

The Practitioners' Treatise on International Joint Ventures

Basic Structures, Essential Documents,
Special Problems, Common and Civil Law
Jurisdictions with Multiple Clauses and Forms

RONALD CHARLES WOLF

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Ronald Charles Wolf



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*To Marilyn Fein
Who wrote this treatise with me through the decades
Of Newton, Massachusetts*

Preface

It is time for the literary past to not only be respected but also be transformed.

In 1995 Kluwer Law International published my first edition of “A Guide to International Joint Ventures with Sample Clauses.” A bold venture by an established publisher for the Guide was a slim review, albeit highly practical, of the practice of international joint ventures garnered by me through decades of counsel in Portugal, an American attorney not displaced but trail blazing on behalf of mostly American multinationals seeking joint ventures with Portuguese companies.

To my surprise, but perhaps not that of Kluwer Law International, the Guide became very popular. Through the years the Guide went through two more editions, 2nd and 3rd and the original title was always retained, much as you continue with the nickname of a childhood friend because of familiarity and intimacy, even though the 3rd edition contained over 400 pages!

In 2014, Kluwer Law International asked me to revise and expand the 3rd edition and in doing so I realized that the title “Guide” was a misnomer. How could a book of now over 600 pages be considered a Guide?

Hence, the time has come to say partially farewell to a childhood friend, this Guide with which I began my legal literary career. The present title reflects the true objective of this life time labor: “The Practitioners’ Treatise on International Joint Ventures: Basic Structures, Essential Documents, Special Problems, Common and Civil Law Jurisdictions with Multiple Clauses and Forms”.

But the past must surely still have its honored place. And so the present treatise is divided into two parts. Part I contains the material which formed the contents of the 1st, 2nd, and 3rd editions of the Guide. Part 2 contains new material which continues our search for text and material to aid the practicing lawyer.

Ronald Charles Wolf
Quinta de Beloura,
Sintra, Portugal
2015

Acknowledgments

Since 1995, Kluwer Law International has been my publisher. The passage of time alone indicates my sense of loyalty and gratitude to a fine publisher who has always been present to aid and assist me in all aspects of my legal writing career, a publisher which has contributed significantly to divulging reliable and needed legal information in a variety of formats. Not only I but the entire legal profession the world over is the beneficiary.

I wish to publicly express my appreciation to the publisher M.E. Sharpe, Inc. of Armonk, New York for granting me permission to utilize extensively and without restriction material from my title *Effective International Joint Venture Management: Practical Legal Insights for Successful Organization and Implementation* (2000).

An author is indeed privileged to have such a fine publisher.

I also wish to extend my gratitude and respect to all my Portuguese colleagues, too numerous to be mentioned, who through all my decades in Portugal never hesitated to collaborate with me, render me the assistance I requested, and gave their professional services within the framework of outstanding competence and integrity in a most generous professional spirit.

With them, I learned the craft of international joint ventures.

Quinta de Beloura
Sintra, Portugal
2015

Introduction

'The joint venture form is a casual generic label ...', Robert Flannigan, The Joint Venture Fable, 50 American Journal of Legal History 200 (2010) at p. 222.

A number of scholarly and impressively researched law review articles (Flannigan 2010, 2009) deny emphatically that there exists a law of “joint ventures.” *Obiter dicta* taken for legal principles, case precedents misapplied, judicial vagueness in analysis of the facts, all have contributed to a grammatical confusion causing jurists and lawyers to refer to the law of joint ventures, when no such law(s) exists.

Such is the thesis of our cited commentator.

Granted that the incisive investigation by the commentator in question (Flannigan 2010, 2009) lies bare a now revealed legal truth, we are nevertheless confronted with various facts of the law practice demanding explanation: the clients refer continuously to “joint ventures”; the various common law jurisdictions are a fertile source of case law concerning joint ventures; the various national legislative branches in the most remote corners of the earth do the same; the European Union has extensive legislation and case law concerning “joint ventures” as well as directorates handling cases involving joint ventures; there are countless legal treatises on “joint ventures”; and a cursory review with research tools brings to our attention thousands, yes thousands, of references to articles dealing with “joint ventures” from law journals all over the world.

The resolution of this apparent conflict—there is no law of joint ventures yet a multitude writes about this area, including your author—is found in that each party is normally utilizing a different reference.

Our commentator is seeking to demonstrate or deny the presence of legal principles specifically unique to joint ventures. Since they do not exist, there can be no law of joint ventures. Consequently, the courts are applying and should apply the various principles of law of corporations, partnership and other organizations to the problems afflicting joint ventures.

What then is there left to study meriting the designation of “joint ventures?”

A great deal, if the object of your investigation is different and if you are an attorney whose practice requires you to counsel on joint ventures, acquisitions,

mergers, business combinations of the most varied type involving two or more entities. Only the most committed counselor to academic principles, no matter what the personal economic consequences, would tell her/his multinational client their proposed description of the planned enterprise as a joint venture needs to be “renamed” as joint ventures do not exist. The tyranny of pure theory will not convince the entrepreneur who will eventually seek counsel more amenable to boardroom atmospheres.

The law practice of joint ventures (note, not the practice of the law “of joint ventures”) is substantially dependent on the use of customary documents, some contractual others no more than an manifestation of intent, drafted and utilized by lawyers throughout industrial nations establishing accepted standards of business conduct and finding expression in legal forms developed through decades of professional use by lawyers, auditors, commercial bankers, risk capital investors, organizations of the most varied kind, as an incomplete illustrative list.

The practice of joint ventures describes the formal activity of these groups, professional or not, manifesting itself in well-defined legal structures but with reference to established commercial practices built up through generations of international commerce and founded on the common sense rules of lawyers and merchants to facilitate trade which rules shall have the enforcement of courts of law by reference to the traditional categories of the law.

However, as the activity relates to a commercial collaboration whose endeavors transcends state or national boundaries the commercial term adopted by lawyers, merchants and others, has been “joint venture or international joint venture” with no one having in mind a specific legal form. A joint venture is what our commentator says, a generic label, an etiquette whose meaning has to be deciphered case by case.

These terms—“joint ventures”—are no more than references to a multiple varied ways of doing business. As joint ventures are created by recourse to a number of legal structures, of course the law applied to these structures must be by reference to corporate law, contractual obligations, shareholder rights, *inter alia*, as determined by the applicable national law.

That attorneys and courts have at times misunderstood the practice of joint ventures and sought instead to claim special rules of law applicable to joint ventures where none exist is convincingly argued by our commentator (Flannigan, 2010, 2009). What is needed, therefore, is an analysis of how the usual joint venture is constructed and how the objectives of the parties can be achieved.

To achieve this objective, it is necessary to understand a great variety of information ranging from an analysis of business organizations; the drafting of documentation; a knowledge of standard clauses used in the industry; the contents of these documents; the necessary legal mechanisms to ensure the parties are protected, the foreseeing and resolution of a multitude of problems inherent when two parties collaborate; suggestions to colleagues how to avoid the most common pitfalls inherent in joint ventures, acquisitions, mergers, and contractual collaborations.

These in general, are the broad objectives of this discourse which is a treatise on the practice of law of joint ventures.

Ronald Charles Wolf
Cascais, Portugal
2015

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