"Joint Ventures: Practice Pointers (Part II)"

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Audio Archive

The art of working on joint ventures is just that - an art. Each joint venture has their own story to tell. Even though each JV tends to be unique, there are many "lessons learned" that can prepare you to master the art. Prepare to learn oodles of practical nuggets through the stories woven by our experienced masters. We held the first in this series of two webcasts on this topic on June 18th.

Join these experts:

- **Robert Friedman**, Partner, Troutman Sanders LLP
- **Ben Orlanski**, Partner, Proskauer LLP
- **Marya Postner**, Partner, Cooley LLP
- **Chuck Yen**, Partner, Aon North American Rewards Consulting

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John Jenkins, *Editor, DealLawyers.com:* This is John Jenkins, editor of DealLawyers.com and I'd like to welcome you to today's program, Joint Ventures Practice Pointers (Part II).

This is part two of our Joint Ventures webcast series, and I hope you tuned in to Part I of our Joint Ventures webcast. If you didn't you can check out the audio and transcript on our website. As with our first Joint Ventures webcast, we've assembled with a panel of very experienced practitioners to provide you with practical nuggets that you can use to help address the issues that arise in structuring, managing, and unwinding joint ventures.

Joining me today are Robert Friedman, a partner of Troutman Sanders, Ben Orlanski, a partner of Proskauer, Marya Postner, a partner at Cooley and Chuck Yen, a partner at Aon North American Rewards Consulting.

We've got a lot to cover today, and I will now turn the webcast over to Marya who will kick things off with a discussion about choosing between real and virtual joint ventures. Marya?

Real vs. Virtual Joint Ventures

Marya Postner, *Partner, Cooley*: Thanks very much. Hello everyone, this is Marya Postner from Cooley. When someone approaches me and said, "Hey, we're thinking about doing a joint venture." I always want to know what you mean when you say a "joint venture."

Are you talking about setting up a new entity that will basically be co-owned by two parents but have its own employees, management, stock and equity plans and things like that?

Or are you talking about a situation where there are two companies that want to work together to share the cost and the profits of a particular product or maybe a whole suite of products? That's more what I would call sort of a "virtual joint venture" in that there is no new entity formed, but you can accomplish many - but not all - of the same things via a contract or a series of contracts that would allow for that sort of joint decision making and joint sharing of costs and profits.

One of the exercises I frequently do with clients when they have these questions is to look at sort of what makes the two structures different and what direction they would tend to favor depending on what they're trying to accomplish.

One of the things in terms of a joint venture is that it's more work to set up and to maintain because you do have a separate entity and you need to manage all the corporate norms of having a separate entity. It's also - at the end of the day - more work to unwind if for some reason it's not going to happen whereas if it's all a virtual joint venture, everything can be done by a contract.

Although putting the contracts in place is time consuming, you don't have to have a separate entity that needs sustained level of care and feeding. And similarly, you can terminate just by letter or otherwise without having to undo entities.

But with that said, in terms of sort of pros and cons, one of the things that really drives people to do a real joint venture is that it does allow for a management team that will be focused on the new business enterprise and then can hire employees who're also focused on that and a board of directors who actually has fiduciary duties to that entity.

It allows the entity to bring in funding from third parties in the future and more easily to be spun off either by a merger or acquisition or by an initial public offering. Those things really don't work very well in the situation of a collaboration. That really is more a two-party type of relationship for the most part.

Some of the questions are is this kind of a business that you do want to have a life of its own potentially independent of the founding parties or is this a series of projects where the parties want to act together as sort of joint ventures as in collaborators. And that's sort of for me some of the pros and cons of that. Robert, I don't know if you want to mention some of the tax issues that come up in these.

Robert Friedman, *Partner, Troutman Sanders*: Thank you, Marya. This is Robert Friedman, a tax partner from Troutman Sanders. We ask those same questions when I get involved with a colleague like Marya in discussions with a client - whether you want to do real or virtual - and think about, well, what does the relationship establish from a tax perspective?

