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Steven R. Salbu

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Steven R. Salbu, Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns, 43 Cas. W. Res. L. Rev. 1221 (1993)
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Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns

Steven R. Salbu*

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* Assistant Professor, University of Texas at Austin. B.A., Hofstra University; M.A., Dartmouth College; J.D., The College of William and Mary; M.A., Ph.D., The Wharton School of the University of Pennsylvania. This article was written under a summer research grant provided by the Graduate School of Business at the University of Texas at Austin.
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I. INTRODUCTION

The international joint venture is a rapidly developing form of business organization. As markets became increasingly global in the 1970s and 1980s, and as artificial political barriers have begun to fall in the 1990s, transnational business activity has accelerated. With this process, collaborative arrangements among existing businesses have become very popular, both domestically and internationally.

Increasing numbers of parent companies that develop international joint ventures tend to be motivated by one or more of a consistent set of goals. Some ventures are created in order to provide entry into a host country that restricts, or once restricted, direct foreign investment ("DFI"). Countries moving toward more

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1. The terms "joint venture" and "strategic alliance" are often used interchangeably. Some consider the joint venture a particular form of strategic alliance, with the latter category considered to also include non-organizational forms of collaboration. Because the term strategic alliance has more varying interpretations than the term joint venture, I shall limit its use in this text.

2. The formation of joint ventures between American companies and international co-venturers has increased at an annual rate of twenty-seven percent since 1985. Stratford Sherman, Are Strategic Alliances Working?, FORTUNE, Sept. 21, 1992, at 77, 77.

3. While there are many definitions of joint ventures, efforts to distinguish joint ventures from partnerships and corporations have not been fruitful and have often been confusing. A joint venture will be either a partnership or a corporation, depending on the desires of the parent companies. Whether partnership or incorporation is chosen, the resulting entity is a joint venture if it represents the collaborative efforts of two or more existing businesses united for short- or long-term purposes.

4. See The Global 1000, BUS. WK., July 13, 1992, at 50, 53-108 (ranking the one thousand largest companies in the world by market value, reflecting business expansion into a wide range of countries, predominantly in North America, Europe, and Asia).


6. For the purposes of this article, a joint venture will be considered "international" when the predominant national affiliations of the parent companies are not identical.

7. While we tend to think of socialist and formerly socialist countries as being in these categories, restrictions on foreign investment have been implemented in capitalist countries as well. For example, direct foreign investment in Japan was relatively restricted until the 1960's but was gradually liberalized through the 1970's and 1980's. For a discussion of the history of foreign investment in Japan, see Zenichi Shishido, Problems of International Joint Ventures in Japan, 26 INT'L. LAW. 65, 66-68 (1992). Likewise, Mexico has traditionally barred foreign corporations from operating wholly owned subsidiaries within its borders. For a discussion of the use of joint ventures as part of a strategy for entering Mexico and Japan, see JOHN GARLAND ET AL., INTERNATIONAL DIMENSIONS OF BUSINESS POLICY AND STRATEGY 100 (2d ed. 1990).

8. For a discussion of different types of foreign market entry strategies, see Ming-Je
open economies are able to do so gradually and securely by restricting DFI to situations in which the foreign corporation enters an equity joint venture with a domestic partner. Even in countries that do not require a degree of local ownership in foreign investments, the use of a joint venture may expedite entry into foreign markets because of opportunities to utilize a host country firm's existing labor, operations, and marketing structures. Transnational joint ventures are especially promising in countries like Mexico, which are currently negotiating treaties for more open trade with the United States.

Likewise, joint venture activity in Europe is likely to increase beginning in 1993 as European Community market efficiencies and open competition provide opportunities for

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(i) Foreign direct investment, where an entering firm establishes a wholly-owned subsidiary; (ii) exclusive licensing, where an entering firm licenses its know-how to a single local licensee; (iii) multiple licensing, where an entering firm licenses its know-how to several local licensees; (iv) a joint venture, where an entering firm shares the ownership of a local venture with a local partner and does not charge any fees for the use of the know-how; (v) a combination of joint venture and licensing, where an entering firm forms a joint venture with a local partner and, at the same time, licenses its know-how to the local venture.

Id. at 476.


10. The extent to which host countries require local ownership or local majority ownership seems to be diminishing as international markets continue to become more open in the 1990s. For example, restrictions on amounts of foreign ownership in the former Soviet Union have been liberalized since 1987. See David M. Bost, *The 1987 Soviet Joint Venture Law: New Possibilities for Cooperation and Growth in East-West Relations*, 17 DENV. J. INT'L L. & POL'Y 581, 584 (1989) (discussing the feasibility of American venture partners owning majority interests in joint ventures in Russia).


American companies whose domestic markets are saturated.\textsuperscript{13}

International joint ventures may also serve to facilitate geographical diversification in situations not related to global politics, as when foreign investors rely on the marketing expertise and established distribution networks of the domestic partner.\textsuperscript{14} Joint ventures may be formed across borders in order to promote the transfer of proprietary technologies and processes, or to exploit synergies which exist by virtue of differentiated but complementary strengths of parent companies.\textsuperscript{15} Some international joint ventures are created to reduce risk,\textsuperscript{16} particularly in such volatile industries as biotechnology.\textsuperscript{17} Joint ventures can also provide American partners with host-country management that has an equity stake in the endeavor and understands the local business environment.\textsuperscript{18} A swell of Japanese investment in international joint ventures in the United States and Europe accompanied Japan’s transition from technological dependency to technological leadership, functioning as what one author calls “‘trade-oriented’ investment.”\textsuperscript{19} This kind of joint venture is aimed at increasing export opportunities\textsuperscript{20} and expansion into overseas marketplaces that are less competitive than those in Japan.\textsuperscript{21} Economic analysis explains the use of international joint ventures as an application of the transaction cost theo-

\textsuperscript{13} For a discussion of the anticipated effects of the unification of Europe in 1993, see Stewart Toy, \textit{Europe’s Shakeout: The Race to Restructure is Getting Frantic}, BUS. WK., Sept. 14, 1992, at 44, 44-46.

\textsuperscript{14} ROBERT P. LYNCH, \textsc{The Practical Guide to Joint Ventures and Corporate Alliances: How to Form, How to Organize, How to Operate} 19 (1989).

\textsuperscript{15} Japanese companies, for example, are often motivated to enter joint ventures with American companies to obtain technology transfers. For some examples of this phenomenon, see Shishido, \textit{supra} note 7, at 75-76.


\textsuperscript{17} See Giovanna A. Cinelli, \textit{Biotechnological Research and Development: The Joint Venture as a Viable Corporate Entity in a High Risk Industry}, 13 J. CORP. L. 549, 550 (1988) (discussing how corporations operating in the rapidly changing field of biotechnology enter into joint ventures in order to remain competitive).


\textsuperscript{19} LOUIS TURNER, \textsc{Industrial Collaboration With Japan} 13 (1987) (discussing how “‘trade-oriented” strategies contrast with the traditional “trade-destroying” investment strategies embraced by European and American multinationals).

\textsuperscript{20} Id.

\textsuperscript{21} Id. at 14.
ry, although one consultant has observed that “[s]aving cash alone is not enough to justify an alliance.”

While all collaborative strategies bring an array of complex problems, the international joint venture is perhaps the most demanding. Difficulties associated with cooperation can be magnified by legal, linguistic, and cultural differences. An enterprise's effectiveness and longevity may depend on the successful resolution of these special challenges to international ventures.

This article addresses some of the problems peculiar to the international joint venture, and focuses on the ways in which the contract and negotiations that form the venture can be improved to increase the venture's utility and longevity. Section II addresses the challenges associated with dispute resolution during international collaboration. In Section III, I discuss important linguistic considerations in drafting transnational joint venture contracts. Section IV concerns the cultural factors that must be considered in the course of negotiating and contracting the establishment of an international venture. The conclusion in Section V serves to summarize and integrate the foregoing observations, and to suggest some directions for future research in this area.

II. LEGAL CHALLENGES OF CONTRACTING: PROVIDING FOR EFFECTIVE DISPUTE RESOLUTION

While international venturing creates a seemingly endless array of substantive legal challenges, this article emphasizes those that relate to the processes of negotiation, contracting, and dispute resolution. The discussion in this section focuses on these associational aspects of joint venture contracting—the consensual infrastructure adopted by the venture to manage ongoing relations.

22. See, e.g., Jean-Francois Hennart, *The Transaction Costs Theory of Joint Ventures: An Empirical Study of Japanese Subsidiaries in the United States*, 37 MGMT. SCI. 483 (1991) (stating that the transaction cost theory posits that the choice between joint venture and wholly owned subsidiary will depend on the costs (such as free riding by the partner) and benefits (such as access to technology and markets) of the shared ownership of a joint venture versus the wholly owned subsidiary).

23. Sherman, supra note 2, at 77.

24. The demands placed on all international business enterprises are complex. International joint venture failure may be attributable to inability to overcome difficulties related to law, language and culture. See Kenichi Ohmae, *The Mind of the Strategist: Business Planning for Competitive Advantage* 177-80 (1983) (stating that "without careful individual study of the more than 150 independent nations that make up the world today, effective penetration of the right overseas markets is hardly possible," and discussing American and Japanese business starts that have failed in Europe and South America).

25. Dispute resolution is mentioned by one commentator as one of four crucial consid-
International joint ventures, like their domestic counterparts, can provide for alternative means of dispute resolution or allow, by default, for traditional dispute resolution within courts of jurisdiction. Under either option, questions of conflict of laws should be addressed at this stage of contracting. If arbitration is rejected in favor of recourse to litigation, the parties to an international contract may stipulate their choice of a judicial forum for resolving disputes that may arise.

Provision for effective dispute resolution is perhaps even more important to international joint ventures than to their domestic counterparts because international joint ventures tend to be more highly idiosyncratic to the needs of the parents, so that either partner's stake is very difficult to sell. Joint ventures in Japan, for example, typically take the form of closely held corporations whose shares have no public market. Either parent, and particularly

26. While contractual provisions for dispute resolution are desirable, their importance can be mitigated with effective contractual mechanisms for dispute avoidance. Modern approaches to contract have placed greater significance on averting disagreements as a preventative legal practice, under a theory that prevention is usually more desirable than cure. For a classic discussion of the desirability of using contract law to avoid litigation and conflicts rather than just resolve them, see Samuel Williston, Some Modern Tendencies in the Law 95 (1929).

27. There is some movement toward developing international norms and codes covering all kinds of transnational business ventures, such as the International Chamber of Commerce Guidelines (1972), the International Labor Organization Tripartite Declaration Concerning Multinational Enterprises and Social Policy (1977), and principles and equitable rules of the United Nations Conference on Trade and Development (1980). See Sotirios G. Mousouris, Codes of Conduct Facing Transnational Corporations, in Handbook of International Business 9.4 to 9.5 (Ingo Walter & Tracy Murray eds., 2d ed. 1988). Progress of this movement may eventually reduce the importance of addressing conflict of laws in international joint venture contracts.

28. Choice of forum clauses are generally enforceable, at least under American law. However, such clauses may be stricken in the event of fraud or overreaching, or when the clause is one of adhesion and the forum chosen is seriously inconvenient. See, e.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.").

29. See Zenichi Shishido, Problems of the Closely Held Corporation: A Comparative Study of the Japanese and American Legal Systems and a Critique of the Japanese Tentative Draft on Close Corporations, 38 Am. J. Comp. L. 337 (1990) (discussing analogies to partnerships and corporations available to joint ventures in Japan). These closely held joint ventures in Japan are usually in the form of Yugengaisha, for which there is no precise American equivalent. Id. at 337-38.
a majority-ownership parent, can use the captivity of the other either to coerce agreement or squeeze the disadvantaged party out of the venture. By addressing dispute resolution in the joint venture contract, the parents can provide a problem-solving framework prior to the development of disagreements and thus prevent future manipulation.

