PART ONE

Introductory Principles

CHAPTER 1

Introduction to Joint Ventures[1]

In the past three decades, the joint venture has emerged as one of the most talked about and intriguing forms of business strategy. Noted American joint venture scholar Kathryn Harrigan predicts that "[m]ore joint ventures will undoubtedly be launched in the wake of increasingly rapid rates of technological change, deregulation and globalization, especially where boundaries are blurring between industries due to the capabilities of information processing and data transmission technologies to link together formerly disparate products."[2] The increased use and importance of the joint venture form have been attributed to three broad factors: (1) shortened product lives, (2) more pronounced cost advantages, and (3) an expansion in the number of domestic firms expanding into global markets.[3] In Canada, joint venture activity has also been encouraged by developments such as the *North American Free Trade Agreement*.[4] Each of these factors has worked together to create what has been described as an "explosive growth" in joint venture activity in Canada and around the world.[5]

Globalization has changed the face of the traditional business world by creating a need for new types of business relationships. In practical terms, the new global economy means firms must compete in markets that know no borders. This translates into increased customer bases, the necessity for larger manufacturing capabilities, more expansive distribution networks, and other increased economies of scale. In addition to the demands of globalization, firms face increased competition from an active merger market that creates more formidable

1 Parts of this chapter appear in M.A. Shishler, "The *Graham* Decision Revisited: The Fading Promise of the Joint Venture as a Distinct Legal Concept" (1998) 31 Can. Bus. L.J. 118.
2 K.R. Harrigan, "Joint Ventures and Competitive Strategy" (1988) 9 Strategic Mgmt. J. 141.
3 K.R. Harrigan, "Strategic Alliances and Partner Asymmetries" (1988) 28 Mgmt. Int'l Rev. 53.
4 17 December 1992, Can. T.S. 1994 No. 2.
5 J.M. Geringer, *Formation and Operation of Joint Ventures in Canada* (Ottawa: Investment Canada, 1990) at 3.

competitors. Rapid rates of technology, costs associated with quickly diminishing profit returns, and the added losses attributable to competitors who free-ride by mimicking technology pose additional challenges.[6] The blurring of boundaries between industries also puts pressure on firms to learn additional skills to please a new set of customers. A frequent example of this phenomenon is the increasingly interconnected telecommunications, computer, and information services industries.[7] Traditional telephone companies must now offer a whole range of services including traditional local phone services, long-distance phone capabilities, Internet access, mobile communication services, and even video access. This translates into an expanding customer base and the need for more diverse skills and assets. The telecommunications industry is just one example of how the necessity of ever-increasing skill-sets places enormous demands on traditional companies. To meet these demands, firms often find it necessary to form strategic alliances with foreign and unknown parties.[8] It also means that parties will typically get involved in more than one alliance at a time, which can create a complex web of interrelated business relationships.

A. Joint Ventures Defined

Despite the increasing importance of joint venture activity and the corresponding increase in scholarship dedicated to the topic, clear and consistent terminology for discussing joint ventures remains elusive. Some literature confines the term "joint venture" to business ventures that are incorporated as separate legal entities.[9] Others, however, maintain there is nothing in the term that requires incorporation or shared equity. Indeed, this view holds that joint ventures are not required to

6 See generally D.L. Deeds & C.W.L. Hill, "Strategic Alliances and the Rate of New Product Development: An Empirical Study of Entrepreneurial Biotechnology Firms" (1996) 11:1 J. Bus. Venturing 41–55.

7 For a discussion of this point, see Geringer, above note 5 at 4.

8 See generally K.R. Harrigan, "Strategic Alliances: Their New Role in Global Competition" (1987) 22 Colum. J. World Bus. 67. Joint ventures with foreign partners are now being used for strategic purposes (i.e., to reach an expanded market) instead of for tactical purposes (i.e., to reduce trade tariffs): S. Magun, *The Development of Strategic Alliances in Canadian Industries: A Micro Analysis* (Ottawa: Industry Canada, 1996) at 3.

