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Legal relationships among the participants and with third parties

Ivan R. Feltham, Q.C.

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See table of contents

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Article abstract

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Legal relationships among the participants and with third parties

IVAN R. FELTHAM, Q.C.
McMillan, Binch, Toronto

ABSTRACT

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RÉSUMÉ

La coentreprise (joint venture) *ou* consortium *est étudiée dans cette conférence en regard de son implication au Canada et aussi à l'étranger. Son environnement juridique est analysé, spécialement où deux juridictions, l'une locale et l'autre étrangère, se côtoient. Dans le contexte des projets de coentreprises, les relations des parties, entre elles-mêmes et avec les tiers, y sont étudiées. On y considère également la possibilité d'une responsabilité partagée ou séparée. Finalement les critères essentiels pour un accord de groupements momentanés sont présentés, avec un mot sur l'éthique professionnelle, de façon à guider les participants.*

TABLE OF CONTENTS

(1988) 19 *R.G.D.* 821-839

INTRODUCTION

1. The "joint venture" or *consortium* concept may be utilized in a wide variety of circumstances. [1] For example, joint sales efforts among Canadian companies for the distribution of what are essentially commodity products is one relatively straightforward situation. Joint distribution arrangements may include, however, non-Canadian companies to enlist their experience in markets unfamiliar to the Canadian participant, and similar considerations with regard to effective marketing may lead to "partnerships" with local businessmen and enterprises for any manner of activities including services, franchises, manufacturing, construction and capital projects for the use of Canadian-made machinery. The scope of the latter may range from a limited machinery package to a turn-key commitment and even to a "build, operate, transfer" arrangement which contemplates recovery of some or all of the capital costs from operations over a substantial period of time.

2. In the context of what you have already heard from my co-panelist, Denis Crevier, and from the speakers during the morning session, this presentation will focus on the legal relationships among the participants and with third parties.

3. There is no universally right or wrong way to structure the relationship among the parties. Much will depend on the circumstances. The agreement has to be custom made to meet the needs of the parties in the circumstances. However, I can offer a checklist of considerations and a few comments on them.

4. With regard to exposure to liability to third parties, there are, generally speaking, two relationships to consider. One is with the customer or customers and the other is with all others who may be

1. Note : The terms "joint venture" and *consortium* are used interchangeably throughout this paper and in practice.

affected by the venture but with whom there is no contractual relationship. More on that later.

5. When considering a joint venture, one should always have clearly in mind that in all cases a joint venture is contemplated because, for one or more reasons, the party sees an advantage in a joint venture compared with taking on the whole responsibility, if that option is available. This may be because of, for example, lack of knowledge of the market, too much risk to bear alone, lack of technology, lack of manufacturing capacity for a large machinery order, etc. The essence is that the venturer needs a "partner" (used in the non-technical sense) and this means sharing both management and obligations. Put another way, all joint ventures involve some surrender of personal "sovereignty" over freedom of action. Marriage is not an estate to be entered into lightly and the same is true of a joint venture or a partnership!

6. The key is to know the participants, to define their respective functions specifically and to limit as much as possible opportunities for deliberate or inadvertent unauthorized commitment or risk exposure of the co-venturers by any one participant.

I. EXPORT *CONSORTIA*

7. Although the emphasis of the conference is on joint venturing *abroad*, it is useful to refer briefly to joint ventures among Canadian producers to enhance their foreign market opportunities. Typically, this will involve producers of the same or similar products and can be a combined effort in the form of a more or less loose co-operative or it can be formalized in a corporation. The joint venture can function as a market developer and sales agent to identify opportunities and arrange contracts directly between foreign customers and the Canadian suppliers, or as a corporation formed by the joint venture participants to buy from the participants and resell in the overseas markets. The business objective in all cases is to develop an ongoing flow of product to several or many customers abroad.

8. If the creation and operation of an export trading company is not intended in fact, the main concern is to avoid liability for the failure of other parties to deliver on time or to provide goods that meet contract requirements. The export co-operative, whatever form it takes, can act as an agent only, and expressly stipulate that it acts only as such in any communication with the customer. The identity of the seller should be clearly established as the party to the sales contract.