A. Arbitration Clauses

Arbitration clauses are the most commonly used contractual tools for providing alternative dispute resolution in joint ventures. Public policy, including several United Nations conventions on the enforcement of international arbitration awards, has evolved over the past few decades to support and to expedite the use of international arbitration. Likewise, the United States Supreme Court has enforced private arbitration agreements, even for the resolution of disputes entailing both public and private interests.

Use of arbitration panels may be preferable to litigation for several reasons. First, arbitration is more private and informal than a public trial. The less publicized nature of arbitration compared to trial may be important in allowing parties in conflict to save face, particularly if either parent’s culture is averse to litigation or views lawsuits as bringing disgrace. Second, arbitration can allow parties to choose a decisionmaker considered more neutral than a foreign court might be. The neutrality of private arbitration may

30. Shishido, supra note 7, at 83.
31. For a thorough discussion of arbitration agreements, see W. Laurence Craig et al., International Chamber of Commerce Arbitration (2d ed. 1990).
32. For a discussion of these policies favoring international arbitration, see Parsons & Whittmore Overseas Co. v. Sociste Generale de L'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974) (“[E]nforcement of foreign arbitral awards may be denied on [a public policy] basis only where enforcement would violate the forum state's most basic notions of morality and justice.”).
33. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (“There is no reason to depart from [the federal policy favoring arbitration] guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.”).
be particularly desirable for ventures operating in foreign countries where justice systems are perceived to be held captive to national interests. Third, prospects for successful resolution of conflict and the ultimate survival of the venture may be improved by avoiding the trauma of litigation.

The most compelling disadvantage of international arbitration is cost. The expense of international arbitration is a function of several factors: the high fees charged by international arbitration organizations, the tendency of international arbitrators to use panels rather than individuals, and the expenses associated with translation and travel. These costs must be weighed against the anticipated reduction in the costs of the adversarial process inherent in a mechanism for arbitration, as well as the value of continued good will and mutual parental support. A commitment to resolve disputes amicably through arbitration may improve the venture’s prospects for functioning effectively after the conflict in question is determined.

Parents that decide to include an arbitration provision in their joint venture contract must also decide how specific to make the contractual terms. While there are many gradations of specificity, ventures tend to provide for arbitration using one of two general approaches: ad hoc clauses and institutional clauses. Ad hoc clauses create a basic commitment to arbitrate disagreements, without establishing the particular rules of arbitration to be applied and without choosing the arbitration board or institution that is to

36. For example, the arbitrazh, an administrative agency which functions as a court in former Soviet states, is perceived by some to be too closely aligned with national interests to provide an equitable forum for Western partner participation. See Issak I. Dore, Plan and Contract in the Domestic and Foreign Trade of the USSR, 8 SYRACUSE J. INT’L L. & COM. 29, 91-92 (1980).
37. Allison, supra note 34, at 378-79.
38. See John R. Allison, Easing the Pain of Legal Disputes: The Evolution and Future of Reform, 33 BUS. HORIZONS 13, 15 (1990) (observing that while commercial arbitration is still essentially adversarial, the agreement to arbitrate tends to evince a desire and commitment to settle differences relatively amicably).
41. Different arbitration centers have different rules, such as the rules of The International Chamber of Commerce or of the United Nations. Id. at 121.
Institutional clauses designate in advance the governing organization and the rules that will apply to arbitration. Whichever form of arbitration the parties provide in the joint venture contract, the commitment to arbitration should be unambiguous and firm once made because equivocation straddling arbitration and litigation generally results in the parties resorting to the latter.

Ad hoc provisions have several advantages over institutional provisions, including flexibility, efficiency, and information accrual advantages. Ad hoc arbitration confers flexibility on the dispute resolution process by allowing conflicting parents to choose an arbitration forum best suited to a particular kind of dispute, given the arbitration board's expertise and strengths in various areas of practice. By delaying particular arbitration choices the parents also avoid transaction costs involved in negotiating and contracting with potentially unused arbitration organizations. As the needs and expectations of the parties change, so may their choices for dispute resolution. Yet a series of anticipatory changes may be premature and inefficient if there is, as we hope, no dispute to resolve. In this context, the need to change specified arbitration provisions is a function of over-specification prior to optimal information accrual. The ad hoc approach delays specification of arbitration terms until information sufficient for making acceptably rational decisions has accrued.

The institutional approach has advantages as well. If a disagreement occurs which threatens the effective functioning or even the survival of the venture, or which requires quick resolution to exploit an opportunity, an early and detailed commitment to an institution of arbitration can expedite dispute resolution. By specifying the rules and the organization which will be used for arbitration, an institutional clause removes the logistical step of setting up

42. Id. at 120.
43. Id. at 121.
45. The specification of rules, such as the Rules of the International Chamber of Commerce, however, can result in unintended ambiguity which undermines the desire to stabilize arbitration parameters at the start of the venture. See, e.g., Mobil Oil Indon. Inc. v. Asamera Oil (Indon.) Ltd., 372 N.E.2d 21, 22 (N.Y. 1977) (showing how a 1968 contract, which stipulated arbitration "in accordance with the Rules of the International Chamber of Commerce," resulted in ambiguity regarding whether the parties intended to apply the 1955 rules which were in existence at the time of contracting, or the revised 1975 rules which were adopted after contracting).
a workable process that would be required under ad hoc arbitration.

A firm commitment to a particular mode of arbitration may also help to allay misgivings which invariably arise when a new venture is created. Ad hoc clauses are analogous to "agreements to agree," in which the concept of mandatory, relatively amicable resolution is embraced, but which lack a fixed means to achieve that process. Since international joint ventures always have an additional layer of uncertainty because of the magnified cultural and normative differences between parents, the security of stipulated particulars concerning arbitration may provide a zone of comfort necessary at the venture's incipiency. Moreover, ad hoc arbitration clauses are predicated on the assumption that feuding parties can negotiate the particulars of arbitration amicably and with sufficient ease. When this presumption proves unrealistic, institutional arbitration clauses have the advantage of fixing the rules prior to the development of the differences which may impede cooperative ad hoc arbitration.

In addition to considering the advantages and disadvantages of ad hoc and institutional arbitration clauses, international joint venturers should consider how venture risk, cultural and transaction-specific dimensions of trust, and barriers to exit factor into the choice of the optimal arbitration clause. Each of these factors is discussed separately in the following sections.

1. Degree of Venture Risk

High-risk ventures tend to be compatible with ad hoc arbitration, whereas low-risk ventures are congruous with institutional arbitration. Because a high degree of risk is associated with low foreseeability over the span of a strategic planning horizon, fixing arbitration rules and choosing governing organizations early may prove unsuitable as events shift in unpredictable ways.

46. Mobil Oil, 372 N.E.2d at 21.
47. See Park, supra note 44, at 1784.
48. Degree of risk may be idiosyncratic to the particular venture itself, or it may be more systematic, such as the high level of risk which typifies ventures in new industries. For a discussion of how high risk in embryonic industries can be a source of potential conflict, see Kathryn R. Harrigan, Joint Ventures and Competitive Strategy, 9 STRATEGIC MGMT. J. 141, 154 (1988).
49. High-risk ventures, generally steeped in conditions of uncertainty, should be able to reduce transaction costs by participating in ad hoc rather than institutional arbitration agreements. These savings result from the removal of unnecessarily burdensome commitments that are likely to require costly modification. For example, early commitment to an
While an institutional arbitration clause may therefore be too rigid given the vicissitudes of high-risk ventures, ad hoc arbitration can be tempered by the use of either mandatory or precatory contingency clauses in which the rules and institutions of arbitration vary by stipulated circumstance. Such contingency clauses allow the venture to maintain the flexibility which may be indispensable in high-risk situations, while expediting the settlement of logistical considerations associated with arbitration choices. Because high-risk ventures may require expedient resolution of conflict, contingency clauses are an effective tool for achieving acceptable levels of both flexibility and speed.

Low-risk ventures require less flexibility and rely less on quick reaction and responsiveness to environmental signals than high-risk ventures. As a result, low-risk ventures generally seek security and control rather than speedy adaptability in arbitration provisions. Institutional clauses that fix which organizations will preside and which rules will apply maximize predictability. The loss of maneuverability that inevitably results from early, highly specified commitment will be of little concern to low-risk ventures that operate in stable environments.

2. Cultural and Transaction-Specific Dimensions of Trust

Ad hoc arbitration is advantageous when there is a considerable degree of mutual trust upon which the parents can rely. Conversely, when the parents operate under conditions of mistrust, institutional arbitration may be preferred. The trust continuum acts in this context as a proxy for the predicted effectiveness of the "agreement to agree" component of ad hoc arbitration. The venture's ability to defer arbitration specificity to the latest time to maximize incorporation of relevant information is a function of the maturity of the parents' relationship and of their reliance upon mutual good faith.

institution that proves faulty may require breach of contractual obligations in order to provide for what proves over time to be more suitable arbitration.


50. For example, arbitration of technology access and transfer issues may be subject to arbitration by organization A under one set of arbitration rules, while decisions regarding management disputes may be subject to arbitration by organization B under another set of rules.

51. See Williamson, supra note 49, at 250-54.

52. The degree of justifiable trust that exists between co-venturers is partially a func-
Trust in contracting is both a cultural and a transaction-specific artifact. From a macro-organizational standpoint, degrees of trust are probably also a function of levels of organizational interdependence, which creates incentives for each party to behave in a trustworthy manner. Failure to meet expectations of trustworthiness may dry up resources upon which the disappointing party depends. This dynamic encourages self-policing behavior, which in turn establishes increments of reliable trust.\textsuperscript{53}

The cultural aspect of trust as a component of contract refers to differences between one culture and another in terms of contract specificity, combativeness in resolving disagreements, and tendencies to engage in the kind of opportunistic behavior likely to result in conflict. In cultures where the element of contractual trust is high, contract language need not be very specific. Conflict is avoided rather than encouraged, and resolved amicably rather than adversarially. Conversely, cultures evincing low levels of contractual trust must compensate for the deficiency by greatly elaborating contractual terms. In low-trust cultures, conflict is common and acceptable, and is resolved adversarially, typically through the process of litigation.\textsuperscript{54}

While cultural tendencies may provide a rough approximation of cultural differences in values in general, as well as the degree of reliance on non-contractual, more relational maintenance of collaborative arrangements. Several aspects of Japanese business practices, for example, support the development of trust sufficient to justify ad hoc arbitration: (i) Japanese companies tend to engage in protracted negotiation and courting periods prior to entering joint venture arrangements, allowing development of interpersonal relationships which support justifiable trust; and (ii) partially because of this extended courtship process, trust is considered a reliable proxy for contract under many circumstances. See Timothy M. Collins & Thomas L. Doorley III, Teaming Up for the 90's: A Guide to International Joint Ventures and Strategic Alliances 297-98 (1991) ("[F]or the Japanese the building of mutual trust is the first item on the agenda in any business relationship.").

In the United States, finely articulated contract terminology combined with a high incidence of litigation tends to create a mistrustful contracting environment relative to other cultures. Yet, as contracting in the United States has progressed from classical to neoclassical and even relational varieties, the American contracting culture may be moving toward greater flexibility and reliance upon justifiably trustworthy alliances. In other countries, such as Japan, contracts traditionally have been little more than declarations of good faith and a general commitment to support future dealings with another party. See The Handbook of Joint Venturing 374-76, 390-91 (John D. Carter et al. eds., 1988).