9 K.R. Harrigan in *Strategies for Joint Ventures* (Lexington, Mass.: Lexington Books, 1985) states that joint ventures create a jointly owned entity, while non-equity forms of cooperation do not; similarly in Harrigan, above note 2 at 142, joint ventures are defined as business agreements whereby two or more owners create a *separate entity*.

have an actual partnership or corporate designation.[10] Rather, a joint venture is defined along contractual lines as an agreement between the parties to cooperate. To some, these kinds of relationships, characterized by joint activities but which do not involve shared equity, would not be termed "joint ventures" but rather "cooperative agreements."[11] In contrast, others maintain that a joint venture arises whenever there is an agreement between business entities to cooperate.[12]

Finding a definition for the term "joint venture" is an easy task. Defining a joint venture with any amount of consistency is much more difficult. As we will see, the term "joint venture" captures a wide range of business relationships in an even more diverse range of industries. The fact that joint ventures operate in a number of industries and in many different forms contributes to the descriptive and definitional difficulties. The problem is compounded when one approaches joint ventures from an interdisciplinary perspective. What the management scholar or client refers to as a joint venture, for example, is often very different from what a lawyer considers a joint venture.[13] Similarly, what a lawyer treats as a joint venture often bears no resemblance to the enterprise to which a judge would assign the label.[14] Because corporate lawyers, corporate executives (and their advisers), and students of business law and strategy must move between the legal and business worlds, it is important to understand how the term "joint venture" is used in both contexts. This requires a more sophisticated understanding of what business people, on the one hand, and legal practitioners (including academics and judges), on the other, consider to be a joint venture.

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10 W.H.E. Jaeger, "Joint Ventures: Origin, Nature and Development" (1960) 9 Amer. Univ. L. Rev. 1 at 6.

11 Harrigan, above note 3.

12 See, for example, Jaeger, above note 10.

13 The management literature often restricts the term "joint venture" to the equity form of collaboration achieved by incorporation. Non-equity forms are sometimes referred to as strategic alliances. On the other hand, in the legal context the term will often be attributed to both equity and non-equity forms of joint undertaking: see, for example, Jaeger above note 10; and P. Moore, "Non-Corporate Forms of Joint Undertaking" (Tory Tory DesLauriers & Binnington, 1983) [unpublished].

14 Judges often attribute the status of joint venture to a much wider range of activities. See, for example, *Harper* v. *Harper* (1979), [1980] 1 S.C.R. 2 (treating a matrimonial home as a joint venture between husband and wife); *Mason* v. *Boughton Peterson Yang Anderson*, [1993] B.C.J. No. 2824 (B.C.S.C.) (finding that a joint and several guarantee is a joint venture); and even *Parent* v. *Lapointe*, [1952] 1 S.C.R. 376 (characterizing a shooting trip in which the driver and passengers agreed to share all expenses as a joint venture).

This definitional section provides the necessary background to the legal analysis that follows in Parts Two, Three, and Four of the book. In the interest of clarity our discussion is divided into two separate parts: (1) the business perspective, and (2) the legal perspective.

1) The Business Perspective: Defining Joint Ventures as a Strategy

The business world often provides the broadest definition of joint ventures. It is widely accepted that cooperation lies at the heart of every joint venture. An enterprise is likely to be called a joint venture whenever two or more organizations get together to pool complementary assets for mutual gain. In these situations, the participants in a joint venture are typically referred to as the parent corporations. Viewed in this way, the phrase "joint venture" simply captures the strategy of collaboration.[15]

However, not all collaborative relationships can properly be considered joint ventures. The business definition is more nuanced than that. For example, licensing, franchising, and spot-market transactions all involve elements of collaboration. A licensor provides the licensed product to the licensee who pays a fee to use its own expertise to exploit the product. A franchisor contributes the goodwill and name of its franchise to the day-to-day work and capital investment of the franchisee in return for a franchise fee. Even the exchange of assets in a discrete contract requires cooperation between the parties. Each of these relationships contemplates one party contributing something to the relationship and receiving something in return. The net effect of the collaboration is to make both parties better off as a result of the business interaction. Yet, these examples are clearly not joint ventures.

Joint ventures deviate from traditional relationships in a number of important respects. Joint ventures differ from merged entities because the parent firms remain intact as legally distinct organizations. Joint ventures are also distinct from discrete transactions because they contemplate the kind of ongoing business interaction that is missing from spot-market transactions. Assets are not exchanged in joint venture relationships; they are pooled. Joint ventures require both parties' continued participation in the decision-making and long-range management of their project. In addition, joint ventures are typically used to access "synergies" or increased gains that result from collaboration and that cannot

15 The term "strategic alliance" is generally used interchangeably in this context.

be accessed individually or through a mere exchange of assets. Because the assets of each parent are combined (rather than exchanged), complementarity of the assets becomes another important feature.