9. If the parties desire to co-operate in a form of export company that will act as principal in the transaction, the obligations of the producer to the export corporation have to be clearly established as if

the sale were entirely arms length. Presumably, the export corporation is not intended to bear any risk of liability and has to have a comprehensive save harmless agreement with the supplier-member. *Vis-à-vis* the customer, such a corporation is, of course, responsible to the extent imposed by contract and governing law. [2]

10. Whether as agent or purchaser and reseller, an export JV is usually designed to exploit foreign markets by collectivising the selling process including pricing and other terms. Thus, the parties agree not to compete in the target markets. This may raise questions under both Canadian and foreign competition law. Note, for example, the recent European Commission decisions involving Canadian pulp exporters. Similarly, it may raise issues under Section 32 of the *Canadian Competition Act* which are not settled by the so-called export exemption in subsection 4 of that section. An excursion either into sample foreign systems or into Canadian law on the subject is beyond the scope of this paper. However, it should be noted that as between the parties to an export *consortium* the contract may be unenforceable in Canada or elsewhere if it is found to violate the applicable competition law. And, this result may follow in the event of a dispute between the parties in which one party successfully alleges illegality even though the arrangement has not been challenged by governmental authority.

11. *Vis-à-vis* third parties, a corporate vehicle may perform its traditional function of insulating shareholders from third party claims. But, don't count on it. The manufacturer is likely to be directly responsible for tortious or delictual claims, and may be responsible depending on the circumstances and the law applied for commercial obligations not fulfilled by the export company.

12. An export *consortium* is relatively simple and generally involves third party risks no greater than if the participant were selling directly. Also, the rights among the participants can be a domestic agreement (unless of course there are foreign participants) the obligations of which are reasonably foreseeable and enforceable by domestic dispute resolution procedures, whether by courts, arbitration or some intermediation process.

13. To extend marketing efforts abroad, it may be desirable to establish a joint venture in the market for long-term market penetration. For this purpose, it may be desirable to take on a local "partner" who has established distribution or at least has substantial knowledge of the market. In these circumstances, the JV contract has moved away from the familiar home legal environment to a foreign environment. The

2. See my article on "Export Contracts" in *New Dimensions in International Trade Law*, 1981, originally a presentation to the Canadian Export Association at its Fall meeting in 1980.

participants will still be concerned about the same relationships, but be less comfortable because the JV agreement is likely to be governed by the local law. Indeed, there may be multi-jurisdictional operations which will further complicate the situation. In such cases, it is desirable to establish a "home base" legal environment for the relations with the other participant or participants. In all cases, the JV agreement should identify issues that might arise and, as far as reasonably practical in the circumstances, establish the rights and obligations of the parties.

II. INVESTMENT ABROAD

14. As one considers extending one's markets abroad and perhaps has developed some experience in doing so through a joint venture with a local participant, it is a natural and logical step to contemplate more substantial operations abroad to further develop opportunities in foreign markets. As we sketch these alternative scenarios, we must constantly remind ourselves that we are joint venturing because we think this is preferable to doing it alone or not entering a market at all. In some cases, local participation may be required by local law as a condition of entry to the market. In any event, as mentioned before, there is always some surrender of independent decision making power in any joint venture arrangement. Moreover, a joint venture may result in the establishment of a competitor in a market where such competitor would not have been able to develop had the Canadian enterprise decided and been able to enter the market alone.

15. A likely scenario is that the venture will involve a single product or a family of products and that the parties are complementary to each other in that one brings local market knowledge and perhaps market position as well as manufacturing capability and the other brings technology and perhaps high-tech components and possibly the opportunity to exploit the product in a wider market than either company had achieved in the past. For example, the companies may be strong in the same or similar products, but their distribution strength being in different geographical areas.

