Legal and Practical, a Contradiction?

Laying the Foundations for a Successful Alliance

A White Paper by

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Introduction

Mutual trust between alliance partners as well as experience and high quality of alliance management of both partners is essential for building an alliance. However, equally important for a fruitful cooperation is a solid legal structure. Whether alliance managers like it or not, in most cases lawyers need to be involved to ensure a correct legal underpinning of a collaborative agreement. From quite close, I have seen alliances fail due to a lack of legal structuring and balanced, responsible arrangements between the participating organisations. Many issues simply have to be addressed in agreements, as ignoring them increases the risk of failure of the alliance.

This paper aims at describing, as a 'best-practice' example, the steps one must take in order to, from a legal perspective, lay the foundations for a successful alliance. Firstly, the role of the legal expert in setting up alliances will be discussed, as well as when to involve him or her. Next, three contractual steps in getting to an alliance are defined. Finally, the larger part of this paper is devoted to a practical checklist of various elements that may need to be addressed in a definitive alliance agreement. It is not a comprehensive overview of all possible choices to be made in the various alliance forms available. It rather serves to create awareness of subjects to be addressed, accompanied with suggestions and specific examples.

Further, this article does not address the entire process of setting up alliances including all business and managerial aspects involved. Others are more experienced in this area and better equipped to do so.

My main focus lies on business alliances, with financial results as one of the primary objectives. Most of the content, however, also applies to alliances with a public interest, with their main objective typically assigned to public authorities or non-profit organisations.

The role of legal expertise and when to involve it?

When I attended the A.S.A.P. Europe conference in Brussels, October 2005, I asked business managers engaged with the alliances of their organisation as well as independent alliance professionals, when they tend to involve their in-house lawyers or external legal counsel in the process. The answer often was "once we have more or less reached agreement on the deal" or even "as late as possible". The explanation that followed conveys the impression that lawyers tend to stall or slow down the process with all kinds of 'what if …?' questions, bringing up topics that seem of little or no interest to the project involved or that may endanger the set-up of the deal as it was just reached between the partners after such delicate negotiations, which neither party wishes to reopen. In many cases it would not be in the interest of - at least one of – the parties to reopen discussions, and could cost additional value in return.

The responsibility for this attitude towards legal involvement lies with both the business manager and the legal expert involved. However, keeping the legal expert out of the process

until after some kind of agreement has been reached, is generally not the right approach. There are two important remarks to be made on the subject:

1) Lawyers involved should bring up only matters of actual importance and should know how to communicate such importance to both partners.
2) The attitude of managers as described above has a self-confirming element to it.

1) A key word in business is speed. It often means the difference between being the leader in a market or just a follower. The last thing a manager needs is a professional, hired to support a business process, slowing down such process with issues that do not really seem to matter. A lawyer involved in setting up new businesses should take the responsibility to both address all relevant legal subjects and at the same time be experienced and skilled enough to identify and filter out those issues that have only the smallest chance of being relevant in a particular project. Without this filtering activity, his work will harm the business and will cost more than it will add to it. However, once a subject is identified as clearly relevant, the lawyer should have the skills to communicate such relevance to all parties involved.
In short, the process requires a lawyer who understands the process and the business concept, has well-developed communication skills and the experience to be secure when making a choice between what really matters and what does not.

2) If the deal is already done when a lawyer is brought into the process 'in order to have him just put things into writing', any responsible lawyer will, and will have to, address all those relevant issues apparently not taken into account. If for instance, no balanced IPR arrangement is agreed upon in a technologybased cooperation, or regulatory approvals or anti-trust restrictions were not addressed, the lawyer can do nothing but bring up the subject, even at such a late stage. This is where the "what if …. questions" come in, which are regarded as hampering the process and reopening discussions that were so carefully closed. However, such situations could have easily been avoided.

This leads to the conclusion that, even at the dawn of ideas, it can be useful to have a legal expert review the general concept of an alliance in order to identify those matters that need attention from the very start or throughout the process. In this review the lawyer should indeed only address those aspects that are relevant and important. It does not mean that a lawyer needs to be present and involved at depth during each and every step in the process. However, an up-front legal check on the process, the structure of the alliance and the subjects to be taken into account could pay off very well in the end. Once that is done, legal expertise should be kept posted and only when contract negotiations start, should a lawyer take up his or her role in that process.