Uniform definition has proved difficult because joint ventures take on many shapes and sizes in a variety of contexts. While joint ventures continue to defy precise definition, the common attributes and features identified and delineated above aid in distinguishing joint ventures from other business forms. Using these features, we can state the definition of joint ventures in the business world as follows: a joint venture encompasses any business venture where there is an agreement between two or more parent firms (who remain separate entities) to engage in ongoing collaboration to pool complementary assets and/or skills for a common goal. This suggests that the five critical features that work together to create a joint venture are as follows:

1. ongoing collaboration;
2. shared participation in decision making;
3. parent firms who remain separate entities;
4. a combination as opposed to an exchange of assets; and
5. complementary assets.

Where these five criteria are met, the business strategy can properly be considered a joint venture.

2) The Legal Perspective: Defining Joint Ventures as a Vehicle

The legal situation is more complex. Joint venturers can pursue their business goals using a corporate, partnership, or contractual vehicle. The fact that joint ventures as a business strategy can be pursued in a number of *legal* forms has contributed to some of the existing confusion. In business terms, the phrase "joint venture" is usually sufficiently descriptive. It refers to a collaborative project or strategic alliance in pursuit of certain synergies or shared goals. The details, structure, and technicalities of the joint venture are often left to legal counsel.

For lawyers and judges, using the term "joint venture" or "joint venturer" without any legal context is a very imprecise and dangerous exercise. The loose use of the term, and the assumption that it has some defined legal meaning, have caused many of the interpretive problems explored below in Part Two. For now it is sufficient to recognize that the term "joint venture" has no precise meaning in law. Where a collaborative business arrangement is housed in a corporation or a partnership, the

joint venture is more properly called a "joint venture corporation" or a "joint venture partnership." In these situations, it is the corporate or partnership designation that is the defining element of the legal relationship.

In the past, when joint venturers pursued their common goal through a contractual arrangement, the venturers were considered to be partners and the contract to be a partnership agreement. Even where the agreement specified a short-term or goal-specific venture, the parties were still considered to be partners. Contractual joint ventures were merely a subset of partnership law.[16] In Canada, the clarity in the contractual situation changed after the Nova Scotia Supreme Court (relying on an American authority) recognized contractual joint ventures as a new legal concept in *Central Mortgage & Housing Corp.* v. *Graham.*[17] Notwithstanding this recognition, however, the current status of contractual joint ventures is still unclear. Courts routinely accept joint ventures as a *new* legal concept, but their track record in interpreting joint ventures as a *distinct* legal concept has been disappointing. For now it is sufficient to recognize that parties are free to structure their business arrangement by contract, but it is unclear whether courts will consider and interpret a joint venture structured solely by contract as a legal concept distinct from a partnership.[18]

To avoid confusion, the more descriptive legal terms are used in this book: joint venture corporation (JVC), joint venture partnership (JVP), and contractual joint venture (CJV). The simple term "joint venture" will only be used in a broader sense to describe the relationship in which two or more legal entities cooperate (in any legal structure) to achieve mutually beneficial synergies. For the rest of this chapter all joint ventures, whatever their particular legal form, will be examined together as a strategy.[19]

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16 In Britain it is well settled that joint ventures are merely a subset of partnership law: a partnership limited in time and scope. This position was expressed succinctly by Viscount Cave, L.C. in *Ross* v. *Canadian Bank of Commerce*, [1923] 3 D.L.R. 339 at 342 (P.C.). "It appears to their Lordships to be immaterial whether the combination is called a partnership or a joint venture." In Canada, joint venture partnerships are contemplated in provincial partnership legislation. See, for example, *Partnerships Act* (Ontario), R.S.O. 1990, c. P.5., s. 32(b).

17 (1973), 43 D.L.R. (3d) 686 (N.S.T.D.).

18 This point is discussed in further detail in chapter 4 at note 63 and accompanying text.

19 This approach is taken by K.R. Harrigan, "Strategic Alliances and Partner Asymmetries" (1988) 28 Mgmt. Int'l Rev. at 53: "[A]ll business activities where partners may cooperate are referred to as "ventures" — regardless of their ownership form and status as a separate organizational entity."