16. In contemplating such an investment, the first consideration is that all factors relevant to a single party investment have to be examined. Of course, one of the purposes of a joint venture is to engage the local partner in this endeavour. Having decided that the local market circumstances warrant investment, the special risks of a joint venture are the second and essential set of considerations in evaluating whether to proceed or not. In this context, I have in mind that the investment will be for a long term and a corporate form is usually appropriate. All the considerations that bear on the establishment of a corporation and the

relations of the share owners in a Canadian corporation are likely relevant to any venture abroad. Shareholder agreements may be appropriate, veto powers provided for, and dispute resolution mechanisms established including the circumstances under which one party may buy out the other according to a pre-determined formula and under which the parties may be free to dispose of their shareholding to third parties.

17. *Vis-à-vis* third parties, one should be concerned about potential liability as a shareholder or director in addition to the exposure of the joint venture corporation to such claims. As we know from our experience in Canada and in other jurisdictions with which we tend to be more familiar, there is increasing risk to directors and shareholders with regard to the environment, employee health and safety and employee compensation in the event of insolvency, to mention only a few hazards. If the Canadian participant is a supplier of technology or has special responsibility for safety and environmental protection systems, there is an enhanced risk that third party claims may be launched directly against the Canadian participant. The Bhopal incident and claims directly against Union Carbide Corporation illustrate graphically the potential risks.

18. It may be noted in passing that "joint venturing abroad" includes ventures for the development of minerals and oil and gas resources. These are a special category usually involving complex local legal requirements. Another special situation is the formation of an alliance with an established local manufacturer to take advantage of low-cost production to serve traditional markets in North America and Europe. Typically, the local enterprise will provide an understanding of the local environment including the operation of a manufacturing facility and the Canadian participant will provide technology and an established distribution system in North America and elsewhere or at least knowledge of the market to be able to establish such a system effectively.

III. LEGAL ENVIRONMENT OF JOINT VENTURES

19. Whichever of the circumstances described above is involved, joint venturing abroad necessarily involves at least two relevant jurisdictions, domestic and foreign. The Canadian participant is venturing into unfamiliar territory just as the foreign joint venture partner is taking on unfamiliar associations.

20. At home, we may rely on the legal framework to provide rights and impose obligations that are understood in that environment. When venturing abroad, we need to learn as much as possible about the foreign environment (within the practical limitations of time and cost). One may find results that one can avoid by contract stipulation; at least

one can identify risks to minimize surprises and enable one to plan action to eliminate or to contain the risk.

21. With regard to the relations among the participants in the joint venture, it is desirable to establish at the outset whether the agreement is to be subject to the law of one of the Canadian jurisdictions or to the jurisdiction of the principal activity. When all of the participants are Canadian, for example an engineering firm and several Canadian equipment suppliers, it is reasonable and convenient to establish the joint venture agreement between the participants within the framework of a familiar legal system. The agreement will be enforceable in a Canadian court, and the basic commercial risks are the risk of insolvency of one or more of the participants during the course of the venture and damage to on-going relationships that may result from disagreements.

22. However, when one or more of the participants is not Canadian, the question of the legal framework for the joint venture agreement becomes more problematic and it may be necessary to reference the law of the location of the principal activity to satisfy local participants or customer or governmental requirements. If local law is the referenced legal system, it is obviously necessary to gain sufficient understanding of that system to achieve a reasonably clear picture of the rights and obligations among the parties that might be imposed by law in the absence of specific agreement (or even notwithstanding such agreement).

23. In any event, local law will undoubtedly govern the relationship with the customer and probably also potential liabilities to other persons who are not parties to the contract, *e.g.*, for the supply of a machinery package or the building of a project.

24. A key question is whether to develop a contract among the participants in general terms or to go into much detail. One approach is to emphasize that a JV will work only if there is a sincere willingness to work together to achieve a shared objective. In this scenario, unexpected problems are worked out in consultation and successful resolution depends on the good faith of all parties. In this approach, it is often said that a long, detailed contract is not appropriate. Problems often cannot be anticipated and, in any event, the proper resolution cannot be predetermined. It all depends on the mutual sincerity and good faith of the parties. Hence, a short statement of purpose and the principal features of management of the venture should suffice. The governing legal system is relied upon to provide the answers to issues that are not covered in the agreement or resolved by the parties.