Figure 1 below shows the level of legal involvement throughout the process, as described above.

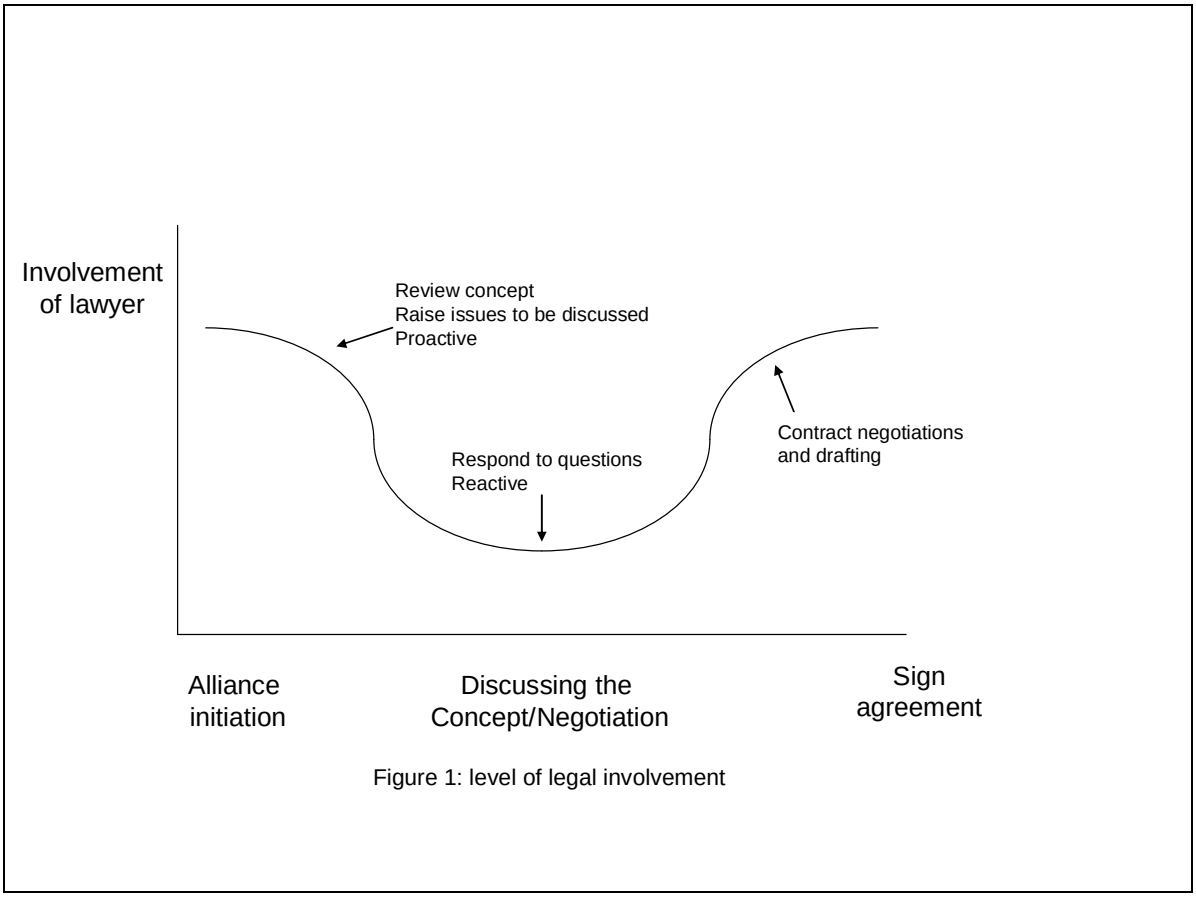

Figure 1: level of legal involvement

Three contractual steps:

In many alliance processes, like in M&A transactions, one can distinguish three contractual steps to take:
1) A Confidentiality Agreement, which at least makes all parties aware of the fact that they are receiving information only to be used for the purpose of discussing the alliance and that they might be disclosing confidential information of their own as well. It is important to be specific where possible. One can also openly indicate what a party will disclose and will not disclose, or not yet.

