide for an exception to the principle stipulated in Article 27.2.

It should be emphasized that the authorizations that are considered here are those which a Party may require for performing its obligations. The Joint Venture activity, too, may require authorizations. Unless a Party has made a commitment to obtain them, the unavailability of such authorizations for the activity of the Joint Venture does not fall under the *force majeure* clause. If lack of such an authorization prevents the Joint Venture from achieving its Object, this is not a case of *force majeure* but grounds for termination under Article 25.1 (b).

**27.6 and 27.7** As a matter of principle, if a Party is excused for non-performance, the other Parties should not be required to perform either. This principle is suitable in exchange contracts, where the obligations of one party (or group of parties) match those of the others. A joint venture agreement operates differently. The obligations which the Parties have to perform normally concern contributions to the Joint Venture and other commitments in the interest of the Joint Venture activities. If one of the Parties is prevented from performing its obligations, all Parties (including the non performing one) may have an interest in the continued operation of the Joint Venture, rather than withholding their own contributions.

For this reason, the Model Agreement requires that the Parties consider the matter jointly and adapt the Joint Venture activity as may be required. Even though it is excused for the non-performance of its original obligation, the Party exposed to the impediment must cooperate and, if necessary, contribute its share in additional contributions that may be necessary for the continued activity of the Joint Venture.

## **Article 28 Intangible assets and/or intellectual property rights**

Two situations must be distinguished with respect to intangible assets and intellectual property rights: the rights one of the Parties contributes to the Joint Venture and those which are created in the course of the Joint Venture's activities. The former situation is dealt with by Articles 3 and 28.1 and by the Ancillary Agreement in Appendix 2; the latter by Article 28. 2 and 28.3.

**28.1** Parties should be able to clearly identify the rights contributed by one or the other of the Parties on the one hand, and those created by the Joint Venture activity, on the other hand. As this is a potentially difficult area, it is recommended that any licence agreements contributed to the Joint Venture are agreed prior to or at the signing of the Joint Venture Agreement (see option under Article 28.1).

**28.2 and 28.3** Intangible assets and intellectual property rights may be created through various activities of the Joint Venture. The Agreement determines the conditions under which these intellectual property rights may be used, for the activity of the Joint Venture, or for the Parties' own needs, as well as the conditions under which such rights can be licensed to third parties (see, in this connection, *Manual on Negotiating Technology Licenses*, WIPO/ITC, 2004).

The Agreement must also ensure that the Joint Venture, i.e. the Parties collectively, can take the necessary action to protect its rights. This concerns both registration of the rights and any legal action taken to protect them. For instance, in some jurisdictions one co-owner of an intellectual property right may commence patent infringement proceedings acting alone, while in other jurisdictions all co-owners must act jointly.

Parties are recommended to consider more specifically the status of intellectual property rights after termination of the Joint Venture. In this regard, the proposed clauses below could be added as Article 28.4 and 28.5. They outline that:

- Where an individual Party withdraws, is replaced or excluded, that Party ceases to have any right to use the intellectual property rights of the Joint Venture; and
- Where there is a general termination of the Joint Venture, each Party has a (free) right of use.

**28.4** Upon withdrawal, replacement or exclusion of a Party from the Joint Venture, the leaving Party shall not be entitled to use any intellectual property rights contributed to or used by the Joint Venture (unless so decided under Article 20 or otherwise agreed by the other Parties).

**28.5** Upon termination of the Joint Venture under Article 25, each Party shall (unless agreed by all Parties) be entitled to use free of charge for its own purposes any intellectual property rights jointly owned by the Parties pursuant to Article 28.2.

## **Article 29 Duty to promote the interests of the Joint Venture and not to compete with it**

When entering a Joint Venture Agreement and during its performance, the Parties continue to have their own priorities, interests and objectives. While there is no reason to deny these, the Parties must bear in mind, protect and promote the interests of the Joint Venture.

Where there is a possibility that the activity of a Party could compete with and be detrimental to, the Joint Venture, the contract could specify that the non-competition restriction is extended for a certain period after a Party withdraws or is replaced or excluded from the Joint Venture. Under several laws, such a clause must be limited in time and/or in other respects. A clause is offered to that effect as an option.

Parties may also provide for a penalty for failure to fulfil the obligation not to compete. The validity of such a clause under the applicable law should however be examined.

## **Article 30 Avoidance and resolution of deadlock**

A Deadlock is defined as the inability of the Meeting of the Parties or the Management Committee to reach a decision at two successive meetings. Most joint venture contracts provide for mechanisms to resolve Deadlock situations, which can otherwise paralyse the decision-making process.

First, the Model Agreement contains provisions that it is hoped can avoid, or lead to the resolution of the Deadlock (possibility to call a new meeting immediately, possibility for the majority to take interim decisions, and the rule stated in Article 30.3 that Parties shall refrain from using provisions on attendance requirements to provoke a Deadlock).

Second, any Party can require that a decision be taken by the senior management of the Parties, or resort to mediation or other alternative dispute resolution processes provided for in Article 30.2 and 30.3. The Model Agreement does not provide for arbitration to resolve a Deadlock situation. Most Deadlocks are caused by business policy issues which normally are not a suitable subject for arbitration.

As an alternative, an option to Article 30.3–30.5 provides for the resolution of the Deadlock by the decisive vote of the Presiding Party or the chairperson of the Management Committee. The option has the advantage of providing a simpler solution. However, it confers on one of the Parties a decisive role which the Parties may not wish to grant to any among them. If the option is used, the Agreement should contain provisions dealing with the designation of a Presiding Party and/or a chairperson of the Management Committee.

## Article 31 Applicable law and guiding principles

While the Joint Venture Agreement can be expected to regulate the most important aspects of the Parties' cooperation, there may always arise issues which have not been settled by the Agreement. For this purpose, the choice of the law applicable is a necessary component of the Joint Venture Agreement.

Some parties to international contracts choose 'general principles of law', the *lex mercatoria* or other similar rules or principles as the 'law applicable' to their contract. The validity and usefulness of such a choice of law has given rise to much debate. In contract practice, the choice of an existing national law may still have distinct advantages with respect to predictability. The Model Agreement therefore proposes the choice of the law of a given country. This does not prevent the Parties from choosing one of the non-national solutions to which reference has just been made.

When deciding which law to choose for the Joint Venture Agreement, the Parties should first of all ascertain that the law they intend to choose either provides for or does not prevent the formation of the Joint Venture they are about to create. In particular, they should examine whether that law has adequate flexibility to accommodate the Agreement and its specific provisions.

Two other criteria are important for the choice of the applicable law: familiarity and accessibility. There is a considerable advantage for a Party if the law applicable to the Joint Venture is one with which it is familiar. However, in the practice of international joint ventures, the law which is familiar to one of the Parties often is less familiar or not familiar at all to some of the other Parties. For this reason, the Parties often choose a 'neutral' law. When choosing the law, especially if they choose a neutral law, the Parties should consider a law that is accessible to them. Accessibility relates to questions of language and legal concepts, but also to the form in which the law is expressed and how a foreigner may understand it.

International contracts involving States or State-owned entities, if the State does not impose its own law, are frequently submitted to a neutral law removed from the influence of the State or to general principles of law or similar systems.

The Model Agreement, while providing for the choice of the law of a specific country, tempers this choice by reference to principles of good faith and fair dealing as well as applicable practices in international trade, and specifically mention the UNIDROIT Principles of International Commercial Contracts. Reference to such principles may also be introduced by the choice of a particular dispute resolution system. Thus, the 1998 ICC Arbitration Rules, for instance, provide that 'in all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages' (Article 17.2). Article 32.7 of the Model Agreement introduces similar concepts.

## Article 32 Resolution of disputes

It may be useful to indicate a few fundamental landmarks set out in Article 32:

- Parties have an obligation to seek to resolve any dispute amicably. The Article refers to various processes for achieving an amicable settlement. It should be borne in mind, however, that as long as a Party has attempted to find an amicable

settlement (Article 32.1), it may resort directly to arbitration or court proceedings (whichever the Parties have opted for), without necessarily having to set in motion the processes described in Article 32.2 and 32.3.

- Failing an amicable settlement, disputes are resolved through arbitration, as specified in Article 32.4 to 32.7. However, Parties may opt for state courts instead of arbitration (see below).
- Concerning the specific matter of valuation, disputes are resolved in a final and binding manner by an Independent Expert (Article 32.8).

**32.1 to 32.3** International contracts concerning long-term relationships frequently provide for an attempt to resolve disputes amicably prior to arbitration or court proceedings. The Model Agreement follows this trend by providing:

- First, a general undertaking of the Parties to resolve disputes amicably (Article 32.1);
- Second, that the dispute can be brought to the senior management level (Article 32.2); and
- Third, that disputes can be brought to mediation or some other form of alternative dispute resolution, but only after a request has been made for resolution at the senior management level (Article 32.3).

These provisions ensure, on the one hand, that at least one serious effort will be made to resolve the dispute amicably, and, on the other hand, that recourse to arbitration (or State courts) is not unnecessarily delayed.

**32.4 to 32.7** Particular attention should be paid to the arbitration clause (unless the option of Article 32.4 for a State court is selected). Parties must choose between ad hoc arbitration (for which in particular the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) are available, or arbitration within the framework of an arbitration institution. The latter solution has the advantage that a number of matters which the Parties would have to regulate, in the Agreement or at the time when the dispute arises, are taken care of by the institution. If the Parties provide for ad hoc arbitration under the UNCITRAL Rules, they should not forget to designate the Appointing Authority.