25. At the opposite end of the spectrum, one may attempt to anticipate all possible contingencies and stipulate how each will be addressed, who shall decide, etc. This approach is designed to avoid uncertainty and to exclude general principles of the governing legal environment that would otherwise apply. This approach results in a long,

detailed document and will elicit the comment, "if you can't trust me, we had better not get together on this venture". Clearly, a balance is the preferred alternative. There has to be a large element of good faith in any joint venture, but at the same time serious attempts to anticipate the sorts of issues that might arise and provide mechanisms for their resolution will go a long way toward ensuring smooth and successful relations. At the least, the objectives and scope of the venture should be clearly stipulated, the machinery of management clearly established, and major issues requiring unanimous agreement (if any) clearly identified.

IV. PROJECT JOINT VENTURES

26. In the context of this conference, it seems to me to be useful to focus on overseas capital projects that will use Canadian-made equipment or Canadian-based services and may well involve local participants as well. A typical case involves one of the major engineering companies such as Denis Crevier's company, SNC, together with several Canadian machinery suppliers and the provision of local construction and manufacturing content by one or more participants in the country of the job site. These projects also often involve CIDA or EDC financing which have already been discussed today.

27. Many of the considerations respecting the relationships of the parties among themselves and with third parties that I shall be discussing in some detail in this context apply also to the other joint venture situations to which I referred earlier. However, recognizing the wide variety of situations which dictate the nature of the relationships among the parties and with third parties, it is useful to focus attention on a particular type of joint venture which is of special importance to Canadian exporters of capital goods and to the major Canadian engineering companies with worldwide experience and capability. Such arrangements often involve the transfer of technology, not only to the customer, but also to the local participants who are expecting to enhance their capability for future projects.

28. It is essential to recognize that there are two key documents or groups of documents. One is the agreement among the joint venture or *consortium* participants and the other is the agreement with the customer with respect to which the *consortium* participants may be in effect a single party or they may be separate and independent parties to what are in substance independent agreements with the customer. In the simplest structure, the purchase contract identifies and quantifies the obligations and risks which the parties to the *consortium* assume jointly *vis-à-vis* the customer. The *consortium* agreement among the parties allocates their obligations and risks among themselves.

V. JOINT OR SEPARATE LIABILITY

29. It is not unusual that the customer's expectation is that the participants in the joint venture will be jointly responsible for the completion of the work contracted for. It appears that every reference to the special concerns of participants in joint ventures includes the problem of exposure to joint liability. Of course, the objective of a JV is to limit the risk exposure. Put another way, the purpose of a JV is to avoid acting as "prime".

30. The customer's position may be expressed as follows :

> I am engaging your team to produce a result. I want all of you on the hook to perform on time in accordance with the contract specifications. Among yourselves, you sort out who is responsible to cover any damages or penalties for which together you have become liable to me. In many cases, I won't be able to tell who is responsible and therefore it is reasonable for me to look to you for joint responsibility.

31. The point of view of the joint venture participants may be expressed as follows :

> You [the customer] are getting a collection of independent inputs. Each of us is pleased to be responsible for our own work but not for the others. Only if a situation develops in which you cannot reasonably be expected to identify who is responsible, we shall sort that out among ourselves. Otherwise, we do not undertake joint responsibility for work over which we have no control (and for which we do not have the necessary expertise).

32. The use of the term "joint venture" or *consortium* may in itself carry inherent danger. If the parties intend to avoid any responsibility for each other *vis-à-vis* third parties including the customer, they probably should avoid using any term which could be interpreted as indicating or implying a "joint" effort as distinct from a mere coincidence of activities *vis-à-vis* a particular customer. Even the term "team bid" (see Appendix A) carries the same inherent risk. Of course, if the customer's expectation of joint liability is in fact an accurate reflection of the contract agreements, the question is not the extent to which any participant can avoid responsibility for the obligations of other participants, but rather the degree to which any participant can be comfortable that the obligations of the participants can be effectively enforced among themselves.

