

Joint ventures and foreign representation

Why venture out and what are your options? **Dr Wolf Vierich**, chairman of the Vitala Group, discusses the key considerations for businesses looking to form joint ventures or to expand into new international markets



ONCE an individual or a company reaches a certain level of success they will consider expanding their base of offering for sale and/or collaboration their products or services. However, there are a multitude of considerations to make, not only economic but also logistical and legal.

There are distinct options available for an individual or company to venture into foreign fields, namely to expand their sales or services. When expanding commercial enterprises in whatever shape or form, as many attempt a joint venture only, the legal and economic formats to be applied differ.

This process requires synergy – the ability of two or more units or companies to generate greater value working together than they could working apart.

THE TWO-WAY TEST

The things we think, say or do. Two main questions arise, firstly: are you prepared?

This means have you formed a strategy for how to proceed? Did you assess the time and costs involved in pursuing this strategy? Did you form or agree a mission statement? Did you form a committee or team to start the search to venture out?

The second part of the test is: is it fair to all concerned?

There is no point in attempting to venture out commercially unless you have made provision to have sufficient manpower available without affecting your existing business. You also will require an organisational backup, i.e. more capital has to be spent on resources to support your committee/team to move ahead.

A third potential question is how does all this fit into your future commercial plans?

The key steps towards creating a joint venture:

COMMUNICATION

Effective communication deals with:

Compatibility

This is a stage similar to a “courtship” in that it deals in its analysis with emotional issues rather than commercial ones. Why did you select a particular country/person/corporation to form a commercial relationship with? Was it love at first sight? Was it the company of your dreams?

Analyse the reality and compare that to the reputation. Create an analysis of your goals and aspirations and assess the level of risk you are about to enter into.

Most of us “believe what we see,” i.e. we like what we have learned about our future representative/partner.

Reasonability

This is the “engagement” period where you plan and close the deal. You need to ask yourself do both parties share the same goals? Are you aiming for the same targets? Are the efforts made by both of you in tandem or is one of you overloaded? Are the limits set out to share financial and economic risks equally shared?

Domination

Here is where you “meet the family” - you set up housekeeping and management operations. You need to investigate whether you need the approval of others, i.e. executives, stockholders or critical suppliers.

Avoid and control that not-too-great an influence is exercised by lawyers, accountants, lenders and/or investors. After all, your deal is to be controlled by two parties only.

You also need to allow for both parties to learn. It is quite normal and acceptable to explore and discover the other party’s viewpoints in order to avoid taking a dominant position.

Management

This deals with the “continuation of your goals.” It represents a check on the balance of both parties. Are you both sharing and managing the full extent of opportunities that you agreed to pursue? Do both parties contribute with an equal value to the future commercial relationship? Are both parties’ motives positive?

Remember that dreams - and not realities - interfere with set strategies. Both parties are to be strong and manage “together.”

Stability

You have now reached the stage of “maturing.” Check that the speed and time limitations you are progressing are reasonable and that the assumptions you have made are as close to the discovered realities as they can be. Re-check your goals set originally, as they often move in line with heated discussions.

SELECTING THE IDEAL REPRESENTATIVE

There are a number of categories that range in the positive, from maximising information research, to the negative of being aware of fraud and deception.

A number of questions need to be addressed to determine the scope and depth of your efforts to select suitable representatives.

Questions you should ask your future partner/ representative:

Do they hold any trademark or copyright, ensuring that they do not interfere with your products or services? What role do you wish them to play? Service agents, consultants, suppliers, contractors, producers or manufacturers?

Critical checklist

Your risk levels between high and low are determined by your detailed research on:

- How old is the party, partner or company?
- Are they registered as a sole-trader, limited



company, PLC or any other foreign legal format?

It is best to check the relevant Companies House/local court entries.

Who else do they represent?

A number of questions that are indicative of the level of risk you are involved in when dealing with a new untested party are:

- What is the length of time they are in business?
- Are their business activities similar to yours?
- Would they allow you to obtain references?
- Are there any product lines they are involved in that could constitute competition to yours?

Memorandum of association and article – legal documents

These are the legal terms of business as recorded at Companies House when a company has been incorporated.