B. Joint Venture Attributes

Drawing on available empirical evidence, we can conclude that joint venture projects are often conducted on a short-term or goal-specific basis at the end of which both parties return to their usual business. In many cases, the parent companies continue in their usual course of business throughout the life of the venture. The venture is often a mere addendum to the primary business of at least one venturer (usually the larger one). Overlap between the businesses of the parent firms and the venture is on the rise.[20] Sometimes the primary business competes indirectly or even directly with the joint venture. We will see later that this often creates a complex and interrelated web of duties and obligations for venture participants.

In terms of more particular joint venture attributes, American scholars have undertaken narrow studies of joint ventures from which we can draw some generalizations.[21] A recent study of 895 strategic alliances competing in twenty-three industries provides the following conclusions:[22] the average lifespan of a joint venture is 3.5 years (with a standard deviation of 5.8 years),[23] and the shortest-lived joint ventures were found in the technology industries (computer, software, electronic, and programming packaging industries);[24] 45.3 percent of the ventures were considered by both parties to be successful;[25] most joint ventures are undertaken as related diversifications to at least one of the sponsoring firms' business;[26] ventures that were unrelated diversifications for both parties comprised only 6.3 percent of the sample and were less likely to

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20 Geringer, above note 5, reports that by 1988, 98 percent of Canadian JVCs involved two or more parent firms from the same industry. Similarly, 85 percent of all JVCs operated in the same industry as one or more parent. Results in the United States are similar. Harrigan, above note 3, found that most joint ventures in the United States involve related diversifications to one parent firm's business.

21 See Harrigan, above note 3 (sample included 895 joint ventures). For a further discussion of these findings, see notes 22 to 28 below and accompanying text; L. Hatfield and J.A. Pearce II, "Goal Achievement and Satisfaction of Joint Venture Partners" (1994) 9:5 J. Bus. Venturing 423 (survey included fifty-four joint ventures); and M. Niederkofler, "The Evolution of Strategic Alliances: Opportunities for Managerial Influence" (1991) 6:4 J. Bus. Venturing 237 (case study of six joint ventures).

22 Harrigan, above note 3.

23 *Ibid.* at 55.

24 *Ibid.*

25 *Ibid.* at 54.

26 *Ibid.* at 63.

be successful;[27] and approximately one-third of all joint ventures were formed by joint venturers with similar levels of venturing experience.[28]

C. Incidence of Joint Venture Activity

Comprehensive empirical studies on joint ventures are lacking. In the United States, the *Yearbook on Corporate Mergers and Joint Ventures and Corporate Policy,* which lists all joint ventures reported in the business press, is the most comprehensive source of joint venture formation information. However, since reporting of joint venture activity is not required by law, there is no comprehensive list of all joint ventures. In Canada, the situation is more bleak. Not only is joint venture activity not regulated or subject to reporting requirements, there is also no compilation similar to the *Yearbook.* The most extensive study available in the Canadian context was commissioned by Investment Canada in the late 1980s.[29] Unfortunately, although a thorough and sophisticated treatment of joint venture activity, the Investment Canada report deals exclusively with JVCs,[30] and only covers the eight-year period from 1981 through 1988. Some reference is made to the study here, but its overall utility for our purposes is diminished by its limited scope. The support for the widespread extent of joint venture activity in Canada remains largely anecdotal.[31]

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27 *Ibid.* at 63–64.

28 *Ibid.* at 68.

29 The commission included two reports authored by Professor J.M. Geringer. The first, *Formation and Operation of Joint Ventures in Canada*, above note 5, provided Canadian firms with guidelines relating to practical aspects of forming and managing joint ventures. The second, *Trends and Traits of Canadian Joint Ventures* (Ottawa: Investment Canada, 1990) is a comprehensive and sophisticated statistical analysis of joint venture activity based on joint venture data provided to the author by Investment Canada. A more recent study investigated a much more broadly defined group of collaborations: Magun, above note 8.

30 Joint ventures are defined in each report in similar ways. *Formation and Operation*, above note 5 at 4, states: "The term joint venture refers to those ventures which involve two or more legally distinct organizations (the parents), each of which actively participates in the decision making activities of their *jointly owned entity.*" [Emphasis added.] Similarly, *Trends and Traits*, *ibid.* at 4, describes joint ventures in this way: "Joint ventures occur when two or more separate legal entities (the parents) share the ownership of a third entity (the joint venture)." Partnerships and contractual entities are clearly excluded from the study's scope at 27.