Choice of the place of arbitration is of critical importance. It determines not only the place where the arbitration proceedings are held (although most arbitration rules permit the arbitrators and the parties to meet at places other than the place of arbitration), but also the law applicable to the arbitration procedure and the jurisdiction of the courts supervising the arbitration and providing any necessary assistance. For considerations similar to those discussed in the context of the choice of law, parties to international transactions often choose a neutral place of arbitration. In doing so, they should ascertain that the legal and judicial system at the selected place is suitable for international arbitration proceedings.

Since disputes arising out of joint venture agreements often involve more than two parties, special provisions have been foreseen in Article 32.6.

**32.7** An *amiable compositeur* is an arbitrator with the power to disregard non-mandatory provisions of a given law if strict application of those provisions would result in an unjust outcome.

**32.8** Recourse to an Independent Expert for valuation purposes is foreseen in Articles 3.4, 4.3, 13.3 and 19.4. In all cases, the Expert's decision is final and binding. Should a Party still wish to bring a valuation case to an arbitral tribunal or a court, it is expected that the requirement for an expert's determination and its final and binding character will be upheld.

### **Article 33    Miscellaneous provisions**

In addition to the issues settled in this Article, the following may also be given consideration:

- (a) Should the competition authorities be notified of the Joint Venture Agreement?
- (b) Is the Joint Venture required to register the Agreement?
- (c) Is the validity of the Agreement subject to authorizations required by national law?
- (d) Is it necessary to adapt the Agreement to national and local laws and practices?

*PART TWO*

*ITC Contractual Joint Venture  
Model Agreement  
(two parties only)*

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## ITC CONTRACTUAL JOINT VENTURE MODEL AGREEMENT (two parties only)

*Note:* the passages in this agreement identified as ‘options’ are binding on the Parties only if they have been specifically retained in each case.

between

Party 1

[Specify for individuals: {surname and first name}, {status}, residing at {address}, {profession}, {nationality}, {identity card or passport number}.]

[Specify for corporations: {name of company}, {legal form (e.g. limited liability company), country of incorporation, trade register number}, having its seat at {address}, represented by {surname and first name, address, position}.]

and

Party 2

## Recitals

Party 1: is active in [*specify field of activity*];

has at its disposal [*mention if appropriate one or several distinctive assets, abilities, specific know-how, or intellectual property rights necessary to its activity and/or to the Object of the Joint Venture*] which it is prepared to place at the disposal of the joint development;

has the following objectives [*specify the objectives which this Party seeks to promote by the Joint Venture*];

is interested in [*describe the development that the Party expects from this Agreement, its contractual expectations*].

Party 2: ...

In the light of their activities, abilities and objectives, as described above, both Parties wish to jointly [*specify in general terms the proposed activity of the Joint Venture*].

In consideration of the above, the Parties agree as follows:

## Article 1 Contractual definitions

The following terms shall have the meanings set out below:

- (a) 'Agreement': the present Contractual Joint Venture Agreement and all subsequent amendments, agreements and decisions of the Parties concerning the Joint Venture and the rights and obligations of the Parties pursuant to it;
- (b) 'Annual Accounts': the annual accounts of the Joint Venture as defined in Article 7.3;
- (c) 'Arbitral Tribunal': the dispute resolution body provided by Articles 24.4 to 24.6, i.e. an arbitral tribunal or the courts, if that alternative is chosen by the Parties;
- (d) 'Auditors': the external auditors of the Joint Venture, having in particular the duty of auditing the accounts (see Article 8);
- (e) 'Contributed Assets': the total of the individual contributions made by the Parties pursuant to Article 3.1 and 3.2;
- (f) 'Deadlock': the inability of the Parties to reach a decision (Article 22);
- (g) 'Financial Year': a year as defined in Article 7.2;
- (h) 'Force Majeure': an Impediment of Performance as defined in Article 19;
- (i) 'Independent Expert': the expert appointed with respect to any disputes relating to questions of valuation as defined in Article 24.7;
- (j) 'Joint Venture': the Parties collaborating together for the Object and activities described in this Agreement;

- (k) 'Joint Venture Agreement': see 'Agreement';
- (l) 'Object of the Joint Venture': the object of the Joint Venture as defined in Article 2;
- (m) 'Party': each of the Parties (whether an individual or a corporation) signatories to this Agreement;
- (n) 'Share in the Contributed Assets': the proportion in which a Party has made contributions to the Joint Venture in accordance with Article 3.1.

## Article 2 Object of the Joint Venture

Under this Agreement, the Parties hereby agree to pool their resources and efforts as described in Articles 3 and 5 below to:

- (a) develop [*specify*];
- (b) exploit [*specify*];
- (c) research [*specify*];
- (d) produce [*specify*];
- (e) distribute [*specify*].

[*Complete or modify the list as required.*]

## Article 3 Contributions of the Parties

3.1 The Parties to the Joint Venture shall make the following contributions, in cash, real estate, personal property (including machinery and tools), intellectual property, services, or other in-kind contributions (the 'Contributed Assets'):

Party	Contributions
(a) [ <i>specify</i> ]	
(b) [ <i>specify</i> ]	

[*Complete the list as required.*]

The contributions are deemed equivalent and the Parties have equal shares in the Contributed Assets.

*{Option: the Parties may decide that they should each have a different share in the Joint Venture. In this case, Article 3.1 should provide: The Parties to the Joint Venture shall make the following contributions, in cash, real estate, personal property (including machinery and tools), intellectual property, services, or other in-kind contributions (the Contributed Assets) and they have agreed on their corresponding Share in the Contributed Assets as follows:*

<b>Party</b>	<b>Contributions</b>	<b>Value (amount/currency)</b>	<b>Share in the contributed assets (voting rights)</b>
(a) <i>[specify]</i>			
(b) <i>[specify]</i>			

*[Complete the list as required.]*

3.2 Both Parties may jointly decide to make additional contributions, over and above those made in compliance with Article 3.1, as required for the development of the Joint Venture or for making up its losses. Both Parties shall make such contributions in equal value.

*{Option concerning the last sentence of Article 3.2, if the option of Article 3.1 has been chosen: Both Parties shall make such contributions in proportion to their Shares in the Contributed Assets. They may however jointly decide not to make their contributions in proportion to their Shares in the Contributed Assets.}*

The Shares in the Contributed Assets shall thus be adjusted to take into consideration the difference in contributions and, if differentiated voting rights have been provided in the Agreement, these rights shall be adjusted accordingly.

3.3 Any dispute concerning the valuation of non-pecuniary Contributed Assets shall be resolved pursuant to Article 24, with the valuations (or any adjustments) being made by the Independent Expert pursuant to Article 24.7.

## **Article 4 Liability for contributions**

4.1 Each Party represents and warrants that the contributions described in Article 3 and relevant Ancillary Agreements:

- (a) Are at its free disposal and that it is entitled to contribute them to the Joint Venture for the agreed use;
- (b) Are of the described quality; and
- (c) May be used for the purpose and duration in the contribution.

4.2 If the use by the Joint Venture of all or part of a contribution is restricted or rendered impossible in any way due to defects, claims by a third party or for other reasons, the contributing Party shall replace the contribution, providing the Joint Venture with other contributions which meet, as closely as possible, the needs of the Joint Venture for which the contribution was intended. A failure to replace such a contribution shall be treated as a Breach of Obligations pursuant to Article 11. The replacement contribution shall be treated as a contribution and all representations and warranties shall apply to it as they did to the replaced contribution.

4.3 Where a replacement contribution of equal value cannot be made and the value of the replacement contribution is different from that of the replaced contribution, the other Party may require compensation if the value is less.

If it is more than the value of the replaced contribution, compensation is due only to the extent that the increased value is of commercial use to the Joint-Venture.

*{Option (if the option of Article 3.1 has been chosen): If the value of the replacement contribution is different from that of the replaced contribution and a replacement contribution of equal value cannot be made, the valuation of the contribution, as shown in Article 3.1 or otherwise agreed for the purposes of the Joint Venture, shall be adjusted by agreement of the Parties or, failing such agreement, as valued by the Independent Expert (Article 24.7); it being understood that, irrespective of the estimated value of the replacement contribution, an increase in the Share in the Contributed Assets shall be provided only if the other Party agrees to it.}*

4.4 The contributing Party shall compensate the Joint Venture for all loss and damage suffered as a result of any defects in the Contributions and any restrictions affecting their use contrary to the representations and warranties of that Party. It shall indemnify the Joint Venture against any claims by third parties if the use of the contributions interferes with their rights contrary to the representations and warranties in Article 4.1 and the relevant Ancillary Agreement.

## **Article 5 Technical or commercial commitments of the Parties**

5.1 The Parties agree to the following technical or commercial commitments:

- (a) Party 1 shall ... *[specify]*.
- (b) Party 2 shall ... *[specify]*.

*[Complete the list of commitments as required.]*

5.2 Performance of the technical or commercial commitments shall be additional to any in kind contributions required to be made under Article 3. Such technical or commercial commitments shall be performed free of charge *{option: on such terms, including payment, as shall be approved by both Parties}*.

5.3 Each Party shall use reasonable care and skill in performing such technical or commercial commitments.

5.4 A Party's failure to comply with its technical or commercial commitments shall be treated as a Breach of Obligations pursuant to Article 11.