33. If the arrangement with the customer is that the joint venture participants are responsible only for their respective contributions to the project, this fact must be made known clearly to all persons with whom the joint venture organization communicates. In particular, there will often be a person identified to perform the lead role in representing the co-ordinated efforts of the joint venture participants, and this role can easily lead to the assumption on the part of outsiders that that person speaks for and can bind each of the participants. If this is not to be so,

suitable communication and identification of the fact on all documentation is essential.

34. The circumstances may require that one of the co-venturers be the co-ordinator or manager both in the bid negotiation stage and in the construction stage. It is especially important in this connection that the customer and others be fully informed of the restrictions on the authority of the co-ordinator/manager to bind the other participants — to the extent that such restrictions are practicable in the circumstances. Should the co-ordinator/manager exceed his authority, it should be clearly stipulated that any additional costs incurred by the participants as a result of such action should be reimbursed by the co-ordinator/manager's organization.

35. Again, we should remind ourselves that any one of the participants may have the opportunity to "go prime" and to bear responsibility for the project or the machinery package, subcontracting as required to obtain the necessary input. The reason for using the joint venture form is to limit the commercial risk to an extent commensurate with the participants' contribution to the project and expected profit from it.

VI. JOINT VENTURE AGREEMENT

36. An essential step is to settle the joint venture agreement before beginning the bidding process. Often the engineering consultant will have been involved at an earlier stage and will become part of the joint venture when the decision has been made to go ahead with the project and to call for tenders or negotiate the supply contracts with the participants. Sometimes, settlement of the terms of the joint venture agreement is left until the bidding process is well under way. Such a situation may well lead to difficulties in settling the ground rules because the customer will already have developed certain expectations.

37. The importance of establishing the *consortium* agreement before proceeding with the preparation of the bid cannot be over-emphasized. Bid preparation for large projects is a time consuming and expensive process. Much of this effort and cost may be wasted if the available time and enthusiasm for bid preparation results in leaving the details of the *consortium* agreement to be worked out at a later date. Difficulties in establishing the *consortium* may result in dropping the project bid at the last moment or in a dispute or subsequent litigation among the *consortium* members who turn out to have a misunderstanding about the respective contribution of each of the participants to the venture and, in particular, in connection with the early stages of identifying the opportunity.

38. However, during negotiation of the purchase contract, it may become evident that some elements of the *consortium* agreement are not appropriate and must be renegotiated. The joint venture agreement should contain a clause that obligates the parties to negotiate such modifications in good faith which provision, although not self-executing, at least imposes some obligation on the joint venture participants to work sincerely toward a mutually satisfactory solution.

39. If several or separate responsibility *vis-à-vis* the customer can be achieved, that will limit the risk exposure of participants for defaults of other participants, but will not practically eliminate it entirely. As between the participants, whether or not there is joint liability, it is essential to have a comprehensive indemnification and save-harmless provision.

40. Such provision will, of course, not eliminate the risk of insolvency of a party for whom the joint venture participants may be collectively responsible to the customer or otherwise. Cross-bonding is a possibility, but may be difficult to achieve in practice and in any event involves a cost. If there is concern that one member of the joint venture may be relatively weak, it is not likely that that member will willingly incur the cost of bonding, even if it is available, while not requiring the same kind of commitment from the co-venturers. Perhaps a guarantee may be obtained from a "deeper pocket" within a group of affiliated companies. If the venture includes participants based in jurisdictions other than those with reasonably predictable judicial systems, there may be problems in enforcing contractual rights. There is no sure way to protect against these risks which must be evaluated when looking initially at the attractiveness of the project.

41. Many legal systems impose upon co-venturers all the responsibilities that we understand to apply to a partnership. For this reason, it is invariably the practice to stipulate in a joint venture agreement that nothing in the agreement constitutes the participants partners or agents of each other except to the extent that there is joint management of the venture and commitments to third parties are expressly authorized.

42. One of the elements of "partnership" is the obligations that each owes to the others including the duties not to engage in activities that are in competition with the partnership and not to exploit opportunities that come to the participant because of his participation. Among the parties, it is essential to have a clear understanding as to whether any such obligations are imposed on the parties by the joint venture arrangement. Typically, a joint venture is intended to impose no such obligations. This is especially important if there is likely to be an opportunity to gain future business from the same customer. A participant

in a joint venture may wish to do that separately on his own account or in any event not in co-operation with that particular group of co-venturers.

