INTERNATIONAL JOINT VENTURES

PRACTICAL ISSUES AND HELPFUL HINTS*

This chapter will address the practical issues which American companies and the attorneys who advise them should be aware of when entering into a joint venture outside the United States. Because so many joint ventures are operated in Europe, Central and South American and Asia, the particularities of each of these geographic regions will be examined separately.

It should be noted from the onset that there is no specific European Union legislation which regulates the creation and management of European joint ventures. However, EU laws and regulations as well as national laws and regulations will apply to European and national joint ventures and care should be taken to keep this in mind when considering the creation of a joint venture in one or more EU countries. For example, EU antitrust regulations, including but not limited to the EU Directives concerning block exemptions for certain types of agreements, will apply as will the EU Directives on the free movement of people and goods.

### I. EUROPE with an Emphasis on France

#### A. CHOICE OF PARTNER

When looking at several potential partners in any given European country, it is important to look carefully not only at the partner’s business experience and the nature and quality of the assets, services and expertise which the partner may be bringing to the joint venture, but also the cultural, linguistic, political and social advantages and disadvantages of such partner.

For example, in Europe and particularly in France, many companies have historic, social, financial and political ties to the political leaders (or their families) and financial institutions of the country, which ties may (or may not) be an advantage or an impediment to the joint venture.

To ascertain the existence and extent of such interlocking relationships, the foreign investor should obtain the annual report and financials of the company, as well as a listing, with biographical data, of the members of its board of directors and the shareholders of the company. Often, despite the fact that a company is publicly traded, there may be several shareholders which hold large blocks of publicly traded stock, such as one or several governmental or semi–governmental entities.

It is often important to know which schools the President and other important directors and board members attended, to whom they are married, the associations to which they belong and on what other corporate boards they sit. This type of

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information will not only give the foreign investor an idea of potential conflicts of interest, but also of the contacts and influence of such board members and shareholders.

In order to obtain this type of information, if not readily and publicly available through data bank and local registry searches, the commercial attaché at the local American Embassy or Consulate, as well as the United States Commerce Department are good sources of information.

It is also useful to research articles in the local press to verify the reputation and image of the potential partner. To the extent that language may be a problem, local counsel can often assist in such research.

If concerns arise, they should be discussed with the potential partner, which may (or may not) understand the concerns and explain them. This exchange of views may be essential in understanding the business culture of the country.

**B. CHOICE OF LEGAL ENTITY**

Once the partner has been vetted, it is equally important to decide on the form of the joint venture. The term “joint venture” is not defined under European or French law and hence it can mean whatever the partners want it to mean. Often, a joint venture will be a contractual arrangement such as a consortium of several partners established for a specific project such as the Eurotunnel. Other joint ventures are newly created legal entities which are intended to be on-going business ventures. Generally speaking, if the purpose of the joint venture is project oriented, it is usually better to form a contractual joint venture; if the purpose of the joint venture is the creation of a business in which the partners will have on-going obligations, responsibilities and financial involvement including the distribution of profit and which will continue over decades and perhaps even centuries, an established and incorporated legal entity is usually more appropriate.

**B.1 European Entity**

There is only one purely European vehicle which can be used to form a joint venture the European Economic Interest Group “EEIG” (or “Groupement Européene d’Intérêt Economique”)

In 1985, the European Union Council enacted Regulation N° 2137/85 dated July 25, 1985 which created the possibility to form a European Economic Interest Group and which sets for the requirements for the incorporation of such a vehicle. This type of “entity” is essentially a registered contractual arrangement wherein the parties thereto agree to a certain number of minimum obligatory provisions as set forth in the Regulation such as the purpose of the EEIG, the number and identity of its members, the amount of its capital, the address of its registered offices, its term and its name. It is also advisable to include in the incorporation document the manner in which the EEIG can be terminated and dissolved, the terms and conditions governing the entry and exit of members and the accounting and tax provisions.
The purpose of this type of vehicle is not to engage in commercial operations which generate profits and losses. Its sole purpose is to develop and increase the economic activities of the members and to provide services to its members. Essentially, it is a manner in which companies can share common expenses and personnel in order to undertake a common goal and facilitate cooperation amongst its members such as promoting and marketing products and services. There are a number of restrictions on the activities of a EEIG as follows:

- It cannot indirectly or directly manage or control its members’ activities in particular concerning human relations, finances or investments.
- It cannot be a shareholder of any of its members including a shareholder in a third party joint venture company.
- It cannot have more than 500 employees.
- It cannot make loans or sell assets to a manager or director of a member company contrary to the laws of such member’s country.
- It cannot be a member of another EEIG.