53. For a discussion of the nature of interorganizational interdependence in joint ventures, see Jeffrey Pfeffer & Philip Nowak, Joint Ventures and Interorganizational Interdependence, 21 ADMIN. SCI. Q. 398 (1976).

54. For an illustration of the differences between American and Japanese cultures regarding development of trust in business relationships, see supra note 52.
of expected levels of trust between parties from different cultures, variation within these stereotypes must be accounted for as well. In this sense, transaction-specific levels of trust must be measured in order to fine-tune the choice of arbitration provision. Parent companies from usually low-trust contracting cultures may nonetheless develop an atypical relationship of trust.\textsuperscript{55} Data on particular co-venturers’ expectations of trust must be incorporated into the drafting of the arbitration clause, accounting for both the unique relations between the particular parents, and the legal and cultural limitations that may bind their ability to operate in the normally ambiguous atmosphere of ad hoc arbitration.

If the cultural and transaction-specific levels of trust seem sufficient to support ad hoc arbitration, and the barriers to exit and repositioning discussed below are high, then ad hoc arbitration is probably preferable for its flexibility and malleability, which allow for last-minute accommodations in the course of the venture’s development. If, however, overall levels of both types of trust are poor, then it may be necessary to sacrifice the benefits of ad hoc arbitration for gains from the stabilizing influence of the institutional variety.

3. Barriers to Exit and Repositioning

Kathryn R. Harrigan has observed that failure of management systems to adapt to a new venture’s industry dynamics may create barriers to exit\textsuperscript{56} “by impeding [the venture’s] ability to reposition its strategy with respect to customers or vertical linkages with its

\textsuperscript{55} See Sherman, supra note 2, at 77-78 (stating that two large U.S. companies, Corning and Ford, have effectively used trust in their dealings to build very successful joint ventures). As American companies gain more experience with international partners who expect higher working levels of trust between co-venturers, American parents become more like their Japanese counterparts. For example, Corning Vice Chairman Van Campbell stated, “you... constantly have to deal with the relationship you have with the partner—nurturing it and maintaining high-level contacts, so that when you deal with items of substance you will be dealing with friends, people you understand and respect.” Id. at 77.

\textsuperscript{56} For a good general discussion of the nature of exit barriers, see Richard E. Caves & Michael E. Porter, Barriers to Exit, in ESSAYS IN INDUSTRIAL ORGANIZATION IN HONOR OF JOE S. BAIN 39-69 (David P. Qualls & Robert E. Masson, eds., 1976). For the purposes of this article, the term “barriers to exit” to refer to barriers that are a product of industrial characteristics and dynamics rather than transactional barriers that may be erected by parent firms as incentives to continue the venture. These transactional barriers are generally contractual in nature. For example, penalties may be applied to a parent company seeking to exit the venture.
parents. Barriers to exit are the result of industry dynamics which impose economic costs upon a decision to leave that industry. The phenomenon of repositioning occupies the middle ground between stasis and exit, such that the venture significantly alters its products or markets without entirely abandoning the industry.

Barriers which impede either the exiting of an industry or the repositioning within an industry are undesirable obstructions of flexibility. In the international context these barriers are exacerbated by a number of factors: geographic distance tends to magnify costs associated with either exiting or repositioning, foreign governments may impose regulatory barriers compelling the continuation of operations viewed as vital to economic development, and incremental legal complexities associated with dissolution across borders tend to impose additional transaction costs upon the exit of any transnational venture, acting as a disincentive to discontinue or realign operations.

58. An example of this kind of exit barrier is found in capital intensive industries, such as steel and oil, where the salvage value of capital investments is a fraction of book value and few buyers can afford to pay even salvage value.

For a discussion of the kinds of exit barriers that often exist in international joint ventures, see R. Duane Hall, The International Joint Venture 10 (1984) (discussing such problems of "[g]etting out of business [as] . . . the presence of specialized assets or low liquidation value of assets; . . . the need to 'buy off' a union; emotional barriers that can cause difficulties, such as tradition, people loyalty, customs, and local practices; or even social barriers").

59. The joint venture itself is sometimes a mechanism for reducing parents' exit barriers. Harrigan notes, for example, that "[j]oint ventures may . . . be used to permit firms to divest their assets incrementally in situations where they face such high exit barriers that no buyer could afford to purchase them outright." Harrigan, supra note 57, at 108-09.

60. These costs include expenses associated with moving a plant and equipment, hiring agents for overseas sales of assets, and hiring overseas legal counsel to handle the complexities of foreign dissolution.

61. A related phenomenon can occur when foreign governments are part-owners of joint ventures. Industrial policy considerations may compel the governmental owner to continue operations that would be abandoned by unrestricted private owners if the venture is viewed as serving an important national interest. See Michael E. Porter, Competitive Strategy: Techniques for Analyzing Industries and Competitors 292-93 (1980) (discussing the need to assess industrial policy and the political and economic climate of co-venturer countries).

62. The likelihood that one parent will not welcome the other parent's desire to exit is increased when the parents enter the venture with different motives, as is usually the case in symbiotic international ventures formed for the purpose of exploiting each other's comparative advantage. When the parents have different motives for venturing they will each view the success of the venture using criteria related to their separate motives. For exam-
Exit barriers will affect the desirability and feasibility of ad hoc versus institutional arbitration provisions. High exit barriers act as an incentive for the amicable resolution of conflict, because the barriers impose prohibitive costs on the failure to reach such resolution. The need to resolve disputes quickly is heightened by the intensely competitive environment that tends to result when exit barriers inflate supply. As a result, when barriers to exit are high, tolerance for ad hoc arbitration is also high. Conflicting parents understand that the penalty for failure to settle disagreements may be the prohibitively expensive dissolution of the venture. Systemic pressures associated with the need to continue operations will tend to result in a culture of accommodation and compromise. These characteristics render ad hoc arbitration less costly than institutional arbitration for several reasons: (i) ad hoc arbitration can be tailored to the demands of a specific dispute, and can therefore address that dispute more effectively and more efficiently; (ii) ad hoc arbitration avoids the reiterative transaction costs of modifying institutional arbitration provisions that may prove inappropriate under certain conditions; and (iii) ad hoc arbitration is more flexible than institutional arbitration and may be more conducive to pre-arbitration resolution of conflict, which results in arbitration avoidance and financial and psychological cost savings. Because barriers to exit tend to be higher for international joint ventures than for domestic joint ventures, ad hoc arbitration, rather than institutional arbitration, is often more suitable.

When barriers to exit are low, incentives to avert irreconcilable differences and resulting dissolution are also low. Low exit
barriers result in reduced stakes in the continuation of the venture so that parents are relatively unconcerned with adapting and adjusting to one another's expectations. In these instances, institutional arbitration may be more suitable than ad hoc arbitration. The low exit barriers do nothing to discourage discord, and therefore add their own peculiar element of systematic volatility and instability. A high degree of structure will help restore a portion of equilibrium under these conditions and institutional arbitration provides that structure which is lacking in the ad hoc variety. Fixing the resolution infrastructure prior to disagreement will result in savings by removing points of procedural contention from any disputes that might arise.

As noted earlier, international ventures are generally subject to higher exit barriers than their domestic counterparts. Still, each venture must be scrutinized individually to determine the type of arbitration clause most suitable. In general, high exit barriers should indicate, ceteris paribus, the utility of ad hoc arbitration. Likewise, low exit barriers should normally be associated with institutional arbitration.

65. It has been noted earlier that high exit barriers are a source of instability because of the increased competition from exaggerated supply created when those who wish to leave the industry are economically restrained from doing so. Id. The instability created by low exit barriers is of a different variety, attributable to the frailty of contractual relations which results from low-level parting stakes. In essence, low barriers to exit expand the range of predictable behaviors under pressure, as co-venturers here have the option of leaving an undesirable situation. This augmented scope of behavior adds an element of unpredictability to joint venture relationships.

66. This movement toward equilibrium is noted in organizational theory as normal, rational behavior. See, e.g., JAMES D. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY 21 (1967) (“Under norms of rationality, organizations seek to anticipate and adapt to environmental changes which cannot be buffered or leveled.”).

67. Institutional arbitration should reduce transaction costs associated with dispute resolution when exit barriers are low, for the following reasons:

(i) Because low exit barriers correlate with low incentive to accommodate, hammering out the specific terms of arbitration after a dispute has arisen is likely to be difficult. The selection of arbitration specifics during the period of peace and good will that exists at the time the venture is created will reduce the expenses, such as legal fees, associated with bargaining and haggling during times of conflict.

(ii) The expedience of institutional arbitration may enhance the prospects of a speedy resolution of the conflict itself, reducing costs associated with dispute settlement.

(iii) The avoidance of incremental sources of friction connected with setting up arbitration specifics during wartime should increase the venture's prospects of survival (if in fact survival is desirable upon resolution of the conflict). Even low exit barriers involve some cost of dissolution which can be saved if an otherwise agreeable venture can be successfully salvaged.
B. Conflict of Laws

Whether the parents of an international venture choose to provide for arbitration of disputes or simply to subject any disagreements to litigation, areas of contention will often be affected by conflict of laws. Potential conflict of laws is magnified when joint ventures cross international borders because the laws of the parent companies’ countries tend to vary more than laws between states or provinces within the same country. While co-venturers across international borders will generally want to stipulate choice of law as a term of the contract, they cannot uniformly rely on enforcement of such clauses throughout the world. American parents of international joint ventures should be aware of the approach taken by American courts to resolve conflicts regarding contracts. They must also understand the approach of the partner country’s conflict laws, and determine which conflicts approach will be applied.

In the United States, the law applied to a contract has traditionally been a function of the intent of the parties in the matter. This means that the parties can state, in the contract, which law is to prevail in the event of a disagreement. If the parents fail to so stipulate, intent may be inferred from the facts and conditions of contracting. When a court has no basis for determining the particular intention of the parties, presumptions of generic intent will apply. For example, questions regarding the content of the contract are determined under the law of the place where the contract was

68. E.g., Carlyle E. Maw, Conflict Avoidance in International Contracts, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 23, 30 (Willis L.M. Reese ed., 1962) ("The doctrine of 'party autonomy' has not yet advanced to the point where we can place full reliance on the governing law clause for all purposes.").

69. Conflict of laws questions in international ventures are extremely complex, and the ability of the contracting parties to stipulate the choice of law to be applied is not absolute under all circumstances. For a detailed examination of these questions, see ANTONIO BOGGIANO, INTERNATIONAL STANDARD CONTRACTS: THE PRICE OF FAIRNESS (1991).

70. See, e.g., Gaston, Williams & Wigmore of Can., Ltd. v. Warner, 260 U.S. 201, 203 (1922) ("[I]t does not appear that the contracting parties in making [the contract] had in view any other law than that of the place where [the contract] was made."); Fidelity Mut. Life Ass'n v. Harris, 57 S.W. 635, 638 (Tex. 1900) ("It is true, however, that the effect of a contract, wherever it may come in question, is to be determined by the law with reference to which the parties contracted .. .").