43. It should be clearly established whether the participants are expected to have fiduciary responsibilities to each other. For example, is each participant free to sell or to buy from the venture at a profit to himself? Is each participant free to compete with the venture? Is each participant free to use for his own personal benefit information gained through the joint venture activities? Is each participant relieved of the obligation to make full disclosure to his associates in dealings with the joint venture or in parallel activities in other ventures? Is each participant free to pursue for his own benefit opportunities that come to him only by virtue of his membership in the joint venture? In the case of a partnership governed by ordinary Canadian law principles, the answer to all of these questions is clearly no.

44. Without going off shore, reference to Canadian and U.S. materials about the nature of joint venture agreements indicates that, however much the parties may strive to achieve certain results and avoid others, the elements of the law applicable to partnerships may be imposed. The results may lie in the field of tax liability of the participants, their relations among themselves and their potential obligations to third parties. In particular, as noted, partnership law imposes fiduciary obligations and generally empowers a partner to bind the partnership and render it liable for wrongs done to third parties as well as for breach of contracts undertaken in the name of the partnership. However, there is nothing in partnership law that prevents the parties from detailing every aspect of their relations amont themselves. For the purpose of drafting, it is therefore essential that every aspect of a true partnership relationship that one wishes to exclude should be dealt with specifically.

45. Because this presentation is intended as a practical checklist and not as a definitive analysis, I shall refrain from attempting to define the differences between a joint venture and a partnership as we understand them in our domestic legal systems. Reference may profitably be made to literature on the subject, some of which is listed in the bibliography to this paper. [3]

46. One must look at the issues in the context of the law of the place where the joint venture is to operate. Only in this context can risks be properly evaluated.

A. CONFIDENTIAL INFORMATION

47. When competitors are involved as co-venturers, the exchange of technical and cost information can become a problem. This

3. See Appendix B.

should be anticipated and a solution appropriate to the circumstances worked out at the time the *consortium* agreement is negotiated. The sharing of confidential information may be a key element of a joint venture, and it is reasonable for the agreement to obligate the parties to use such information only for the purpose of the venture. In practical terms, it is virtually impossible to police such a provision, but its existence is at least admonitory and may be enforceable if a violation is apparent and egregious.

48. Incidentally, since each capital project is a distinct situation, there is little likelihood of a competition law charge at a later date that any exchange of information amounted to an agreement as to technical or price competition in the future.

B. PROBLEM SOLVING AND DISPUTE RESOLUTION

49. Timely performance of the respective functions of the co-venturers will often depend upon each of them performing according to a schedule and providing portions of the civil work and machinery and equipment that exactly conform to the specifications which in turn should ensure that each of the components of the project matches. It is virtually self-evident that there may be disputes about responsibility for delays and failures of components to link and operate together satisfactorily. Matching problems may cause damage to equipment, the cause of which damage is hard to determine. Early identification of the problem is a good first step to solution, and procedure to achieve early identification should be built into the operating arrangement.

50. Dispute resolution among the participants has the added dimension that it is usually necessary to preserve good relations with the customer while disputes are being resolved among the participants. It is equally important, of course, that good relations among the participants be preserved at least until the project is completed and commissioned, and probably beyond for the period of time during which the co-venturers may have to accommodate each other in fulfilling their respective warranty obligations.

51. Essential elements of effective dispute resolution are early identification of potential disputes, and a fair and expeditious method by which disputants can state their positions and the potential dispute avoided or actual disputes resolved.

52. Communication among the co-venturers is probably the most important feature of the organization to minimize the likelihood of disputes and harm to each other. For example, in a venture involving the installation of interconnected equipment, it is essential that there be a mechanism to review progress as frequently as the job requires to reduce

the risk of surprises in delivery schedules and technical specifications. Good communications make for smooth implementation of project responsibilities.