It must have a minimum of 2 members but there is no ceiling on the number of members. Members can be physical persons or legal entities.

Each EU member country can enact legislation restricting certain of its nationals from entering into an EEIG or the incorporation of certain types of EEIGs.

The EEIG is registered as a legal entity in the country where the registered offices are located and each EU country has different requirements for the documents which must be filed in order to incorporate and register an EEIG. For example, France requires the filing of the bylaws or the contract which sets forth the minimum information set forth in the Regulation (see above) as well as the name(s) of the manager(s) of the EEIG.

The taxation of an EEIG will depend upon the tax legislation in the country in which the EEIG is registered.

**B.2 French legal vehicles**

France has a number of legal vehicles which could be used for the purposes of a joint venture.

Commercial law companies:

- A share corporation (“société anonyme” or “S.A.”)
- A limited liability company (“société à responsabilité limitée” or “S.A.R.L.”) to which may be assimilated the single shareholder limited
liability enterprise (“entreprise unipersonnelle à responsabilité limitée” or “E.U.R.L.”)

- A simplified share corporation (“société par actions simplifiée” or “S.A.S.”), to which may be assimilated a single shareholder simplified share corporation (“société par actions simplifiée unipersonnelle” or “S.A.S.U.”).

Civil law partnerships:

- A civil law professional partnership (“société civile professionnelle”) which is most often used for professional partnerships between attorneys, accountants, physicians and the like.

- A civil law real estate partnership (“société civile immobilier” which is most often used for the purchase and management of real estate.

- A participation partnership (“société en participation”) which is used when partners of different regulated entities which are prohibited from forming a commercial or other type of partnership; It is rarely used now but a participation partnership can be inferred if two physical persons or legal entities share profits and losses.

- A collective partnership (« société en nom collective »).

Other Vehicles:

- EIG: French law has created a national version of the EEIG: the Economic Interest Group. This entity is very similar to the EEIG discussed above and would only be used for a joint venture if the purpose was to assist members in their activities and not create and manage a business.

- French law also has legislation which governs not for profit associations, but this type of entity is beyond the scope of this chapter.

In all civil law partnerships, the partners have personal and unlimited liability for the debts of the partnership. In civil law professional partnerships and collective partnerships, the partners are not only personally liable without limit for the debts of the partnership but are also jointly and severally liable for such debts. The use of participation partnerships and collective partnerships is becoming rarer due to the flexibility of the commercial vehicles available under French corporate law and the possibility of limited liability for shareholders of commercial legal entities.

Since the vast majority of joint ventures have commercial objectives and most joint venture partners do not want to assume personal and unlimited liability for the debts of the partnership, this chapter will concentrate on the advantages and disadvantages of the commercial vehicles for joint ventures.

Unless otherwise indicated, references herein to the S.A.R.L. or S.A.S. will apply to the E.U.R.L. and S.A.S.U., as the case may be.
Historically, the two forms most generally utilized were the S.A., which was designed for widely or publicly held companies and the S.A.R.L., inspired by the German G.M.B.H. and designed to permit private partnership-style companies to benefit from limited liability. The E.U.R.L. form, established in 1985, was designed to permit individual entrepreneurs (and, by extension, wholly owned subsidiaries) to benefit from limited liability. Since joint ventures always have more than one partner, this type of company is rarely used as a joint venture vehicle.

The S.A.S., introduced in 1994 for limited categories of shareholders and generalized in 1999, permits a privately held share corporation to dispense with the statutory rules designed to protect minority or public shareholders of an S.A and is an ideal vehicle for a joint venture.

**S.A. versus S.A.S.**

As between the S.A. and the S.A.S., the only major advantage in utilizing the S.A. form for a joint venture is the possibility of raising funds from the public through the issue of securities and the existence of well-established rules set forth in the law and in court precedents.

The S.A.S. has many advantages over the S.A.

If used for a joint venture, one of the shareholders can, but is not obligated to, serve as President and there is no legal obligation to have a Board of Directors or any other collegial body. If such bodies exist, they are informal and they are not indicated in the official extract of the registration of the company (“K-Bis”). In such a case, no meetings need be held physically or in either at shareholder or at board level and decisions may be reached by circular resolution, telephone conference or other methods. If there is no Board of Directors, there will not be any risk of director liability, and there is no obligation to have workers council representatives’ attend Board and Shareholders meetings.