2) A Memorandum of Understanding (MoU), Letter of Intent (LoI) or Term Sheet, in which at least the initial scope of the alliance, each partner's financial and other contribution (e.g. IPR) and, where possible, the general business concept of the alliance is determined or at least described. Furthermore a description of the financial consequences of termination of the MoU/LoI should be addressed. An MoU and LoI may contain a description of the process to follow and, for example, the extent to which the document is binding.

3) A Definitive (or Alliance) Agreement. The major share of this article will address the subjects to be addressed in such document.

Figure 2 below shows a scheme of the order and size of the documents involved.

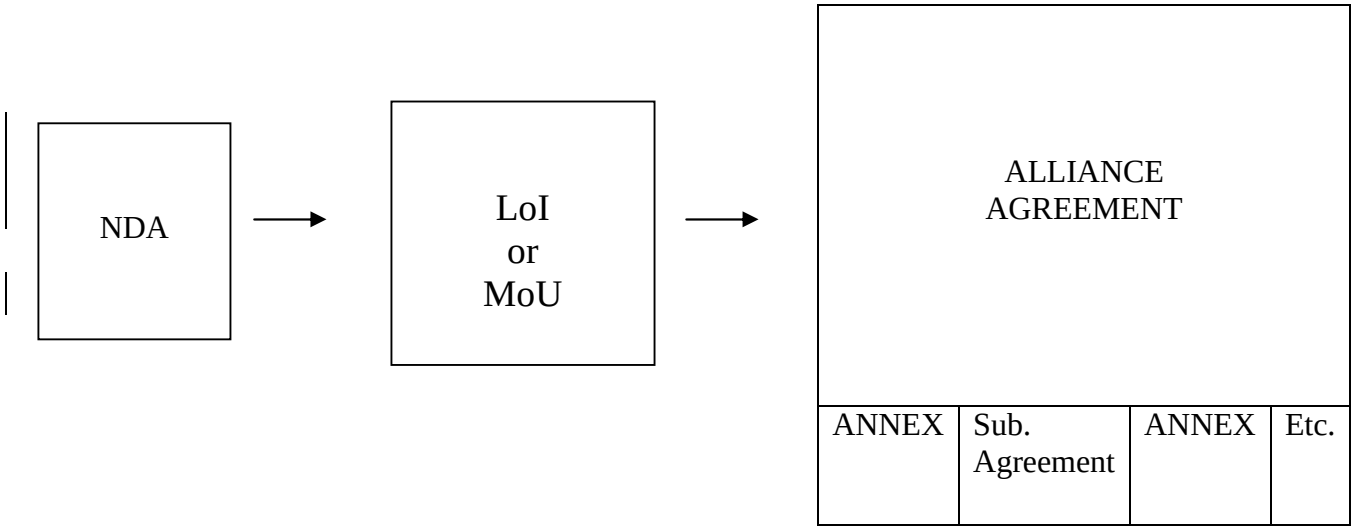

Figure 2: Three Contractual Documents Supporting the Process

The Alliance Agreement:

In my view, alliances have characteristics that are unique, or at least typical to this form of cooperation, that need special attention and a specific approach.
In drafting the Alliance Agreement the following elements usually play an important, if not crucial role, obviously depending on the nature of the alliance:

a) Legal structure of the alliance
b) Objectives and Scope
c) Exclusivity and non-compete
d) Business concept, cost/benefit sharing
e) IPR
f) Trademarks
g) Governance, management support
h) Representations and warranties
i) Liabilities
j) Opt-out
k) Antitrust
l) Duration
m) Termination and its consequences
n) Confidentiality
o) Dispute resolution

a) Legal structure: I distinguish here two principle structural forms of alliances: an equity joint venture, which is a separate legal entity often referred to as "incorporated" (), and a contractual alliance that is often referred to as "unincorporated." The latter may or may not be a "Partnership" in the formal sense of the applicable law, such as the Limited Liability Partnership under US law, or the LLP as allowed in the UK since 2001.