53. Enforcement of rights, including indemnification rights, may be problematic if the situation turns out to be a "bad guy — good guy" standoff as between the "foreigner" (as perceived from the point of view of the local participants) and the local participant. It should not be a surprise to find an inherent, event subconscious, bias of judges especially if there is any element of local custom or national pride involved.

54. Because of concerns about submission to local judicial systems, it is not uncommon to provide for arbitration in a neutral *form*. However, no one should expect that any form of arbitration is likely to be an inexpensive quick fix. Arbitration procedures may well be an attractive alternative to submission to any one particular judicial system, but they can be expensive and protracted. Moreover, enforcement may be a problem although this is becoming less so as more and more countries adopt the UNCITRAL model law as has been done by Ontario, Quebec and British Columbia.

C. WORKING CAPITAL, COST SHARING AND ACCOUNTING

55. If there are any working capital requirements for the joint venture as such, these should be anticipated and the obligations to contribute settled in detail. Also, if any party is to handle funds on behalf of the joint venture, suitable provision has to be made for banking arrangements, accounting records and accountability. Distribution of contract proceeds must also be provided for, and it may be appropriate that there be holdback of reasonable amounts to cover foreseeable liabilities and claims and to avoid the possibility that any one of the co-venturers may be unwilling or unable to satisfy its obligations.

56. There should also be clear understanding of the proportionate sharing of responsibility for project costs which are not demonstrably the fault of any participant.

D. ASSIGNMENT AND SUBCONTRACTING

57. One of the key elements of a joint venture is that each party can rely on its assessment of the others' capabilities to perform. If it is possible for a co-venturer to assign its position in the venture or subcontract all or part of its obligations, this increases the risks that co-operation and performance, essential features of the venture, will not be as good as expected. It is therefore not unreasonable to prohibit such

assignment and subcontracting without the approval of the co-venturers. This may well be covered in the contract with the customer who often shares the same concerns.

VII. BUSINESS ETHICS

58. When establishing a joint venture, it should be borne in mind that the parties may have different behavioural obligations based on different corporate codes of business ethics and different legal environments within which the companies operate. Perhaps the most obvious difference is that companies affiliated with U.S. companies are concerned about the U.S. *Foreign Corrupt Practices Act*[4] and will likely have established corporate policies reflecting the standards of that stature and, often, going beyond its requirements. The "knowledge" test as interpreted in the U.S. requires a more diligent effort to avoid improper payments and other attempts to influence conduct than may be thought to be required by other co-venturers. Although bribery is universally condemned by national laws, the observance of those laws in practice varies considerably. The extent to which a Canadian company should take steps to attempt to prevent an agent from utilizing part of his commission for such purposes (to gain the contract or in connection with its implementation) is still debatable. Some take the position that good corporate ethics extend only to avoiding any direct participation, while others hold the view that good corporate practice requires that agents be carefully evaluated in advance of their appointment in this connection and that it be crearly understood by them that such payments are not tolerated, and if indulged in, will be cause for instant dismissal without compensation. Although hard to deal with practically, it is desirable that co-venturers address this issue at the initial stages of their discussions. Leaving it to a later date invariably leads to hard-to-resolve problems when allegations are levelled that improper payments are being made or when the agent states frankly that he needs additional resources to achieve a certain result. The subject of business ethics is a topic for another day. All I am saying at this time is that it is an issue that cannot practically be ignored. A key consideration is the degree of strictness to be applied to the accounting for disbursement of funds by the joint venture manager.

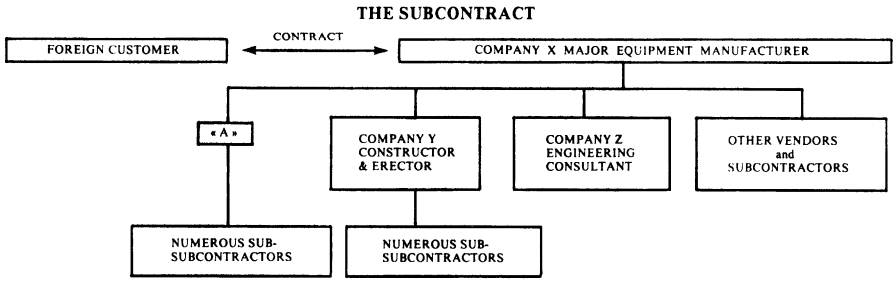
4. As amended by *The Omnibus Trade and Competitiveness Act of 1988*, Public Law 100-418, Title V.