If you do real, then you have more decisions as to what kind of entity do you wish to be. Very commonly things are done through a limited liability company. And then you have a choice. Do you want to be a partnership or a corporation for tax purposes? You need to think about the various ramifications of that especially in light of recent tax law changes that have now made the corporate tax rate more favorable.

There are a myriad of decisions that get made along the way that would probably happen in the same conversation of whether you're doing a real or a virtual because, even though you might do a virtual JV from a corporate law or contract law perspective, depending on

the nature of those contracts, you have to be careful as to how that is viewed from a tax perspective because you could still be regarded as having formed a partnership.

And I think, Marya, you would agree one of the key elements in that would also be what the overall economics are. But I believe we're going to talk about economic arrangements a little bit later.

Postner: I do agree.

Friedman: Chuck, I think you are going to talk now as we move further about sort of purpose of the JV.

Clarifying JV's Purpose, Strategy & Owner Expectations

Chuck Yen, *Partner, Aon North American Rewards Consulting*: Right. Thanks, Bob and Marya. If you decided to pursue a joint venture, real or virtual, and if you enjoy conflict and having and unfocused employee population striving towards the wrong things, then by all means gloss over purpose and business strategy.

Doing so, business disruption in my experience is almost certain. Accountability really goes out the window. You're left with a CEO spending his or her days responding to shoulder needs and request for information versus really executing on the business plan, a JV tax if you will.

Having a business strategy aligns all your parties and something that everyone gets behind, on the surface seems very straightforward but very difficult to achieve in a JV. Why? After all, we have multiple shareholders with differing views and approaches to the market.

Each of them had different emphasis on what they want, role or cash flow, not to mention they have very different and contrasting cultures and operating styles. It's not surprising perhaps to you when I say two out of three joint venture CEOs believe their owners really have a lot of trouble agreeing on an annual budget and long-term strategy.

What can you do? You can improve your odds of success of a joint venture and a business purpose and strategy through a little bit of introspection. Start by asking some fundamental questions of yourself. One, what is important to you in organization? What do we hope to achieve? What is our end game?

You don't give your leaders an opportunity to say no to the new venture. Shift the burden. Why can't we buy our way into growth? Why can't we grow it ourselves organically? When do we call it quits? What would cause us to dissolve a joint venture?

And then turn around and ask your potential partners the same question to gauge their fit. You then want to be clear on the desired growth model. And what I mean by that is are we looking to create growth that's focused on maximizing profits? Or do we just expect the JV to deliver products and services to the parent companies for a little bit of profit? Or is it a shared service where they provide services roughly to the parent companies?

Simply put, does a JV function as a profit or a cost center? You want to kind of poke at that, make sure you have the other partner agreeing to different scenarios around where and how we compete. What does that say about our views on the market? What are the assumptions? And how long are they good for? In a tie between the partners, who wins, shareholders or customers? Above all, all parties should strive for a win-win situation.

Before I turn over to Ben, let me close at a few additional tips and learnings. I would say, in my experience, you need a clear purpose and strategy. Done right, it can act as a circuit breaker in disputes and lead to effective downstream decisions around the JV's operating model, investments and management incentives, which we'll talk a little bit later.

Another important aspect is - believe it or not- market conditions and how the situations do change over the course of 5 to 10 years of the life of a JV. Ultimately, a joint venture's ability to adapt would dictate its ability to survive and thrive. Establish regular reviews of short-term progress. Capture midterm milestones achieved and hold offsite board meetings to refresh your strategic goals and business plans.

My advice is whether you are in just the exploratory stages and you're coming to Marya for advice about what kind of joint venture you want to be or you're well into your tenure as a joint venture, it's never too late to strengthen alignment and add clarity. Next, I'll turn it over to Ben.

Piloting a JV Before Full Commitment

Ben Orlanski, *Partner, Proskauer*: Thanks, Chuck. This is Ben Orlanski from Proskauer. I'm going to stick with the theme of improving the odds of success of a joint venture that Chuck just discussed.