The choice for either an Equity JV or a Contractual Alliance is usually based on several factors. The main considerations include, but are not restricted to, the following:

- Preferred or required extent of managing influence by the partners
- Level of integration and commitment, as required by the business objectives
- Estimated timeframe of the cooperation
- Tax minimization
- Limiting potential liabilities
- Financing
- Regulatory filing, competition law approvals and licensing requirements
- Transfer or licensing of intellectual property rights (or other assets and liabilities)
- Accounting Principles (gain/loss recognition etc.)
- Termination of the JV or Alliance

One other consideration that should be highlighted here is the level of flexibility required to adapt to new situations in the environment of the alliance or to that of one or more of the partners. In general, a purely contractual alliance would be more flexible than a Joint Venture in many aspects, thus forming a precision instrument to serve exactly the needs of the alliance business at a particular moment. Specific clauses in the Alliance Agreement can address such flexibility.

The project team of a partner will need to weigh the relevant factors, sometimes requiring financial, fiscal or legal support in assessing what would be the most advantageous form of cooperation for their own organisation and in finding the right balance between their assessment and those of the other partners.

b) Objectives and Scope: Before initiating any alliance discussion with a potential alliance partner, it is of essential importance to clearly define the primary objectives of your own organisation. The first question you must ask yourself, of course, is whether entering into an alliance is indeed the best way to achieve your objectives.[1] Although your objectives may extend or evolve during discussions with your partner(s), you need to have the initial objectives well-defined as a starting point. While building an alliance, one should always keep in mind that, even during that process, the conclusion could be drawn that an alliance is not the best solution to the business objectives.
During the process of setting up an alliance with your partner(s), the objectives of each partner should be made clear to the other partner(s) in order to avoid future disappointment and/or hidden agendas which are likely not to be met due to their hidden character. For example, your company designs prefab building components and it is *one of* your objectives to acquire know-how on the process of the production of construction materials, as this would help you in your design activities. You do not inform you partner of this objective. The alliance objective you have set together with your partner, a manufacturer of construction materials, is to jointly approach the building industry with a totally new type of building components, made of very innovative materials. Your hidden or at least not communicated objective might not be achieved, simply because your partner will in general not share know-how on its production process with third parties when his role merely consists in manufacturing the materials you have designed. Production information will most likely not be shared with you if there is no need to do so. Defining and communicating your objective(s) is, therefore, highly important as a starting point.

[1] See "The Role of Alliances in Corporate Strategy", Kees Cools and Alexander Roos, BCG, Nov. 2005

As the next step in the process, the scope of the alliance should be determined. Is it limited to only one or two steps in the product/marketing cycle? Or is a much broader cooperation envisaged? When you define the scope, you must also determine the product or service type, as well as a territory within which the cooperation will take place between the partners. Finally, the Alliance Agreement should leave room to be flexible and adaptive to developments in the market in availability of technology. Without such flexibility in scope, small external factors might easily disrupt continuity of the alliance.

Defining the scope may be a confrontational exercise. It forces both partners to make clear to what extent each party wants to cooperate and where the cooperation stops. This also relates to the following point c):

c) Exclusivity and non-compete: Inside the scope the partners often grant each other mutual exclusivity. Both the exclusivity and the non-compete clause places limitations on the parties' liberty to enter into a similar co-operation with other parties, or to 'go it alone'. Defining these exclusivity and non-compete clauses naturally also defines the borders outside which each party is free to do as they wish. Sometimes the scope is defined in a few (nut)shells:

- 1st shell: the initial field of cooperation (for example the joint design of a robot arm to be applied in the pharmaceutical industry for the mass production of a medicine with a delicate production process, starting with Europe as the initial market) → exclusivity

- 2nd shell: a projected next field of cooperation (for instance, the rest of the world added to the territory)→ exclusivity

- 3rd shell: a potential (but already considered) extended field of cooperation (a new application of the robot arm in nuclear power stations)→ mutual first right of acceptance/refusal

- 4th shell: a new business, based on the same technology (extended use of the core technology in a more elaborate robotic application)→ parties can negotiate with others, but will at least also in good faith approach their partner(s)

- outside shell 4 (any other robotic application or in any other type of industry or household use), each party is totally free.

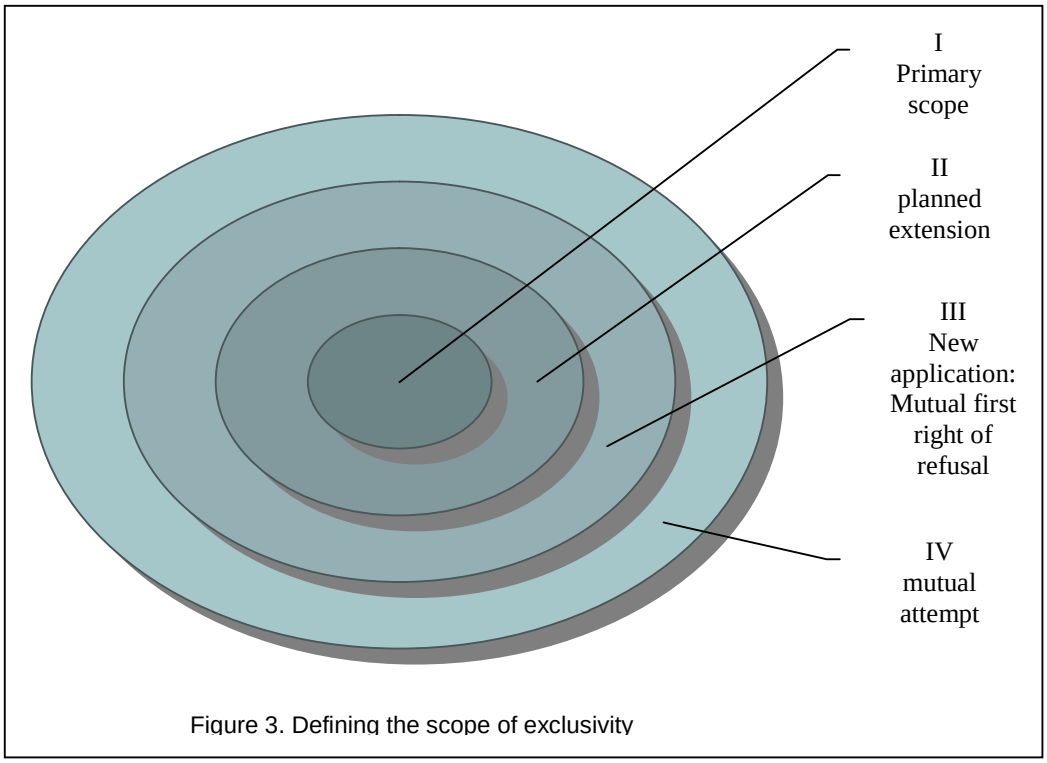

Figure 3. Defining the scope of exclusivity

Albeit confrontational, it is important to have a very precise definition of the non-compete provision. At least the relevant product/service, technology, territory and term need to be defined. Furthermore, one needs to be aware that an exclusive arrangement between one business activity of a company and that of a partner may also limit all other activities of that company in the same field. It is worthwhile to check on your company's other activities before entering into an exclusive arrangement.
As a starting point, the non-compete obligations should always be checked against the applicable merger control and anti-trust laws.

d) Business concept: The business concept should be clear, including the way in which results are shared:
In case of sharing financial results, a choice should be made between sharing either profit or turnover. Sharing profit has the advantage of gaining equal benefit from the alliance, but it involves lengthy discussions on which costs to count in and at a later stage during the alliance, what these cost were, sometimes involving detailed mutual audits.
Sharing turnover in not necessarily equal percentages does not guarantee equal benefits, but it involves only an audit on turnover or even 'the amount of products sold'. For instance, a choice can be made here on a percentage of turnover or an amount per product or service sold.
Another form of benefit sharing could be that one organisation has the benefit of a high quality service provided to its end-users on a cost-neutral basis, as was the objective, whereas the other organisation provides the service and makes profit on it. E.g. a catering service to hospital patients, personnel and visitors would reflect such concept.

e) Intellectual Property Rights ("IPR")/Licensing: Most technology-based alliances will require various IPR arrangements with respect to either patents, know-how, copyrights, trademarks, other IPR, or combinations thereof. A distinction needs to be made between Foreground IPR, which is here defined as IPR developed within the framework of the alliance and Background IPR, developed by one of the parties before or at least outside the framework of the alliance.