## **Article 6 Decisions made by the Parties and Management**

6.1 All decisions are taken by both Parties jointly.

*{Option 1 (if the option of Article 3.1 has been chosen): Decisions on the following require unanimity of both Parties, regardless of their Shares in the Contributed Assets:*

- (a) *Change in the Object of the Joint Venture or in the contractual rights and/or duties of the Parties;*
- (b) *Defining the strategy and common goals;*
- (c) *Appointment, removal and remuneration of a Managing Party or third parties entrusted with the management;*

- (d) *Appointment and removal of the Auditors;*
- (e) *Approval of the yearly accounts;*
- (f) *Acquisition of an interest in other companies or acquisition of assets to be jointly owned by the Joint Venture;*
- (g) *New alliances; and*
- (h) *Termination of the Joint Venture.*

*[Complete list or delete items which are not applicable (see letters c, d and e).]*

*All other decisions require a majority of all Voting Rights, the Voting Rights being proportional to the Share in the Contributed Assets. }*

*{Option 2: All decisions require a majority of all Voting Rights, the Voting Rights being proportional to the Share in the Contributed Assets. }*

6.2 The Joint Venture is managed jointly by both Parties.

*{Option 1: entrust the day-to-day management to one of the Parties designated as the Managing Party. }*

*{Option 2: entrust the day-to-day management to one or more third parties, which are chosen and may be removed at any time by the Parties. }*

6.3 Should the Parties decide to entrust the day-to-day management to a Managing Party (or to one or more third parties), the latter shall have responsibility for all activities necessary for the operation of the Joint-Venture, provided that these activities are not delegated, in particular by virtue of a technical or commercial commitment of a particular Party pursuant to Article 5. Activities necessary for the operation of the Joint Venture include:

- (a) Representation of the Joint Venture (e.g. in relations with clients and suppliers);
- (b) Billings and collection of payments;
- (c) Accounting;
- (d) Market studies and communication;
- (e) Production planning and coordination

*[Complete the list of activities as required.]*

## **Article 7      Accounts**

*[Where applicable.]*

7.1 The Joint Venture shall keep accounts in compliance with the laws and regulations applicable at its principal place of business. The books of account and records shall be preserved at this place in a manner accessible to the Parties.

7.2 The accounting period shall be the year according to the Gregorian calendar, ending on 31 December of each year (the 'Financial Year').

7.3 At the latest three months after the end of each Financial Year, the Joint Venture shall prepare the Annual Accounts, including the balance sheet of the Joint Venture at the end of the Financial Year and the profit and loss statement for the Financial Year.

## Article 8 Auditors

[Where applicable.]

8.1 The Joint Venture's Auditors shall be independent of the Parties and, where applicable, of individuals entrusted with the Management.

8.2 The Auditors shall be appointed by both Parties for one Financial Year with the possibility of renewal from year to year.

8.3 The Auditors shall verify the accuracy of the Annual Accounts and prepare a report, which is submitted to the Parties.

## Article 9 Representation

9.1 The Joint Venture shall be represented by either Party.

*{Option 1 (add): 'by both parties jointly'.}*

*{Option 2: representation of the Joint Venture by a third party entrusted with management activities.}*

9.2 Commitments contracted on behalf of the Joint Venture by a Party (or, as the case may be, by a third party entrusted with management activities) shall bind the other Party (or the Parties), provided the former has specified that it acted for and on behalf of the Joint Venture and the commitment is within the Object of the Joint Venture.

9.3 A Party is not bound towards third parties by acts performed by the other Party outside its powers of representation, unless it has expressly ratified such acts for the Joint Venture or unless it has created or entertained with the third party the appearance of such powers of representation. The Party acting without or outside such powers is solely obligated to the third party and is liable for any damage caused to the Joint Venture, the other Party and/or any third party.

## Article 10 Liability

10.1 Unless otherwise provided in the law governing the Joint Venture, both Parties shall be liable jointly and severally towards any third parties for any debt, commitment or other liability of the Joint Venture.

10.2 In the relationship between the Parties, each Party shall bear an equal share in the Joint Venture's liabilities.

*{Option (if the option of Article 3.1 has been chosen): In the relationship between the Parties, each Party shall bear the Joint Venture's liabilities in proportion to its share in the Contributed Assets, unless otherwise provided in this Agreement.}*

10.3 A Party who is pursued on the grounds of a liability of the Joint Venture shall notify the other Party. It shall be indemnified promptly by the other Party for half of any loss and expense which it may have had to bear on account of the Joint Venture. *{Option (if the option of Article 3.1 has been chosen): It shall be*

*indemnified promptly by the other Party in proportion to its Share in the Contributed Assets for half of any loss and expense which it may have had to bear on account of the Joint Venture.}*

10.4 Each Party shall be solely liable for any taxation payable in respect of its share of any profits of the Joint Venture. Nothing in this Article 10 shall affect this principle.

*{Option (add): A Party shall indemnify promptly the other Party if that other Party is required to pay to any tax authority any tax attributable to the first Party's share of profits of the Joint Venture.}*

## **Article 11 Breach of obligations**

11.1 A Party having failed to perform properly its obligations under this Agreement may be notified by the other Party of this failure and invited to remedy it within a reasonable period fixed by the other Party. If the Party does not remedy the failure within the period fixed, the other Party may terminate the Joint Venture pursuant to Article 16 with immediate effect.

11.2 In all cases, the Party having failed to perform properly its obligations under this Agreement shall be liable to the other Party for the damage resulting from its failure.

11.3 When a Party or the Joint Venture is in delay with a payment obligation, the amount in delay shall bear interest at the average rate of actual borrowing of the Joint Venture during the period of delay. If such average rate cannot be determined, the rate shall be the commercial rate of borrowing available to the Parties of the Joint Venture *{option: provide the rate of an institution in the country of the Joint Venture, such as x points above the Central Bank's discount rate}*. In case of disputes about the applicable rate, it shall be determined by the Independent Expert as provided in Article 24.7, taking into consideration the borrowing costs which the delay by a Party causes to the Joint Venture or the savings which the Joint Venture makes by delaying the payment.

## **Article 12 Share in profits and losses**

12.1 Both Parties shall have an equal share in the profits and losses of the Joint Venture.

*{Option (if the option of Article 3.1 has been chosen): Each Party shares in the profits and losses of the Joint Venture proportionately to its Share in the Contributed Assets.}*

12.2 Unless otherwise decided by the Parties, shares in the profits shall be paid out 30 (thirty) days after the approval of the Annual Accounts.

*{Option (if the Annual Accounts must be audited): shares in the profits shall be paid out 30 (thirty) days after the approval of the audited Annual Accounts, but not later than six months after the end of the Financial Year.}*

The Parties may decide whether a Party may receive an advance to on its share in the profits.



12.3 Shares in any losses of the Joint Venture shall be settled pursuant to the provisions regarding additional contributions (Article 3.2), it being understood that, at any time, the Parties may make additional contributions to compensate losses that have occurred.

### **Article 13 Access to information**

13.1 Each Party has the right to be informed about the business activities of the Joint Venture.

13.2 A Party may have access to accounts and records of the Joint Venture, including the legal documents creating rights and obligations of the Joint Venture.

### **Article 14 Change in control of a Party to the Joint Venture**

14.1 A Party that is a legal entity must immediately notify the other Party of any important change *{option: any change}* in its control or ownership.

14.2 In case of such a change, the other Party may terminate the Joint Venture pursuant to Article 17.

### **Article 15 Replacement of a Party**

15.1 A Party may advise the other Party by written notice at least three months before the end of a Financial Year of its intention of being replaced by a third party.

15.2 This replacement is subject to the approval of the other Party.

The approval may be granted with the proviso that certain conditions or guarantees shall be given by the replaced Party.

15.3 Should the replacement be refused, the Party requesting it may terminate the Joint Venture pursuant to Article 16.

15.4 Should the replacement be approved, it shall be effective at the commencement of the following Financial Year. The replacing Party shall in all respects be treated as the replaced Party. Subject to any continuing obligations or guarantees which may be provided in the terms of the replacement, the replaced Party shall cease to be a Party on the effective date. It shall have no claim whatsoever against the other Party.

### **Article 16 Notice to terminate the Joint Venture**

16.1 Either Party may terminate the Joint Venture. In cases other than breach of obligations (Article 11), termination requires that the written notice to the other Party be delivered at least six months before the end of a Financial Year.

16.2 If the other Party objects to the termination, the provisions on the Resolution of Disputes (Article 24) are applicable.

16.3 The termination shall become effective at the time identified in the notice of termination, unless the other Party objects. In that case, if the termination is admitted, the effective date shall be determined by an Arbitral Tribunal.

## **Article 17 Termination of the Joint Venture**

17.1 The Joint Venture is terminated:

- (a) When its Object is achieved;
- (b) When the achievement of its Object becomes impossible;
- (c) By decision of both Parties;
- (d) By unilateral decision of a Party pursuant to Article 16; or
- (e) In case of death or bankruptcy of one or both Parties.

**{Option: (consider adding the following grounds for terminating the Joint Venture):**

- (f) *By expiration of the duration of the Joint Venture;*
- (g) *By a decision of the Arbitral Tribunal to dissolve the Joint Venture based on just grounds for dissolution.*}

17.2 Upon its termination, the Joint Venture shall be liquidated. To this effect the Parties shall take in particular the following steps:

- (a) Terminating all legal relationships of the Joint Venture with third parties;
- (b) Selling the assets of the Joint Venture at the best possible price; either Party having a justified interest in the return of a contribution it has made in a form other than cash shall have the option to recover this contribution, at market value;
- (c) Settling the debts of the Joint Venture;
- (d) Where applicable, refunding the loans made by the Parties.

17.3 At the end of the liquidation process, any remaining cash surplus shall be distributed to the Parties in equal shares.

**{Option (if the option of Article 3.1 has been chosen): according to their Shares in the Contributed Assets.}**

17.4 If the liquidation of the Joint Venture produces a loss, the Parties shall bear it in equal shares.

**{Option (if the option of Article 3.1 has been chosen): according to their Shares in the Contributed Assets.}**

17.5 Should a Party wish to take over the activities of the joint Venture, it shall notify the third parties and purchase the assets of the Joint Venture. If each of the Parties wishes to take over these activities, they shall seek a reasonable allocation of assets. Failing agreement, the Arbitral Tribunal (Article 24) shall decide.