If you read some of the literature about structuring joint ventures, you'll immediately hear about how complex they are with cautions about considering whether a JV really is the right choice for a particular situation. In fact, I think we've already discussed that a little bit with Marya's discussion.

In a way though, this can be misleading because JVs tend to be so varied that it is not necessarily meaningful to simply say that they are highly complex. That is the real rub. Because JVs don't really follow a standard playbook like many M&A deals or capital raises tend to do, it's a lot harder to predict how well they will work out over time and importantly where is the so-called market outcome on a particular deal point.

But rather than despairing over a JV's complexity, perhaps a better approach is to recognize the relative lack of precedents - precedent for your JV by creating your own precedent with a pilot JV. Taking this baby steps approach can be illuminating, build confidence and ward off trouble for a larger JV down the road. The pilot JV approach might focus on an extremely narrow JV product or service or focus on a one-year or other very specific timeframe.

If successful, the pilot JV might ultimately get rolled into the larger JV. But in any event, the parties will likely learn critical information about their partner and a necessary business and legal terms to make a better decision about whether and how to proceed to a bigger commitment.

With that, I'm going to now turn it over to Marya. Thank you.

IP Issues for JVs Based on an Owner's Platform Technology

Postner: Thanks, Ben. And totally agree that doing a little trial run can be a really good way of "getting to know you" and make it a little easier to negotiate that at the more complicated points because you already have a basis for those.

And one of the complicated points that comes up in a lot of the JVs that I get involved in is that, the issue of platform technologies and having to deal with them if one or both of the founders of the JV are bringing those to the table. And that is something that I frequently

see. Because a lot of times some of the companies that we work with have these very broadly applicable technologies, they have limited funding.

Therefore, they are focusing on a particular application or a couple of particular applications of that technology. But they see that there are additional ways that their technology could be used that they just don't have either the money or the bandwidth to go ahead and work on. A JV can be a great way of doing that where they can partner with someone who can provide complementary expertise or payments, et cetera.

The questions that come up though are really about how to deal with that platform technology and the fact that it is so broadly applicable. That's because once you put that into the JV, even if you're putting it in for a particular application, the JV itself can make improvements to that, which would have applications that are not limited to the JV's field.

Similarly, as the parent continues to evolve its technology, those improvements could be applicable to the JV's field. The fundamental questions are always around to what extent is their ongoing transfer of improvements that are made by the JV back to the parent for the parent's use or made by the parent back to the JV for its use.

The thing is - there isn't that sort of a flow. Certainly, if patents are filed on those improvements, they can be blocking for each of the entities in their respective fields in terms of going into next generation areas. It's always tricky though because you don't know the outset the value of those improvements nor do you know how many are going to be made and whether one side is going to be more prolific than the other in terms of making the improvements.

Often the parent company - because it is their technology - already knows it really well and is probably in the business of improving it along the way. It may be that the parent will make more than the JV. But the questions are always do you want to set some rules of the road from the outset in terms of how that goes back and forth.

For the most part, what I do see is that there usually is an opportunity to get a license to the improvements for use in the JV's field or in the parent's respective fields. But the real question tends to be whether or not there is going to be a free license at least for some period of time for - or whether there is going to be compensation for that.

There is no right answer. I would say that being sort of reciprocal tends to be a good idea because it gives everyone sort of similar incentives. But you have to be careful there too because if the JV is not going to do very much work on making improvements and the parent is that reciprocity, that isn't really as even at the end of the day as one might think.

I would suggest considering having some sort of a compensation in terms of a royalty or something like that so that you can make that reciprocity real because the payments will reflect the amount and the actual utility of the particular improvements that are being made.

I think that does still take us onto Chuck, your point in terms of pay prinicples for benchmarking frameworks, et cetera.

Pay Principles: Benchmarking & Long-Term Incentives

Yen: Yes. Thank you, Marya. As Marya was talking about licensure technology, often it's the case where employees are (seconded) to the joint venture. And while seconded, their joint venture CEO, wants to be sure we're maximizing human capital. And one and sure way to do that is to structure the pay program, right, in accordance with a set of principles

that really try the right behaviors, right, for their joint venture, which may be different in terms of the justice from the parent companies.