71. See, e.g., Travelers Ins. Co. v. American Fidelity & Casualty Co., 164 F. Supp. 393, 397-98 (D. Minn. 1958) ("Since the [contract] contemplated performance in several states, it should be presumed that the parties intended the law of the place of performance to control their intentions .. .").
drafted, whereas questions regarding performance are determined under the law of the place where execution is to occur.\textsuperscript{72}

More recent American approaches to conflict of laws questions involving contracts reject the intent approach in favor of a "center of gravity" theory in which the courts apply the law of the forum which has the most significant contacts with the transaction to be adjudicated.\textsuperscript{73} While intent of the parties may be an important factor in determining which jurisdiction has the most contacts with the issue in contest, intent is not in itself dispositive of conflicts questions under the center of gravity approach.\textsuperscript{74} Thus, co-venturers should place somewhat less reliance on choice of laws clauses for contracts drafted or to be executed in center of gravity states than in states that look to the parties' intent. They should also distinguish between subtleties in center of gravity approaches, some of which are almost indistinguishable from intent-based approaches due to the impressive weight placed on intent in determining the jurisdiction with the most significant contacts.\textsuperscript{75}

When an international joint venture is domiciled outside the United States, litigation of local issues is likely to fall within the jurisdiction of local courts, and foreign conflict of laws principles will apply. In some instances the laws of the host country are obligatory, to the exclusion of American laws. For example, Polish labor laws apply by statute to labor relations in enterprises domiciled in Poland.\textsuperscript{76} Likewise, Soviet Joint Venture Law under the

\textsuperscript{72} See, e.g., Auten v. Auten, 124 N.E.2d 99, 101 (N.Y. 1954) (reciting the traditional rule that "[a]ll matters being upon the execution, the interpretation and the validity of contracts . . . are determined by the law of the place where the contract is made," while "all matters connected with its performance . . . are regulated by the law of the place where the contract, by its terms, is to be performed." (alteration in original) (citations omitted)).

\textsuperscript{73} See, e.g., W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 423 (Ind. 1945) ("[I]t is appropriate that a transaction be governed by the law of the state with which it is most closely in contact, not because of the quasi-location of a legal concept . . . .").

\textsuperscript{74} See, e.g., Haag v. Barnes, 175 N.E.2d 441, 443 (N.Y. 1961) ("The more modern view is that "the courts . . . lay emphasis . . . upon the law of the place which has the most significant contacts with the matter in dispute." (alterations in original) (citations omitted)).

\textsuperscript{75} See, e.g., Jansson v. Swedish Am. Line, 185 F.2d 212, 218-19 (1st Cir. 1950) (applying a center of gravity conflict of laws approach which relies heavily on the parties' intent).


For a discussion of the "obligatory applicability of host countries' labor laws" in
Kremlin’s edict of January 13, 1987 provided that the resolution of disputes between joint venture partners or within the venture itself “shall be settled either by Soviet courts of law, or if so agreed by the parties, by an arbitration court . . . ”

When application of local laws is not mandated by statute, the number of approaches to resolving contractual conflicts varies widely. One of the more common methods, in addition to variants of the American conflicts doctrines discussed earlier, is to apply the law of the country in whose language the contract has been drafted to questions of contract construction. This approach appears to be a form of intent-oriented conflicts of law doctrine, probably the most prevalent among courts that have not usurped choice of law legislative edict. Because of the wide variety of conflict of laws approaches available throughout the world, American co-venturers need to examine the conflict of laws principles of their own states as well as those of the partner parents.

III. LINGUISTIC CHALLENGES OF CONTRACTING: THE COMPLEXITIES OF CROSS-LANGUAGE DRAFTING

International joint ventures always generate linguistic challenges. Disparities in language are an important consideration be-
cause they increase the likelihood of gaps and errors in communication. Contractual terms have no absolute meaning independent of the context in which they are created; and socio-linguistic differences between contracting parties create breeding grounds for contextual ambiguities.

Linguistic challenges will occur at two levels: at the contracting stage itself, and over the course of the venture's life, as the contract is implemented. Vigilance regarding linguistic sources of misunderstanding during both formulation and implementation of the contract is crucial.

When collaboration exists between companies sharing the same primary language, the joint venture contract will, of course, be in that language absent extenuating circumstances. The ostensible unity of language may lull parent parties and their lawyers into a false belief that language differences are not an important issue.

81. Communication in organizations is directly related to the development of ongoing relationships within those organizations, because communication is an inextricable component of social processes. See Joanne Yates & Wanda J. Orlikowski, Genres of Organizational Communication: A Structurational Approach to Studying Communication and Media, 17 ACAD. MGMT. REV. 299, 299 (1992) (discussing organizational communication as "embedded in social process" and not "isolated rational action").

82. For a discussion of the contingency of texts in general, see Gerald Graff, Disliking Books at an Early Age, LINGUA FRANCA, Sept./Oct. 1992, at 45. Graff explains, "As readers we are necessarily concerned with both the questions posed by the text and the questions we bring to it from our own differing interests and cultural backgrounds." Id. at 50. See also Jean Braucher, ContractVersus Contractarianism: The Regulatory Role of Contract Law, 47 WASH. & LEE L. REV. 697, 726-30 (1990) (discussing the importance of context in contractual interpretation).


84. Imperfect decision-making has been attributed to human cognitive limitations, particularly in information processing. See HERBERT SIMON, MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETTING 196-206 (1957) (discussing how the rational man model of decision-making should be changed to reflect the limited cognitive ability of man). Language barriers can be viewed as a layer added to these limitations. As such, their reduction or the amelioration of their impact should improve decision quality in international joint ventures.

85. See supra note 80. Unity of language even within national borders is largely illusory. In Italy, for example, dialects other than Italian are spoken by a large part of the
Domestic common law in the United States is illustrative of attempts to resolve ambiguity in contracts. Primary rules of construction exist for the purpose of aiding interpretation. For example, when subjective intention of the parties is not clearly manifested in the contract, language is to be accorded its generally prevailing meaning. Likewise, words of art and technical terms are to be given their technical meaning when they are used by parties in a technical field. Secondary rules of construction serve as "tie-breakers" to be used in the event that contract-specific interpretation is not possible. For example, when contractual provisions cannot be clarified through the application of a generally accepted meaning, ambiguities are interpreted against the party who drafted the agreement. Written provisions are favored over printed ones, and specific provisions are preferred to general provisions with which they are inconsistent.

Primary rules of construction are superior to secondary rules in resolution of ambiguity because they specifically address the merits of a particular interpretive issue, whereas secondary rules simply apply a generic default interpretation when more particularized efforts have failed.

Regardless of whether primary or secondary rules of interpretation apply, linguistic ambiguities may not be resolved as satisfactorily in shared-language international joint venture contracts as they would in their domestic counterparts, because nuances of linguistic variance are magnified across cultures. This propensity

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86. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1981) ("Unless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning.").
87. Id. § 202(3)(b) ("Unless a different intention is manifested, technical terms and words of art are given their technical meaning when used in a transaction within their technical field.").
88. Id. § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").
89. Id. § 203(d) ("Separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated" in the interpretation of a promise, agreement or term.).
90. Id. § 203(c) ("In the interpretation of a promise, agreement or term, specific terms and exact terms are given greater weight than general language.").
91. See supra note 80. Barbara Smith has observed that communication cannot ever
for interpretational difficulties is exacerbated by the inherently unicultural orientation of the ordinarily superior primary rules of interpretation. "Generally prevailing meanings" are less likely to exist in the context of international contracts than in the context of domestic contracts. As a result, both the drafting and the construction of cross-cultural contracts are especially thorny processes. Likewise, terms of art and technical terms are most likely to have one relatively clear, widely shared meaning within the linguistic context of one culture. Professions and disciplines that develop separately across national borders usually experience many major and minor variants in vocabulary development. As a result of these dynamics, both the development and later interpretation of terms for international joint venture contracts are fraught with potential difficulties.

A different set of linguistic challenges applies to international joint venture contracting between parents using entirely different languages. Subtleties of interpretation and cultural variation in the meaning of identical words will be less important, though by no means eliminated. Because there are fewer identical words across

make what we call "knowledge" and "information" completely common in the sense of creating perfect correlation of understanding. BARBARA H. SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY 109 (1988). Smith attributes the inevitable failure of communication to, inter alia, "inevitably different life histories as verbal creatures." Id. Such disparities of verbal life history are cultural-linguistic artifacts, magnified by international differences. Id.

92. In fact, the notion that "generally prevailing meanings" exist at all is questionable. The idea that disputes can be resolved by resorting to some objective standard of analysis evolved during the drafting of the original Restatement of Contracts as part of an effort to establish stability and legal certainty as desirable objects in a commercial society. Critics of an objective theory and approach to contracts suggest that the idea of "generally prevailing meanings" is a myth that has been created to foster logistical ease and consistency in contract interpretation, and may dispense with the subjective understandings and expectations of the parties. For a good discussion of objective and subjective theories of contract, see Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760-69 (2d Cir. 1946).

93. For a discussion of the kinds of misunderstandings that can arise both between languages and within one language spoken in different countries, see JACK ENEN, JR., VENTURING ABROAD: INTERNATIONAL BUSINESS EXPANSION VIA JOINT VENTURES 75 (1991) (discussing different meanings of words in American English and British English, and the ways in which literal Japanese translation of informal American phrases can create misunderstanding).

94. Id. Even when parent companies use different languages, they may be subject to varying interpretations of related words that often exist, for example, between two Romance languages or two Germanic languages. Moreover, the Americanization of many languages has spurred the introduction of American English words into many world vocabularies. See BRYSON, supra note 85, at 180-95 (explaining that English words have
languages than within a language, there are simply fewer opportunities for parties to attach different nuances of meaning to a single term. Moreover, under conditions of disparity of language, use of terms common to both parents is likely to stand out in stark relief. It is easier for the parents to scrutinize the assumptions they are making in these limited instances of common usage.\(^9\)

Joint ventures contracts between different-language parents present their own unique challenges. These begin with the drafting process itself. Will the contract be drafted in a primary language, then translated into a secondary language?\(^{96}\) Perhaps no formal translation will be provided and one language will be deemed the official language of the venture.\(^{97}\) Or the process may be more equitably collaborative, with initial drafts made in each language, resulting in a final version which comes with negotiation from these two starting points.\(^{98}\) If this more neutral process is used, will the final contract be in one language or both languages? And, regardless of the process used, if there are versions in each language, which will take precedence in the event of dispute or in the case of ambiguity?\(^{99}\) In the remainder of this section, I shall discuss separately the challenges of unilateral contract design and the challenges of collaborative drafting.

\(^{95}\) International ventures with an American parent are particularly likely to encounter Americanized usage in foreign languages. American parent companies should be aware that the adaptation of such phrases into foreign languages still entails a process of translation and isolated cultural development, so that the American version and the foreign version may have different meanings. See BRYSON, supra note 85, at 180-95.

\(^{96}\) Venturing parents usually provide for translation into the secondary language when the contract is drafted in an official, primary language. MICHAEL P. LITKA, INTERNATIONAL DIMENSIONS OF THE LEGAL ENVIRONMENT OF BUSINESS 125 (2d ed. 1991).

\(^{97}\) Given the Americanization of world languages, as well as the dominance of English in the educational systems of many countries and the relatively low emphasis on foreign language training in the United States, the official language for venture pursuits involving an American parent is likely to be English.

\(^{98}\) This dual-tiered process of contract drafting is much rarer than unilateral drafting in an official, primary language. The discussion here is not descriptive of a widely established practice. Rather, dual-tiered contracting is discussed as an option which may avoid some of the pitfalls of unilateral drafting.