It is worthwhile checking whether they are empowered to do all those things with you, such as a joint venture, borrowing, taking out loans, increasing share capital, etc.

Are their directors and officials listed or are they hidden by having used nominee parties to incorporate their company? This is common with offshore companies where attorneys or accountants register companies in order to hide the actual participants' names for tax avoidance reasons.

Who are the auditors/ lawyers? Are they well-known firms?

If they are not an offshore company, can you access their annual accounts filed?

If they are an offshore company then you will have to check with your lawyers as the business terms and liabilities differ substantially.

Litigation record

One of the strongest indicators of how your future partner is going to behave is to investigate their past and current litigation record with other parties.

The questions to ask include whether there is there any current litigation in progress? If so, what is it? Have they ever applied for bankruptcy proceedings or has another party attempted to

bankrupt your future partner? Do they have an unusually high insurance premium levy to pay? Did they ever have to settle any legal claims and/or have they ever been refused insurance for whatever reason?

Unionisation

Not all companies and partners are necessarily involved in being unionised, unless they operate in a country or domain where belonging to a union is a legal requirement.

You need to ascertain if there are there any labour/union agreements in existence, what their labour dispute record is and if they are in any way politically involved.

References

The issue of written references for individuals and/or corporations has become a sensitive matter globally. Banks and other financial institutions are not very keen on issuing references for the fear of being litigated later on.

What has slowly replaced this process are credit checks, however it may prove worthwhile to check some of their customer contacts and past and present suppliers.

Expectations

There are numerous expectations your future representative should be able to deal with on your behalf, as follows:

Legal registration compliance

They should be able to advise you on how to register your commercial business, what legal format it should have and, at the very least, be able to guide you to a qualified local solicitor.

Basic customs advice

This applies also to a knowledge of general customs regulations, particularly the documentation and bureaucracy to be complied with, which you will need to deal with when you bring in samples or specimens of your products or services.

Taxation advice

All the various different taxes applicable to your business venture should be advised by your local representative.

Cultural representation

There's little point in appointing an Ethiopian to represent you in Germany, it makes sense to appoint a German, since you need your representative to understand the cultural dos and don't's.

Presentation roles

Be clear in your mind about what you want this new representative to be - a partner, joint venture, shareholder, broker, general representative or something other.

The type of presentation role you wish to choose will determine the legal liability exposure you need to entertain.

In any event you should be able to issue your new representative with a confidentiality, non-disclosure, or non circumvention agreement, a commission letter, a power of attorney with precise limitations as to the degree they can act for you, and sufficient materials with which to explain your products or services.

Currency regulations

I would expect your new representative to be able to advise you on the local currency regulations mechanisms, such as where to obtain the best rates and how much to change at any one time.

Incentive and reward schemes

Usually a local representative receives a fixed commission based on success. However, it is wise to at least provide some type of incentive or reward scheme, probably based upon volume sales and/or where the representative could achieve substantial savings.

Insurance requirements

Always ensure that your chosen representative is fully covered for all commercial risks when they represent you in their country.

Work permits and residence permits

If your new representative is not a native of their country of residence, you need to view their current, valid work or residency permits. All need to be looked at in detail to turn "expectations into reality."

USING ALTERNATIVE SCENARIOS TO BE SUCCESSFUL

Expand into new business:

- Enter new geographical territories
- Widen existing markets
- Develop new markets
- Shape new product knowledge

Unlock assets

- Doubt about continued positive performance
- Unloading of investors' shares
- General staff despondency
- Plummeting performance
- Management exodus
- Company for sale = low sales price

Improve assets

- Seek a joint venture
- Maintain performance
- Management or personnel commitment and retention
- Maintain or increase share price
- Investment not departure = low risk participation

Restructuring

When assets are not essential in the company's future:

- Avoid huge capital injections (usually required)
- Redirect geographical market share
- Dispose of costly labour
- Continuous involvement in core (non-core) business
- Limited joint venture life-span options

PROTECTING YOUR PRODUCTS

Protect your intellectual samples and spare parts with:

- Security print
- Copyright
- Trademarks
- Specimen printing
- Voice recording
- Self-destruct mechanism

Protect your physical samples and spare parts with:

- Stamp imprints
- Sound interruptions
- Smoke devices
- Non-copy paper
- Watermark print
- Tagging

Your venture with your new representative is going to deal with:

- The use of logos
- Copyright and patent issues
- Trade marking

Use of logos

You obviously want to be certain that your company and product logos can be used by your representative, thus maximising your product sales penetration in the new country or geographical area. Some countries require a

separate registration for the continuous display and use of logos of whatever type. It is best for your representative to guide you to the correct intellectual rights attorneys.