Because joint ventures present a very unique and significant engagement challenge. We want to make sure we're identifying, retaining and motivating the right talent. There should be of utmost importance a top priority for the JV board as well as the JV CEO and the lead HR person.

What you want to do is you want to start by paying close attention to the specific skills, knowledge and behaviors that really can drive your business forward. And then it's incumbent upon the HR team working in collaboration with sometimes with the subject matter expert at each of the parent organizations to really identify and permeate a unique culture, communicate aggressively to employees and establish a comprehensive comp program with enough "glue in the seat."

Oftentimes, we're asked two questions - the first one is really how do we pay the CEO and lieutenants and, secondly, how do we drive the right launch from behaviors? On the question of how much, there are generally two archetypes for compensating joint venture executive officers. You can pay them like they are leading an independent company or like they are leading a division of a larger organization. Start by examining certain key business attributes of how the JV goes to market.

In other words, if the joint venture has full control over price and pricing, it is responsible for acquiring new customers without the parent company's help or aid. They face real external competition and competitors out there. Their growth lies in new markets. And quite frankly, their growth is then financed through their own earnings. Now, you have a very strong argument to say that you should - you ought to pay your CEO like a CEO running an independent company. What does that look like?

We did a little bit of research. While holding organization size constant - as many of you know, the size of an organization has a significant impact or is strongly correlated with base pay - we examined total compensation earned by a CEO running a $1 billion independent company versus a CEO running a $1billion division.

All else equal, the corporate CEO generally earns two to three times that of a top division CEO. And as you would expect, the disparity is much more pronounced as we move from base to total cash, which includes annual incentives, through total direct compensation, which includes long term incentives.

As you move from left to right and those elements, the proportion of at-risk pay really increases the level, the differences between the corporate CEO and the division CEO. Now, market analysis is only part of the equation here. Other influencing factors could include legacy pay mix from either of the parent organizations and the chosen growth model that we described earlier.

On the question of delivery - i.e., form - long term incentives are a fixture on the compensation corporate landscape irrespective of whether you're publicly traded or privately held. Now, of course, the quantum, the form and the number of vehicles certainly differ.

However, at a JV you have several options at your disposal. It can range from simple cash performance plans with perhaps a three-year performance period to phantom equity that tries to mirror the economics of a stock option or the use of parent company equity if available. There is no silver bullet. Each has its own pros and cons.

Now, I will say most joint ventures adopt a cash performance plan. Why? Due to its simplicity. But it's also perceived as having very limited upside potential when you compare that to a phantom equity or a stock option.

Now, phantom equity should be considered and is appropriate where there is a need that's agreed upon between a board and a JV CEO to drive and reward value creation. But that can be complex to administer and as oftentimes a valuation is maybe required.

Parent equity is another option. And it can be considered where the JV's earnings are material to the parent company and where cash conservation is a key decision criteria. However, one could argue that the line of sight to the JV result using parent equity is limited and less clear. Expect tradeoffs in each of these alternatives.

My other counsel is don't do too much with a single vehicle. Have one focused on retention, another one on performance. Oftentimes, they get mushed together into one vehicle which does neither effectively.

Couple of closing thoughts before I turn it over back to Ben. Here's what I say. It's you have to resist the temptation to pick the path of least resistance. It is very tempting to simply emulate or take the best of each current company's pay programs on day one. It may not be optimal for the joint venture. Ask yourself what do you want to be famous for when it comes to compensation and rewards and talent, why and how should it be different or similar to that provided by your shareholders and partners?

Start by taking a pulse of your employees. Let them tell you what matters most. And finally - and I can't emphasize this enough - focus on the main issues swiftly and deliberately. If we can't get the people issue and people have anxiety and are fraught with some uncertainty, we can't move the business forward. Address these issues first.

Friedman: Hey Chuck, this is Robert. Just to jump in for one second here on all those very important and valid points, and the tax structure of what the JV, it also comes into play with determining what your form of compensation structure is.

All the things you mentioned about whether it's equity or a phantom equity in the JV or using parent company stock or cash compensation, also the tax components that relate and tie to each of those and related complexities will play a key role as well.

Very often, when a JV is structured as an LLC, and taxed as a partnership, the key management members want real equity. And we come up - there's a term called "profit interest" that allows them to share after certain hurdles or event. They share just like the other equity partners in the JV.

Alternatively, some management team members or other employees are not used to getting K-1s or filing a partnership tax return, which is a complexity tied to having direct equity in a partnership JV. Some of those people might get parent equity.

And that's a tradeoff in the balance of some of the people issues that you talked about in terms of knowing both - being able to manage and expectations as to what's important to the called equity partners in the JV as well as the people issues along the way.

Yen: Yes. You're right, Robert, albeit I think those considerations have to be considered part of the process that would determine the alternatives.

Sometimes, the conversation can orbit out of that. The parent company can say, well, profit interest is good. You hold on to a certain period of time, you make an 83(b) election, you hold onto it, you get capital gains.

It's something that ought to be considered. Although rare, I have seen other organizations consider an S corp. And there, you have a limitation on number of shareholders. And these derivatives - and it's oftentimes a part of that, a counsel.

Friedman: That's all right. And as you said, the S corp. not only has a limitation on the number of shareholders. It has limitations on the kind of shareholders. You can have one class and you can't have foreigners.

If you have multinational employees, that could be a problem. The one class of stock is both for your employees and your partners, which many feel creates complications in terms of how you capitalize the company, which I know we're going to get to, well, we hope to get to a little bit later in terms of the key business decisions in economics.

But my own experience in many JVs is the LLC taxed as a partnership provides the greatest flexibility for the partners to drive the economic arrangements they desire.

Yen: Yes.

Friedman: And - but again, it depends on how large a JV are we talking about, what - going back to the first discussion of what's the real purpose here and including Ben's piece about whether this is in a call to baby step JV that will lead to a bigger plan.

It is helpful to try to think of - in broad strokes initially and then as Marya talked about real versus virtual JV. The compensation is a component of it as well.

Yen: Yes. Thank you, Robert. I think that was a good point. I think you and I can talk about it all day long.

Friedman: Yes. But we might bore some people. Sorry.

Yen: Let me turn it over to Ben then.

Majority/Minority Dynamics

Orlanski: Thanks, Chuck and Robert. We're going to now move to discuss some of the kind of the nuts and bolts issues that come up in a minority, majority JV. JVs with majority and minority partners can raise tricky issues around minority protection even though the underlying premise of a joint venture is of course a high degree of cooperation. That often is more of an aspirational concept rather than one that is easily or readily reflected in the legal language.

As a result, the majority/minority dynamic often gets resolved with a structure that says that the majority can do anything it wants except X, Y or Z. But what are X, Y and Z?

Nearly, every discussion of this question will start with something like the majority cannot self-deal. But parties tend to give less focus to some of the other innocuous sounding minority protections. I like to call out three of these protections that punch above their weight, protections I'd love to get as a minority and which as a majority I want to be very careful about.

These are, number one, approving the annual budget or materially deviating from the annual budget, number two, raising equity capital and, number three, amending the JV's key governing documents.

Having the right to approve the budget can be a powerful right at least if a JV is required to operate under that budget, which is not always clear by the way.

Approving deviations can be a powerful right too. And extra caution needs to be given to limitations on percentage limits on deviations from a budget. Which line items are those that are subject to that percentage limit? I recommend some real stress testing to make sure that this will work as intended.

Having the right to restrict raising equity capital can be like having the right to choke off oxygen to the JV. This is also a powerful right that needs to be carefully tailored if it is appropriate to the JV at all.

Finally, not being able to amend a JV agreement can be highly restrictive on the majority JV partner. But the remedy often proposed of allowing amendments as long as they don't have a disproportionate impact are not very comforting if you are the majority party trying to rely on that clause.