In addition, it is possible to freely fix (subject to only a few exceptions) quorums and majorities, to provide for the designation of directors and officers directly by designated shareholders (or third parties) and to give designated shareholders direct responsibility for certain types of management decisions and more generally create provisions that are often found in shareholder agreements.

The transfer of shares may be prohibited for up to 10 years, pre-emptive rights may be made applicable to all transfers (including transfers to other shareholders and family members, which is not possible for the S.A.) and share transfers in violation of the rules set forth in the Articles are void. In addition, a shareholder may be required to sell its shares in certain hypotheses (for example, if the shareholder is taken over by a competitor of the joint venture; if the shareholder wants to exit the joint venture etc).

The relationship between voting rights and participation in profits and losses need not be parallel and thus the control via voting rights of the joint venture can be disassociated from participation in the profits.

When forming a joint venture, there seems little reason – other than habit - to choose the S.A. form unless the joint venturers intend to raise funds from the public or be
listed on a stock exchange (and an S.A.S. may be transformed into an S.A. at such time as a public offering is contemplated).

S.A.R.L. versus S.A.S.

The S.A.R.L. has a relatively streamlined form of management (one or several co “Gérants” or General Managers, but no Board of Directors or other management bodies), but this streamlined management structure can also be a disadvantage if the objective is to have a shared management structure which is not dependent upon physical persons (a company cannot be a Manager of a S.A.R.L).

Another disadvantage of a S.A.R.L as opposed to a S.A.S. is that S.A.S. shares are negotiable and can be transferred without formalities or payment of the 3%* transaction tax which is applicable to the transfer of S.A.R.L. equity interests. The tax is based upon the transfer price, or the market value of fixed and intangible assets (including goodwill), and also applies to equity interest transfers within the framework of a group reorganization. Tax on transfer of S.A. shares is taxed at 3% with a maximum of € 5000 for any given transfer.

Moreover, psychologically speaking, the SAS has a “President” which is a title that is generally considered to be more prestigious than the “Gérant” (General Manager) of a S.A.R.L. While a S.A.R.L. “Gérant” may claim damages if s/he is removed without good cause, this would not be the case for the President of an S.A.S. unless the Articles so specify or if the removal is effected in an "abusive" manner.

The disadvantages of the S.A.S. form are that the minimum capital is € 37,000, of which at least one-half must be paid up at the time of incorporation, as opposed to no minimum capital for the S.A.R.L. (although insufficient capital may deprive the S.A.R.L. of its limited liability). If an existing S.A.R.L. is transformed into an S.A.S. (or a S.A.), however, the entire € 37,000 capital must be paid up at the time of the transformation. A statutory auditor (“commissaire aux comptes”) is required for the S.A.S., giving rise in most cases to additional costs and formalities.

These cost factors, plus greater familiarity may induce certain joint venture investors to continue to prefer the S.A.R.L. form but generally speaking, the S.A.S. form appears more advantageous for the management and operation of a joint venture since the parties can establish the working rules of the venture without being hindered by obligatory provisions of corporate law including those concerning shareholder agreements. However, the S.A.R.L. may be established with a much lower paid-up capital and without the necessity of a statutory auditor which limits the upfront costs of establishment.

Irrespective of the choice of vehicle, joint ventures in which 2 parties have equal ownership (50/50) is not advisable unless it is made very clear in the contract or bylaws how a deadlock can be resolved. It is very dangerous in a S.A.R.L. since the “Gérant(s)” cannot generally break shareholder deadlock unless the “Gérant” is herself a shareholder in her own name. In the form of a S.A.S. the bylaws can specify tie-breaking and deadlock breaking mechanisms and can also separate voting control from financial control.

*Rate for 2009
C. GETTING INTO THE COUNTRY

C.1 Visas and Work Permits

Once the joint venture partner has been chose, the structure decided upon and any necessary authorizations filed (see below), the foreign investor will often want to send people to assist in the management and operation of the joint venture.

American companies should not assume that Americans can simply take a plane, rent or buy an apartment and begin work in a European country. As in the United States, all European countries have visa, residence and work permit regulations and like the United States, the procedures are complex and often take time. Consequently, local counsel should be consulted as early in the process as possible in order to advise on the timing and procedures to obtain the necessary visas, resident and work permits for American nationals if it is intended that they live and work in situ.