Copyright and patent issues

There have been many discussions and misleading so-called "legal opinions" regarding the limitation, use of and infringement of copyright.

Most manufacturers, suppliers and contractors believe strongly (and often wrongly) that they possess "copyright" over their products or services.

Various countries apply specific administration and registrations rules, but the principle of copyright remains the same, namely: copyright is a property right giving the owner the exclusive right to make copies of and to control an original literary, musical or artistic work. Copyright arises automatically when the work is made; no registration is required.

Copyright exists in original "artistic works," including graphic and architectural works, or models for buildings.

Nearly the whole product of the design work carried out by the creator is protected by copyright. Therefore, the creator or anyone who acquires or owns the copyright in their designs has the exclusive right to make copies of them whether by making graphic copies or by constructing buildings from the designs.

One of the hardest concepts to grasp in copyright law is originality. It is important because only original works are protected by copyright. The term has a technical meaning and inventiveness is not required for a work to be original.

It does mean, however, that some independent effort must have gone into producing the work. A work may be similar to an existing design or incorporate well-known elements and still be protected by copyright.

The author, being the creator of the work, will normally be the "first owner" of any copyright in the work except, for example, where the work is made by an employee in the course of his employment. In that case, the employer will be the "first owner" of the copyright unless the employer and the employee have agreement to the contrary.

Although a joint owner may deal with his own interest in the work – for example by assigning it – he may not grant a licence without the consent of the other joint owners.

In the case of design works, the commissioning of an architect does not confer ownership of the design on the person who gives the commission unless so agreed with the architect.

The commissioner usually obtains a licence to use the plans that is provided they have paid the architect for the "use" of his design. It is often mistakenly thought that payments to an architect or designer provides the exclusive right to use or amend the design. This can only be done by obtaining their permission beforehand.

If plans or drawings of a building are reproduced in a magazine or if architectural drawings or a model of a building are exhibited the author should be identified.

The author of an artistic work also has a right to object if their work is publicly dealt with in a

derogatory way (right of integrity).

This right is limited in the case of a building so that an author has no right other than to require removal of their identification on the building.

Trademarks, service marks and patents

A client needs to acquire the necessary intellectual property rights/trademarks/service marks/patents, including:

- Project email addresses
- Project names
- Project descriptions
- Descriptions of services
- Potential inventions for patenting
- Images of any kind
- Architectural renderings
- All titles/working titles
- Theming or themes created

A full explanation of the availability and affordability of those rights will need to be undertaken by consulting a law firm specialising in intellectual rights. These lawyers will advise where and when the use of trademarks and/or service marks and/or patent registration details are appropriate, and are required to be shown on printed materials/ brochures/ products/ packaging/other.

GUIDELINES AND HINTS

Do:

- Check out prospective parties
- Mobilise the required registrations/documents
- Maintain tight budget control
- Ensure legal representation "from day one"
- Ensure adequate insurance cover for products and services
- Cover foreign exchange fluctuations/risks

Avoid:

- Substituting "personal contact" with IT
- Cultural ignorance
- Laying blame
- Relying upon outside parties (in the case of disputes)
- Losing personal contact with the decision makers

THE SIX NEGOTIATION STEPS

Prepare:

- The terms of reference
- The objectives
- The strategy

Hold discussions with:

- Management and key personnel
- Advisers
- Consultants

Positioning:

- Legal
- Financial
- Structural

Negotiate/bargain:

- Allow flexibility
- Allow for the “unknown”
- Prepare a counter solution

Agree/implement:

- Legalise the deal
- Put funding in place
- Appoint your team

Commit/manage:

- Establish communications and controls
- Nurse/assist/give it time
- Try to improve matters continuously