31 For example, a scan of the *Globe and Mail* CD-ROM revealed 291 articles reporting the formation of joint ventures during the one-year period running from July 1995 through June 1996. This number is not restricted to joint venture activity in Canada. In 1999, a 365-day archive search for the phrase "joint venture" on the *New York Times* website retrieved 622 articles.

A survey of news stories in both the Canadian and American press reveals that joint ventures are typically found in the following settings: technology joint ventures including computer, electronic, and software technologies; television and film production; manufacturing and distribution, including machinery, industrial products, and medical products; real estate development; research joint ventures; pharmaceutical joint ventures;[32] automobile joint ventures;[33] and mining and other natural resource exploration joint ventures. A more limited number of joint ventures have been established to provide financial services,[34] insurance,[35] and marketing services.[36] Joint ventures have been used to

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32 These include joint ventures to create and test pharmaceutical products: see "In Brief" *The [Toronto] Globe and Mail* (7 December 1995) B13 (announcing an agreement between a Californian and German pharmaceutical company to jointly develop, manufacture, and market oncology products). Joint ventures are also used solely as marketing devices: see "Health care firms create joint venture J&J, Merck to market over-counter drugs" *The [Toronto] Globe and Mail* (1 February 1996) B2 (reporting the marketing alliance of two of the largest providers of healthcare products in Canada, Johnson & Johnson and Merck Consumer Pharmaceuticals of Canada).

33 All of the major automobile companies have entered into various types of joint ventures. Some ventures centre around parts production: G. Keenan, "UAW, Magna discuss GM joint venture" *The [Toronto] Globe and Mail* (17 May 1996) B3 (announcing plans to build a plant to make plastic body parts). Others focus on creating new technologies: "In Asia" *The [Toronto] Globe and Mail* (21 May 1996) B8 (reporting an agreement between Toyota Motor Corp. and Matsushita Electrical Industrial Co. to make a nickel-metal hydride battery for new electric vehicles). Joint ventures have also been formed between automobile manufacturers and dealers for retail purposes: see, for example, G. Keenan, "Daimler Chrysler deal signal a new era for auto industry" *The Globe and Mail* website (2 January 1999).

34 See, for example, L. Buhasz, "Deutsche Bank grows as locals mark time" *The Globe and Mail* website (16 December 1998) (announcing the possibility of a joint venture between Deutsche Bank Canada and a Japanese bank); "CIBC strikes deal with Mellon: Bank lenders join forces in securities services" *The [Toronto] Globe and Mail* (13 February 1996) B6 (announcing the combination of the institutional trust and securities custody business of CIBC and Pittsburgh-based Mellon Bank Corp.); and "RBC in joint venture" *The [Toronto] Globe and Mail* (20 January 1996) B2 (reporting on a deal between RBC Dominion Securities and South African SMK Securities Ltd. to represent each other in their home markets).

35 See, for example, "Manulife in China" *The [Toronto] Globe and Mail* (4 May 1996) B2 (reporting the formation of the first joint venture life insurance company in China). In addition to facilitating penetration in foreign markets, joint ventures can also be used by smaller companies to increase coverage on themselves. See also D. Slocum, "Insurers link in 'shared risk' plan: Three firms seek to raise consumer confidence in their term life products" *The [Toronto] Globe and Mail* (18 October 1995).

36 See, for example, T. Appleby, "McBambi, fries and a shake to go, please: Disney-McDonald's marketing alliance has the makings of a cultural category killer" *The [Toronto] Globe and Mail* (24 May 1996) A1 (announcing a ten-year corporate cross-marketing plan for Disney and McDonald's).

collaborate on setting airline rates.[37] The form is also widely used for large building projects such as bridges,[38] rapid rail systems,[39] and luxury hotels.[40] Despite the varied business opportunities the joint venture form has accommodated, the highest incidence of joint venture activity occurs in industries where technology plays a key role and where that technology is rapidly changing. Computer, software, electronics, and telecommunications technology joint ventures are at the top of the list for incidence of joint venture formation.[41] Not far behind are the aerospace and automobile industries. Joint ventures are also commonly employed in mining and oil exploration projects along with various manufacturing projects.

