WILMER, CUTLER & PICKERING

Corporate Law Developments NEWSLETTER

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STRATEGIC ALLIANCES AND JOINT VENTURES: *PEOPLE, PROPERTY AND PLATFORMS*

The real story behind IGEN's $505 million verdict against Roche Diagnostics is a cautionary tale about strategic alliances and joint ventures.[1]

In January, our litigation partners obtained for IGEN a jury award of $105 million in royalties and $400 million in punitive damages based upon a strategic alliance agreement with Roche, a division of F. Hoffman-LaRoche, based in Switzerland.[2] The IGEN-Roche deal had enormous potential to leverage one party's proprietary technology through another party's product development, manufacturing, and marketing expertise. IGEN had the *property* (best of breed technology), and Roche had the *people* (the sophisticated means to commercialize the biotechnology).

Risks and Rewards

Strategic alliances and joint ventures have a number of positive attributes including reduced transactional costs and the facility to seize strategic financing and operational opportunities. These advantages can provide access to new distribution or marketing channels, products, technology, markets and capital. Companies typically enter into strategic alliances[3] or joint ventures[4] as alternatives to entering into acquisitions or standard vendor-customer agreements. Strategic alliances and joint ventures do have certain disadvantages, including a higher risk of failure (due to many factors including different levels of commitments), substantial requirements of time and resources, and dependence on other parties.

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1 See *No Perfect Partnership*, The Washington Post, Monday, June 3, 2002, E1.

2 Wilmer, Cutler & Pickering did not represent IGEN in the contract negotiations with Roche.

3 A strategic alliance may be structured through contractual arrangements between parties (*i.e.*, and "entityless" strategic alliance) or an organized business entity with a simple structure (*e.g.* a limited liability company (LLC) with a simple operating agreement). The contractual arrangements range from modest to very complex agreements and can involve multiple agreements.

4 A joint venture implies a structure in which an entity (usually a LLC, partnership or corporation) is formed or invested in.

How To Structure A Successful Deal

To be successful, a strategic alliance or joint venture must be structured to address the following key issues:

- Who are the players?
- What are the business objectives?
- What assets are being brought to the table and by whom?
- What are the regulatory issues?
- What is the exit strategy?

A lawyer should use these key business issues to draft a blueprint to create an effective platform for the strategic alliance or joint venture. These business issues play different roles depending on a client's specific industry. For example, when structuring a venture in the biotechnology industry, it is important to craft a deal around the particular players at the table. In designing a negotiation strategy for our biotechnology clients, we initially focus on such issues as the relative size of the parties and their respective roles in the biotechnology market (*e.g.* pharmaceutical, biotechnology, academic). Strategic alliances or joint ventures between biotech-biotech, biotech-pharma, and biotech-academia require very different considerations about such things as operationalization, intellectual property ownership, and exit strategy.

> *You've got to be very careful if you don't know where you're going because you might not get there.*
>
> Yogi Berra

It may seem antithetical to think of the exit strategy when beginning a venture. However, a client's exit strategy is a significant factor in determining (i) the type of strategic alliance/joint venture platform to use, (ii) what milestones are appropriate, and (iii) when and how to terminate the relationship by cashing out or buying out the other party.

Additional business considerations such as the following will determine the details of the strategic alliance or joint venture:

- What are the exclusivity and non-competition issues for the client and the strategic alliance/joint venture?
- What are the client's management and operational control needs?
- What tax efficiencies can be achieved for the client?
- Are there international considerations (*e.g.*, trade restrictions, currency exchange rates, etc.)?
- Does the client face antitrust considerations?
- What are the product liability concerns (if any)?

Translating the business issues into productive deal terms requires careful coordination among the technical team, businessmen and lawyers. This coordination will produce specific provisions such as:

- Scope of licenses (if applicable)
- Level of control over intellectual property (e.g. brand, proprietary material)
- Termination rights and effect of termination
- Corporate change of control issues
- Financial terms (*e.g.* development costs, milestone payments, royalties, equity investments, alignment of incentives)
- Reporting and access provisions
- Dispute resolution (*e.g.* litigation forum and jury trial selection or waiver, arbitration, and operational and science issues)

The IGEN-Roche deal serves as a parable for both the potential benefits and pitfalls of strategic alliances and joint ventures. Strategic alliances and joint ventures can provide enormous value if structured effectively and managed well.

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Glynn Key is a partner with a broad corporate practice with extensive experience with strategic alliances and joint ventures. She represents established and emerging companies. From 1993-1996, she served as Special Assistant and Counselor to Secretary Bruce Babbitt and the Associate Solicitor of the U.S. Department of the Interior, where she was the lead negotiator of the historical $700 million Everglades environmental settlement among the agricultural industry, environmentalists, and the federal and state governments in South Florida. She is President of the Board of Managers of the University of Virginia Alumni Association. University of Virginia (B.A. 1986, J.D. 1989).

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