For most critical issues, specific amendment provisions might be called for on a clause-by-clause basis. With that kind of nuts and bolts discussion, I think Marya is now going to talk about what happens when things might go wrong in a JV.

Negotiating "Divorce" Up Front

Postner: Thanks, Ben. Yes, this is always the tough thing to talk about at the outset - what's going to happen if everyone's hopes and dreams are not realized and at the end of the day, the parties decide to wind down the JV.

I do want to sort of distinguish that from other exits for the JV. We're not talking here about selling off the JV via a sale or an IPO and not talking about one party buying the other out. Those are all important concepts but different.

This is really about the situation where it's really kind of not working out. The business itself has not turned out to be as valuable as one thought. Or maybe the technology didn't turn out as expected. And it doesn't make sense to keep that JV going.

Therefore, the question is how much at the outset should you plan for that possibility? Is there a benefit to going through that sort of painful exercise of figuring out how you essentially take your toys and go home at the point where you're trying to build something?

And although it is painful, my experience has been that it is - it is usually worthwhile to do that because the parties are first of all at a point where they're getting along well and able to think through those issues. And secondly, it really does allow - having a roadmap makes it much easier in the long run.

I had an interesting experience a few years back of unwinding two JVs at the same time. And what made it particularly interesting is both JVs actually had the same parent companies.

One JV was a JV that I'd worked on the outset for one of the two owners. The other JV was a JV that both owners inherited via M&A activity that happened over the years. Two parties, two JVs, same parents but needing to wind them up.

The one that I had worked on, which we had spent a lot of time in terms of figuring out how to do this, we were able to unwind that in basically less than a day's worth of legal time whereas the other one where - which didn't really have a roadmap for unwinding it, it was about six months' worth of negotiations, some which were fairly heated.

And a lot of it had to do with the one we do with the IP that's been created by this entity - that even though we don't have products, it sort of brings in pieces from both parents. And we in-license some technology as well that came in from a third party. And how did we divvy all of that up and still run our respective businesses?

And although we did eventually find the path forward, it was tricky. Thinking through that path at the outset - not that you'll have a crystal ball - but to the extent you can have some basic rules of the road that can be applied in a variety of circumstance, I do think it is generally worth the time and effort to do that.

Friedman: Marya, I will simply add that tax issues can create additional layers of complications here, which goes back to the choice of entity discussion at the beginning. And if something is a corporation for tax purposes, unwinding is a little more costly and less tax efficient whereas if it's a partnership for tax purposes, it is easier to unwind or distribute out asset in a more tax efficient manner.

Postner: Yes. Great point. OK. Chuck, should we pass it onto you for your next point?

How Key Pay Decisions are Made

Yen: Sure. I think what I hear you say, Marya, is that in smart JVs, people contemplate the exit up front. No one wants a divorce. But when it happens, we want to make sure that we have enough air cover.

Actually, oftentimes I hear the term - the phrase that JVs are like marriages. I would amend that by saying they're like marriages but with a rock solid prenup. Breaking up is very difficult and painful. But while their union is still active, I would say take time, set the proper rules of engagement and governance. Why? Because it matters.

There was a recent report by CalPERS that said some 50% of failed JVs attributive their demise to - in part to poor governance. However, the upshot and the silver lining here are that when you do get it right, it actually improves profitability by as much as 30% per year.

Why do JVs fall short in governance? It's not hard to see why. Oftentimes, these board members are executives who have been seconded by each of the peer organizations. And maybe this is the first time serving as a board member.

More often than not, they lack a shared view of how governance should work and can work. And then what happens is that you start seeing overreaching by the shareholder.

Now, with respect to pay and governance, there is some staple tools like a compensation committee charter, a role matrix, a calendar. All of these individually and collectively can minimize headaches and surprises. And that in turn can defuse some of conflict that will rise.

While these tools are not new, developing them is very tricky because of the sheer number of stakeholders here. Think about it - you may have two or more shareholder organizations and each with their respective managers and boards. You have the JV executive management team and the JV board members.

