KEY POINTS

- Articles 26 and 28 address the issues of voluntary and involuntary amendments to the JVA, both very important matters – and both of which could be improved.
- It is foreseeable that one JV party may claim that a provision in the JVA has been "found" null and void due to the passage of a new law or the issuance of a judicial or administrative decision even if it is not specifically directed to the JVA, JV parties or JVCo.
- The potential nullification of further provisions of the JVA, or even the entire JVA, are increasingly drastic remedies that should only be relied upon if less drastic remedies fail.

Feature

Author Richard Keck

Joint Venture Agreements: part 17 – voluntary and involuntary JVA amendments and formal JVA notices

This article is 17th (and the penultimate) 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 focuses on JVA Arts 26 and 28, which address related issues – partial invalidation of the JVA and amendments to the JVA – and Art 27, which sets out the procedure for formal JVA notices.

Article 26 addresses the consequences of partial invalidation of the JVA. Article 26.1 deals with situations where "any of the provisions of this Agreement are found to be null and void". Although disputes under the JVA are to be resolved through arbitration (a topic discussed in the next instalment), Art 26.1 is not so limited. It would certainly be triggered by a ruling of a court of competent jurisdiction as well as an arbitral award. Moreover, it is not even clear that the ruling must be directed to the JV parties or the joint venture company (JVCo) or even involve the JVA. For example, a decision of a court in the relevant jurisdiction that sets precedent of general application may be sufficient to trigger application of Art 26.1. The JVA appears to leave this threshold issue deliberately ambiguous.

It is thus foreseeable that one JV party may claim that a provision in the JVA has been "found" null and void due to the passage of a new law or the issuance of a judicial or administrative decision even if it is not specifically directed to the JVA, JV parties or JVCo. Such a claim may itself become the subject of disagreement, with one or more JV parties claiming a provision is null and void and others disputing this claim. The dispute would then need to be resolved through the JVA's dispute resolution mechanism.

Once the JV parties accept that a provision of the JVA is null and void, Art 26.1 states next that the remaining JVA provisions will remain valid and binding "unless it is clear from the circumstances that, in the absence of the provision(s) found to be null and void, the parties would not have concluded the present Agreement". The impact of this exception is not stated. Perhaps it renders the entire JVA void and unenforceable, or perhaps it only requires the nullification or reform of the remaining provisions. The lawyers drafting the JVA should clarify these consequences.

Moreover, as drafted, the exception is potentially large enough to swallow the rule. If one assumes that a commercial agreement such as the JVA is a deliberate act of the JV parties and attempts to give every provision meaning, it is a difficult task to find any material provision whose exclusion would not have sufficiently altered the balance of rights and responsibilities effected by the remaining provisions such that those provisions would have differed in the absence of the null and void provision. Indeed, if the challenged provision were not material to the JV party seeking to enforce it, and its impact were not material to the JV party seeking to avoid it, then it likely would not have been challenged.

Of course, Art 26.1 requires the party challenging the validity of the remaining provisions (who might concurrently challenge the claim that the provision that started it all is null and void) to show that "it is clear from the circumstances". This establishes a contractual presumption of the validity of the remainder of the JVA. But it is a rebuttable presumption.

In addressing these issues arising under Art 26.1, the remedy in Art 26.2 may prove useful to the JV parties. Article 26.2 directs the JV parties, with the "assistance" of an arbitral tribunal under Art 31 "if necessary," to "replace all provisions found to be null and void by provisions that are valid under applicable law and come closest to their original intention". In its effort to honor the intention of the JV parties, this Art 26.2 remedy should presumably be attempted before resorting to the more drastic Art 26.1 remedy of striking out even further provisions of the JVA due to the lack of commercial reciprocity or failure of consideration.

The author recommends reorganising Art 26 of the model JVA to better reflect this process of escalation. It should also be made clear that the initial cure of a null and void provision is to attempt to repair or replace it, and the potential nullification of further provisions of the JVA, or even the entire JVA, are increasingly drastic remedies that should only be relied upon if less drastic remedies fail.

The triggering circumstances and remedies under Art 26 also lead into the more general, and shorter, dictate of Art 28. It commands that "[t]his Agreement may be varied or modified only by a written amendment signed by each of the Parties." Formal amendments to a JVA are not uncommon. Indeed, as Art 26.2 already suggests, a formal amendment may be necessary to replace a null and void provision with an alternative provision that achieves the intent of the original provision. Interestingly, the "assistance" of an arbitral tribunal referred to in Art 25.2 also reveals that the modification of the JVA may be directed by an arbitral award, even absent the express written agreement of the JV parties, and hence highlights one of many exceptions to the rule unequivocally set out in Art 28.