17.6 Any dispute concerning the valuation of the assets shall be resolved pursuant to Article 24, valuations being made by the Independent Expert pursuant to Article 24.7.

## Article 18 Hardship

18.1 If events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present Agreement, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations, that Party shall be entitled to request revision of this Agreement.

18.2 The request for revision shall be addressed to the other Party *{option: add 'and the Management' if option 1 or 2 of Article 6.2 is chosen}*. It shall indicate the grounds on which it is based.

18.3 In response to such a request, the Parties shall consult with a view to revising the Agreement on an equitable basis, so that no Party suffers excessive prejudice or burden.

18.4 If the Parties fail to reach agreement on the requested revision, either Party may resort to the proceedings provided in Article 24.2 and 24.3, and to arbitration pursuant to Article 24.4 to 24.6. The Arbitral Tribunal shall have the power to make any revision to this Agreement that it finds just and equitable in the circumstances.

## Article 19 Relief from performance and liability in case of impediment of performance (*force majeure*)

19.1 Non-performance by a Party is excused if that Party proves that the non-performance was due to an impediment beyond its control and it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Agreement or to have avoided or overcome it or its consequences ('an Impediment of Performance').

19.2 Unless otherwise provided in the present Agreement, an Impediment of Performance within the meaning of Article 19.1 does not include the lack of any authorization, licence, entry or residence permit, or of any approval necessary for the performance of the Agreement and required to be issued by a public authority of any kind whatsoever in the country of the Party seeking excuse for non-performance.

19.3 When the impediment is only temporary, the excuse for non-performance shall have effect for such period as is reasonable, having regard to the effect of the impediment on the performance of the Agreement.

19.4 The excuse for non-performance takes effect from the time of the impediment.

19.5 The Party which fails to perform due to such an Impediment of Performance must give notice to the other Party of the impediment and its effect on that Party's ability to perform. If the notice is not received by the other Party within a reasonable time after the Party which fails to perform knew or ought to have known of the impediment, the failing Party is liable for damages resulting from such non-receipt.

19.6 As soon as notice according to Article 19.5 has been given, the Parties shall consult about the consequences for the operations of the Joint Venture. Both Parties shall make their best efforts to overcome any obstacles to the

activities of the Joint Venture that may result from the excused non-performance. Such excuse does not relieve the Party concerned from its obligation to assume its share of any financial additional commitments that may be necessary to overcome the obstacle.

19.7 Nothing in this Article prevents a Party from exercising a right to terminate the Agreement or to withhold performance or request interest on money due.

## **Article 20 Intangible assets and/or intellectual property rights**

20.1 The contribution by a Party of intangible assets and/or intellectual property rights pertaining to technical developments, patents, distinctive signs or get-ups, trademarks, software or other authors' works shall be made by transfer of property and title or by licence agreement. The contributing Party shall be entitled to limit the rights transferred to licences.

*[Attach any licence agreement concluded prior to the present Joint Venture Agreement.]*

*{Option (add): The terms of any licence agreement concluded at or before the execution of the present Joint Venture Agreement are attached as Appendix [2] and shall apply in respect of the contribution by [specify Party] of the intangible assets and/or intellectual property rights therein described.}*

20.2 Intangible assets and/or intellectual property rights pertaining thereto (whether registrable or not) developed, created or acquired by one or both Parties within the framework of the activities in the Joint Venture or for purposes of the Joint Venture shall become a joint property of both Parties. Any registration of such rights shall be made jointly in the name of both Parties.

20.3 The use of these rights shall be subject to agreements made in the name of the Joint Venture. Upon their request, the Parties shall be given preference in the conclusion of such agreements.

## **Article 21 Duty to promote the interests of the Joint Venture and not to compete with it**

21.1 This Agreement is concluded with the objective of promoting the Parties' common interests in the field of the Joint Venture. Each Party shall use its best efforts to promote and protect the interests of the Joint Venture. In particular, each Party undertakes to refrain from any personal activity, behaviour or steps which would compete with and/or be otherwise detrimental to the Joint Venture's interests.

*{Option (add as Article 21.2): Upon replacement of a Party in the Joint Venture, the leaving Party shall continue to be under an obligation not to compete with the activities of the Joint Venture (as carried on at the Exit Date) for a period of [two] years after the Party's Exit Date.}*

## **Article 22 Avoidance and resolution of deadlock**

22.1 A Deadlock for the purposes of the present Agreement arises when the Parties are unable to reach a decision.

22.2 If a Party considers that a Deadlock prevents the Joint Venture from pursuing its Object, it may so notify the other Party and require that the matter be subject to the provisions of Article 24.1 to 24.3.

22.3 If, for a period longer than two months after the notice pursuant to Article 22.2 the Deadlock remains unresolved, a Party has the right to terminate the Joint Venture pursuant to Article 16.

## **Article 23 Applicable law and guiding principles**

23.1 This Agreement is governed by the laws of [*specify country*].

23.2 The Agreement shall be performed in a spirit of good faith and fair dealing.

23.3 In the interpretation and application of the Parties' rights and obligations under this Agreement, due weight shall be given to applicable practices in international trade. When defining these practices, reference shall be made, *inter alia*, to the UNIDROIT Principles of International Commercial Contracts.

23.4 When consent or approval is required of a Party under this Agreement or in the course of the activities of the Joint Venture, such consent or approval shall not unreasonably be withheld.

23.5 The passages in this Agreement identified as 'options' are binding on the Parties only if they have been specifically retained in each case.

## **Article 24 Resolution of disputes**

24.1 If a dispute arises between the Parties with respect to this Agreement or in the course of the activities of the Joint Venture, both Parties shall seek to resolve it amicably.

24.2 In the course of the Parties' attempts at amicable settlement, either Party may request that the dispute be brought before the most senior decision-making persons in their respective organizations. If such a request is made, the decision-makers in the organizations concerned shall meet at least once to consider the dispute and possible means to resolve it.

24.3 If the dispute has not been resolved within one month after the request under Article 24.2, either Party may request that it be brought to mediation or any other form of alternative dispute resolution (ADR). The other Party shall give constructive consideration to such requests but, with the exception of the meeting of senior decision-makers pursuant to Article 24.2 above, no Party shall be obliged to engage in ADR procedures unless (and then only for so long as) it agrees to it.

24.4 If a Party has come to the conclusion that the attempts at amicable resolution are to no avail, it may give notice to the other Party of this failure and, thereupon, may commence Arbitration pursuant to Article 24.5 *et seq.*

The Parties exclude recourse to the courts, unless required for urgent interim measures of protection which the Arbitral Tribunal cannot provide effectively; for measures required to form the Arbitral Tribunal and to provide support to it; and for the enforcement of an arbitral award.

*{Option: If a Party has come to the conclusion that the attempts at amicable resolution are to no avail, it may give notice to the other Party of this failure and, thereupon, may turn to the courts of [specify place/country], which shall have exclusive jurisdiction.}*

24.5 The Arbitration proceedings shall be conducted under the rules of [*specify UNCITRAL or other Rules, or an Arbitration Institution (e.g. International Chamber of Commerce)*]. The place of arbitration shall be [*specify*].

24.6 In the resolution of the dispute, the arbitrators shall give effect to the letter and the spirit of this Agreement and, where necessary, reconcile conflicting provisions of the Agreement in this spirit. In case of conflict between the Agreement and the applicable law, the arbitrators shall act as *amiable compositeurs* and, subject to mandatory rules and public policy, shall give effect to this Agreement and the reasonable intentions and expectations of the Parties.

24.7 In the case of any disputes relating to questions of valuation, either Party may request the appointment of an Independent Expert according to proceedings to be agreed by the Parties. If the Parties fail to agree on the appointment of the Independent Expert and on the applicable rules, the Rules for Expertise of the International Chamber of Commerce's International Centre for Expertise shall apply. The Independent Expert's valuation shall be final and binding on the Parties.

## **Article 25    Miscellaneous provisions**

25.1 If any of the provisions of this Agreement are found to be null and void, the remaining provisions of this Agreement shall remain valid and shall continue to bind the Parties, unless it can be concluded from the circumstances that, in the absence of the provision(s) found to be null and void, the Parties would not have concluded the present Agreement. The Parties, if necessary with the assistance of the Arbitral Tribunal pursuant to Article 24.6, shall replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

25.2 The rights and obligations of any Party under this Agreement cannot be assigned without the prior written consent of both Parties.

25.3 The Parties agree to keep confidential all business and technical knowledge relating to and acquired in the course of their activity related to the Joint Venture. This obligation is not limited in time, and shall continue after the Joint Venture has been terminated.

25.4 The Addresses for Notifications and Service of Process are the following:

1) [*specify*].

2) [*specify*].

Unless and until a new address has been notified to the other Party, all communications to a Party are validly made when sent to its address as specified above.

25.5 Notices foreseen in the present Agreement shall be made by registered mail or by fax with confirmation by mail. They may also be validly made by electronic mail provided the sender takes precautions necessary to ensure that the notice has been received.

25.6 This Agreement may be modified only by a written amendment, signed by both Parties.

The present Agreement is signed in [*specify number*] copies, each of which is an original.

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XXX

YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:





## Appendix 1 Ancillary Agreement on real estate

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

YYY [*identify the name of the other Party to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, tenant, lease holder, etc.)*] with respect to the following property (referred to as 'the Property'):

[*describe the property*].

2. The Joint Venture wishes to use the Property for the following purpose:

[*describe the purpose for which the Property is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party places the Property at the disposal of the Joint Venture for the described purpose.

{**Option(add)**: *This Agreement does not transfer ownership of the Property to the Joint Venture but gives the Joint Venture solely the right of use as herein specified.*}

4. The use of the Property by the Joint Venture shall be subject to the following terms:

[*specify any particular terms and conditions, e.g. as to rent, compliance with any covenants or planning conditions applicable to the Property, etc.*].

5. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 23 (Applicable Law and Guiding Principles) and 24 (Resolution of Disputes).

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XXX

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YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:



## Appendix 2 Ancillary Agreement on intangible assets/intellectual property rights

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

YYY [*identify the name and address of the other Party to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, licensee, assignee, etc.)*] with respect to the following Intangible Assets and/or Intellectual Property Rights (referred to as 'the Rights'):

*[describe the Intangible Assets/Intellectual Property Rights (e.g. invention, patent, industrial designs and models, distinctive designation, get-up, trademark or service mark, software, copyright)].*

2. The Joint Venture wishes to obtain use {*option: ownership*} of the Rights for the following purpose:

*[describe the purpose for which the Intangible Assets/Intellectual Property Rights are to be used/owned].*

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party grants to the Joint Venture an exclusive {*option: a non-exclusive*} licence to use the Rights within the following territories [*specify*] of the Joint Venture, for the described purpose.

*{Option: Instead of granting a licence, the Contributing Party assigns the Intangible Assets/Intellectual Property Rights to the Joint Venture and remains a co-owner.*

***If the option is chosen, add:***

*In such event, if the Intangible Assets can be registered, the Joint Venture shall undertake all necessary steps for registration, at its cost, of such Intangible Assets in the joint names of the Parties.*

4. The contributing Party agrees to use all reasonable efforts to maintain the Rights in force in all countries where they are registered {*option: provide a list of countries*}.

5. The Joint Venture agrees to pay all administrative costs, taxes, and fees necessary for the registrations to remain in force in the above-mentioned countries.

*{Option: In the event that the Contributing Party uses the Rights to a greater extent than the Joint Venture, consider a different distribution of the costs.}*

6. If and to the extent that the Contributing Party continues to use the Rights in territories in which the Joint Venture is also active, the Contributing Party shall do so subject to Article 21 (Duty to Promote the Interests of the Joint Venture and Not to Compete with It) of the Joint Venture Agreement.

7. The Party other than the Contributing Party agrees to refrain from exploiting individually the Rights contributed to the Joint Venture.

8. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 23 (Applicable Law and Guiding Principles) and 24 (Resolution of Disputes).

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XXX

YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:

### Appendix 3 Ancillary Agreement on know-how

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

YYY [*identify the name and address of the other Party to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party, as [*identify the nature of the rights (e.g. owner, licensee, assignee, etc.)*], has knowledge and experience in [*describe the Know-How*] (referred to as 'the Know-How').

2. The Joint Venture wishes to use the Know-How for the following purpose:

[*describe the purpose for which the Know-How is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party grants the Joint Venture an exclusive {*option: a non-exclusive*} licence to use the Know-How within the following territories [*specify*] for the described purpose.

{*Option: instead of granting a licence, the Contributing Party assigns the Know-How to the Joint Venture and remains a co-owner.*}

4. If and to the extent that the Contributing Party continues to use the Know-How in territories in which the Joint Venture is also active, the Contributing Party shall do so subject to Article 21 (Duty to Promote the Interests of the Joint Venture and Not to Compete with It) of the Joint Venture Agreement.

5. The Party other than the Contributing Party agrees to refrain from exploiting individually the Know-How contributed to the Joint Venture.

6. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 23 (Applicable Law and Guiding Principles) and 24 (Resolution of Disputes).

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XXX

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YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:



## Appendix 4 Ancillary Agreement on equipment and production tools

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

YYY [*identify the name and address of the other Party to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party has rights as [*identify the nature of the rights (e.g. owner, lessee, lease holder, etc.)*] with respect to the following equipment, machines and production tools (referred to as 'the Equipment'):

[*describe the Equipment*].

2. The Joint Venture wishes to use the Equipment for the following purpose:

[*describe the purpose for which the Equipment is to be used*].

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party places the Equipment at the disposal of the Joint Venture for the described purpose.

4. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 23 (Applicable Law and Guiding Principles) and 24 (Resolution of Disputes).

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XXX

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YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:





## Appendix 5 Ancillary Agreement on contributions in services

between

XXX [*identify the name and address of the Party in question*], referred to as the Contributing Party

and

YYY [*identify the name and address of the other Party to the Joint Venture Agreement*] (jointly referred to as 'the Joint Venture')

1. The Contributing Party is competent and experienced in [*describe the Services*] (referred to as 'the Services');

2. The Joint Venture wishes to benefit from the Services for the following purpose:

*[describe the purpose for which the Services are to be used]*.

3. Further to the Joint Venture Agreement and pursuant to its terms and conditions, the Contributing Party undertakes to provide its Services to the Joint Venture for the described purpose.

4. The following rules shall govern the Services:

*[describe the general rules that the Services are subject to]*.

5. The Party which has made the Services receives no special compensation for this activity. **{Option: specify any payment or other terms.}**

6. The present Ancillary Agreement shall be construed as part of the Joint Venture Agreement, in particular with respect to Articles 3 (Contributions of the Parties), 4 (Liability for Contributions), 23 (Applicable Law and Guiding Principles) and 24 (Resolution of Disputes).

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XXX

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YYY

Party to the Joint Venture Agreement    Party to the Joint Venture Agreement

Place and date:

Place and date:



## Checklist of options, fill-ins and time limits

The following list is intended to assist drafters of the Contractual Joint Venture Agreement. It indicates the contractual provisions containing either options, time limits or blanks to be filled.

Cover	Identification and specification of both Parties
Recitals	Activities, abilities, objectives and interests for each Party Proposed activity of the Joint Venture in general terms
Article 2	Detailed description of object of the Joint Venture
Article 3.1	List of contributions of each Party Option: contribution list for Parties with a different share in the Joint Venture
Article 3.2	Option concerning additional contributions
Article 4.3	Option (replacement value)
Article 5.1	Technical or commercial commitments of each Party Option (performance)
Article 6.1	Option 1 (decisions requiring unanimity) Option 2 (majority of Voting Rights)
Article 6.2	Options 1 and 2: management
Article 6.3	List of management activities: to complete as required
Article 7.2	Time limit
Article 7.3	Time limit
Article 9.1	Options 1 and 2 (representation of the Joint Venture)
Article 10.2	Option (share in liabilities)
Article 10.3	Option (indemnification)
Article 10.4	Option (tax indemnification)
Article 11.3	Option (fixing rate of interest)
Article 12.1	Option (share in profit and loss)
Article 12.2	Time limits (two) Option (time limit for audited accounts)
Article 14.1	Option (change)
Article 15.1	Time limit
Article 16.1	Time limit
Article 17.1	Option (grounds for terminating the Joint Venture)

Article 17.3	Option (key for allocation of remaining cash surplus)
Article 17.4	Option (key for allocation of loss)
Article 18.2	Option (to whom should the request for revision of the Agreement be addressed in case of hardship)
Article 20.1	Attach appendix or agreement referred to in the Agreement Option (licence agreement)
Article 21.1	Option (non competition clause for replaced Party)
Article 22.3	Time limit
Article 23.1	Specify applicable law
Article 24.3	Time limit
Article 24.4	Option (court jurisdiction)
Article 24.5	Specify rules of arbitration Specify place of arbitration
Article 25.4	Specify each party's address for notifications
Signatures	Specify number of copies Specify place and date of signature Signature of the Parties

## Documents to be produced prior to or at signing

### A. *The Parties*

#### 1. *With respect to physical persons*

- Passport or other document identifying the person appearing.

#### 2. *With respect to Parties that are corporations or other legal entities: documents to establish the legal existence of the Party and the authority of the person appearing for it*

- Certificate issued by the authorities where the Party is registered, confirming the existence of the legal entity and identifying the organs that may represent it (Board of Directors, etc.);
- Authorization of the Board of Directors to conclude the Joint Venture Agreement;
- If the Party does not act through a person having statutory powers to represent it (as for instance the members of the Board of Directors), the person appearing for the Party should present powers of attorney executed by the competent body in the corporation;
- Certificate of good standing;

#### 3. *Group relationship of corporations*

- Document outlining the detailed structure of the holding entity and of the Group;
- Articles of Incorporation and organizational by-laws of all companies of the Group;
- Yearly accounts of the Parties and/or their Groups, and possibly consolidated accounts of the Group;
- Shareholders' register or list of the Parties and/or Parent entities;
- Shareholders' resolution/agreement approving the Agreement;
- Minutes and decisions of the Shareholders' Meetings and Board of Directors' Meetings; etc.

#### 4. *Solvency*

- Confirmation by a bank of the existence of funds (bank reference).

**B. Contributions**

- Valuation, by expert opinion or otherwise, as agreed by the Parties, of contributions other than cash (*such valuations may also be attached to Ancillary Agreements as per Appendices to this Model Agreement*).

**C. Guarantees between the Parties**

- Guarantee by parent company, bank guarantee, comfort letter; etc.

**D. Agreements (as may be required for the Joint Venture activity)**

- Licence agreements and assignment of trademark and/or service mark;
- Distribution agreements;
- Sales agreements;
- Confidentiality agreements;
- Agreements for the assignment of company shares; etc.

# USER'S GUIDE

## ITC CONTRACTUAL JOINT VENTURE MODEL AGREEMENT (two parties only)

### Description of the Parties

It is important that the Parties to the Agreement are correctly identified and that those representing them have the powers to do so for the purpose of concluding the Agreement. The legal issues that arise in this context relate primarily to the personal status of the Parties, their capacity and the powers of their representatives to enter into an agreement on behalf of their company. Normally these issues are subject not to the law applicable to the Joint Venture Agreement but to the 'personal law' of each Party, which is generally the law where each Party has its residence or place of business, or the law of a company's incorporation.

It is important that the Parties understand that this specific Contractual Joint Venture Agreement is limited to two parties only.