D. Measuring Joint Venture Success

There is no dispute that a successful joint venture can lead to enormous gains and advantages for both venturers.[42] Making a joint venture work,

37 Numerous airlines have entered alliances in order to coordinate flights and rates. See also "United-Lufthansa link gets U.S. approval: Can set fares, schedules jointly" *The [Toronto] Globe and Mail* (22 May 1996) B9. A similar plan was entered into briefly by Canadian Airlines and Deutsche Lufthansa AG: "CAI/Lufthansa end pact" *The [Toronto] Globe and Mail* (5 December 1995) B2.

38 See, for example, "European group gets Swedish link job" *The [Toronto] Globe and Mail* (28 November 1995) B10 (reporting the formation of a joint venture between Swedish, German, and Danish construction companies to construct a U.S.$962.6 million bridge linking Sweden to continental Europe).

39 See, for example, A. Gibson, "Bombardier in rail mega-deal" *The [Toronto] Globe and Mail* (28 February 1996) B1 (reporting the formation of a joint venture to develop U.S.$4.8 billion high-speed rail technology in Florida). Interestingly, it was recently reported that the Florida government has cancelled the high-speed train project: M. Navarro, "Florida ends support for a high-speed train" *The New York Times* website (15 January 1999).

40 See, for example, M. Pacelle & T.R. King, "Loews Corp. joins MCA in Orlando hotel project: Deal steps up challenge for Florida tourism business" *The [Toronto] Globe and Mail* (3 May 1996) B6 (reporting on a U.S.$600 million development of two luxury hotels); and P. Kennedy, "Financier resorts to the spotlight" *The Globe and Mail* website (31 December 1998) (reporting plans for a $75 million Cuban resort project composed of eleven hotels, golf courses, and other entertainment facilities).

41 More than 29 percent of the newspaper articles in a sample of eighty-nine were reporting on the formation of a technology joint venture.

42 There are authors, however, who contend that the long-term effects of these joint ventures may not be beneficial. See, for example, Deeds & Hill, above note 6 (contending that in technology acquisition ventures, immediate benefits can be reaped from cooperative ventures; however, in the long run, venturers would be better off developing technology in-house). See also H.W. Chesbrough & D.J. Teece, "When is Virtual Virtuous? Organizing for Innovation" (1996) Harv. Bus. Rev. 65 (arguing that where the technology to be acquired is "systemic technology" that is dependent on its coordination with other technology, firms should develop the technology internally).

however, is not necessarily an easy task despite the seemingly large benefits a successful venture can bring to both sides. As early as 1973 it was said that "it is a popular business axiom that joint ventures don't work."[43] Studies show that the percentage of existing joint ventures that are considered successful by both venture participants is low.[44] This pessimism is due in large part to the disappointing returns that these potentially synergistic ventures actually achieve. Some authors report that after factoring in lost time, reputation, and litigation expenses, the returns on cooperative investment can even be negative.[45] Not surprisingly then, the dissolution and failure rates of American joint ventures are estimated to lie somewhere between the alarmingly high rates of 36 and 70 percent.[46] The Investment Canada report puts dissolution rates of Canadian joint ventures as high as 48 percent.[47]

The correlation between survival rates and success is an imperfect one. After all, it is quite possible that joint ventures are dissolved because they have fulfilled their strategic objectives. In fact, many joint ventures are created for a specified term. In these situations, ventures are dismantled precisely because they have been successful. Dissolution is no measure of failure. Nonetheless, survival rates have continued to be used as a proxy for joint venture success. In some cases this approach is

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43 G. Foster, "The Joint Venture Gambit" (1973) Mgmt. Today 75. More recently, the chronic failure of joint ventures has been noticed in various contexts. For, example, one writer noting that joint ventures, historically, have not worked well in the context of jet engine production stated that "[t]he jet engine joint venture between rivals General Electric Co. and United Technologies Corp's Pratt & Whitney unit promises big rewards. But if history is any guide it also risks becoming a tempestuous relationship": W.M. Carley, "GE and Pratt's 'marriage of convenience'" *The [Toronto] Globe and Mail* (10 May 1996) B6.

44 K.R. Harrigan, above note 3 at 53. [Citations omitted.]

45 Niederkofler, above note 21. For further treatment of low or negative returns on cooperative investments see, for example, Z. Block, "Can Corporate Venturing Succeed?" (1982) 3 J. Bus. Venturing 21–33; E.B. Roberts, "New Ventures for Corporate Growth" (1980) Harv. Bus. Rev. 134–43; and Y.L. Doz, "Technology Partnerships between Larger and Smaller Firms: Some Critical Issues" in F. Contractor & P. Lorange, eds., *Cooperative Strategies in International Business* (Lexington, MA: Lexington Books, 1988) 317–38 and 445–56.