\(^{99}\) Parents can designate one language version as the official document and the other as a translation, exhibiting evidence of intent to render the former binding in the event of subtle language distinctions. Another method of achieving this end is to utilize one contract and provide an unofficial translation to the parent who needs it. While this approach may help resolve some disputes, it should not be viewed as dispositive in determining differences in interpretation. Cases will exist in which unofficial translations more accurately embody the true nature of the agreement than documents designated as official.
A. Unilateral Drafting

The choice taken among these varying options may have implications beyond the logistics of the contracting process itself. In particular, choice of contract language can affect the balance of power between parent companies, as well as the direction of venture implementation and the degree of managerial participation by each parent. If the contract is initially drafted in one language (hereinafter the "primary language," which will also be referred to as the language of the "primary parent") and translated into the other (hereinafter the "secondary language," which will also be referred to as the language of the "secondary parent"), the following dynamics may result:

First, the primary parent will probably have more input into the content of the contract. Because drafting contractual terms in a foreign language makes meaningful participation in the drafting process difficult, the secondary parent will have the incentive to limit its participation to negotiation, trusting the primary parent to incorporate results into the contract. Since the secondary parent is naturally excluded from the drafting and revision process, that parent will not ordinarily be present as issues arise in the process of hammering out the body of the agreement. Ownership of language is transformed into ownership of the drafting process. As the primary parent dominates contract creation, the process becomes essentially unilateral. Decisions from which the secondary

100. The impediments to contracting which result from language barriers and unilateral drafting are consistent with the theory that multinational entities are networks of transactions. Christopher A. Bartlett & Sumantara Ghoshal, Managing Across Borders: The Transnational Solution 75-94 (1989); Oliver E. Williamson, The Economic Institutions of Capitalism 15-42 (1985).

Transaction costs are increased by language barriers, as disadvantaged parties must spend time or money to reach minimal ability to use the primary language. These transaction costs will decrease the likelihood that the secondary party will be willing to invest its resources in participating in the creation of contract content.

101. Any practicing attorney who has been engaged in contract drafting knows that terms are refined after formal negotiations are settled, during the process of committing oral understandings to written language. This occurs because the drafting process requires a precision of thinking and verbalizing that raises questions beyond those identified during more general pre-contract discussions. When the drafting process is not co-opted by one party, the new questions that arise have the potential to improve the thoughtfulness and effectiveness of the contract in meeting mutual expectations. When unilateral drafting results in one party's domination over the development of the agreement, the contract can become lopsided, balanced in favor of the drafter. Partiality of contract terms is a significant component of the disparity of power that can result, potentially leading to discord or dissatisfaction with the ultimate functioning of the joint venture.
party is excluded will, realistically, tend to favor the primary party.

Second, the primary parent is likely to realize power benefits by virtue of the advantage associated with contracting in the primary language. These benefits extend beyond the establishment of favorable contract terms. The secondary parent confers a degree of trust upon a primary parent company that is drafting the contract in the primary language. That trust is a form of dependency. The secondary party relies on the primary party to draft negotiated provisions as accurately as possible and in good faith. When questions unforeseen in the negotiation process arise during the drafting stage, the secondary parent hopes that the primary parent will avoid the temptation to behave opportunistically and will disclose the questions for secondary parent input.

The dependency inherent in the status of the secondary parent increases the power of the primary parent. The secondary

102. Power in negotiations is largely a function of position, authority, and knowledge. All of these attributes are augmented by linguistic skill and dexterity, resulting in increased power relative to those lacking ability in the relevant language. For a more detailed discussion of the affect of position, authority, and knowledge on negotiation power, see Donald B. Sparks, The Dynamics of Effective Negotiation 99 (1982).

103. Corporate control is associated with knowledge flows, which are in part enhanced by primary language advantages and the exclusive participation in contract development that is likely to follow. For a discussion of the relationship between knowledge flows and control, see Anil K. Gupta & Vijay Govindarajan, Knowledge Flows and the Structure of Control Within Multinational Corporations, 16 Acad. Mgmt. Rev. 768 (1991).

104. See Boggiano, supra note 69, at 81. He states, [H]ow ignorant of a language somebody may be is a question open to subtle distinctions the evidence of which is highly hazardous. Whoever enters the realm of a foreign language obviously assumes a risk the extent of which greatly depends on how exotic the language is and therefore on the difficulties of getting a proper translation. The obstacles to which Boggiano refers may be understated, as he assumes that one can get a "proper translation" if one is willing to pay the price. Whether there is such a thing as a "proper translation" is itself questionable, and the reliance upon any translation puts a party at an inherent disadvantage.

105. The advantage of resolving unforeseen issues that arise in contracting is arguably minimal, as the secondary parent will have the opportunity to review various drafts of the contract before final approval. Yet the secondary party is disadvantaged in several ways notwithstanding its ability to analyze drafts. Perhaps most importantly, the party that engages in the arduous process of contract drafting is more likely to have considered difficulties presented by various options and is therefore more likely to recognize subtle questions which may establish an advantage for one party or the other when resolved. Moreover, the secondary party is disadvantaged whether reviewing primary language or a translation into the secondary language. If the secondary party is reviewing a draft in the primary language, comprehension is limited and recognition of subtle distinctions is greatly impaired. If the secondary party is reviewing a draft translated into the secondary language, distinctions are lost as the natural result of the translation process itself.

106. Dependency and power are reciprocal concepts. To the extent that party A is dependent on party B for resources or favor, party B develops an increment of power over
parent's dependence on the primary parent to protect its interests when obscure issues arise in the contracting process creates a bargaining chip. In return for objectivity in contract formation, the primary parent can expect more favorable treatment as the relationship between the parents develops. The secondary parent is likely to make substantive concessions to the primary parent, recognizing the tacit power of the latter to exploit its superior familiarity with the primary language. While the power of a primary parent in contracting may be covert and subtle, it is no less effective than a more palpable advantage. As the secondary party experiences its relative impairment in the utilization of a foreign language, the delicate balance of power will shift in the direction of the drafting parent.107

Moreover, documentation in the primary language may evince an intention of the parties to subject contract interpretation to the law associated with the primary language.108 Perhaps even more significantly, choice of contractual language may be used by a court to infer choice of laws regarding any contractual litigation.109 While this resolution of conflict of laws questions may conceivably favor the secondary party under some circumstances, the primary party is more likely to receive the advantage. The primary party will be more familiar with the basic approach of its own legal system, as well as its particular doctrines. When negotiating terms that are likely to be interpreted under its own laws, the primary party therefore has better access to and understanding of information than the secondary party. Decisions reached under these conditions will tend to favor the primary parent.

Third, contrary to the secondary rules of construction, ambigu-
ities in the resulting contract may be interpreted in favor of the drafting party. Normally, under American laws, a court will attempt to resolve ambiguities by adopting the usual or standard meaning of terms, or by reference to the intentions manifested by the parties under the specific conditions of contracting. If all efforts to determine intended meaning are depleted without resolving the ambiguity, a secondary rule of interpretation favors construing the contract against the party which drafted it, or contra proferentum ("against the profferor"). Because the drafting party has control over the contracting process and the opportunity to avoid ambiguity, construction against the drafter is supported in part by an element of fairness. Moreover, since a drafting party generally enjoys a superior ability to protect its own interests, failure to do so may be a manifestation of intent to draft the term in favor of the non-drafting party.

This rule of construction is weak where secondary parties to contracts drafted by primary parties are concerned. And, perhaps most crucially, the doctrine is less likely to be applied in international settings than in domestic contract cases. As a secondary rule of construction, interpretation against the drafter is only evoked when evidence of actual intent is lacking. As the exclusive drafter of a contract in the primary language, the primary party develops ownership of virtually all intent with regard to the choice of language when creating the terms of the contract. All evidence regarding what was meant by a particular phrase will be provided by the drafting party, who also has a great advantage in fashioning arguments regarding the possible and likely meanings of ambiguous terms. When the secondary party attempts to argue the intended meaning of a phrase, it argues from logic rather than from actual experience, essentially stating, "X should mean this" rather than "When I chose the word X it was because it means this."

In cross-linguistic situations, the secondary party also argues

110. See supra note 86.
111. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 165-72 (3d ed. 1987) (discussing various standards used in interpreting a contract and what evidence may be allowed in applying the standard of interpretation selected).
112. See supra note 88.
113. For a discussion of the reasoning behind the rule of construction which favors interpretation against the party who provided the language at issue, see North Gate Corp. v. National Food Stores, Inc., 140 N.W.2d 744, 747-48 (Wis. 1966).
114. Id.
115. See supra text accompanying notes 88-90.
from a position of rhetorical inferiority\textsuperscript{116} and must rely on the testimony of language experts. These experts can only testify regarding generalities and tendencies in language use, whereas the primary parent can provide a history of drafting supported by close personal experience with the language chosen. As a result, the primary party has great opportunity to persuade the court of its drafting intentions, blocking the application of the secondary rule that favors construction against the drafter.

Of course, the secondary party can argue that the intent of negotiations and oral understandings of terms favors interpreting contractual language in its favor, but the impediments to this line of reasoning are significant. Since a written contract is generally viewed as a final arbiter of disagreements and misunderstandings, the use of oral evidence of negotiations to decide the meanings of a writing is often viewed as tautological and backwards. The contract is meant to finalize and formalize the agreement, so the use of less formalized oral evidence to determine its meaning is considered retrograde. The preference for textual interpretation over evidence of pre-drafting behaviors and understandings has been formalized in doctrines like the parol evidence rule, which limits the use of extrinsic evidence in the construction of integrated written contracts.\textsuperscript{117}

\section*{B. Collaborative Drafting}

An entirely distinct set of challenges may arise if parents using different languages agree to collaborate in the contracting process. Collaboration is likely to entail the formulation of a contract in two languages which will eventually be negotiated into one final form. This official, finalized contract may be formally adopted in either one or both languages. Dual-language, dual track contract

\textsuperscript{116} Donald Sparks has observed that dual language usage "clearly indicates recognition of and respect for the other party . . . [and] conveys acceptance as an equal." \textit{Sparks, supra} note 102, at 147. Conversely, unilateral linguistic control establishes conditions of what I am labelling "rhetorical inferiority."

\textsuperscript{117} For a classic common law explanation of the parol evidence rule, see \textit{Gianni v. R. Russel & Co.}, 126 A. 791, 792 (Pa. 1924). For a statutory explication, see \textit{U.C.C.} § 2-202 (1992).

Formal rules disfavoring oral evidence regarding written contracts, such as the parol evidence rule, are usually considered inapplicable to the resolution of contractual ambiguities. Yet even when there is ambiguity, our proclivity is to favor drafting intent over negotiating intent. The primary party's assertion of intent in choosing terms is generally considered more compelling than a secondary party's statements concerning its understanding of intent at the time of negotiation.
development has both strengths and weaknesses relative to the primary language approach discussed in the previous section. The potential benefits and potential disadvantages of dual-language development are considered separately in the following paragraphs.

1. Benefits of Dual-Language Contract Development

   a. Mitigation of Power Disparities in Negotiation

   Dual-language contract development is likely to mitigate power disparities in the negotiation of terms. When the contract is developed through the proposals of each parent and formulated in the language to which that parent is accustomed, neither partner has the advantage of presenting potentially skewed terms on its home turf.\textsuperscript{118} Since there is no dominant party in this regard, the parents have greater potential to negotiate on equal terms.\textsuperscript{119} The contract which results is more likely to reflect the proposals and counter-proposals made by both parents, resulting in greater potential for fairness of terms. Opportunism of a dominant parent is circumvented as the parties bargain from positions of relative parity.

   b. Increased Likelihood of Venture Survival

   Dual-language contract development may also increase the likelihood of venture survival. If the contract is drafted in the language of each parent, the meaningful participation of both is facilitated. When both parents are involved in contract formulation as well as preliminary negotiation of terms, several benefits are likely to obtain which may improve probabilities of venture survival.\textsuperscript{120}

\textsuperscript{118} Technical language adopted by large organizations, or “bureaucratese,” is difficult to understand outside of its context, which is rarely explained to those who are not involved in the drafting process. This results in the adaptation of a “prestige dialect” that excludes and mystifies outsiders. Veda R. Charrow, \textit{Language in the Bureaucracy}, in \textit{8 ADVANCES IN DISCOURSE PROCESSES: LINGUISTICS AND THE PROFESSIONS} 173, 186-87 (Robert Di Pietro ed., 1982). When the drafting process is collaborative or when neither of two languages is given preferential treatment, opportunities to exert power through language intimidation are reduced.

\textsuperscript{119} Experts on negotiations emphasize the importance of using objective criteria in reconciling parties’ interests. See, e.g., ROGER FISHER & WILLIAM URY, \textit{GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN} 84-86 (1988) (explaining that negotiating on the basis of objective criteria is effective because it is independent of the will of either side). Dual-tier, dual-language drafting enhances the objective nature of contracting by removing the territorial advantage conferred by unilateral language dominance.

\textsuperscript{120} Extension of the number of persons who participate in managerial decision-making
Perhaps most crucially, the balance of power reflected by joint participation in drafting reduces the potential for opportunistic behavior where the negotiated expectations become warped or altered when transposed into contract language. Because the agreement which results from mutual participation will tend to be kept truer to the parents’ pre-contractual verbal understandings, the final document should be a more faithful representation of the real essence of the negotiated deal. As the implementation of the venture unfolds, there will be fewer unpleasant surprises related to any schisms between informal understanding and formalized contract. Disputes are less likely to arise when the contract accurately reflects the expectations the parties developed when the deal was being processed. This enhanced likelihood of harmony between parents is beneficial to venture survival and increases the chance that the parents will be satisfied with the collaboration as it unfolds.

In addition to increasing the accuracy of the contract as a reflection of the parties’ understanding, dual-language drafting and concomitant dual-parent participation allows the parents to process cultural and linguistic misunderstandings before venture implementation begins and before the parties are officially bound to pursue the venture at all. As the parties address the complexities involved in reducing expectations to the precision of language, they will discover areas of potential contention which would remain obscured if one party were removed from the rigors of contracting. The

\[\text{\smaller 121. \ A good negotiation process reduces or eliminates both the prospects for and the desirability of opportunistic behavior. Fisher and Ury suggest that parties seek common ground, finding opportunities to negotiate for “mutual gain.” Fisher & Ury, supra note 119, at 73. When the parties are both full participants in the continued negotiations that take place during contract drafting, parity of power creates controls against opportunistic temptations and increases the chance of finding the common goals which will support the venture as it is implemented.}

\[\text{\smaller For an excellent and detailed discussion of the process of creating value through joint gains, see David A. Lax & James K. Sebenius, The Manager as Negotiator 88-116 (1986).}

\[\text{\smaller 122. The negotiation literature refers to the importance of mutual satisfaction in the ultimate contract in terms of coordination benefits. For a good discussion of the role of coordination in high quality contract negotiations, see Dean G. Pruitt, Negotiation Behavior 91-135 (1981).}
resulting product tends to be a contract that has been thoroughly examined, encouraging resolution of areas of potential conflict in advance. In the process, impediments to smooth venture implementation are reduced.

c. Improved Quality of Managerial Decisionmaking

Dual-language contract development can also improve the quality of managerial decision-making at the start of the venture. In fact, participation in formal processes of contracting should be viewed as having value beyond that added to the quality of the contract itself. Contracting is a potentially strategic process as well as a legal process aimed at forming a binding document. Contracting forces parties to think in advance about important questions which are likely to arise well into the future of the venture. This kind of thinking is strategic in nature, as both business strategy and contract formulation are concerned with long-range development of relations and expectations between parties.

While participation in contracting can always be seen as a useful strategic exercise entirely apart from legal considerations, its strategic value in cross-cultural and cross-linguistic contexts is particularly compelling. The dual-language contracting process and resulting parity of participation increase the pool of ideas and alternatives from which decisions are derived. In a transnational setting, the augmentation of the pool of alternatives is vitally important. Each party is guided by cultural biases and limitations and thus lacks independent access to important considerations which are simply non-existent in their individual worlds. The usual incre-

123. This is not to imply that improvement in the quality of decisions reflected in the contract itself is unimportant. Any parent considering gains in power through control over the contract process should be aware of tradeoffs in the reduced likelihood that the venture will be mutually satisfactory. See Margaret A. Neale & Max H. Bazerman, Negotiating Rationally: The Power and Impact of the Negotiator's Frame, EXECUTIVE, Aug. 1992, at 42, 43 (suggesting that the goal of negotiating contract terms should be the attainment of a good agreement).

124. See Steven R. Salbu, Joint Venture Contracts as Strategic Tools, 25 Ind. L. Rev. 397 (1991) (examining the similarities between contract drafting and strategy formulation, and contending that managerial participation in the former will have positive spillover effects on the latter).

125. C.f. L. Richard Hoffman & Norman R.F. Maier, Valence in the Adoption of Solutions by Problem Solving Groups: Quality and Acceptance As Goals of Leaders and Members, 6 J. PERSONALITY & SOC. PSYCHOL. 175, 177 (1967) (discussing how in a study of groups given a problem and told to reach the best solution, the group satisfaction with the adopted solution seemed to be peculiar to the unique character of the process in that particular group).

126. Often these considerations are linguistic ones which may affect the ability to trans-
ments to decision quality which can be obtained by increasing the numbers of inputs are magnified when these inputs reflect varying perspectives, as when the inputs are culturally divergent. From a strategic standpoint, international joint venture contracting which encourages mutual participation also encourages realistic terms that are acceptable under culturally distinctive norms, expectations and values. The overall result of collaborative drafting will be an enhancement of the quality of the contract as a tool for the growing, developing relationship between two distinctive parties in a highly idiosyncratic setting.

2. Disadvantages of Dual-Language Contract Development

   a. Inadequate Integration of Parallel Efforts

Dual-language contract development can result in a two-tier system of contracts. If both parents are to participate in the contract development process through parallel efforts in separate languages, they must ensure that these logistically separate efforts are integrated. Because language barriers tend to separate this kind of contract development into two discrete processes, it is especially easy for parent companies that are attempting to gain parity of input and power to find themselves with two differing contracts that may contain inconsistencies and conflicts.

In order to avoid developing different versions in isolation, parent companies may meet frequently during the drafting process or they may attempt to reconcile their drafts in one final, intensive round of negotiations. The former option is more likely to retain

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form domestic product-market segments into international ones. Reinhold Aman observes, for example, that names of products may have inadvertently offensive meanings when translated into other languages. Reinhold Aman, Interlingual Taboos in Advertising: How Not to Name Your Product, in ADVANCES IN DISCOURSE PROCESSES: LINGUISTICS AND THE PROFESSIONS 215, 219-21 (Robert Di Pietro ed., 1982). If the contractual terms are highly detailed, these kinds of language-related complications can be noted earlier as the information of both parents is incorporated into contracting through the use of a two-tiered system.

127. There is a unilateral drafting alternative that can be used to avoid the difficulties of integrating two drafts into one cohesive agreement while reducing the power disparity normally associated with one-sided contract formation. This alternative is labelled in the negotiations literature as "one-text procedure." One-text contracting entails the use of a single draft in order to avoid confusion and exacerbation of bargaining differences that are magnified when parties attempt to move from two partisan drafts to a single cooperative form. The one-text approach avoids language dependency by choosing a neutral third party to engage in the drafting process. While one-text contracting incurs the additional cost of hiring an independent drafter, it may be an effective means of reconciling the strengths and weaknesses of unilateral drafting. FISHER & URY, supra note 119, at 118-22.
some of the benefits discussed earlier. By comparing progress regularly during the course of parallel drafting, the parents have sufficient time to examine each segment for inconsistencies. Likewise, frequent coordination should enhance the strategic utilization of contracting as a tool for planning, as the parents work step by step to resolve disagreements and to consider one another’s viewpoints and perspectives. These procedures can be undermined when detailed, completed drafts are the first and only stage for comparison. In addition, the use of steps will enhance coordination and allow a number of feedback loops so that information and decisions from each meeting can be processed in the remaining tasks. When the parties complete an entire draft before comparing their products, they lose an opportunity to incorporate knowledge gained in the course of drafting.

b. Increased Conflicts

A two-tier system of contracts may increase the likelihood of disagreements between parent parties based on conflicts between different-language versions of the contract. To understand the relationship between two-tiered drafting and the probability of disagreement, consider current criticism of the old fallacy embodied in the “plain meaning rule.”128 Both the Uniform Commercial Code129 and the Second Restatement of Contracts130 have recognized that language is never clear and unambiguous, and therefore can never yield to interpretation of “one plain meaning.” Meaning is contingent upon the “surrounding circumstances,” including the persons, objects, and events to which the words can be applied and which caused the words to be used.”131 Unfortunately, variance in the context and circumstances of speech will contain more error when two separately drafted contract versions are eventually collapsed into one, especially when the drafts are originally conceived in different languages. The myth of plain meaning loses another increment of credibility when the variables of language and culture are incorporated into interpretation through two-tiered drafting. In

128. The plain meaning rule says, “if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.” CALAMARI & PERILLO, supra note 111, at 166-67.
any event, whether a two-tiered approach to contracting results in one official version in a language of choice or two official translations, the process of parallel contract development can lead to later conflicts of interpretation and construction.\textsuperscript{132}

The parties may decide to adopt either language as the "official language" of the contract. This decision reflects an intent to elevate one version to a more definitive status. The decision may be made based on advantages held by the party whose language is thus elevated or may simply be part of a broader system of give and take as the prospective parents each gain various advantages and make various concessions. The establishment of an official language version is likely to ameliorate some but not all of the potential conflict arising from dual-tier drafting. To some extent the elevated official version may be considered definitive, thereby circumventing potential disagreements. Yet the official language version can never be truly dispositive of all issues, since the construction of the contract relies so heavily on evidence of intent which is manifested by both drafts in a dual-tiered system. Areas of divergence that are masked by misunderstanding or misinterpretation across languages and cultural assumptions create potential errors between versions of the draft and are incremental sources of conflict arising from collaborative drafting. These sources of conflict will increase in severity if the parties decline to choose an official language version, leaving two official translations which can never be entirely consistent.

c. Misaligned Strategic Approaches

A two-tiered system of contracts which are not perfectly aligned may also result in misaligned strategic approaches to the venture’s purposes and modes of operations. Language barriers that encourage parents to develop separate versions of strategy in isolation may result in two separate and distinctive strategies. While the democratic character of two-tiered contract development will tend to decrease power disparities, it encourages inconsistencies between the parents’ stated goals, objectives, and expectations.\textsuperscript{133}

\textsuperscript{132} While the distinction between interpretation and construction has been ignored in recent contract jurisprudence, it is an important one. Interpretation is the search for the parties’ intended meaning, whereas construction is the use of rules to attach a legally binding meaning to the generic terms. Interpretation of subjective meaning will more reliably yield just results than construction of legal effect.
\textsuperscript{133} A good joint venture contract depends largely on good negotiation processes both prior to drafting and during the drafting period, as the exercise of committing understand-
These strategic inconsistencies can undermine the effectiveness of the joint venture. Dual-tiered contracts can act as strategic roadmaps leading the venture in conflicting directions, especially if the venture is jointly managed by representatives of both parent firms. As a result, management may find itself internally disjointed, which inadvertently or purposefully frustrates the movement of the venture in a unified direction.

While the eventual reunification of two-tiered drafts into a final, official version of the contract will reduce inconsistencies in managerial expectations, it cannot dispose of them entirely. The ratification of a final contract has limited powers of reconciliation because the document itself is the smaller and less compelling part of a contract. The understandings that develop in relation to the document, which can only be imperfectly encompassed therein, are the richer product of contracting. When the parties draft a contract on parallel tiers those understandings are insular, like species of an organism evolving separately on different islands. The strategies that develop during the contracting period are unavoidably detached from one another under the two-tiered approach.

Late reconciliation of separately developed drafts into one final, unified version implies a meager concept of contracting in which the document itself is the goal. A richer view of contracting envisions the possibility of creating value for the venture by emphasizing the process of planning over the achievement of a legally binding document. This is a relational approach which focuses on the benefits of negotiating. The contract is seen more as a means of solidifying the affiliation and affinity between parents than as a legal tool for the protection of rights.

To gain potential relations to paper evokes new questions and concerns.

The negotiations upon which the contract depends will result in superior managerial decisions if both sides understand one another's philosophies and communicate clearly and often. See Gerald I. Nierenberg, Fundamentals of Negotiating 216 (1987) (emphasizing the need for parties to share philosophies in corporate negotiations, as well as strategic emphases and directions).

Dual-tier contracting segregates the parties, who in a more integrated process would have more opportunities to reach a genuine understanding. The result can be strategic inconsistencies that undermine the venture's success.

By nature and definition, an effective strategy requires a degree of consistency. See Bruce D. Henderson, The Logic of Business Strategy 39 (1984) ("Strategy involves foresight, commitment of resources, coordination of efforts, and analysis that go far beyond the intuition and conditioned reflexes of the ad hoc expediency of day-to-day competition . . . [and results in] a cohesive, tightly reasoned conceptual framework.").

The use of contracts to protect rights and provide remedies for wrongs is a clas-
tional benefits of joint venture contracting, the parents must engage in a single planning process that opens communications.\textsuperscript{136}

3. Tradeoffs Between Unilateral and Collaborative Drafting

Tradeoffs inevitably exist between unilateral and bilateral drafting processes because of the benefits and disadvantages of each process.

To summarize the above discussion, when one party is given exclusive responsibility for developing the written contract, the venture will tend to be characterized by: (i) subjectivity of contract content in favor of the drafting party; (ii) power disparity in favor of the drafting party; (iii) interpretation of ambiguities in favor of the drafting party; (iv) limited quality of managerial decision-making based on relative scarcity of input; (v) cohesiveness of contractual language and concepts; (vi) reduction of venture effectiveness and survival prognosis because of gaps between informal understandings and the formal contract; (vii) augmentation of venture effectiveness and survival prognosis because of relative cohesiveness of the formal contract; and (viii) alignment of parental approaches to strategy. When the parties collaborate in the drafting process, the venture will tend to be characterized by: (i) objectivity of content, such that the contractual language is more likely to represent a reasonable understanding of the agreement rather than one party's skewed interpretation of the agreement; (ii) parity of power between venture parents; (iii) relatively neutral interpretation of ambiguities; (iv) enhanced quality of managerial decision-making based on a variety of inputs representative of parental concerns; (v) non-cohesiveness of contractual language and concepts; (vi) augmentation of venture effectiveness and survival prognosis because of consonance between informal understandings and formal contract; (vii) reduction of venture effectiveness and survival prognosis.

\textsuperscript{136} Planning benefits a venture by: reducing uncertainty, setting direction, identifying critical issues and success factors, institutionalizing analysis and creativity, providing coordination, optimizing the allocation and utilization of resources, increasing responsiveness to change, creating performance measures, and controlling the destiny of the enterprise. Hall, supra note 58, at 10. Effective contracting shares many of the same goals and can serve as a significant planning tool if the parents engage in unified contract negotiations throughout a single drafting process.
because of relative incohesiveness of the formal contract; and (viii) misalignment of parental approaches to strategy.

As these lists of attributes illustrate, neither unilateral nor bilateral drafting is preferable *per se*, because neither is perfect and the options involve inevitable trade-offs. In choosing a method of contracting, parents of prospective international ventures must assess the importance of the factors listed above relative to the venture's goals and its strengths and weaknesses. Once a unilateral or bilateral mode is chosen, the parties should be vigilant to avoid the pitfalls which tend to be associated with the chosen course.

IV. CULTURAL CHALLENGES OF CONTRACTING: THE COMPLEXITIES OF DIVERSITY AND HETEROGENEITY

If we define international joint ventures in terms of diversity of predominant national affiliation, then virtually all such endeavors must address the concerns raised by cultural variation. Since the parent companies of international ventures are, by definition, foreign to one another, expectations of venture owners will always arise out of different cultural contexts. If both owners participate in control of the venture, cultural variability will extend as well to the level of management. Whether this inevitable disparity is confined to the parents' equity interests, or extends to operations and control, it is a crucial consideration in determining

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137. This assessment is best accomplished using a tool developed in strategic management theory called a "SWOT Analysis," in which strengths and weaknesses of the organization are viewed in light of environmental opportunities and threats in order to determine objectives and general direction. For a more detailed explanation of the use of SWOT Analysis, see Lloyd L. Byars, *Strategic Management: Formulation and Implementation* 36 (3d ed. 1991).

138. Cultural divergence between parents may in turn impair the development of a unified corporate culture in the venture. Corporate culture comprises the system of values and beliefs shared within the organization, and is an important component of its external adaptation and its ultimate survival. Edgar H. Schein, *Coming to a New Awareness of Organizational Culture*, Sloan Mgmt. Rev., Summer 1984, at 3, 9. Parental resolution of potential conflict and misunderstanding founded upon cultural differences is an important precursor to the building of a viable joint venture culture.


the best approach to venture contracting.\textsuperscript{141}

\section*{A. Cultural Challenges in Contract Negotiations}

At the contract negotiation stage, American parents should be sensitive to variations in negotiation patterns across cultures. One commentator has observed, for example, that Germanic cultures tend to approach negotiations in a thorough, systematic, but sometimes rigid manner.\textsuperscript{142} Negotiations in this context may require a high degree of preparation, as well as clarity and precision in communications.\textsuperscript{143} French and Belgian negotiators are observed to engage in "lateral" negotiations, preferring to discuss general philosophical issues prior to considering the particulars.\textsuperscript{144} The commentator notes that British negotiators are relatively informal and enter contract bargaining in an undogmatic but sometimes underprepared manner.\textsuperscript{145} British partners of joint ventures are, as a result, likely to be flexible and open to suggestions.\textsuperscript{146} Japanese negotiations may appear tediously slow to Americans, who may become impatient and press their co-venturers too aggressively towards resolution.\textsuperscript{147} Japanese negotiation depends upon the building of a close personal rapport.\textsuperscript{148} American partners often view the development of sympathy and affinity as superfluous and even harmful in light of the American contractual goal of depersonalizing relations.\textsuperscript{149} On entering negotiations, American parents must be aware of nuances in differing approaches to bargaining, and should try to understand the other party's expectations in regard to the process.

After terms and conditions for the venture have been negotiat-

\begin{footnotesize}
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\item See Steven R. Salbu & Richard A. Brahm, \textit{Strategic Considerations in Designing Joint Venture Contracts}, 1992 COLUM. BUS. L. REV. 253, 268-70 (examining a number of variables that affect the optimum joint venture contracting modes, including the variable of cultural disparity).
\item \textit{Id.}
\item \textit{Id.} at 66.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Richard W. Wright, \textit{Joint Venture Problems in Japan}, COLUM. J. WORLD BUS., Spring 1979, at 25, 27.
\item \textit{Id.}
\item The goal of the classical American contract is to standardize relations between the parties and fix all idiosyncracy within the parameters of common law doctrines. For a discussion of the nature and characteristics of classical contract doctrine, see Macneil, \textit{supra} note 135, at 856-65.
\end{enumerate}
\end{footnotesize}
ed, American companies typically turn the process over to attorneys, whose drafting of elaborate and detailed contracts is considered to be a matter of course.¹⁵⁰ Venture partners from other countries, however, may be uncomfortable with this progression. For example, Mexican business culture requires the erection of a preliminary foundation of personal relationships upon which co-venturers build.¹⁵¹ Personal trust and confidence are precursors to venture contracting in Mexico,¹⁵² where Americans who view contract as a legal guarantor of trustworthiness may be viewed with suspicion for wanting to expedite legal forms without sufficient personal interaction.

Likewise, Japanese business people often rely on mutual trust to the exclusion of formal contracting.¹⁵³ They have traditionally viewed the need to contract as a lack of good faith, potentially injuring future relations between venture parents.¹⁵⁴ Reliance on trust as a substitute for formal contracting requires either strong cultural norms, under which trust is so institutionalized in business as to be a viable proxy for contract,¹⁵⁵ or a history of ongoing relations between the particular parties considering the joint venture option, such that mutual parental confidence and faith compensates for a generic cultural environment of mistrust.¹⁵⁶ Therefore, where

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¹⁵⁰ For a discussion of the use of attorneys at this stage in American joint venture contracting, see Salbu, supra note 124, at 407-11.

¹⁵¹ “Virtually the entire context of the Mexican business culture is one based on relationships and, as a result, the preliminary foundation on which a relationship is built is often at the core of any successful business enterprise in Mexico.” Mears, supra note 12, at 625.

¹⁵² Id. at 625-26.

¹⁵³ “Japanese business people consider mutual trust between the trading partners, which can only be developed by a long-term relationship, most important. Legal contracts are usually considered as suppletory, and complicated, long contracts may even be considered harmful.” Shishido, supra note 7, at 88.

¹⁵⁴ Id. at 87.

¹⁵⁵ A cultural foundation of trust may exist when Japanese firms enter joint ventures with one another, but may be missing when they join in a venture with American parents who are part of a litigious society in which the contract is traditionally viewed as a device which acts as a proxy for trust.

¹⁵⁶ The establishment of a relationship sufficient to justify mutual parental trust is advisable whenever feasible because trust may be an effective proxy for contract in cultures where contract is viewed with suspicion, and because long courtships have been associated with chances for joint venture success. See David Lei & John W. Slocum, Global Strategic Alliances: Payoffs and Pitfalls, ORGANIZATIONAL DYNAMICS, Winter 1991, at 44, 55 (noting that because of their emphasis on harmony and trust, the Japanese dislike the inclusion of “divorce clauses,” clauses that deal with the termination of the venture, in contracts at the inception of the venture).
the partner's culture is resistant to formal contracting, it may be advisable to replace formal contracting processes with negotiation and planning processes.

B. Cultural Considerations in Choice of Joint Venture Management

Culturally heterogeneous management may benefit group decisionmaking processes. Culturally homogeneous top management teams tend to encourage group cohesiveness, potentially causing a team to value consensus over rational discussion, conflict, and ultimate quality of decision. Heterogeneity in the management team may decrease the likelihood that decisions are undermined by groupthink and therefore avert the tendency of homogeneous groups to equate consensus with correctness of judgment. Joint venture management teams representing the different cultures of parent firms can increase the pool of perspectives from which group decisions are made, while discouraging the excessive cohesiveness which tends to subvert decision quality.

A diverse pool of perspectives, including representation from the cultures of countries in which business is to be transacted, is a compelling benefit to be derived from shared parental management. For example, global marketing techniques may be used to advertise products in several countries of divergent cultures. Global marketing techniques attempt to find common ground among the distinctive populations of different nations, in order to achieve efficiencies and economies. International joint ventures may be formed in

157. See Charles A. O'Reilly III et al., Work Group Demography, Social Integration, and Turnover, 34 ADMIN. SCI. Q. 21, 33 (1989) (stating that homogeneity in groups will increase social integration while lowering turnover).
159. See IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972) (discussing the tendency of groups to value consensus and harmony over vigorous, divisive debate, and the harmful effects of this tendency on the quality of group decisions).
160. See Sitkin & Pablo, supra note 158.
161. Cultural heterogeneity of management teams may, for example, improve the venture's ability to create culturally and geographically differentiated marketing strategies for optimal effectiveness in divergent locations. See Frank, supra note 142, at 64 (observing, "[T]he company that attempts to jump into world markets indiscriminately — without tailoring its business, negotiating, and marketing approach to individual foreign markets — will suffer the same fate as other undifferentiated marketing efforts: a lot of time and money spent on mediocre results.").
162. For a discussion of global marketing in general, see John A. Quelch & Edward J. Hoff, Customizing Global Marketing, HARV. BUS. REV., May-June 1986, at 59.
order to facilitate global marketing efforts, or may be formed as part of another strategic agenda.\textsuperscript{163} While global marketing has provided advertising efficiencies for some companies,\textsuperscript{164} it has failed for companies that have misunderstood important cultural differences.\textsuperscript{165} Shared management of an international joint venture which includes representatives of both parents, and therefore both cultures, will have a wider base of information from which to recognize important differences in how assorted people transact business. This enriched information base provides a foundation for better decisionmaking in all areas which, like global marketing initiatives, rely on accurate and perceptive understanding of subtle cultural distinctions.