TERMS OF JOINT VENTURES

Some common joint venture misconceptions:

- Another subsidiary company
- Extension of employees
- Permanent associations
- Profitable in the short-term
- Risk free
- Working satisfactorily immediately
- It is about who leads
- It is a competition
- It is a race

Some common joint venture attitudes:

- Do unto others what you would like done to you
- Be fair to both parties
- Equal obligations and rewards
- Sensible reward sharing
- Long-term views
- Counteractive developments
- Happy relationships with individuals
- Teamwork in execution
- Joint venture critical factors that influence decision outcomes



There are a number of factors that influence decision outcomes between both parties and they can be summarised as follows:

Timing and delays

- Ensuring constant and easy access to “the real decision-makers”
- The importance of agreeing to share development costs right from the outset
- The joint decision to “create value”

Value creation

- Alliances involve collaboration → create new value rather than mere exchange
- Economic perspectives → tolerate alternatives versus a strict financial term
- Control aspects → rely on interpersonal connections rather than on formal control systems

WHAT ARE YOUR RIGHTS AND HOW CAN YOU PROTECT THEM?

Legal agreements - safeguards

There are a number of particular issues you may want to address within the framework of a legal agreement, appointment or joint venture, and they cover the following:

- Payment of commission
- Third-party insurance cover
- De-registration issues (if your future association fails)
- Return of samples/stock
- Discontinue the use of trade names
- Agree clear indemnities
- Exclusivity and limitations
- Arbitration clauses (if desired)
- Product registration in another country
- Copyright
- The use of registered and unregistered designs
- The holding of trade and/or service marks
- How to deal with existing patents

JOINT VENTURE IMPLEMENTATION

Construct your alliance

The target markets/customer bases of your two organisations are aligned or complementary
The imagery and associations of your two brands do not clash

Your existing market power/size gives you sufficient clout to negotiate on equal terms or you have assets (e.g. skills, brands, money, real estate, etc.) that the other side needs and cannot access without your help

You have reached mutually beneficial agreements on sharing risks, costs and rewards

Both sides are clear about the likely effect of this alliance on customers, suppliers and other trading/marketing partners

There is a “fit” in terms of corporate culture, attitudes and values

There is a “fit” in terms of personal chemistry with your counterparts

Have both sides’ key personnel involved in the alliance got the authority to get things done, or do they have to refer decisions elsewhere within their respective organisations?

Have both sides set aside enough managerial time to keep communications flowing between the two parties? (Allow for at least double the

time that would be set aside for a similar project that was being handled purely internally)

Are the expected benefits, in terms of brand awareness, reputation, sales, profits, etc., actually coming on stream within the timescales and budgets originally agreed?

Are there any signs that your partner is using the partnership in the wrong way?

Have you negotiated clear conflict resolution/exit procedures?

If you cannot answer “yes” to these questions you are in danger of being dragged into a strategic nightmare, not a strategic alliance.



COMMUNICATION AND MANAGEMENT AFTER THE CONTRACT OR DEAL IS SIGNED

Trust: At the beginning you will not know how much you can trust your partner.

Trust will be built over time.

Ignorance: You and your partner have differing concerns and objectives.

Your partner may care little about decisions that are of great importance to you.

Different objectives: your partner is working to enhance value to its shareholders, not yours.

Success may mean different things to them than to you.

“Good cop” and “bad cop”: Appoint a “good cop” and a “bad cop” to the board.

Allow to manage: Allow the venture’s general manager to manage the parents separately. Have your manager managing ONLY your side of the deal.

Use of majority equity position: If you have the majority equity position, do not use it.

TAKING YOUR BUSINESS OVERSEAS

Keep control of your brand image – it’s your most valuable asset. No-one will understand it like you or share your vision of it.

Think local – don’t presume all consumers are the same. You may need to tailor your approach to meet the demands of the local market.

Assess the competition first – find out who is doing what. Are they offering a similar product but at a cheaper rate? If so, find out how and look at ways of streamlining your costs.

Be prepared to adapt your business model – flexibility is vital when you are exploring new territory.

The Vitala Group is a leading international group of companies specialising in the leisure, tourism and themed entertainment industry.