(1) If the Alliance requires the use of Background IPR of one of the partners, either a license under, or transfer of certain IPR to the alliance (if a JV) or in co-ownership to the other partner(s) needs to be considered.
(2) In case of Foreground IPR developed by one of the parties, it needs to be considered whether the other partner(s) receive(s) a royalty-free license for the use within the Scope as defined, and how to deal with such use outside the Scope.
(3) In case of jointly-developed Foreground IPR, which is often also jointly-owned, will each party be free to use such IPR also outside the scope? Can they freely grant licenses to third parties outside the scope?
(4) Consider how the product or technology resulting from the alliance will be protected against infringement by a third party (e.g. who files and maintains patents if any). In case of jointly-owned Foreground IPR or even Background IPR, it should be made clear who will enforce such IPR against third party infringement. Here distinction can be made between the type of infringement related to each party's contribution to an alliance product or service, even when the IPR infringed upon is jointly developed or owned, e.g. when, in my first example, a third party copies the design of pre-fab building components, it makes sense that the designer takes it upon him to claim infringement of copy or design rights, regardless of whether the design rights were shared. Still the cost of litigation can be shared.
(5) Further it is desirable to agree upfront who will defend against alleged infringement of third party IPR by an alliance product. If this is left untouched until the problem occurs, this will likely cause a discussion driven by short term interest, rather than by sensible ratio.

f) Trademarks, Brands, Company Name etc.: Where products or services arise from the alliance, involve marketing or sales, it should be clear whether these may be marketed under the trademarks of one or more of the partners. In certain cases, co-branding may be considered added value to the products or services, or even a condition of a party to participate in the alliance. See e.g. "for IKEA by Whirlpool". Further, detailed marketing and branding guidelines for the alliance will have to be in place. Make sure who takes action against third party infringement of a new trademark developed in the alliance.
A trademark developed within the alliance will gain value through the alliance (for instance "Senseo" or "Star Alliance"). It will be an asset to be valuated at the end of the alliance. Who will be allowed to continue the use of such trademark, when, as often is the case, it is jointly owned? What should that party pay? A valuation scheme or a bidding process should be considered before value in a trademark is created, i.e. at the beginning of the alliance. Furthermore, the partners should be aware that a domain name, which often contains a trade name or trademark, cannot be jointly owned, whereas such domain name can be of high value.

g) Governance, management support: Each alliance requires a dedicated organisation team, not only for initiating, but also for the day-to-day operations of the alliance. It is common practice that a Steering Committee (SC) and Alliance Management Team (AMT), or similar teams under a different name, are established. The teams keep track of progress in development of the alliance once started and decide on annual budget, budget overruns, project plans, etc. The SC usually decides on long-term matters and has a function in dispute escalation. The AMT decides on the more daily matters, monitors progress and is the driving force of the alliance. It should be made clear how each party and the CS or AMT decide on:
- major investments;
- entering new territories;
- operating standards;
- technology policies;

- marketing& branding policies and
- transfer pricing.

If this is discussed only at the stage when specific decisions need to be made, such discussions will likely be clouded by conflicting interests.

It should be verified that decisions taken by the SC or AMT can be deployed throughout the own and the other partners' organisations, enabling partners to live up to their commitments. The less centrally organised the organisation of a partner, the more this could become an issue, causing extreme stagnation of progress in the alliance.

Last but not least, an alliance should have the full support and dedication of at east one member of the management or board of the partnering organisations. An alliance quite often embodies activities that are outside the normal business of each joining partner. As an alliance always involves two or more parties, this also involves two or more "ways of working", which are hardly ever completely aligned. It is therefore almost inherent to alliances, that the alliance teams are required, to a certain extent, to work in a way different from their own organisation's internal policies. In such case the support of top-management can appear indispensable.

h) Representations and warranties: Representation and warranties largely relate to the in-kind contribution of each partner. Do the facilities used in the alliance comply with local legislation? Are the principles of sustainability complied with such as environmental, child labour etc.? Or, which is highly important: are the IPR contributions of the parties as valuable as they seem? When a certain technology (or, for example, a software application) contributed by one of the partners is essential to the success of the alliance, it is wise to ask a representation from that partner that a patent, if any, describing such technology, or copyright to relevant software, is valid and enforceable against infringers. This could, for example, be very important when the alliance aims at a 'closed system'. e.g. a closed system of a product combination occurs when such combination of products cannot be manufactured without access to certain IPR protected technology or software. When, for instance, parties A and B introduce a home beer tap system that works only with one specific type of drum, the technology of which is protected by certain patents, a closed system is created; no other party can produce these drums, and fill them with their own beer brand, without a license under such patent. The patent might describe the connecting interface between drum and beer tap system. If such a closed system is the backbone of the business concept, non-enforceability of the relevant patents can have catastrophic effects on the business plan carrying the alliance, as others may start selling drums with other beer brand creating competition for the brewer, but creating an additional benefit for the producer of the machines as the price of the beer might drop and thus the beer machine would become even more attractive. Defining the liabilities as a consequence of a breach under such representations or warranties should be considered carefully.