46 Hatfield & Pearce II, above note 21. As an example, the recent dismantling of a software development joint venture between Apple Computer Inc. and International Business Machines Corp. was described as "the first formal recognition by the companies that at least part of the strategic alliance Apple and IBM entered into several years ago with hope of changing the balance of power in high technology is fizzling.": "What's News — United States" *The [Toronto] Globe and Mail* (20 November 1995) B4.

47 Geringer, above note 5 at 7, citing Geringer, above note 29.

followed because other measures of success, such as financially based measures, are simply unavailable.[48] Our point here is to caution readers that rates of dissolution are not necessarily a perfect indicator of joint venture success.

In fact, recently there have been some indications that longevity may not be an appropriate measure of joint venture success for a different reason. In some circumstances, joint ventures appear to be a necessary precondition for some other arrangement, usually a merger or a buyout of the joint venture by one of the venturers. If a merger is a true marriage, then one way to think of joint ventures is as a mode that allows the parties to "live together" before the wedding. Joint ventures provide an opportunity to assess the true strategic gains along with cultural and organizational issues before making an ultimate and irreversible commitment to a particular project. Although the joint venture itself may not survive this purpose, such an outcome should not necessarily be considered a failure.

There are a number of high profile instances of this phenomenon. The DuPont-Merck Pharmaceutical Company joint venture is one good example. In May of 1998, a press release announced that the DuPont-Merck joint venture, one of the most visible and durable joint venture relationships, was coming to an end.[49] The joint venture partnership had been formed in 1991 as a worldwide, research-based pharmaceutical company focused on developing and delivering new medications for heart disease, HIV, central nervous system disorders, and cancer. The two partners, DuPont Co. and Merck & Co., Inc., each held a 50 percent interest in the venture.

With revenues in 1997 of more than $45 billion, employees numbering 98,000, and operations in more than seventy countries, DuPont is one of the world's largest and most diverse businesses.[50] Press agents for the company describe it as a "global research and technology-based materials, life sciences and energy company" that "serves worldwide markets including food and nutrition; healthcare; agriculture; fashion and apparel; home and construction; electronics; transportation and energy." The pharmaceuticals operation conducted by the joint venture obviously represented a very small part of DuPont's overall business.

48 See, for example, Geringer, above note 29 at 38.

49 News Release, "DuPont to Buy Merck's Interest in Pharmaceutical Joint Venture" (19 May 1998) <www.dupont.com/corp/whats-new/releases/98/980519.html>.

50 *Ibid.* at 2.

The joint venture served as an efficient way to build DuPont's existing healthcare business.

The press release that announced DuPont's plan to acquire Merck's interest in the venture for $2.6 billion also revealed DuPont's intention to continue to operate the joint venture business alone as DuPont Pharmaceuticals. Interestingly enough, DuPont's motivation for buying out its joint venture partner parallels the reason it got into the joint venture in the first place: to pool complementary assets in order to access synergies. This time, however, DuPont is pooling complementary assets from its own separate divisions. Charles O. Holliday Jr., DuPont president and CEO, described the rationale in this way:

> This action will enable us to more fully integrate our materials and life sciences research platforms. By capitalizing on considerable synergies at the research level in genomics, biology, chemistry and biotechnology, we will be able to accelerate the discovery of new drugs, crop protection chemicals and enhanced grains. This reinforces our intent to offer the full range of life sciences products and technologies.

From DuPont's perspective the venture was certainly a success. Collaboration made it possible to quickly grow DuPont's pharmaceutical business. The resulting business was then profitably combined with complementary assets from other DuPont divisions.

Even though Merck initiated the demise of the joint venture by exercising its option to sell its 50 percent stake,[51] the venture should not necessarily be considered a failure from its perspective either. Merck benefited from the eight-year relationship in a number of ways. As part of the $2.6 billion deal, DuPont and Merck agreed to continue certain marketing partnerships and to share marketing rights for specific drugs developed by the joint venture. The former joint venture partners also agreed to continue other collaborative research efforts. This particular joint venture may have come to an end, but its synergies continue to survive. The move to sell its stake was prompted solely by Merck's realization that the venture did not contribute "significantly to Merck's overall growth."[52] There is no indication that Merck considers the joint venture a failure.