It should be noted that most members of the European Union permit the nationals or legal residents of other European Union countries to reside and work in the countries which are members of the Schengen Treaty subject to a number of EU directives and regulations which legislate issues such as tax and social security and retirement contributions.

It is almost always easier and more rapid to move European nationals from one European country to another European country than to bring an American to Europe to work and live (at least that is true for France). If the American joint venture partner has a choice, it will find it easier from a bureaucratic point of view to have one or several Europeans employed by the joint venture at least at the commencement of the joint venture activities. However fairly recently the French authorities have modified the regulations to permit a non EU national to be appointed as a President or Manager of a French company without holding a commercial card (which is normally required to be appointed as a President or General Manager of a French company), provided the person will not reside in France.

If an American national wants to live and work in France, obtaining the necessary visa and resident and working permits is a bureaucratic process that must start in the place where the person habitually resides at least 3 months before that person is expected to be operational in France. On occasion, the wait can be up to 6 months if the original file is incomplete. Moreover, if that person will be an employee of a French company and consequently on the French company’s payroll, a separate expatriate or secondment contract should be drafted if the person is being seconded from one of the existing partners. To decrease the cost of social charges in France, a waiver for a maximum period of 5 years is available by requesting a certain form from the U.S. Social Security Administration which will release the French company and the employee from certain payroll taxes in France.
C.2 **Foreign Investment**

When considering a joint venture with a French partner, there are some restrictions which must be examined in order to determine whether a declaration or authorization must be filed prior to the investment being made.

Generally speaking, foreign investment in France is open without distinctions between investments made by companies incorporated in the EU or outside of the EU. However, certain investments require the investor to file a notification of the investment and certain investments require a prior authorization. And sometimes it makes a difference when authorizations are necessary if the investor is a EU investor or a non EU investor.

The laws which apply to foreign investments in France date from December 28, 1966 and December 9, 2004 and are set forth in Articles L 151-1 et seq., L 761-2 and R 151-1 et seq. of the Financial and Monetary Code (the “Foreign Investment Laws”)

The Foreign Investment Laws cover three categories of foreign investments as follows:

**C.2. (a) Investments which do not require an administrative notification**

These include:

- The creation or extension of an activity of an existing French company;
- The increase in a participation in an existing French company when the foreign investor holds 50% or more of the capital or voting rights;
- A capital increase of a French company under foreign control provided that the existing foreign shareholder does not increase its holdings;
- Direct investments between companies of the same group;
- Financial transactions such as loans, cash advances, guarantees, consolidations or waivers of debt, grants, or branch accounting operations granted to a French company under foreign control by the controlling investors;
- Direct investments in real estate companies other than for the purpose of the construction of buildings for their sale or rent;
- Direct investments of up to €1 500 000 in artistic, retail, hotel, restaurant, neighborhood service activities or in companies which exclusively operate quarries;
- The acquisition of agricultural land.

**C.2. (b) Investments which require a prior authorization**

These include investments in certain sensitive activities such those businesses which could affect public order, public security and the national defense and those which involve the research, manufacture and/or sale of fire arms, ammunition and explosive powders and substances.
Such activities include (but are not limited to) gambling, wiretapping, evaluation of the security of products and information technology systems, security services, products used for both military and civilian use, cryptology, contracts with the Ministry of Defense, and the like.

In this category of investments, the specific types of activities covered under the broad categories mentioned above are different if the investment is made by an entity in a EU country which has a administrative assistance treaty with France or with or by non EU investors. The differences are set forth in the Foreign Investment Laws.

Investments in this category are considered automatically granted if:

- Intra group investments which are controlled by more than 50% by the same shareholder, provided that the investment does not or will not result in the branch of activity being transferred outside of France; and
- If the investor has previously received authorization to acquire the control of the same company.

For investments which require prior authorization, such authorization is implicitly granted if the authorities do not respond to the request within 2 months of the filing of such request provided that all necessary information has been filed. A request for further information will stay the response period which will commence to run on the date all required information is received.

**C.2. (c) Investments which require an administrative notification**

All investments which do not fall within the two above categories must be notified to the authorities in a timely fashion. The purpose of these notifications is to verify that a prior authorization (see above) is not required. Such notifications are also used for statistical analysis by the French Government.

Consequently, in the case of doubt concerning whether the joint venture will have an activity which could fall within the required authorization procedure, it is better to file.