While cultural heterogeneity may improve the quality of decisions, it is the source of some costs and can create obstacles to venture effectiveness. For example, although the allocation of human resources to culturally unfamiliar venues provides opportunities for individual growth and breadth of perspective, adjustment and assimilation into novel environments can be challenging and even traumatic for workers.\textsuperscript{166} When employees and managers fail to make these difficult adjustments the venture incurs expense in the form of the ineffectiveness of poorly assimilated workers\textsuperscript{167} or in

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\item[164] See Ken Wells, \textit{Selling to the World: Global Ad Campaigns, After Many Missteps, Finally Pay Dividends}, \textit{WALL ST. J.}, Aug. 27, 1992, at A1, A8 (discussing the successful global marketing strategy of Levi-Strauss, which films all of its semi-annual global jeans commercials in Los Angeles over two weeks and stating that, compared to former marketing practices of filming different commercials separately and within local markets, centralization and globalization are extremely efficient).
\item[165] Id. at A8 (citing as an example, Proctor and Gamble's global advertisement featuring a man in a bathroom while his wife sat in the bathtub that was effective in Great Britain and France, but not in Japan, where the commercial was seen as distasteful. Proctor and Gamble admitted that the blunder might have been avoided "had a Japanese woman been running its campaign there.").
\item[166] Some transitions are more difficult than others, depending on the degree of disparity between the two cultures in question. \textit{See} Mark Mendenhall & Gary R. Oddou, \textit{The Dimensions of Expatriate Acculturation: A Review}, \textit{10 ACAD. MGMT. REV.} 39, 43 (1985) (suggesting that "cultural toughness," or idiosyncracies in various cultures' receptiveness to assimilation, may explain varying degrees of difficulty in adjusting to relocation). \textit{See also} Austin T. Church, \textit{Sojourner Adjustment}, \textit{91 PSYCHOL. BULL.} 540, 547 (1982) (positing a "cultural distance" theory, which states that difficulties in adjusting to a new culture are positively correlated with the degree of conceptual distance between the new culture and the home culture).
\item[167] For a detailed discussion of the dynamics related to ease or difficulty of interna-
\end{enumerate}
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the form of money spent to relocate and replace the worker.

When parents choose to support a diversity of perspectives by establishing a heterogeneous management team comprised of participants from both nations, each abdicates a degree of control. This relinquishment of complete control by each parent will make it relatively easy for the venture to become independent and autonomous. Since neither parent has total power over the venture, a field of discretion inevitably develops. This discretion tends to breed venture independence. Parents considering heterogeneous venture management must assess the desirability of an increased likelihood of venture autonomy.

Harrigan has observed that substantial venture autonomy may lead to termination of the venture, particularly through its reformulation into a stand-alone entity.\(^{168}\) While independence of ventures from parental ownership is not necessarily bad, it may undermine some important strategic goals typical of international co-venturers. Consider, for example, American companies that have sought entry into foreign markets, using the joint venture form either because of governmental restrictions or to exploit a partner’s established linkages and capabilities. Such companies may discover that a newly independent venture functions as an undesired competitor with early entry advantages. A parent in this position must also bear the expense of breaking into the market a second time.

Despite the risk that significant autonomy will lead to ultimate loss of ownership of the venture, many strategic consultants see autonomy as increasingly necessary for joint venture success. Peter Schavoir, Director of Strategy at IBM, states, “Autonomy is emerging as an important ingredient for success in alliances because it allows a new venture to adapt to its particular market instead of aping the practices of its parents.”\(^{169}\) In fact, one study reveals that successful ventures experience dramatic change in their first few years.\(^{170}\) Venture autonomy is a form of decentralization of decision-making which increases the entity’s responsiveness to change\(^ {171}\) and its overall effectiveness.

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168. Harrigan, supra note 57, at 334.
169. Sherman, supra note 2, at 78.
170. Id.
171. See Lawrence B. Mohr, Explaining Organizational Behavior 105 (1982) (observing that “[d]ecentralization of authority is accepted as the key structural result of...
The desirability of venture autonomy increases in industries characterized by volatile competition.\footnote{172} Volatility demands speedy reaction times and rapid decision-making, processes that are impeded by the necessity of coordinating with parents who intrude in venture management.\footnote{173} Transnational joint ventures confront several sources of competitive instability which will increase the desirability of venture autonomy. Changes in host-country foreign investment policies have occurred at alarming rates over the past five years, both because of geo-political instability\footnote{174} and as a result of a worldwide trend toward more open markets.\footnote{175} These unpredictable changes in public policy are a significant source of competitive volatility. Moreover, opportunities to enter new markets at the development stage of the product life cycle attract an increasing number of experienced competitors from highly developed economies who seek rejuvenation of products for which domestic markets have long been saturated. The growing number of businesses with the capability to enter newly developed international markets increases the uncertainty associated with global ventures. As a result, venture autonomy and concomitant responsiveness and flexibility are becoming more important to a greater number of international collaborators.

Ideally, the parents of an international venture may seek the benefits of autonomy while reducing the impact of its defects. Contractual or planning tools such as limited parental vetoes can be used to give operating control to an autonomous venture management team while retaining power over macro-level organizational decisions such as those regarding merger, sale, or acquisition of assets.\footnote{176} This kind of arrangement maximizes the venture’s au-

\footnote{172} Harrigan, supra note 48, at 156.
\footnote{173} Id.
\footnote{175} As an example, energy industry joint ventures in the Middle East became more common in the 1980s as some Arab nations passed laws enabling greater freedom for collaborative activity. See, e.g., Saudi Foreign Capital Investment Code, Royal Decree No. M.4, dated 2.2.1399 (Jan. 1, 1979) (creating incentives for foreign investment in Saudi Arabia), reprinted in ALLEN P.K. KINSEE, COMMERCIAL LAWS OF THE MIDDLE EAST: SAUDI ARABIA (1981).
\footnote{176} The veto might be limited, for example, to decisions made by venture management
tonomy and resulting ability to respond to shifting opportunities and threats, while maintaining parental supervision of ownership issues.

C. Cultural Variation and Expectations of Joint Venturers

While cultural variation is an obvious consideration in allocating management responsibilities and in negotiating contract terms, it is significant as well as a source of legal and contractual differences in the very conception of what a joint venture is and does. Before parent companies commit themselves to a venture and attempt to address cultural challenges, they should ask a crucial threshold question: what are our expectations of a joint venture, and what are the expectations of our prospective collaborator, given the differences in our countries' legal conceptions of the joint venture form. Under Chinese law, for example, international joint ventures are authorized for the express benefit of the People's Republic of China, and liability may attach to strategic decisions to utilize outdated equipment or technology to begin the process of opening a previously untapped market. Whereas an


178. Id. at 144, art. 1 ("With a view to expanding international economic cooperation and technological exchange, the People's Republic of China permits foreign companies, enterprises, other economic entities, or individuals . . . to incorporate themselves, within the territory of the People's Republic of China, into joint ventures with Chinese companies, enterprises, or other economic entities . . . on the principle of equality and mutual benefit and subject to authorization by the Chinese government."). See also Richard E. Pelosi, Jr., A Comparison of Joint Ventures in the People's Republic of China and Japan, 10 N.Y.L. SCH. J. INT'L & COMP. L. 95, 96-98 (1989) (discussing the Chinese government's expectations of joint ventures).

179. MATHER & JAI-SHENG, supra note 177, at 148, art. 5 ("The technology or equipment contributed by any foreign participant as investment shall be truly advanced and appropriate to China's needs. In cases of losses caused by deception through the intentional provision of outdated equipment or technology, compensation shall be paid for the losses.").

180. The use of outdated equipment in new overseas markets is a common practice of American businesses, which retool domestically and are able to salvage old production lines by using them in newly developing countries. From the perspective of the American company, this practice is both efficient and socially responsible, since the old technology is viewed as better than no technology at all. Developing countries may require the utilization of the latest production technologies and prohibit the adoption of outdated processes by joint ventures, in an attempt to expedite industrial development.
American company pursuing a joint venture in China may expect to allow the developing marketplace to assess the viability and profitability of the old technology, the Chinese co-venturer is more likely to develop expectations consistent with Chinese law, viewing the venture as an opportunity for the expedient transfer of the latest technology. For a growing number of American companies concerned with the protection of proprietary information and technologies, China’s insistence that ventures serve national retooling functions may be unduly burdensome. An American co-venturer that would restrict information transfer contractually in a domestic setting may find liability for importing old technologies into China prohibitive.

Chinese joint venture law encompasses cultural expectations that tend to be alien to American companies. The legal and cultural conceptions of the function of a joint venture will vary among other nations as well. If the venture is to be successful for American participants, they must understand such cultural differences among nations’ legal requirements and expectations of the joint venture form.

181. International joint ventures are often established with American partners to achieve the transfer of American technologies. Typically, the American parent finds the venture desirable for a reason unrelated to the technology transfer, such as an entree into foreign markets. In these kinds of ventures, issues of transfer pricing are common. See, e.g., MULTINATIONALS AND TRANSFER PRICING (Alan M. Rugman & Lorraine Eden eds., 1985) (collection of essays discussing transfer pricing in the international context); PENELope J. YUNKER, TRANSFER PRICING AND PERFORMANCE EVALUATION IN MULTINATIONAL CORPORATIONS: A SURVEY STUDY (1982) (studying transfer pricing in the context of multinational corporations).


183. Because China insists upon exclusively cutting edge technology transfer, the parties to a joint venture in China are limited in their ability to make contractual provisions for more flexible arrangement, or for the protection against undesired information disclosure.

184. The differences in national expectations of international joint ventures, whether they be the result of differences in culture, law, or both, are manifold. The example of Chinese expectations is only one of many. Other examples include variation in economic beliefs incorporated into regulatory requirements. For instance, joint venture partners from more protectionist economic cultures are more likely to adopt laws that require that manufacturing components meet “local content” requirements. Protectionist cultures will also tend to be restrictive of imports and protective of technology transfer. For a discussion of these considerations, see ENEN, supra note 93, at 55-59.
V. CONCLUSION

International joint ventures confront a unique array of legal, linguistic, and cultural challenges. While these considerations are compelling throughout the process of managing the venture, they are of special importance to the lawyers who are typically most closely involved at the contracting stage.

While the observations I have made are based on close examination of a literature on international joint ventures which is becoming more substantial each year, numerous theoretical propositions contained in these pages are meant to provide social scientists with the theoretical framework for empirical research. Meanwhile, my suggestions are also intended to help practitioners who are involved in the early stages of negotiation and contract drafting, as they face the difficult challenges that arise when companies contemplate the establishment of transnational collaborative arrangements. Careful consideration of the legal, linguistic, and cultural components of joint venturing should result in more effective endeavors which meet the needs of co-venturers as they evolve in our increasingly volatile global business environments.