### Recitals

The recitals provide the background to the cooperation. They provide some information on the Parties, their fields of activities, and their interests and expectations.

The recitals do not directly create obligations for the Parties, but they may be important for the interpretation of the obligations set out in the body of the Agreement.

### Article 1 Contractual definitions

The Model Agreement uses a number of terms that have a specific meaning. These terms are written with capital initials throughout the Model Agreement. For ease of reference, the defined terms are grouped in this article, with a reference to the article where the term is defined (where relevant). The terms are defined in such a way as to apply to the options proposed in the Model Agreement.

### Article 2 Object of the Joint Venture

The Agreement distinguishes between the objectives which motivate each Party, taken individually, to enter into the Joint Venture (in this case the term 'objectives' is used) and those which the Parties jointly pursue as part of their Joint Venture (in this case, the expression 'Object of the Joint Venture' is used). The objectives of each Party are set out in the Recitals while the Object of the Joint Venture is defined in Article 2.

It is important that the Parties give careful consideration to the Object of the Joint Venture and the methods by which this Object is to be pursued. The definition of the Joint Venture Object provides a framework. However, it should not be used to create undesirable constraints on the evolution of the Joint Venture activities.

Where applicable, it could be wise to define the territorial scope for the activity of the Joint Venture, for instance in a joint venture contract concerning the distribution of goods.

If the Joint Venture is limited in time, the duration should be specified in this Article. In that case the option 'expiration of the duration of the Joint Venture' should be introduced in Article 17 (Termination of the Joint Venture).

When the Parties have chosen a name for the Joint Venture and intend to trade under this name, it could be specified in this Article.

### **Article 3 Contributions of the Parties**

It is an essential feature of any Joint Venture that the Parties make contributions in the interest of achieving the common Object of the Joint Venture. These contributions may be in the form of money or in any other form, such as real estate, technical know-how, access to a market, a brand name or services.

When it comes to valuing the contributions, a fundamental choice has to be made between two approaches:

- First approach: the Parties may consider that their contributions are deemed equivalent and decide that they both have equal shares in the Contributed Assets. This approach is simpler in some respects and is suitable especially in joint ventures where the investment in money or other contributions is less important. It does, however, risk creating tensions if during the course of the joint venture's development changes occur in the value of the contributions, where applicable.
- Second approach: the Parties may decide to have a different share in the Contributed Assets. They will thus fix a value for each of their respective contributions and allocate their shares in the Joint Venture accordingly.

The present Model Agreement has chosen the first approach, that of Contributed Assets that are deemed equivalent, the Parties having equal shares in the Contributed Assets. The second approach is offered as an option.

In any event, whether the Parties opt for the first or for the second approach, it is important to keep in mind that the Share in the Contributed Assets has a critical function in the Model Agreement. It determines in particular:

- Obligations to make additional contributions (Article 3.2);
- Replacement contribution (Article 4.3);
- Management decisions (Article 6.1);
- The extent of liability of the Parties in their relationship with each other (Article 10.2);
- Indemnification by the other Party (Article 10.3);
- A Party's share in the profits and losses (Article 12.1);
- Distribution of cash surplus after termination (Article 17.3);
- Share of the loss to be borne by each Party after termination (Article 17.4).



**3.1** In this provision (first approach), the Parties specify that the value of their respective contributions is deemed to be equivalent. Depending on their nature, the contributions may require the conclusion of separate agreements; models for these agreements are attached to the Model Joint Venture Agreement in the form of Ancillary Agreements.

The option refers to the second approach as described above.

**3.2 & 3.3** Additional contributions: Article 3.2 states that both Parties may jointly decide to make additional contributions. As a rule, these contributions will have equal value. For those who have selected the option of Article 3.1, an option is available in Article 3.2 where Parties can either opt for contributions to be made in proportion to their Shares in the Contributed Assets, or waive this and jointly decide not to make their contribution in proportion to their Shares in the Contributed Assets. There are various other ways to address the issue of additional funding of the Joint Venture. Two alternate constructions are briefly described here.

- (a) Based on their assessment of the market, the Parties could define a 'preliminary stage' of their project for which 'initial contributions' are required. At the end of that 'preliminary stage', the Parties will reconsider the situation and decide what further investments may be necessary. Where it is decided to make 'additional contributions' and a Party to the Joint Venture is either unwilling or unable to contribute, this Party will be deemed to be in breach of its contractual obligations and the provisions of Article 11 of the Agreement will apply.
- (b) Another possible option would be to plan the successive stages of the development of the Joint Venture in such a manner that the need for additional funding at each stage is determined from the outset.

Where the Parties have selected the option of Article 3.1, allowing for different shares in the Contributed Assets, and if both Parties agree, one of them alone may make the additional contribution. Such an additional contribution could, if both agree, increase this contributing Party's share in the Contributed Assets. In this latter case, only this contributing Party will bear the risk of loss or share the profits resulting from that stage of development. This requires special accounting arrangements for identifying the losses and profits allocated to such a stage. If the two Parties decide that one of them may opt out of a certain stage, they may also decide that it is possible for that Party to opt back in at a later date, presumably by settling any differences in the contributions and possibly by compensating the other Party for the risk assumed. Arrangements of this nature can be found, for instance, in joint operation agreements of the oil industry.

## **Article 4      Liability for contributions**

The Model Agreement is based on the premise that a Party making a contribution is liable to the other Party on the terms that would apply if a third party provided the contribution. The Parties may be of the view that, among members of a joint venture, where both Parties have a common goal and are affected accordingly by defective contributions, such strict standards of liability may not be appropriate. In that case they could limit the liability of a Party to gross negligence and wilful damage.

## **Article 5 Technical or commercial commitments of the Parties**

Commitments made according to this provision are similar to the contributions regulated in Article 3. However, the commitments according to Article 5 are generally not a contribution made once and for all, but contributions on a continuing basis, such as the commitment to perform certain tasks, to deliver products, to manufacture components, to market or manage services, or to distribute products.

Article 5.1 makes it clear that these are additional commitments beyond the contributions under Article 3, and that they are to be performed free of charge, unless the option is selected.

Where applicable, this Article should be coordinated with Article 6, which deals with the activities undertaken by the Management for the operation of the Joint Venture.

## **Article 6 Decisions made by the Parties and Management**

The Model Agreement is based on the premise that the Joint Venture is composed of two Parties only. (For three-or-more-party contractual joint venture contracts, please refer to the 'CJV – three parties or more' form.)

**6.1** This specifies that decisions will be made under a simple form of organization, providing for instance as a rule that decisions be taken in agreement between both Parties. Where the option of Article 3.1 is selected (with the Parties having different shares in the contributed assets), option 1 of Article 6.1 provides for a number of items to be subject to a unanimous decision. Option 2 requires a majority of Voting Rights for all decisions. Voting Rights are proportional to the Share in the Contributed Assets.

**6.2** As a principle, the Joint Venture is managed by both Parties jointly.

In the options, the Model Agreement foresees two possibilities: that day-to-day management will be entrusted either to one of the Parties (option 1), or to one or more third parties (option 2).

If the day-to-day management is entrusted to one of the Parties (option 1), Article 6.2 should clarify whether that Party may delegate the management in full or in part. As a matter of principle such sub-delegations should be limited to specific tasks and the Managing Party should remain fully responsible towards the other Party for the management of the Joint Venture.

If option 2 is chosen, and management is entrusted to more than one third party, the Agreement should provide how the decisions are made, e.g. whether the decisions are made by unanimity or by majority of the votes and how votes shall be counted. The clause deliberately does not require that reasons be given by the Parties for removal of persons entrusted with the management of the Joint Venture. Management is a matter of confidence and, if that is missing, the Joint Venture should be able to remove the person in question, without having to engage in a debate about the reasons. This does not exclude that, according to the law governing the employment contract of a non-Party manager, reasons must be given and notice periods must be respected.

## Article 7 Accounts

Keeping proper accounts is a basic requirement for any business and its proper management. Accounting standards at the Joint Venture's principal place of business should be respected. Since the Model Agreement applies to international cooperation, the use of International Accounting Standards (IAS) or other standards and practices accepted internationally and/or in the relevant industry is recommended.

## Article 8 Auditors

In international joint ventures, where one or several Parties invariably come from a country other than that where the Joint Venture is active, verification of the Joint Venture's accounts by an independent auditor is an important means for preserving trust, ensuring that accounts are reliable and protecting Parties, where management is entrusted to one of the Parties or to a third party.

## Article 9 Representation

**9.1** Representing the Joint Venture, in a contractual joint venture with no legal personality as proposed in the present Model Agreement, means representing the Parties taken collectively (see Article 1 under 'Joint Venture').

Article 9.1 provides as a rule that either Party may represent the Joint Venture. Alternative solutions are proposed in the options, providing that the Joint Venture be represented by both Parties jointly (option 1), or by a third party entrusted with management activities. Another option, which is not in the text of the Agreement, is to state that either Party to the Joint Venture may sign alone for commitments up to a specified amount and that the joint signature of both Parties to the Joint Venture would be required beyond that threshold.

The authority to bind the Joint Venture should be expressed in writing and, where compatible with the requirements of the applicable law, include the provisions of Article 9.2

**Article 9.2 and 9.3** regulates certain aspects of the relations with third parties. Obviously, the effect of this provision depends essentially on the law applicable to the relationship with the third party.

## Article 10 Liability

**10.1** This provision confirms the principle that, in a contractual joint venture, generally both Parties are jointly and severally liable. If Parties wish to provide for a more limited liability, Article 10 must be adapted accordingly. The validity of any restriction on liability towards third parties depends not only on the law governing the Joint Venture and/or the Joint Venture Agreement, but also on the law governing the relationship with third parties

**10.2 to 10.4** While Article 10.1 concerns liability towards third parties dealing with the Joint Venture, the remainder of Article 10 regulates the relations between both Parties to the Joint Venture with respect to situations arising from such joint and several liability of the Parties.