Feature

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Given that the JVA governs a long-term relationship rather than a one-off transaction, the JV parties are likely to encounter numerous instances when they realise and agree the JVA requires modification. This could be for any number of reasons – changes in the law that render some provisions of the JVA unenforceable (the circumstances addressed in Art 26), discovery of drafting mistakes or oversights, changes in circumstances faced by the JVCo, changes in circumstances of one or more JV parties, and so forth.

In the author's experience, the subject of formal amendments to the document that governs a JV relationship, as contemplated in Art 28 of the JVA, is typically reserved for matters in which the legal advisers of the JVCo and/or the JV parties become involved. More often than not, the JV parties modify and vary their relationship in small increments, sometimes seemingly indiscernible, over the passage of time. In the commercial context between buyers and sellers, such incremental changes are commonly referred to as "course of dealing" or some similar rubric. The JV parties will also have their own course of dealing.

For example, the JVCo's board of directors, as the representative body of the JV parties, may take decisions on any number of matters under the JVA, which effectively results in a modification of the JVA. The JV parties will typically follow and abide by these decisions, even though they are only taken by a simple majority (or such higher level of approval as may be required of the JVCo board), and even though they are not reflected in a formal written amendment to the JVA.

Likewise, because the JVA is a multi-party document, there may be circumstances in which one party can modify its rights or obligations under the JVA by giving a unilateral undertaking, release or waiver to one or more other JV parties. In addition, it is also possible for there to be bilateral or multilateral amendments to the JVA, approved and signed by the relevant parties, without having a formal amendment signed by all JV parties.

A JV party later raising Art 28 as a bar to enforcement of any such modification or arrangement may thus be seen as relying on a technical argument and sympathy may not be with that party. Article 28 thus becomes a tool for a JV party to try to wriggle out of its commitments rather than to protect the JV parties against unwittingly having their commitments enlarged or their rights curtailed. It is thus debatable whether Art 28 serves any useful purpose or should simply be omitted.

"Article 27 thus lumps all communications and notices together with a single standard applicable."

Article 27 sets out the formal procedure for notices under the JVA. A notice provision appears in virtually every agreement of any consequence, and this is so due to the importance of formal notices to crystallise rights and obligations. However, such notice provisions, notwithstanding their acknowledged importance, are often copied from some previous transaction or precedent, and rarely receive the comprehensive review and attention they deserve.

Article 27 of the model JVA is leaner than many notice provisions, but is not otherwise atypical. Article 27.1 begins with a template for specifying the addresses for "formal notices under this Agreement and service of process". As one commonly encounters in such provisions, Art 27.1 of the model JVA also states that communications to a JV party at its specified address are "validly made when sent to its address as specified" unless a new address is notified to the JVCo board and the other JV parties. Article 27.2, also in typical fashion, requires notices under the JVA to be sent by registered mail or by fax with confirmation by mail. Article 27.2 also adds that notices may be sent by email "provided that the sender takes precautions necessary to ensure that the notice has been received". There is no provision for giving notice by hand delivery or overnight courier other than by post. Both such means of delivery are, in some circumstances, better alternatives than those provided and should be allowed.

Article 27 thus lumps all communications and notices together with a single standard applicable regardless of the purpose or content of the communication or notice. Unfortunately, not all communications and notices carry the same significance or have the same time constraints. A one-size-fits-all approach, though typical, may not be optimal.

In some circumstances, a demand that a party take, or cease, certain actions that are claimed as defaults with serious legal consequences is a grave matter where certainty that the party has notice is an essential element of perfecting any later claim or remedy. Under such circumstances, notices should usually be given by multiple means or other steps should be taken to confirm receipt. While Art 27.2 requires confirmation of receipt for email, postal and fax methods require no such confirmation (and, indeed, requiring faxes to be mailed as well does not confirm receipt).

In others circumstances, time is of the essence, so notice by post is too slow. In these circumstances, notice by email or fax, or if the recipient has no email or fax addresses or the sender is uncertain that they are still valid, by hand or overnight delivery is a better alternative.

The drafters of the JVA may therefore wish to consider improving the flexibility and appropriateness of the alternative forms of notice and specifying that the proper means of notice should be designed to fit the circumstances under which it is given.

In conclusion, Arts 26 and 28 address the issues of voluntary and involuntary amendments to the JVA, both very important matters, but could be improved. As a notice provision, Art 27 could also stand for some modernisation and further thought on how best to effect notices for different purposes. ■

1 The model JVA discussed may be found at www.jurisint.org/doc/orig/con/en/2005/2005jiconen1/2005jiconen1.pdf.