

KEY POINTS

- The model JVA sets forth fairly typical provisions governing the JVCo's board of directors, but these provisions are not inherently appropriate or effective in a start-up project JV.
- The model JVA procedures for calling board meetings may prove too cumbersome and slow for a project JVCo during the start-up stage – particularly procedures requiring significant advance notice of board meetings.
- Lawyers for the JV parties should consider modifying art 9.16 to state expressly that failure to record an action approved by the board in minutes does not render it invalid.

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Joint venture agreements: part 10 – board of directors

Article 9.1 provides that the JVCo 'is managed by a Board of Directors'. The remainder of art 9 sets out the number of directors, how they are selected, their powers and duties, how they make decisions, and other relevant matters. A threshold issue, discussed in part 2 of this series, is whether the JV parties intend this primary decision-making body to act as a *bona fide* board of directors, with each director having attendant fiduciary duties to all shareholders, or simply as a shareholder representative governance body, where each member acts solely in the interest of the JV party that appointed him.

Another threshold issue, not addressed in the model JVA, is whether board members must be individuals or whether they can be juridical persons such as companies or corporations. Some jurisdictions require directors to be individuals, while others do not. The reason for requiring directors to be individuals is to ensure that each director is able to exercise independent and informed personal judgment in serving on the board and participating in its decisions. On the other hand, if the board is merely a representative body for shareholders, having entities fill board seats for each shareholder, which will cause the votes to be cast in accordance with its own interests, may be acceptable practice.

Articles 9.3 and 9.4 address the appointment, replacement and removal of directors. Like art 8, the procedure in art. 9 is somewhat cumbersome for a fast-moving, closely held JVCo. The lawyers for the JV parties may therefore want to simplify the process for appointing directors. Where all board members are to be appointed by JV parties in proportional representation, they may choose to dispense with the need for a formal shareholders meeting to elect

This article is tenth in a series examining project development and finance joint ventures ('JVs') based on the International Trade Centre incorporated joint venture model agreement ('JVA') among three or more parties.¹ This instalment discusses art 9 of the JVA, which addresses the role of the board of directors of the joint venture company ('JVCo').

Instead, each JV party may simply designate those persons to fill the board seats allocated to that JV party. Likewise, the appointing JV party may simply fill any vacancies in its allocated board seats and remove any directors it has appointed at any time without approval of the other shareholders. In particular, the JV parties may want to simplify the removal process if an appointee to the board leaves the relevant JV party's employ or that JV party otherwise has reason to remove him. Otherwise, it may be difficult to remove a director prior to the end of his term.

Article 9.6 endows the board with all powers not expressly reserved to the shareholders or another governance organ, and expressly enumerates certain of those powers. Though the enumerated powers are not meant to define the scope of the board's authority, it is good practice to expressly mention each significant power that the JV parties intend the board to have and exercise to avoid any doubt or disagreement.

The board also has authority under art 9.5 to designate certain persons to fill official roles in relation to the board, including the chair, vice-chair and secretary. Apart from the role of the chair or vice-chair in signing the minutes, art 9 does not define the roles of these officers, nor does it provide for any other types of officers such as chief executive officer, chief financial officer, and the like. Articles 9.7 and 9.8 contemplate that the board may delegate some or all of the management of the JVCo's daily

business to one or several board members or to executives employed by the JVCo. This effectively allows board committees, such as an executive committee, and officers. The lawyers for the JV parties should endeavour to list all board committees and officers contemplated, and define the initial roles and scope of authority for each, which can be made subject to modification by the board from time to time.

If the board is small, separate board committees may be unnecessary. However, if the board is relatively large, having a core executive committee or similar body empowered to make day-to-day decisions is good practice and can facilitate more efficient decision-making. As with the full board, an executive committee typically reflects proportional representation of the larger shareholders, but is likely to meet much more frequently, in person or by phone, perhaps as often as once a week.

Article 9.9 requires the board to keep the JV parties informed about the affairs of the JVCo, a requirement that is useful if the JVCo has shareholders who are not directly represented on the board, but may otherwise be superfluous.

Article 9.10 sets out the frequency of board meetings, 'as often as the [JVCo's] affairs require', and the procedure for calling meetings. As with the procedure for calling shareholder meetings discussed in part 9, the model JVA procedures for calling board meetings may also prove too cumbersome and slow for a project JVCo during the start-up

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stage – particularly procedures requiring significant advance notice of board meetings and limiting the matters to be decided to those contained in the notice of the meeting. The JV party representatives, who are likely also to be their initial board appointees, will typically be working collaboratively on multiple tasks toward tight deadlines, with daily communications and iterative approval processes. The sign-off procedures and protocols developed and employed by the JV parties for these tasks are effectively a substitute for ordinary board approval processes and should be officially recognised in the JVA. Lawyers for the JV parties should consider embedding these procedures in the JVA as acceptable in lieu of the normal board processes that might otherwise be set out in the JVCo's statutes or be common in the jurisdiction of the JVCo's incorporation.

Article 9.11 allows a meeting of the board at which all directors are present to dispense with the formalities in art 9.10. Option 1 allows this procedure to be relaxed so that only one director nominated by each JV party need be present. Again, these protocols alone may prove inadequate to accommodate the fast moving, iterative process for a start-up project JV. Option 2 also allows board meetings to be held by teleconference or video conference. This is not really an option for a project JV. It is a necessity. It is likely that most board meetings will be held with virtual participation by at least some directors, whether by video conference or teleconference. Moreover, many matters may not even be signed off in virtual meetings, but will be approved via email exchanges accompanied by electronic markups and comments on documents and spread sheets. The JVA should expressly recognise the validity of these actions.

Article 9.12 sets out the quorum requirements for board meetings, with one variation being participation by a director representative of each JV party and the other being participation by a majority of the board. While either option may be appropriate for post-start-up activities of the JVCo, these requirements should yield to the collaboration and sign-off protocols developed by the JV parties for making

decisions during start-up.

Article 9.13 sets out the principle of one vote per director in making board decisions. It also allows a director to nominate another director to act and vote in the first director's absence – and does not require any approval by the remaining directors. This concept, akin to an 'alternate director' under English company law, is certainly appropriate and convenient if the board serves as a representative body for the JV parties and the directors do not have full fiduciary duties. However, where the directors have full fiduciary duties (including a duty of loyalty/fidelity and a duty of care), it is not clear that a director can or should be permitted to designate an alternate or substitute consistently

with his own obligation to exercise these duties independently and in good faith. Whether this is the case will depend in part on the jurisdiction in which the JVCo is incorporated (and, if different, the governing law of the JVA), with English company law typically allowing such substitution but US corporate law typically not allowing it.

As with decisions requiring shareholder approval, matters requiring board approval may be divided into those requiring differing levels of approval. These might range from approval by a simple majority at a meeting at which a quorum is present (potentially representing less than a majority of all directors serving), to a simple majority of all directors serving, to a specified supermajority of all directors serving to complete unanimity. The lawyers for the JV parties should take care to avoid processes that allow a single JV party acting through its directors to block action by the JVCo except in the most extraordinary circumstances. They should also address issues arising from vacancies – such as whether a vacant board seat prevents the board from taking a particular action by

making it impossible to obtain a quorum or a specified supermajority vote – and rogue directors, those who are still serving after the JV party that appointed them wishes them to step down from the board but has not or cannot remove them.

Article 9.16 directs that all board decisions 'are to be recorded in the minutes of the meeting' and signed by the chair or vice-chair. The provision does not indicate the consequences of not recording actions in minutes, and the lawyers for the JV parties should consider modifying this provision to state expressly that failure to record an action approved by the board in minutes does not render it invalid. The minutes should simply serve as records and evidence but not be deemed to be a condition precedent to the

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validity of board action. One may also want to take an expansive view of what constitutes 'minutes' of the board.

Article 9.17 permits a written resolution signed by all members of the board to have the same effect as a decision taken by the board at a meeting. As with shareholder written consents, the lawyers drafting the JVA should consider, consistent with the laws governing the JVCo and JVA, recognising the legal validity of a written consent signed by the requisite number of directors to have carried the motion at a meeting. One reason not to do so is that the directors in the minority would thereby be deprived of an opportunity to be heard on the issue, and potentially to sway the votes of the directors who approved it, so that the motion would not have carried.

The model JVA sets forth fairly typical provisions governing the JVCo's board of directors, but these provisions are not inherently appropriate or effective in a start-up project JV, so the lawyers representing the JV parties should exercise great care in tailoring them to the unique requirements of the JVCo. ■