**C.3 Exchange Control and Monetary Transfers**

All resident and nonresident physical persons and legal entities must file a notification with the French customs administration either before or within 5 days of the transfer from a French bank account of €10 000 or more outside of France. Failure to do so can result in fines and the confiscation of the amount transferred illegally. Moreover, if the transfer concerns laundered funds, and in addition to the fines of up to 5 times the transferred amount and confiscation, a prison term of up to one year can be ordered by the Criminal Court.

The regulations concerning monetary transfers are set forth in Article L 152-1 –L 152-6 of the Financial and Monetary Code, Article 1649 of the General Tax Code and the EU Regulation n° 1889/2005.
C.4 Banking

It is often fairly complicated to open corporate and individual bank accounts in some European countries. Banks will often require proof of local incorporation or legal existence of the entity which wishes to open a bank account, powers of attorney in the national language to local residents, obligatory minimum deposits and the physical presence, at least at the time of the opening of the account, of the persons who will have signatory power to operate and manage the accounts.

For individuals, they often require proof of residence in the country as well as copies of passports, residence and working permits and sometimes pay slips or proof of other means of support.

Ordering and obtaining a check book can now be done online with most banks and checking services are for the most part free of charge, at least in France. A credit card issued by a French bank can take up to 2 weeks and credit cards, once obtained are, in most countries (particularly Southern Europe) debit (as opposed to credit) cards, i.e. the amounts charged to the card are automatically debited once a month from the account at a date which is usually chosen by the cardholder. In most European countries, checks cannot be endorsed to a third party, but must be deposited into an account.

To facilitate the paperwork, cost and timing in connection with wire transfers between the American joint venture partner and the joint venture entity, it is often useful to use an American bank which has either offices in the country of the joint venture or which has a correspondent banking relationship with a local bank. Moreover, banks will often debit wire charges for bank transfers that require a third party transferring bank.

As mentioned above, transfers of funds in excess of €10 000 must be notified to the Customs Administration.

C.5 Choice of Local Counsel

Much ink has been spilled on the question and most companies have a preferred method of choice. The author of this chapter recommends that several names be obtained and interviewed before a final choice is made.

When interviewing local counsel, it is important to ascertain English language competence (both oral and in writing), response time (try sending an email and a fax with a simple question and see how quickly a response is sent) conflict of interest and invoicing policies (including expense and travel policies) and proof or a serious indication of specific expertise in the types of matters required.

The latter may be quite important, since the recommendation may have come from an acquaintance who dealt with a particular firm on a matter totally different than the one
required: for example, an excellent tax or banking attorney may not be the best choice for the incorporation of a joint venture involving complex intellectual property issues.

The Martindale Hubbell International Law Directory is a good source of information on law firms in European countries and gives fairly detailed biographical data on the attorneys at the firm, although the reader should be aware that firms pay per line for their insertion and control the information which is published, so it should not be the only reference source when choosing local counsel.

All other considerations being equal, in Europe, it is usually preferable to be a big client in a small firm than a small client in a big firm. American companies should also be aware that, with the exception of England, most law firms in other European countries are small compared to American firms, but this generally does not affect the quality of legal services. One should also be aware that in certain European countries, accountants, and in particular, the large international accounting firms, are admitted to practice law, usually under a name which is different from the name of the international accounting firm.

Confidentiality and conflict of interest regulations vary from country to country so it should not be assumed that the same thresholds and rules as those American business people are accustomed to will apply. Moreover, certain of these rules are quite controversial in Europe with regard to the application of the European gate keeper legislation and the obligation of attorneys to “turn in” their client if certain threshold issues are met.

Finally, it should be noted that when changing attorneys, local bar regulations often require the payment in full of the prior attorney before the new attorney will take on the matter.

D. OPERATIONS OF THE JOINT VENTURE

D.1. Financial Issues

As is the case with exchange control, currency control is becoming quite rare in Europe. However, before sending funds into a joint venture country, local counsel should be consulted to verify that there are no issues or particular reporting requirements either with getting the funds in or out of the joint venture country.

Foreign investors should also be aware that in many European countries, the banks and other financial institutions are subject to certain reporting requirements under national and EU money-laundering laws. See Section C.3. for transfers of over €10,000 in France. In order to avoid any unfortunate misunderstandings with the local banks, it is best to be aware of the national and European Union laws before wiring large amounts of money in and out of European countries.

From a practical point of view, when dealing in several different currencies, it may be advisable to have banking accounts in different currencies to hedge against exchange
rate risks and/or to buy currencies outside of the Euro zone at a fixed rate in advance of the need for such currencies in order to stabilize exchange rate fluctuation.

Finally, it should be noted that when a parent company advances or loans funds to a subsidiary or branch, such advances and loans must be documented and there are tax consequences. Pooling agreements are valid methods of treasury management amongst group companies in Europe including of course joint ventures, but such arrangement must be documented and reviewed by tax and legal counsel.

D.2. Intellectual Property Issues

D.2. (a) Trade name of the Joint Venture Entity and Domain Names

Before deciding upon the name for a newly created the joint venture entity, local counsel should verify that the trade and domain name is available. The foreign investor should also carefully take into consideration the opinion and advice of the local partner, since inevitably, it will have a better appreciation of how the name will be perceived by the local market.

D.2. (b) National IP Protection

As obvious as it may appear, American companies often need to be reminded to verify whether the patent(s) and/or trademarks which are duly registered in the United States are also protected in the country where the joint venture will be incorporated and will operate.

Whether or not intellectual property can and should be protected in the county of the joint venture as well as in the countries to which any products produced by the joint venture may be exported and sold is an essential issue which must be examined very early in the formation of the joint venture particularly if one party is contributing a trademark/logo and goodwill derived there from to the joint venture. Additionally, certain countries, such as France, have a particular procedure for registering the ownership of confidential know-how which could be an attractive alternative for certain foreign investors.

Since trademark and patent registration procedures and costs vary from country to country and take time, and since the criteria for granting, rejecting or objecting to trademark and patent applications and registration vary from country to country, specialized advice should always be obtained from local trademark and patent advisors. This is true even in the case of applications for a European patent or a Community trademark, since the procedures may be somewhat more complex and the applications often take much more time to be reviewed and granted, thereby requiring greater oversight. Often the foreign investor’s intellectual property advisor will have a correspondent in the countries concerned.

Finally, in some European countries, such as France, license agreements must be translated into the local language and registered with the appropriate authorities in
order for the licensee’s rights to be binding upon third parties. Failure to carry out the necessary registration requirements could result in the local licensee’s (which often is the joint venture entity) rights being null and void vis-à-vis third parties. This could result in the courts refusing to grant standing (and thus not accept jurisdiction) to the joint venture if it needs to sue a third party to enforce its rights unless the license agreement specifically provides for this possibility and is properly registered.

Information on protecting trademarks and copyrights outside of the United States and international trademark registrations under the Madrid Protocol can be found in the Section of International Law book “International Trademarks and Copyrights” (2004).

**D.3. Hiring Personnel and General Labor Law Issues**

Personnel issues are most likely to be the most frightful problems for a foreign, particularly an American, investor in a joint venture located in Europe.

American companies need to be aware of the fact that although employees may be hired by an American joint venture partner and then seconded to work for the European-based joint venture entity, the labor regulations applicable in the country in which the joint venture is located will apply to the employee once he or she is working in the country of the joint venture. Such labor regulations will most likely override any provisions in the US employment contract of the employee which may be less favorable to the employee than the local labor regulations.

From a practical point of view, this requires the joint venture to comply with all of the legal labor law requirements (including, but not limited to dismissal procedures—see Section E.1 below) irrespective of the nationality of the employees. These local labor law requirements are most often very protective of the employees. In addition, in many European countries, the unions are quite strong and companies are required to have union representatives participate in corporate decision-making at various levels of management; they also assure the protection of employees’ rights.

Most European countries have highly legislated labor regulations which include the form and type(s) of employment contracts which may be entered into, minimum hourly and monthly salaries, maximum work week laws, strict regulations for overtime, obligatory minimum paid annual vacation, obligatory sick, maternity, parental and other types of paid leave, obligatory health, unemployment and pension contributions and other types of employee protection which tend to surprise (and depress) American investors in Europe.

With regard to obligatory Social Security Contributions, the United States is a signatory of a number of bi-lateral social security treaties which provide for particular procedures to be followed to avoid the double payment of these types of contributions. Counsel should be consulted in order to ascertain whether employees of an American company who are seconded to a European-based joint venture entity may benefit from the provisions of a bi-lateral treaty.

Since European countries’ labor laws and regulations cannot be avoided or ignored, whatever additional cost and administrative issues are raised by such laws and
regulations should be considered before, or at the latest, during the formation and staffing of the joint venture.

I highly recommend two books which the Section of International Law has recently published:

- “Labor and Employment in the New EU Member and Candidate States” (2007) which includes a general chapter on European Union law and Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, the Republic of Bulgaria, Croatia, Macedonia and Turkey; and

- “International Labor and Employment Law- Volume 1 Europe” (2nd Edition, 2008), which covers Belgium, an update on the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom and the United States

D.4. Importing and Exporting Products

Importing and exporting components and assembled products often require government certification and authorizations, both from the importing and exporting countries. For example, double use (military and civil use) products need Government approval as do products containing cryptology before they can be exported from the United States and imported into France. Customs issues often arise when goods are imported for immediate export without any transformation and, in some countries, such as France, there are obligatory regulations concerning the use of the French language for customs documents, instruction manuals, notices and similar types of documents to be used by consumers. Clearly, the issues raised by export and import regulations will depend upon the activity of the joint venture and the countries with which it will be trading.

American partners of joint venture entities (whether direct partners or indirect partners through a foreign subsidiary) should be aware of the extraterritorial nature of certain American laws and regulation, for example, anti-boycott laws concerning Iran and the Foreign Corrupt Practices Act (FCPA).

While it may be true that some European countries do not always comply with or respect the extra-territorial nature of the criminal provisions of certain American regulations, it is nevertheless important for the American partner to be aware of its obligations and to discuss them with its European partner. Moreover, more and more companies (joint ventures and others) are being prosecuted in the United States for violations of the FCPA despite the fact that the company is not incorporated in the United States and that the main activities of the company and its business are outside of the United States. A simple email which comes through to an American company’s mailbox or funds which transit through a bank account in the United States is sufficient to start an investigation.
E. GETTING OUT OF THE JOINT VENTURE

When a joint venture is not successful for whatever reason be it commercial failure or partner disagreements and the partners decide to cease operations, it will be necessary to reduce and/or eliminate personnel, liquidate holdings, close bank accounts and pay-off debt.

E.1. Personnel Issues

As explained in Section D.3. above, dismissal procedures often are highly regulated. You cannot just shut down a company and dismiss the employees. In most continental European countries, the reasons and justification for mass dismissals based on economic reasons must be presented in great detail to the employees and the union representatives pursuant to codified procedures and an obligatory time line and an “employment plan” must be drafted and presented by management.

Such employment plans usually must include provisions for: offering other employment within the affected company's group if there are other group companies, finding other employment for the dismissed employees, outplacement, lump-sum payments in addition to the legally required dismissal indemnities, and other benefits. Although it is somewhat unusual for the employees and union representatives to have exclusive authority to approve the plan, if they contest it, the legal proceedings which ensue could delay the effective closing of the joint venture for months.

Consequently, a word to the wise: consult local counsel specialized in labor law before attempting any dismissals for whatever reason. Failure to get good advice will usually result in expensive delays, the payment of increased amounts and harmful press.

E.2 Lease termination and real property issues

Most European countries have legislation which deals with real estate lease terminations.

In France, by law, commercial leases are for 9 years and notice can only be given six months before the end of every three year period. Failure to comply with the lease terms and applicable legislation could result in the payment of rent (and charges) for the duration of the term. It is often wise to attempt to find a company which is willing to take over the premises and present the candidate to the lessor.

The ownership of real property presents other issues, if the property is owned by the joint venture entity and the entity will be dissolved requiring the sale of the assets including the real estate.
Can and should the real estate be sold by the entity before dissolution and liquidation? Should one partner purchase the share of the other partner in the real estate? If so, how should the value of the real estate be evaluated? What are the tax issues involved regarding capital gains and carry forward of unused depreciation?

If these issues have not been addressed in the joint venture agreement or the bylaws of the legal vehicle, it is likely that disagreements will arise and that the capital used to purchase the real estate, if it still exists, will be tied up until the dispute is settled between the joint venture partners.

**E.3. Creditor’s rights-Winding up**

If the joint venture is not successful either for commercial, strategic, partner disagreement or other reasons, the partners will have to agree on the method of its ceasing business.

If the reason for the winding up is financial, the risks can be minimized or prevented if the joint venture partners are individually solvent and agree to advance the amounts necessary to pay off creditors. If either or both of them are not solvent or if they do not agree to continue to contribute to the joint venture, deadlock may occur.