If that didn't make your head spin, now, consider this. The JV board tends to act and behave like a board of managers versus a fiduciary board. In a board of managers, these boards make decisions, and deliver them to the management to execute. On that front, it feels more like a board that's occupied by private equity investors for example.

To say the least, setting the right boundaries is critical - i.e., you need an effective charter. How do we go about that? Start by asking yourself what is the role and scope of the joint venture compensation committee? What's been delegated by the JV board? What's the role and scope of the parent organization including its executive managers who are maybe providing subject matter expertise and a board of directors in providing oversight and insurance?

I think when Marya talked about the parent equity, well, if that belongs - if that's a publicly traded company and as equity of the parent, we need the board of the parent company to approve the grants. So that it goes up the food chain.

Next, you'd ought to add in a calendar and a role matrix, which can really help you define who is doing what when. Work with the committee to establish desired review process and content to facilitate efficient decision-making. OK. Make sure you include a sufficient number of checking points and premeeting to socialize before any resolution.

My counsel to many of the JV managers who are responsible and accountable for this activity is that you ought to get yourself familiar with the shareholders' pay governance processes, including how they share information, when, how frequently, what's the content provided. In other words, make it easy for the committee to make decisions.

And then finally, remember these charters just like publicly traded organizations are not static. Regularly reviews to ensure in regulatory compliance and to reflect evolving decision-making and scope is normal and recommended. Ben, let me turn it back over to you.

Acting by Written Consent

Orlanski: Thanks, Chuck and Marya. You guys have touched very interestingly on some very big important issues. And I'd like to kind of maybe bring it down to what on the technical parlance is called a nugget.

You'll see sometimes a seemingly innocuous clause in JV documents that says something like that the board of directors - if the JV is governed by a board - can act by written consent if the same majority that could have approved the matter at a board meeting signs that written consent.

Although that is a perfectly logical position and consistent with Delaware's Limited Liability Company Act, a moment's reflection shows that it differs from the mandatory provision in corporate law namely that while the board - that board meetings can act by a majority rule, written consents must be unanimous. This I believe is based on the view of boards of directors as being deliberative bodies.

But when that deliberation is not in evidence such as with the written consent, the view I believe is that unanimity is required. Again, that is the corporate rule. But it is not the LLC rule, at least not in Delaware where you clearly can act by written consent on a non-unanimous basis.

I've heard passionate arguments for and against applying the corporate rule to the LLC context. The argument for applying it is that a majority is a majority. Why should the majority be forced to go through the motions, which may burn up time, to call and hold the board meeting when the outcome is foreordained? Good point.

But the other point is also good and may come in as a bit of moral high ground. And it goes like this: Who says the outcome is foreordained? If you agree I can be on the board, then

at least hear me out. Maybe, I'll make a good point. And maybe, you'll agree with me. You are open-minded too. Right. Or tell me to my face why you disagree.

You can always vote against me. But at least, I want to be heard.

Robert, I think you wanted to add something?

Friedman: Just while we have minute, and we talked again earlier about choice of entity, and we talked a little bit about economics making sure the party discuss what they want to accomplish. On the tax side, I'll just point out it - when the parties decide they want to actually run a business together - they need think about how they want to share the profits. Are they going to contribute sort of equal things and share equally?

And there's a myriad of complications that can stem from all that that's part of all of the discussions we've had so far. And just making sure that people stop and think about and recognize partnership accounting or partnership tax accounting might just be different than what they're expecting if it's a regular corporate entity.

While I'm a big fan of partnership accounting and the LLC as a partnership for tax purposes because it creates in my mind the most flexibility for the parties to create the deal they wish to create, the parties just need to bear in mind the complexity and with drafting that LLC agreement and sort of getting it, all the accounting, financial and tax accounting to mirror what they expect to happen.

Orlanski: Definitely a critical structuring point. I think we probably come to the end of this presentation. Thanks, everybody, for listening in. And we hope we found this useful.

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