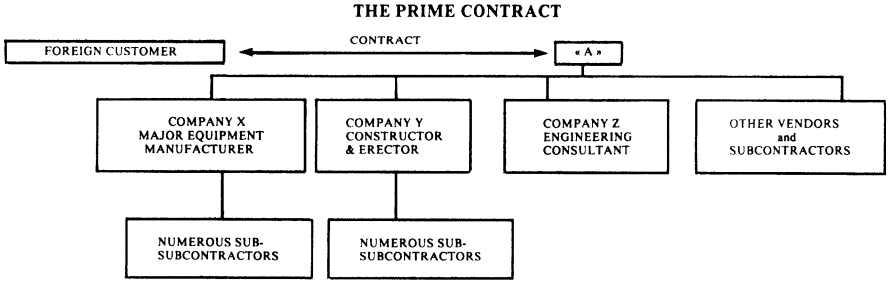
CONCLUSION

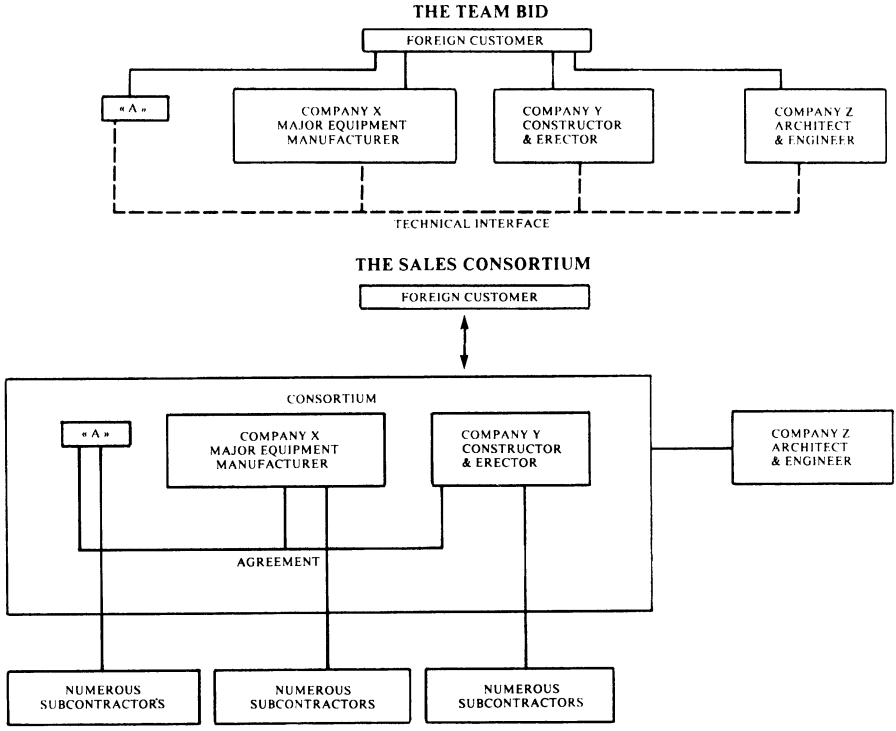
59. All ventures involve risk. Ventures abroad often involve additional uncertainty and risk. The joint venture approach can reduce the risks, but does require careful attention to the obligations among the parties.

APPENDIX A

ALTERNATIVE CONTRACTUAL STRUCTURES FROM THE POINT OF VIEW OF COMPANY « A »







This is an example of a « first tier » *consortium*. There can also be « second tier » *consortia*, *e.g.* a contract between a prime bidder (first tier) and a *consortium* of subcontractors (second tier).

APPENDIX B

JOINT VENTURES ABROAD : SELECTED REFERENCES

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