Parties should consider whether they need protection against the risk resulting from commitments which one of the Parties, in the exercise of its activities for the Joint Venture, may create for both of them jointly and severally. For this purpose, one might consider: a bank guarantee, an insurance policy, or a security from a parent company.

**10.4 Tax issues.** This contractual joint venture may well amount to a ‘partnership’ in law in many jurisdictions. One particular consequence may be that a tax authority could, in theory, hold each of the Parties jointly liable for tax. The wording of Article 10.4 and the proposed option to be added to it makes it clear that each Party is liable for its own tax. This provision may have to be reviewed by a tax expert.

## **Article 11 Breach of obligations**

**11.1** A Party in breach of its obligations shall first be invited to remedy its failure. The Model Agreement does not determine a time period in which this has to be done. It would be difficult to fix such a period in the abstract. This is why the Agreement leaves it to the reasonable judgement of the other Party to determine an appropriate period. The reasonableness of the period so fixed may be reviewed by the Arbitral Tribunal.

Should the Party in breach fail to remedy such breach within the fixed period, the other Party is presented with the possibility of terminating the Joint Venture, pursuant to Article 16, with immediate effect.

**11.2** In all cases, i.e. even if the failing Party remedies the breach immediately, the Party having suffered losses from the failure may claim damages.

**11.3** A separate clause is provided to deal with delay in payments. At the level of the Model Agreement, it is practically impossible to fix a rate that is appropriate for the great variety of situations that may exist in different countries or at various times. However, the Parties, when they enter into their Joint Venture Agreement, may be able to do so in light of the circumstances then known to them. Instead of fixing a specific rate, e.g. 7%, the Parties may be better advised to fix a reference rate (e.g. the three months discount rate of the national bank in the country of the Joint Venture’s principal place of business). It is important that the Parties ascertain that this reference actually exists and that it operates as they expect.

In all cases, the benchmark for determining the rate of interest should be the costs that the Party entitled to the payment incurs by reason of the delay.

## **Article 12 Share in profits and losses**

**12.1** The basic choice to be made, as explained above (under Article 3), is whether to allocate profits and losses between the Parties in equal shares or in proportion to their Shares in the Contributed Assets. The Model Agreement has adopted the former solution for Joint Venture Agreements between two Parties, the ‘proportional’ solution is offered as an option.

Other arrangements are also possible, such as allocating an agreed amount of profits in equal shares and distributing the remaining profits by reference to specific criteria. One may also consider, in particular in the context of financing operations, awarding to certain Parties, or to third parties, a share of the profits only, without the corresponding risk of losses.

**12.2** The time for distribution of any profits depends on a number of considerations, in particular the availability of liquid assets.

Parties may wish to include provisions requiring that a certain part of the profits must be re-invested or retained as reserves.

### **Article 13 Access to information**

**13.1** Access to information about the business of the Joint Venture is a fundamental right of both Parties. For any Party not involved in the management of the Joint Venture, it is an essential prerequisite for the exercise of its right to control what is going on.

In certain circumstances, restrictions might be necessary in order to protect a Party's trade secrets. The validity of such restrictions under the applicable law must be checked.

### **Article 14 Change in control of a Party to the Joint Venture**

Change of control over a Party may be a justified cause of serious concern for the other Party, in particular when a Party is taken over, directly or indirectly, by a competitor or when, because of a change in control, the Party concerned (and with it the Joint Venture) can no longer muster the support of a group of companies that is crucial for the business of the Joint Venture. For this reason, the Model Agreement provides for the possibility of termination under Article 17.

No attempt has been made in the Model Agreement to define what is meant by change of control or ownership, nor is there an indication on a threshold above which a change becomes 'important'. Because there are many ways to exercise control, it was thought that the fairness of termination would best be determined by the other Party under Article 17, on a case-by-case basis, or by an Arbitral Tribunal under Article 24.

In practice, there is a case for including a more specific definition of change of control (e.g. a third party acquiring, directly or indirectly, more than 50% of the voting rights in the Party concerned). The Parties may wish to clarify this in the Agreement, given their familiarity with the specific circumstances of the companies forming the Joint Venture.

Termination as a result of the change occurred may not be the best solution. It may be preferable to find some other arrangement with the Party affected by the change, and the group to which it belongs, that will enable the Joint Venture to cope with the new situation in an acceptable manner.

### **Article 15 Replacement of a Party**

In accordance with the principle that the composition of the Joint Venture may change, the Model Agreement provides that a Party may be replaced, subject to the consent of the other Party to the Joint Venture. Such consent could be given with the proviso that guarantees will be offered by the Party leaving the Joint Venture.

## Article 16 Notice to terminate the Joint Venture

This article allows either Party to terminate the Joint Venture by delivering written notice to the other Party. Unless there is a breach justifying immediate termination, written notice should be delivered at least six months before the end of the Financial Year. The Financial Year (as defined under Article 7.2) ending on 31 December of each year, this raises the question of what consequence a written notice delivered after 30 June would have.

## Article 17 Termination of the Joint Venture

**17.1** At the time when they draft their Joint Venture Agreement, Parties are normally optimistic about the future of their cooperation; often they do not give sufficient attention to the possibility that their expectations may not materialize. It is therefore important to consider the circumstances in which the Parties may wish to see the Joint Venture terminated.

The Model Agreement contains five cases for termination, including the case where the achievement of the Object of the Joint Venture, as defined in Article 2, becomes impossible, for instance because a necessary permit is not delivered or a main product is no longer available for distribution. In addition, two other possible grounds for termination are listed as options. This list is not exhaustive.

**17.3 and 17.4** At the end of the liquidation process, and as a rule, distribution of remaining cash surplus or resulting loss to be borne shall be divided equally between the two Parties. Where the option of Article 3.1 has been selected, this will take place according to the Parties' Share in the Contributed Assets.

## Article 18 Hardship

Situations may arise which, although not making performance of an obligation impossible, make its continued performance excessively burdensome. This problem may happen in a particularly acute form in long-term contracts. Legal systems differ in their willingness to alleviate the burden of the disadvantaged party. In some long-term contracts, clauses providing for adjustments in case of hardship are more frequent than in others. In joint venture agreements, such clauses seem to be less frequent. Nevertheless, the Model Agreement includes such a clause. The provision of Article 18 has been inspired by the corresponding clauses in the UNIDROIT Principles of International Commercial Contracts (see Article 6.2 of the UNIDROIT Principles).

In a situation of hardship, parties are usually under the obligation to renegotiate their contract in good faith, possibly with a mechanism providing for an adjustment if their negotiations fail. This is the solution adopted by the Model Agreement. If a case of hardship arises, the Parties must negotiate in good faith. Since this is no guarantee for success, attempts at mediation may be made and, in the last resort, recourse made to the Arbitral Tribunal or to the courts (if that is the option chosen in Article 24).

It must be pointed out that the power of a court or an Arbitral Tribunal to adjust a contract is not accepted in all legal systems; some systems consider that the function of the courts is to interpret the contract and not to make or remake it. Therefore, the validity of the hardship clause in the Model Agreement should be determined by reference to the law governing the Joint Venture Agreement and to the powers of the decision-making body under Article 24. For this reason, the Model Agreement expressly provides that the Arbitral Tribunal shall have the power to make any



revision to the Joint Venture Agreement that it finds just and equitable in the circumstances. This provision may not be sufficient to overcome the objections in some jurisdictions; but it is believed that in most cases an Arbitral Tribunal with this power will accept the task of making the necessary adjustments.

## **Article 19 Relief from performance and liability in case of impediment of performance (*force majeure*)**

*Force majeure* clauses are a regular feature of international contracts. Despite the French expression generally used to describe it, *force majeure* is not just a Civil law concept but is used equally in international contracts in common law practice. The clause as proposed in this Article of the Model Agreement follows in its principal features the standard approach to the matter, as contained for instance in the United Nations Convention on Contracts for the International Sale of Goods (1980, Article 79), the UNIDROIT Principles of International Commercial Contracts (Article 7.1.7) and the International Chamber of Commerce Model Force Majeure Clause (2003).

The clause proposed here differs however from most standard *force majeure* clauses because it does not merely provide an excuse for non-performance but emphasizes that both Parties must make efforts to overcome the obstacles that the excused non-performance has put in the way of the Joint Venture activity.

**19.1** The main feature of *force majeure* is the occurrence of an ‘impediment’ that prevents a Party from performing its obligations. Subject to certain conditions, the occurrence of an impediment excuses the non-performance of the Party affected by it.

There are different techniques for drafting a *force majeure* clause. In common law practice, preference is normally given to an enumeration of preventing events. In civil law practice, the events are usually defined generically. Since it would be very difficult to provide an exhaustive list of *force majeure* events that are relevant for all circumstances under which the Model Agreement is likely to be used, the latter technique has been chosen.

In order to qualify as an excuse for non-performance, the *force majeure* event must be unforeseeable, unavoidable and beyond the control of the Party exposed to it. These requirements can be found, with some variations, in most *force majeure* clauses. They are the subject of frequent commentaries and of some case law in different jurisdictions and international arbitration cases.

**19.2** Commercial activities are subject to many public regulations which may require various sorts of authorizations, licences etc. The Model Agreement assumes that it is for each Party to obtain such authorizations for its own commitments. The other Party should not have to bear the consequences, if a Party is unable to obtain them. Therefore, it is important for each Party to examine whether there are any public authorizations necessary for it to perform its obligations. If it feels that it cannot bear the risk of such authorizations not being granted, it must point this out to the other Party and provide for an exception to the principle stipulated in Article 19.2.

