知识产权的分配
Allocation of Intellectual Property

中美合营项目中知识产权分配的形式和考虑
The Form & Rationale of IP Allocation in Joint China-US Projects

钟英和
(Y W Chung)

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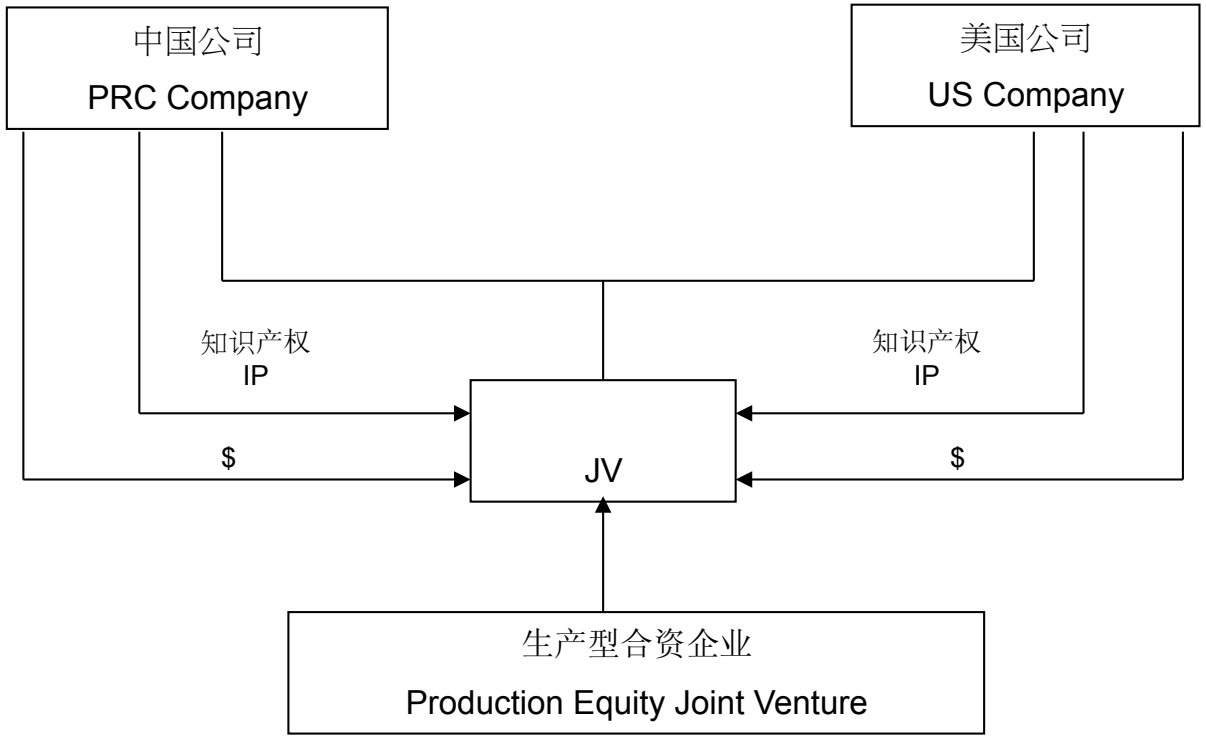
1. 情景
Scenario



合资双方提供给合资企业的知识产权多数为技术
The majority of IP provided by the joint venture parties is technology

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2. 合资企业成立前的讨论
JV Pre-establishment Discussions

- 双方的技术人员讨论项目中技术合作的细节
  The technical personnel of both parties enter into discussions about the details of the technical cooperation of the project

- 双方可能需要向对方披露本身的专有技术用作评估
  Both parties may be required to disclose to the other party their proprietary technology for assessment

- 就对方披露的保密信息双方签订互相保密协议:
  Both parties enter into a Mutual Non-disclosure Agreement with respect to the confidential information disclosed by the other party:

  - 保密
    Preserving confidentiality
  - 只可以用作技术合作评估之用
    Only for assessment of technical co-operation
  - 并无转让或许可任何其他权利或权益
    No transfer or license of any other rights or benefits

3. 向合资企业提供技术
Provision of Technology to the JV

- 每一方可以透过转让或许可将其技术提供予合资企业
  Each party may provide its technology to the JV by way of transfer or license

- **"转让"会将技术的所有权转到合资企业**
  "Transfer" will assign the ownership of the technology to the JV

- **"许可"允许合资企业在许可范围内使用技术**
  "License" permits the JV to use the technology within the licensed scope

- 许可范围由合资双方约定，例如:
  The licensed scope to be agreed by the joint venture parties, for example:

  - 时段
    period

3. (继续Continued)

- 地域
  territory
- 特定地点(例如: 合资企业的厂房）
  specific location (e.g. the JV's factory)
- 生产特定的产品
  production of specific products
- 特定销售市场
  specific sales markets

4. 提供技术给合资企业的对价
The consideration for the Provision of Technology to the JV

4.1 作为对合资企业的出资
As contribution to the JV's registered capital

(1) 以转让形式
By Transfer

例如: 提供方将其技术作价３００万元人民币转让给合资企业作为其对合资企业注册资本30%的出资

For example, the providing party transfers its technology, at a value of RMB3 Million, to the JV, representing its contribution of 30% of the JV's registered capital.