In many European countries, an outside trustee/administrator will be appointed to manage the joint venture, collect receivables, sell assets and pay off the creditors. In France, any director or any shareholder holding at least 10% of the voting shares can also open “alert proceedings” whereby the Commercial Court is notified of the joint company’s financial difficulties and the Court may appoint an administrator to oversee operations until the financial issues are resolved.

If the financial issues are not resolved, bankruptcy proceedings can be filed either voluntarily by the joint venture company or involuntarily by any creditor of the joint venture. Moreover, If the difficulties are not resolved, the Court can transform the procedure into a liquidation or winding up when the court appointed administrator decides, after consultation with the creditors’ representatives, that the company is not viable and cannot be continued either by the current shareholders and management or by selling it to a third party.

The shareholders or partners can also an amicable liquidation if they decide to cease operations and liquidate or wind up the joint venture company. In this case, the creditors will need to be paid -if funds are available- before the legal entity can be dissolved. In a court ordered liquidation following an involuntary or voluntary bankruptcy, the court appointed administrator will oversee the disposal of assets by judicial sale and will pay off the creditors with any resulting proceeds.

In both scenarios, a company cannot be liquidated and wound up if there are outstanding lawsuits with third parties or shareholders or partners.

It should be noted that in France, when sufficient funds do not exist to pay creditors and the company has not yet sought bankruptcy protection, creditors have the right to seize assets, including bank accounts owned by and receivables due and payable to
the joint venture entity (even if in the hands of third parties) provided a debt is due and payable and an attempt to get it paid has proved useless.

In some European jurisdictions, joint venture assets may be seized (Maervia or freezing injunctions) in other European countries to recover debts of the joint venture entity.

Although some assets may be protected from seizure if they legally are owned by one of the partners and not the joint venture entity and are identifiable as such, this may not be possible for all types of joint venture entities.

This brings home the necessity to draft good “divorce” provisions in the joint venture by laws or contract at the beginning when the partners are still excited about the venture and in a position to negotiate from a blank slate.

Such “divorce” provisions should provide for a method to evaluate the monetary value of the tangible and intangible assets of the joint venture. For example, often the bylaws or contract will provide for a defined accounting method and the use of a previously named third party to set a value if it is in dispute. They will also provide a method for each partner to have the opportunity to buy the other out, or sell to a third party. They should also provide for the manner in which the accounts will be settled between the partners at the time of the dissolution of the joint venture company. Other typical provisions are provisions stipulating which party will have the use of the trademarks, trade names, logos and domain names (or none of them); provisions concerning which party will (or will not) assume part or all of the personnel and a mediation and arbitration clause to avoid endless litigation.

Inevitably, if the incorporating documents do not have solid provisions which provide for the death of the joint venture, this will delay winding it up and in particular the recovery of the each partner’s share of the assets, if any.

Irrespective of the outcome, creditors’ rights are not uniform across Europe and often are less protective than the rights provided for by the Uniform Commercial Code and other relevant state and federal statutes in the United States.

E.4. Banking, Financial and Commercial Issues

Bank accounts may not be closed without the proper signatures and until all checks and credit card charges have been cleared. Additionally, in several European countries, payments for taxes, social security contributions, employee salaries, and electricity, gas and telephone bills are paid by direct debit from bank accounts and are debited months after the winding up of the company. For example, telephone and electricity charges in France are invoiced for two month periods and social security contributions are paid quarterly in arrears. Taxes are paid in year 2 for earnings in year 1. Customer receivables must be received and credited (in Europe, most customers pay within 90 days, but not usually before then). Consequently, if the foreign investor leaves the country, someone will have to be authorized to oversee the winding up of the bank accounts, the payment of debts and other formalities.
Given the delays in administrative matters which local and national governments control, as well as the delayed or non payment of receivables by customers who learn that the joint venture entity will be wound up, it could be months and sometimes years before the joint venture can be legally wound up. A good bi-lingual local accountant and counsel are indispensable in these circumstances.

E.5. **Environmental issues**

If the joint venture is involved in manufacturing or otherwise handling dangerous materials, it may be necessary to obtain authorizations or other types of certificates from the local authorities attesting to the non polluting nature of the site (or compliance with applicable norms and regulations) in order to sell or transfer the site to another party or when winding up the joint venture entity which owned and/or operated the site.

Compliance with environmental regulations both during the operation of the joint venture and after its demise will require consultation with local counsel since most European countries have national norms, in addition to the applicable European norms.