i) Liabilities: Obviously the contract needs to address the responsibilities of the alliance partners both towards the other partner(s) as well as towards third parties. Liabilities can appear in many forms and the length of this paper does not allow for in-depth consideration of all these forms and their details. However, one clear appearance of liability towards the partner(s) is that of liability in view of termination in case of breach under the alliance agreement.
One other form of liability is product liability towards third parties, such as to customers and/or end-users. One should decide in which cases one of the parties is solely responsible

and will indemnify the other(s), if at all, and in which cases liability will be shared. A responsible and balanced liability structure can even strengthen the alliance.

j) Opt-Out: Sometimes an alliance contains an opt-out possibility for one or both partners, next to termination possibilities. They may allow a test period or test market in order to establish whether the alliance can be a commercial success, before the complete roll-out is executed or to assess whether any changes are required. It is critical to define the Key Performance Indicators in such a way that they reflect your interest in the alliance. This may be critical, for example, if the nature of your partner's business indicates relatively short-term success factors that neglect your large up-front investments in research and product development. This typically occurs when one party has developed an entire product concept and another party is merely involved in marketing and sales. Sometimes sharing financial consequences of an opt-out can help. If no satisfying agreement can be reached on this point, one might very well decide not to pursue the alliance any further with that particular partner.

k) Anti-Trust: Although many alliances are based on innovative product or service concepts, they may still have an impact on existing businesses, either through the market they will operate in, or through the partners involved. Therefore, certain types of alliances involve the obligation to file for a merger control approval with the relevant authority/ies. Answering the question whether such obligations exist, requires expert legal advice, preferably at a very early stage of your discussions, but at least prior to entering into a binding agreement (in whatever form) with respect to the alliance.

As a general rule, notifiable transactions cannot be closed without the prior approval of the relevant competition authorities. Typically, the responsible agencies assess whether the alliance transaction will result in -an increase of- a dominant market position or impede competition on any of the product, technology or geographical markets involved in the scope of the alliance. When planning the alliance start-up, one should consider the time schedule related to obtaining the required approvals, if any.
Needless to say that, during the negotiation of the alliance, you and your partner should continue to act in the normal course of business and not align in any way your commercial behavior prior to the approval by competition authorities, if required.

l) Duration: The duration, or term, of the alliance agreement should reflect the purpose of the alliance. Sometimes a relatively short period perfectly serves the objective. Some R&D alliances could end once a particular R&D project has been completed. Others justify, perhaps from a time consuming market creation point of view, a much longer term. As the term of the agreement could also define the term of the non-compete, which, as the word says, puts a restriction on certain competing activities, competition/anti-trust law may have an influence here that restricts the maximum term of the agreemengt or at least of the non-compete. In certain cases, exception to these rules may apply. Again, this requires expert legal advice. See also item k).

m) Termination and consequences: Termination of the Alliance Agreement has an impact on both the business of the alliance and the assets involved, such as IPR, trademarks, access to markets etc. For each type and cause of termination the consequences need to be defined. It is a complicated process and an unnatural one in the phase of setting up an alliance, but it nevertheless requires in-depth consideration.
- When one party simply wants to get out of the alliance after the agreed first term, as is allowed in the contract (Termination for 'convenience'), continued availability of (or part of)