(2) 以许可形式
By License

例如: 提供方将其技术许可给合资企业，作价１００万元人民币，作为其对合资企业注册资本15%的出资

For example, the providing party licenses its technology, at a value of RMB1Million, to the JV, representing its contribution of 15% of the JV's registered capital.

4. (继续Continued)

4.2 作为一般买卖交易
As a Sales & Purchase Transaction

(1) 以转让形式
By Transfer
提供方将其技术转让给合资企业。合资企业向提供方支付转让费
The providing party transfers its technology to the JV. The JV pays a transfer fee to the providing party

(2) 以许可形式
By License
提供方将其技术许可给合资企业。合资企业向提供方支付提成费（或许可费）
The providing party licenses its technology to the JV. The JV pays a royalty (or license fee) to the providing party

- 一次性的提成费（或许可费）
  One-off royalty (or license fee)
- 在许可期限内分期收取提成费（或许可费）
  Periodic collection of royalty (or license fee) within the licensed period

5. 对被许可技术的改进的权属
Ownership of the Improvement to Licensed Technlogy

5.1 合资企业对由合资双方许可的技术作出的改进权属问题的考虑：

The considerations on the ownership of the improvements to the licensed technology made by the joint venture parties:

(1) 进口技术的改进
Improvements to Imported Technology

- 按中华人民共和国技术进出口管理条例，被许可技术的改进属于改进方

  According to the *Administrative Regulations on Import & Export of Technology of the PRC*, improvements in licensed technloogy belong to the party making the improvements

5. (继续Continued)

(2) 中方许可技术的改进
Improvements to Technology Licensed by the Chinese Party

- 按照中华人民共和国合同法，被许可技术的改进的分享办法，应当按合同双方的约定，没有约定或约定不明确，由改进方独自享有技术改进
  According to the *PRC Contract Law*, the method for sharing the improvements to the licensed technology shall be based on the agreement of the contracting parties. If there is no agreement or the agreement can't be determined, the party making the improvements shall solely be entitled to such improvements.

5.2 谈判要点
Negotiation Point

通常，许可方会要求拥有被许可技术的改进的所有权，而合资企业作为被许可人对被许可技术的改进享有免费的使用权
Usually, licensor would require to own the improvements to the licensed technology and let the JV as the licensee to use the improvements to the licensed technology royalty-free

6. 雇员创造的知识产权
Intellectual Property created by Employees

6.1 员工就本身拥有的知识产权的陈述
Employee's Representations as to Their Own Intellectual Property

- 合资企业可要求每位员工在签署劳动合同时向合资企业陈述:
  The JV may require each employee to represent to the JV when he/she signs the labor contract:

  - 已向合资企业披露自己所有的知识产权
    The employee has disclosed to the JV all intellectual property owned by him/her

  - 该等知识产权没有侵犯任何第三方的权利
    Such intellectual property does not infringe any third party rights

  - 未得合资企业的书面同意，不会在其履行合资企业的职务时将其所拥有的知识产权加入合资企业的产品中
    Absent the JV's written consent, will not incorporate his/her own intellectual property into the JV's products

6. (继续Continued)

6.2 职务技术成果
Technological Achievements Made During the Course of Employment

- 优先受让权
  First Right of Refusal to Acquire

  当合资企业转让员工职务技术成果时，完成该成果的个人享有在同等条件下的优先受让权

  When the JV transfers technological achievements made by the employees during the course of employment, the individuals accomplishing such achievements shall have the first right of refusal to acquire such achievements upon the same conditions

6. (继续 Continued)

- 对员工的奖励或报酬
  Reward or Compensation to Employees

  - 合资企业应从使用和转让该职务技术成果所取得的收益中提取一定的比例，对完成该一项成果的个人给予奖励或报酬
    When the JV uses and transfers such achievements, it is required to withhold a certain percentage of the proceeds obtained from such use and transfer as a reward or compensation to the individual who accomplished such achievements

- 结束 -

- End -