It should be emphasized that the authorizations that are considered here are those which a Party may require for performing its obligations. The Joint Venture activity, too, may require authorizations. Unless a Party has made a commitment to obtain them, the unavailability of such authorizations for the activity of the Joint Venture does not fall under the *force majeure* clause. If lack of such an authorization prevents the Joint Venture from achieving its Object, this is not a case of *force majeure* but grounds for termination under Article 17.1 (b).

**19.6 and 19.7** As a matter of principle, if a Party is excused for non-performance, the other Party should not be required to perform either. This principle is suitable in exchange contracts, where the obligations of one party match those of the other. A joint venture agreement operates differently. The obligations which the Parties have to perform normally concern contributions to the Joint Venture and other commitments in the interest of the Joint Venture activities. If one of the Parties is prevented from performing its obligations, both Parties (including the non performing one) may have an interest in the continued operation of the Joint Venture, rather than withholding their own contributions.

For this reason, the Model Agreement requires that the Parties consider the matter jointly and adapt the Joint Venture activity as may be required. Even though it is excused for the non-performance of its original obligation, the Party exposed to the impediment must cooperate and, if necessary, contribute its share in additional contributions that may be necessary for the continued activity of the Joint Venture.

## **Article 20 Intangible assets and/or intellectual property rights**

Two categories must be distinguished with respect to intangible assets and intellectual property rights: the rights one of the Parties contributes to the Joint Venture and those which are created in the course of the Joint Venture's activities. The former category is dealt with by Articles 3 and 20.1 and by the Ancillary Agreement in Appendix 2; the latter by Article 20. 2 and 20.3.

**20.1** Parties should be able to clearly identify the rights contributed by one or the other of the Parties on the one hand, and those created by the Joint Venture activity, on the other hand. As this is a potentially difficult area, it is recommended that any licence agreements contributed to the Joint Venture are agreed prior to or at the signing of the Joint Venture Agreement (see option under Article 20.1).

**20.2 and 20.3** Intangible assets and intellectual property rights may be created through various activities of the Joint Venture. The Agreement determines the conditions under which these intellectual property rights may be used, for the activity of the Joint Venture, or for the Parties' own needs, as well as the conditions under which such rights can be licensed to third parties (see, in this connection, *Manual on Negotiating Technology Licenses*, WIPO/ITC, 2003).

The Agreement must also ensure that the Joint Venture, i.e. both Parties, can take the necessary action to protect its rights. This concerns both registration of the rights and any legal action taken to protect them. For instance, in some jurisdictions one co-owner of an intellectual property right may commence patent infringement proceedings, acting alone, while in other jurisdictions all co-owners must act jointly.

Parties are recommended to consider more specifically the status of intellectual property rights after termination of the Joint Venture. In this regard, the proposed clause below could be added as Article 20.4

**20.4** Upon replacement of a Party from the Joint Venture, the leaving Party shall not be entitled to use any intellectual property rights contributed to or used by the Joint Venture (unless otherwise agreed by the other Party). Upon termination of the Joint Venture under Article 17, each Party shall (unless agreed by all Parties) be entitled to use free of charge for its own purposes any intellectual property rights jointly owned by the Parties pursuant to Article 20.2.



## **Article 21    Duty to promote the interests of the Joint Venture and not to compete with it**

When entering a Joint Venture Agreement and during its performance, the Parties continue to have their own priorities, interests and objectives. While there is no reason to deny these, the Parties must bear in mind, protect and promote the interests of the Joint Venture.

Where there is a possibility that the activity of a Party could compete with and be detrimental to, the Joint Venture, the contract could specify that the non-competition restriction is extended for a certain period after a Party is replaced in the Joint Venture. Under several laws, such a clause must be limited in time and/or in other respects. A clause is offered to that effect as an option.

Parties may also provide for a penalty for failure to fulfil the obligation not to compete. The validity of such a clause under the applicable law should however be examined.

## **Article 22    Avoidance and resolution of deadlock**

**22.1** A Deadlock is defined as the inability of the Parties to reach a decision. Most joint venture contracts provide for mechanisms to resolve Deadlock situations, which can otherwise paralyse the decision-making process within joint ventures, especially where there are two Parties with an equal share in the Contributed Assets.

**22.2 and 22.3** Where a Deadlock situation arises, a Party may require that the matter be subject to the provisions of Article 24.1 to 24.3. Should the deadlock situation remain unresolved, 22.3 opens the route of termination pursuant to Article 16.

## **Article 23    Applicable law and guiding principles**

While the Joint Venture Agreement can be expected to regulate the most important aspects of the Parties' cooperation, there may always arise issues which have not been settled by the Agreement. For this purpose, the choice of the law applicable is a necessary component of the Joint Venture Agreement.

Some parties to international contracts choose 'general principles of law', the *lex mercatoria* or other similar rules or principles as the 'law applicable' to their contract. The validity and usefulness of such a choice of law has given rise to much debate. In contract practice, the choice of an existing national law may still have distinct advantages with respect to predictability. The Model Agreement therefore proposes the choice of the law of a given country. This does not prevent the Parties from choosing one of the non-national solutions to which reference has just been made.

When deciding which law to choose for the Joint Venture Agreement, the Parties should first of all ascertain that the law they intend to choose either provides for or does not prevent the formation of the Joint Venture they are about to create. In particular, they should examine whether that law has adequate flexibility to accommodate the Agreement and its specific provisions.

Two other criteria are important for the choice of the applicable law: familiarity and accessibility. There is a considerable advantage for a Party if the law applicable to the Joint Venture is one with which it is familiar. However, in the practice of

international joint ventures, the law which is familiar to one Party often is less familiar or not familiar at all to the other Party. For this reason, the Parties often choose a 'neutral' law. When choosing the law, especially if they choose a 'neutral' law, the Parties should consider a law that is accessible to them. Accessibility relates to questions of language and legal concepts, but also to the form in which the law is expressed and how a foreigner may understand it.

International contracts involving States or State-owned entities, if the State does not impose its own law, are frequently submitted to a neutral law removed from the influence of the State or to general principles of law or similar systems.

The Model Agreement, while providing for the choice of the law of a specific country, tempers this choice by reference to principles of good faith and fair dealing as well as applicable practices in international trade, and specifically mentions the UNIDROIT Principles of International Commercial Contracts. Reference to such principles may also be introduced by the choice of a particular dispute resolution system. Thus, the 1998 ICC Arbitration Rules for instance, provide that 'in all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages' (Article 17.2). Article 23.3 of the Model Agreement introduces similar concepts.

## **Article 24 Resolution of disputes**

It may be useful to indicate a few fundamental landmarks set out in Article 24:

- Parties have an obligation to seek to resolve any dispute amicably. The Article refers to various processes for achieving an amicable settlement. It should be borne in mind, however, that as long as a Party has made an attempt for an amicable settlement (Article 24.1), it may resort directly to arbitration or court proceedings (whichever the Parties have opted for), without necessarily having to set in motion the processes described in Article 24.2 and 24.3.
- Failing an amicable settlement, disputes are resolved through arbitration, as specified in Article 24.4 to 24.6. However, Parties may opt for state courts instead of arbitration (see below).
- Concerning the specific matter of valuation, disputes are resolved in a final and binding manner by an Independent Expert (Article 24.7).

**24.1 to 24.3** International contracts concerning long-term relationships frequently provide for an attempt to resolve disputes amicably prior to arbitration or court proceedings. The Model Agreement follows this trend by providing:

- First, a general undertaking of the Parties to resolve disputes amicably (Article 24.1);
- Second, that the dispute can be brought to the senior management level (Article 24.2); and
- Third, that disputes can be brought to mediation or some other form of alternative dispute resolution, but only after a request has been made for resolution at the senior management level (Article 24.3).

These provisions ensure, on the one hand, that at least one serious effort will be made to resolve the dispute amicably, and, on the other hand, that recourse to arbitration (or State courts) is not unnecessarily delayed.

**24.4 to 24.6** Particular attention should be paid to the arbitration clause (unless the option of Article 24.4 for a State court is selected). Parties must choose between ad hoc arbitration (for which in particular the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) are available, or arbitration within the framework of an arbitration institution. The latter solution has the advantage that a number of matters which the Parties would have to regulate, in the Agreement or at the time when the dispute arises, are taken care of by the institution. If the Parties provide for ad hoc arbitration under the UNCITRAL Rules, they should not forget to designate the Appointing Authority.

Choice of the place of arbitration is of critical importance. It determines not only the place where the arbitration proceedings are held (although most arbitration rules permit the arbitrators and the parties to meet at places other than the place of arbitration), but also the law applicable to the arbitration procedure and the jurisdiction of the courts supervising the arbitration and providing any necessary assistance. For considerations similar to those discussed in the context of the choice of law, parties to international transactions often choose a neutral place of arbitration. In doing so, they should ascertain that the legal and judicial system at the selected place is suitable for international arbitration proceedings.

**24.6** An *amiable compositeur* is an arbitrator with the power to disregard non-mandatory provisions of a given law if strict application of those provisions would result in an unjust outcome.

**24.7** Recourse to an Independent Expert for valuation purposes is foreseen in Articles 3.3, 4.3 and 13.3. In all cases, the Expert's decision is final and binding. Should a Party still wish to bring a valuation case to an arbitral tribunal or a court, it is expected that the requirement for an expert's determination and its final and binding character will be upheld.

## Article 25 Miscellaneous provisions

In addition to the issues settled in this Article, the following may also be given consideration:

- (a) Should the competition authorities be notified of the Joint Venture Agreement?
- (b) Is the Joint Venture required to register the Agreement?
- (c) Is the validity of the Agreement subject to authorizations required by national law?
- (d) Is it necessary to adapt the Agreement to national and local laws and practices?