the alliance product(s) or services will sometimes be required, during a run-out period, or during a period for the other party to find an alternative alliance partner. This might especially be important in case of a closed system (see item h), e.g. a consumer will not accept that he just bought a beer machine and two weeks later the availability of beer drums stops. Furthermore, it needs to be clearly defined who will have continued access to and ownership of IPR including know-how)and trademarks, developed both within the course and scope of the alliance and outside, and at what price. Can such IPR, for example, be used outside the scope of the alliance by the party owning the IPR or acquiring it at termination?
- If one party is in material breach, such as breaching the non-compete, or enters the state of bankruptcy and the other party wishes to terminate ('Termination for cause'), different consequences are involved for both continued availability of products and services, as well as for ownership of and access to IPR, trademarks etc.
Usually the non-breaching party has the right to continued access to IPR and other assets for the purpose of continuing the alliance with another partner; occasionally access is even granted for some other, or any other, purpose. Alliance trademarks often fall in the hands of the non-breaching party as well, whether against payment or not.
Moreover, the non-breaching party may have damage claims related to that party's financial and other investments in the alliance. One ought to consider whether the nature and or size of such claims need to be pre-defined.

n) Confidentiality: In the Alliance Agreement, reference is often made to the Confidentiality Agreement signed at the very start of the process, while extending its term. In addition it may be wise to have specific provisions drafted, such as an arrangement for public announcements.

o) Dispute resolution: In many long-term contractual relations, and definitely in alliances, it is important to define a dispute escalation process within the alliance, before 'going outside'. Disputes resolved internally obviously support continuity of the alliance more effectively than an external decision imposed on at least one of the parties could. Depending on the size of the partners, a typical escalation scheme could be:
Alliance Management Team → Steering Committee → higher management of the relevant divisions of the parties → BoM (if the matter is significant enough) → mediation → go outside.
"going outside" can be done in various ways:
- litigation in court;
- arbitration;
- others, like binding advice

Arbitration is, unlike most people's expectations, not always quicker than court proceedings and, often more expensive. However, one advantage of arbitration above court proceedings for cross-border alliances is that according to international treaties, a decision of an arbitrational forum is accepted and enforceable in many more countries throughout the world than a court decision is. The "New York Treaty" on acceptance and execution of arbitrational decisions has been ratified in more than 200 countries, whereas the enforceability of court decisions depends on much more shattered, often bi-lateral, treaties of which the EU treaty on the acceptance of other member state court decisions, with 25 member states, is already one of the most extensive ones. One other advantage of arbitration above court proceedings, is the confidential character of arbitration, where most court proceedings and all information exchanged therein is open to the public.

In court or arbitration proceedings, usually a particular decision is asked from the court or arbiters, which often results in only one party getting what they want and sometimes not even that. In view of continuity of an alliance, another, very effective way of dispute resolution, especially appropriate for alliances, lies in mediation, where your dispute can be more easily regarded as a point at which the scope and objective of the alliance as a whole may be re-considered by the parties in order to find solutions that satisfy all partners, sometimes even circumventing the dispute as no longer relevant. Mediation typically involves a facilitator (mediator), who aims to find solutions that both parties agree on. As opposed to litigation, where the judge or arbiter decides, the parties have the final decision. Mediation could be taken into the escalation scheme as a last step before taking the case external or terminating the Agreement.

General consideration

Setting up an alliance has different characteristics than, for instance, an M&A process or the building of a long-term OEM relation. These characteristics require a different approach; not only from the business managers, controllers, technicians and marketers involved, but also from the legal professional(s), assigned to put the alliance contract together. There should be a focus on longer term cooperation -unlike the average M&A process -which makes a certain balance in the deal a prerequisite for success. The contract should reflect flexibility and adaptability regarding the scope, while at the same time protect the partners' know-how and other IPR against unwanted dissemination. An alliance usually complies with the principle of result-sharing, financially and sometimes technically, which, if built carefully, could align the partners' interest in the market. Reaching a common understanding on this point is a delicate process.
As said above, it is my aim to be involved as early as possible in the start-up phase of alliances, in order to timely address these issues to management. Through this, a lawyer is in the position to convey the alliance to a grown-up phase and see it succeed, which, for me personally, is the most satisfying result to achieve in my legal profession.

About the author:
After seven years in private practice, and eight years with Royal Philips Electronics, Luuk van der Laan has started his own law firm with a clear focus on the process of setting up alliances, in the many different forms they may have, wherever in the world. His partly technical background, sound insight in business processes as well as a global network of lawyers within arm's reach, strenghtens his aim to support alliance processes with a solid, legal, yet practical approach, which serves businesses best. For more on Luuk van der Laan, Legal Alliance Professional, please see: www.luukvanderlaan.com

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