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51 Press Release, "DuPont buying Merck stake in venture for $2.6 billion" (19 May 1998) <www.pathfinder.com/money/latest/rbus/RB/1998May19/391.html>.

52 *Ibid.*

While dissolution and failure may not be as closely interrelated as some studies suggest, reports of joint venture failure still figure prominently in joint venture literature and in the news media. The disappointing performance of joint ventures has led to a flurry of articles that explore the various potential reasons for joint venture failure. Some authors contend that partner selection is the key to joint venture success.[53] Others maintain that managerial behaviour is at the root of joint venture failure.[54] An alternative theory posits that the probability of joint venture success depends on the particular industry context.[55]

This book examines the problems inherent in the joint venture form from a uniquely interdisciplinary — legal and business — perspective. Our approach is intended to enable readers to gain a better understanding of joint ventures as a strategy in order to consider more thoughtfully the myriad legal and business issues that arise when negotiating and implementing a joint venture. Our focus and approach here is not intended to discount other influences, or to suggest that the legal vehicle that structures the business relationship and other related implementation issues are the only factors at play in contributing to joint venture failure. Rather, we are filling a gap in the existing literature by exploring this as a possible influence on joint venture success. In some areas, the book will overlap with existing management theories. For example, the ideas in Mark Niederkofler's article[56] on managerial behaviour resonate in the discussion in chapter 11, "Governance Considerations: Decision Making, Dispute Resolution, Transfers, and Termination." Similarly, the concepts in the extensive management literature dealing with partner selection[57] are at the core of the discussion in chapter 10, "Relational Considerations: Partner Selection, Culture, Objectives, and Champions." This book, however, takes the analysis one step further by identifying these problems and suggesting ways to resolve these potential difficulties by carefully selecting a legal vehicle, drawing on the expertise of a wide range of professional advisers, and employing creative contracting techniques.

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53 See, for example, Harrigan, above note 3.
54 See, for example, Niederkofler, above note 21.
55 See, for example, Harrigan, above note 2.
56 Niederkofler, above note 21.
57 See, for example, Harrigan, above note 3.

E. Summary

In this chapter we focused on the definition of joint ventures. In particular, we highlighted the necessity to distinguish between business and legal definitions. Business people tend to define joint ventures in general terms as a strategy. In contrast, the legal definition needs to be crafted in a more precise fashion that includes identifying the particular legal vehicle housing the collaborative relationship. Anyone dealing with joint ventures needs to be aware of these intricacies.

We also looked generally at common attributes of joint ventures derived mostly from anecdotal evidence. The unavailability of comprehensive empirical studies leaves a substantial gap in our knowledge of specific joint venture attributes and the precise accounts of the incidence of joint ventures, but we do know that joint ventures are on the rise.

Finally, we took a preliminary look at the success rates of joint ventures. We can draw two principal conclusions from this initial assessment. First, according to published studies, many venture participants report that joint venture success has proven elusive. Throughout this book we will identify potential sources of failure and offer solutions by describing ways to structure the relationship to minimize those destructive effects. Second, we have suggested that longevity is not necessarily an appropriate indicator of joint venture success. It is becoming more evident over time that some joint ventures should be considered successful if they provide a transition vehicle for a more permanent collaborative relationship.

EXECUTIVE SUMMARY

BUSINESS DEFINITION

A joint venture encompasses any business venture where there is an agreement between two or more parent firms (who remain separate entities) to engage in ongoing collaboration to pool complementary assets and/or skills for a common goal.

LEGAL DEFINITION

A legal definition of joint ventures must distinguish between joint ventures carried out in corporate, partnership, or contractual form.

JVC

- joint venture corporation: a joint venture carried on in corporate form

JVP

- joint venture partnership: a joint venture carried on in partnership form

CJV

- contractual joint venture: a joint venture structured by contract that is not a partnership
- Canadian courts have recognized the CJV as a new legal concept but have not yet interpreted it in a distinct way.
- American CJVs seem to have fallen to a similar fate.
- Courts in the United Kingdom view the CJV as a subset of partnership law.

INCIDENCE AND SUCCESS

- Joint venture incidence is on the rise.
- Joint ventures are used most often in the following industries: technology, manufacturing, automobile, real estate, research, and mining.
- Joint venture success has been sporadic.
- Longevity is not necessarily an appropriate indicator of success.