Books

Duncan W.D. (Prof.) and Clarke G. "Default, Deadlock and Resolution" in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney 1994, Chapter 9

Although terms of co-operation may be implied by a court in the case of an impasse, the authors emphasise that a failure to co-operate must amount to a breach of contract before the other party can take action, and to this extent, the construction of the terms in the joint venture agreement will be crucial to the effectiveness of implied terms. The authors discuss the problems associated with partition in the context of mining joint ventures, and the factors a court will consider in exercising its discretion to make such an order. They suggest that in the context of a resource joint venture, it may be more commercially viable to consider a buy-out. Provisions in the joint venture agreement should be carefully worded, so that sale or partition is deferred for sufficient time for a buy-out to occur (12 months) while not offending against the proprietary right of co-owners to seek sale or partition. They also warn, that if the joint venture is in truth a partnership, winding up will proceed according to the *Partnership Acts*.

Ahrens M.C. "Negotiating the Joint Venture" in Part 1 of *Joint Ventures*, Papers delivered at a workshop held April 1990, Business Law Education Centre, April 1990

In the second part of Ahrens' paper, a brief description for the different types of deadlock breaking mechanisms is given, followed by an overview (albeit a little dated) of the shareholder remedies available where a joint venture is incorporated.

4.3 Dispute Resolution

Articles

McCafferty B.P. "Some Practical Problems of Joint Venture Agreements: Decision-Making and Management" (1980) 3 *Australian Mining and Petroleum Law Journal* 25

McCafferty discusses circumstances in which decision-making processes of an exploration joint venture can be obstructed and the potential difficulties faced by a manager/operator. He points out that an operating committee is not analogous to a board of directors, with inherent duties and responsibilities. The only legal responsibility participants have towards each other is by way of fiduciary duties *inter se*. Beyond this there are not formal duties owed, and clauses setting out requirements to be "just and faithful" or to "act reasonably" are inadequate and may even promote hardship. Through a practical and detailed description of day-to-day committee problems, McCafferty demonstrates how, in the absence of specific and detailed procedural provisions, dissatisfaction and disagreements between joint venture parties may severely disrupt the joint venture. Issues raised include: appointment of representatives to operating committees; necessity for a quorum; adequacy of notice and supporting material; and appointment and powers of the chairman. McCafferty offers practical solutions which may be drafted in to the joint venture agreement to avoid disruption and stalemate due to such conflict.

Cash P. "Resolution of disputes and Winding Up of Joint Ventures" Paper presented at BLEC Seminar in May 1998, *Annual Joint Ventures Seminar*, Business Law Education Centre, Sydney, 2000

Cash sets out the alternatives to litigation to resolving joint venture disputes, and argues that parties should not rely on standard form clauses, but should consider their specific joint venture situation and design appropriate dispute resolution mechanisms for inclusion in the joint venture agreement. His discussion of negotiation procedures warns that despite earlier cases suggesting courts may be willing to enforce a contractual obligation to negotiate, contractual clauses such as "attempt in good faith to negotiate towards achieving a settlement of a dispute" are now less likely to be enforced by courts, as demonstrated in *Elizabeth Bay Developments v Boral Building Services.* However there is clear authority that courts will enforce agreements to mediate or conciliate providing the agreement is clear and the procedure is sufficiently certain.

Cases:
Elizabeth Bay Developments v Boral Building Services (1995) 30 NSWLR 709
Hooper Bailie Associated Limited v Natcon Group Pty Ltd (1992) 23 NSWLR 194

Books

Fazio W. "Joint Venture Disputes and How to Settle Them" in *The Rights and Duties of Joint Venturers in Tough Times*, Papers delivered at a 2-day Master Class, Business Law Education Centre, Melbourne, November 1990, Part 9

Fazio gives a general overview of the types of mechanisms used to settle disputes between joint venture participants, including voting provisions; expert opinions; time (cooling-off provisions); put and call options; pre-emptive rights; "shot gun" buy outs; auctions; winding up and partition. He offers practical advice on the advantages or disadvantages of these mechanisms and of the more standard resolution methods of arbitration and court litigation, and cites the work of Lawrence Perlman and Steven Nelson, as providing a convenient checklist when drafting dispute provisions.

Duncan W.D. (Prof.) & Clarke G. "Default, Deadlock and Resolution" in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney, 1994, Chapter 9

Clarke and Professor Duncan give an introduction to the types of resolution mechanisms, including negotiation, mediation, conciliation, mini-trials, and expert determination/appraisal, and point out that mediation and conciliation are the preferred mechanisms for dispute resolution in Asia and the Middle East. They offer practical advice for drafters of ADR clauses, and suggest the Queensland Law Society Model ADR Clause is to be preferred due to its wording being more certain as to the procedure to be followed. In contrast, some aspects of the New South Wales Law Society Model ADR Clause may be construed as merely "agreements to agree" and may be so uncertain as to be unenforceable.

Wei Y. "Dispute Resolution" in Wei Y. *Investing in China—The Law and Practice of Joint Ventures*, The Federation Press, Sydney, 2000

Wei discusses the Chinese legal framework of dispute settlement. In traditional China mediation was the primary mode of dispute settlement and this was the result of Confucian philosophy, which stressed the establishment of natural harmony in human relations. Litigation was viewed as an interruption of the social harmony. In Mao's China this tradition was preserved, partly because of traditional values held by the national leaders, and partly because of an overlap between Confucian philosophy and communist ideology towards law and social control. As a result, most civil disputes were settled outside courts. With the start of economic reforms and the promotion of the rule of law, the importance of the judiciary's role has increased. However, the tradition of mediation has not given way entirely to a judicial regime. The Chinese have continued to attach importance to the role of mediation. However, parallel with this there is an awareness of the importance of building up a respected legal structure and institutions for resolving disputes, especially for foreign-related disputes. Even though there is still a gap between the theory and practice of settling disputes, the legal system relating to dispute settlement has improved remarkably.

Govey I. "Dispute Resolution in the Context of Australia—China Trade", Paper presented at *The Australia—China Trade and Investment Law Conference*, Beijing and Shanghai, October 1985, contained in *Australia—China Trade and Investment Law Conference,* Vol. 1, Commonwealth Government Printer, Canberra, 1985

Govey discusses the essential features of different types of dispute resolution, and the use of these techniques in both Australia and China. He outlines the background to the implementation of a formal Statement of Principles on Dispute Resolution (Statement of Principles) that can be utilised by parties to China-Australia trading. The Statement of Principles resembles the corresponding provision in the US-China Trade Agreement, and includes express reference to arbitration being conducted in a third country, and of using the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Govey's paper examines the four essential elements of the dispute resolution procures, namely consultations; conciliation and mediation; arbitration; and location an arbitration institution. Attached is the text of the "*Statement of Principles for Settlement of Disputes in Australia/PRC Trade*."

4.4 Insolvency and Bankruptcy

Articles

Fox P. "Joint Ventures: Default/insolvency-enforcement: The bankers' position" [1991] *Australian Mining and Petroleum Law Association Yearbook* 85

This paper provides a careful legal analysis of the position of a lender in a hypothetical case in which a borrower (also the operator/participant in a joint venture) is in default. Issues considered in detail in establishing the security position of the lender, include: