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Joint Ventures in Switzerland

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1. General Introduction

The term "joint venture"[1] covers a variety of short or long term cooperation arrangements between two or more parties[2] for a common project or enterprise. There is no body of law that specifically covers the formation or operation of joint ventures; accordingly, there is no statutory definition of the term "joint venture"[3]. Most rules on the formation and operation of a joint venture are found in the Swiss Code of Obligations ("CO") which covers the contractual as well as company law aspects of joint ventures. Tax law, intellectual property law and certain governmental regulations[4] often have a major impact on the choice of the legal structure of a joint venture. Restrictions of Swiss competition law may also apply; but these rules are of minor importance compared to other jurisdictions.

Swiss law allows basically two forms of joint ventures: the contractual joint venture and the joint venture company[5]. Formation of a partnership or a limited partnership is generally excluded because Swiss law requires that the general partners (not, however, the limited partners) be individuals.[6]

A Swiss joint venture which attracted considerable attention in past years was the "merger" between Sweden's ASEA and Switzerland's BBC. The two (listed) companies contributed all their electrotechnical operations (mostly subsidiaries) to a joint venture company

[1] Swiss legal doctrine as well as the economic literature generally use the English term "joint venture"; sometimes, authors use the German term "Gemeinschaftsunternehmen" for corporate joint ventures.

[2] Partners are usually corporations but it is conceivable that one of the parties to a joint venture might be e.g. a contractual joint venture, i.e. not a legal entity.

[3] *See* CLAUDE REYMOND, Le contrat de "Joint Venture", Innominatverträge, Festausgabe zum 60. Geburtstag von Walter R. Schluep (Zurich 1988), p. 383 et seq.; MATTHIAS OERTLE, Das Gemeinschaftsunternehmen (Joint Venture) im schweizerischen Recht (Zurich 1990) p. 2 *et seq.;* MEIER-SCHATZ (editor), Kooperations- und Joint-Venture-Verträge (Zurich/St. Gallen 1994), p. 9 et seq.

[4] E.g. in certain regulated businesses (such as banking and insurance) or with respect to working permits for foreign employees.

[5] Some authors restrict the term joint venture to corporate joint ventures.

[6] Articles 552 and 594.2 CO.

(ABB Asea-Brown Boveri) in exchange for a 50% participation in the joint venture. ASEA and BBC thus became holding companies, their major asset being the shareholding in ABB.

2. Contractual Joint Ventures

2.1 Introduction

Contractual joint ventures are generally subject to Articles 539 to 551 CO,[7] but the parties may contract out of most of these rules.

Contractual joint ventures are chosen in cases where no permanent structure is required or where flexibility is a key element for the success of the joint venture. Tax considerations may influence the decision as to the legal form as well.

A common example of a contractual joint venture is a consortium, formed to carry out a construction project.[8]

2.2 Advantages

(i) *Ease of formation.* No formal procedure must be followed when setting up a contractual joint venture. The contract can be concluded orally although parties will usually enter into a written agreement. No capital has to be put up for the joint venture and no formal management structure is required.

(ii) *Flexibility in operation.* Joint venturers can simply change their contractual agreement in order to adapt to new circumstances. By contrast, a joint venture company is less flexible for instance, with respect to raising funds by increasing its equity.[9]

[7] So-called "einfache Gesellschaft" or "société simple", often translated as "ordinary partnership" as opposed to the general partnership of Articles 552 to 593 CO. As seen above the latter form is generally not suitable for a joint venture in Switzerland, *see* § 1 at footnote 6.

[8] REYMOND, op. cit. (N.3), p. 385, points out that the majority of the cases cited under the heading "joint ventures" in the Yearbook for Commercial Arbitration concern contractual joint ventures. One could argue that this is no indication as to the number of contractual joint ventures versus corporate joint ventures, but is rather due to the fact that contractual joint ventures do not offer a secure structure for the parties.

[9] The increase of the share capital requires a formal procedure and filing with the commercial register. A reduction of the share capital is only possible after the creditors have been notified and after a waiting period has elapsed.

(iii) *Ease of termination.* There is – again contrary to the corporate joint venture – no formal procedure which has to be observed in the termination of a contractual joint venture.

(iv) *Tax transparency.* The contractual joint venture is not subject to any taxation and offers total tax transparency. Profits and losses accrue directly to the partners[10].

(v) *Confidentiality.* The contractual joint venture offers complete secrecy to the joint venturers if such secrecy is desired. Parties could even choose a form under which only one party to the contractual joint venture deals with third parties, the other parties being undisclosed partners.

(vi) *Costs.* The absence of a formal structure and certain tax advantages generally lead to lower costs in a contractual joint venture as opposed to a joint venture company.

2.3 Disadvantages

(i) *Liability.* There is no limited liability for the parties (or "partners") of a contractual joint venture; they may even become liable for debts[11] incurred by other partners of the joint venture[12].

(ii) *External relationship, funding.* Third parties will often find it difficult to deal with a contractually established party, preferring (rather) a legal entity. This is even more so if parties to a joint venture are based abroad. Funding will generally only be available to the joint venturers and not to the joint venture itself.

[10] Losses may usually be carried forward for a period of seven years. *See* SPORI/BUCHER, Übersicht über Steuerfragen im Zusammenhang mit Joint Ventures, in: MEIER-SCHATZ, op. cit. (N.3), p. 178.

[11] There is only liability for debts which have been incurred on behalf of the joint venture.

[12] *See* Article 544 CO. A contractual joint venture generally qualifies as mentioned above as a so-called ordinary partnership (defined as combination of two or more persons with a view to jointly pursuing a common goal by joining their endeavours and their resources).

(iii) *Lack of permanent structure.* While parties may prefer the flexibility that a contractual joint venture offers, third parties are likely to point out that only a corporate joint venture guarantees the permanent structure necessary for a long-term business relationship. The lack of a permanent structure will, in addition, make it difficult for the joint venturers to define the rights and obligations between them.

(iv) *Limited ability to transfer contractual interest.* Swiss law does not allow the transfer of a stake in an ordinary partnership without the consent of the other partners[13]. Even where there is such consent, the withdrawing partner will remain liable for debts of the joint venture for two years following the date of transfer of his share[14].

2.4 When to Select

A contractual joint venture should be chosen for short-term projects or projects which do not require a permanent structure. Common examples would be the formation of a consortium for a given construction project or joint research and development in a specified field.

Cost considerations may be a further reason to prefer a contractual joint venture to a corporate structure[15].

2.5 Formation Documents, Key Aspects

As indicated above, there is no legal requirement for any formal documentation. Rules of the CO will fill gaps not covered by the agreement between the parties. Generally, the following issues are likely to be addressed by the parties entering into a contractual joint venture.

[13] Article 542 CO. The consent could be given in advance, e.g. in the joint venture agreement.
[14] Article 181 CO.
[15] A partnership is generally excluded under Swiss law, *see* § 1 supra at footnotes 5 and 6.

(i) *Name.* Under Swiss law, a contractual joint venture cannot carry a registered corporate name[16]. On the other hand, the joint venture can appear under a name or label freely chosen by the parties, provided that such name or label does not infringe on the rights of third parties.

A contractual joint venture cannot be registered in the commercial register.

(ii) *Purpose and scope.* The purpose and scope of the joint venture will define the parameters within which the partners may act on behalf of the joint venture. Consequently, the partners may have an interest in agreeing on a rather narrow definition.

(iii) *Funding, contributions.* Article 531 CO states that – unless agreed otherwise – each partner must make a contribution, either in cash, assets or in the form of services in order to achieve the agreed purpose of the business. If the partners transfer assets to the business, these will be jointly owned by the partners, because the joint venture is not a legal entity (*see also* § 2.8 infra). Frequently, the partners will not transfer ownership but rather lease a certain asset in some cases without consideration to the joint venture; such a solution also facilitates the liquidation of the joint venture.

Article 537 CO states that each partner has the right to be reimbursed for all expenditure incurred by him on behalf of the joint venture. However (unless agreed otherwise), a partner will have no claim for compensation for work performed. Despite the lack of an automatic entitlement to compensation, each partner is liable to the other partners for losses resulting from his acts or omissions.

(iv) *Management, decision-making and power to deal with third parties.* The contractual arrangement will generally define

[16] Protection for the name of the joint venture may however be available under the Unfair Competition Act of December 19, 1986. This statute offers a remedy that is broadly similar to "passing off" under UK-law – i.e. the joint venturers may be able to prevent a third party from trading under a name that as a result of its similarity (to that employed by the joint venture) is likely to cause confusion in the minds of the public.

which partner will be in charge of the management of the contractual joint venture. Unless agreed otherwise, Article 535 CO provides that each partner may act on behalf of the business but that the other partners have a right to veto any act prior to its completion.

If the contract confers the right to manage the joint venture on one (or more) partners, the others may (according to the mandatory rule of Article 539.2 CO) revoke such power for "important reasons"[17].

A partner not entrusted with the management has certain statutory rights to inspect the books and correspondence of the business[18].

Decisions by the partners must generally be taken unanimously; however, the contract may provide for the possibility of a majority vote on certain issues. Parties are likely to agree that – as a means of minority protection – certain transactions require the consent of all partners involved (*see* § 3.5 (viii) infra).

When dealing with third parties, each managing partner may conclude contracts which are binding upon the other partners of the joint venture, based upon the rules of agency[19]. All partners will be jointly and severally liable in respect of such third party dealings.

(v) *Profit and loss allocation.* Article 532 CO provides that each partner must share any benefit that "by its nature belongs to the joint venture"; this provision may force the parties – which often carry on business in a similar field as the joint venture – to define in detail which transactions the parties may enter into for their own account and which business must pass through the joint venture (*see also* (vi) infra).

Article 533 CO provides that – unless otherwise stipulated in the contract – each partner will share equally all profits and losses without regard to their respective contributions. The law furthermore states that if the parties have only agreed upon the

[17] Article 539.3 CO defines "important reasons" as a major breach of the duties of the managing partner or a loss of the partners ability to manage the business.
[18] Article 541 CO.
[19] *See* Article 543 and 544 CO for details.

allocation of profits, losses shall be borne in the same proportions.

(vi) *Non-competition.* Article 536 CO states that no partner shall do business for his own account which would prejudice the purpose of the joint venture. It is therefore not necessary to include an express non-competition clause in the contract[20]. This is one aspect of Swiss contractual joint ventures which is often appreciated by foreign partners who are reluctant to include express clauses restricting competition due to restraints imposed by their domestic competition law.

(vii) *Confidentiality.* Partners will often agree to treat certain information received with regard to the business and affairs of other partners as confidential.

(viii) *Transfer of interest.* Swiss law does not provide for the transfer of a stake in a contractual joint venture from one party to another. Unless there is an agreement among all parties involved, a transfer would require a liquidation of the existing joint venture, followed by the creation of a new joint venture with different partners.

(ix) *Duration and termination.* Parties often agree on a certain duration for the agreement because Article 546 CO provides that the contract may be terminated upon a 6 months notice if the agreement has been entered into for an indefinite duration.

Under Swiss law a joint venture may be terminated: (i) if the purpose of the joint venture has been attained or has become unattainable; (ii) in the event of the death or bankruptcy of a partner; (iii) by mutual consent; (iv) by decision of a court if there are valid reasons to dissolve the joint venture.

If the joint venture is dissolved, partners are not entitled to demand the return of the assets originally contributed by them; there is, however, a right to claim the value of the contribution.

[20] A breach of this implied non-competition covenant would lead to a claim for damages (but not necessarily to an account of profits made by the partner wrongfully "competing").

Unless the parties of the joint venture have agreed otherwise, assets will be sold upon dissolution.

The dissolution of the joint venture does not affect the liability of the partners towards third parties[21].

2.6 Taxation

A contractual joint venture is not subject to taxation as such and is fully tax transparent unless the joint venture qualifies as a permanent establishment[22]. Losses of the joint venture may therefore be offset against the income of the partners.

2.7 Foreign Involvement

There are generally no limitations on foreign involvement in a Swiss contractual joint venture. Rules restricting foreign ownership of Swiss real estate and regulations on employment by foreign nationals may, however, have an impact upon a contractual joint venture in Switzerland (*see* § 3.7 for details).

2.8 Acquisition and Use of Business Assets and Intellectual Property Rights

Article 531.3 CO deals with the transfer of assets to the business or the leasing of assets to the joint venture.

Intellectual property rights are hardly ever transferred to a contractual joint venture because of the complicated formalities to be observed if such rights were to be jointly-owned. Parties may, however, agree upon a licence between a partner and the contractual joint venture.

[21] Article 551 CO.

[22] In such a case the parties will become liable to cantonal and federal taxes at the domicile of the permanent establishment (the definition of permanent establishment used in Switzerland – even in domestic cases – is substantially equivalent to the definition on the OECD model double taxation convention).

If the joint venture is likely to create intellectual property rights, parties should choose the form of a corporate joint venture (*see* § 3); the contractual joint venture, lacking an independent legal identity, is an inappropriate structure for the creation and holding of intellectual property rights. Under Swiss law intellectual property rights (with the exception of copyrights) created by employees of the joint venture belong to the employer.

2.9 Competition Law Considerations

Contractual joint venture agreements may limit competition in certain areas. Swiss competition law does not, however, prohibit such agreements unless third parties are either excluded from competition or considerably hindered from competing. Even then, joint venturers may still claim that there are overriding interests justifying the agreement (*see* § 3.9 infra for details).

2.10 Summary

The contractual joint venture allows great flexibility and is mostly used for short-term projects. The statutory non-competition provision applying to contractual joint ventures is very often appreciated by foreign parties to a joint venture who might be reluctant to include non-competition clauses due to restraints imposed by their domestic competition law. Tax transparency and tax flexibility may be a further reason to choose a contractual joint venture.

Because Swiss law does not permit corporate entities to form partnerships[23], the contractual structure is always chosen when a corporate joint venture is considered inappropriate by the joint venturers.

[23] *See* § 1 at footnote 6; corporate entities may be limited partners in a partnership, but at least one *natural* person must act as a general partner.

3. Corporate Joint Ventures

3.1 Introduction

Swiss joint venture companies are generally organised as corporations limited by shares[24], regulated by Articles 620 to 763 CO. The company with limited liability[25] is hardly ever chosen[26] mainly because of the lack of confidentiality[27]and the formalities to be observed in the event of a transfer of shares[28].

In contrast to the contractual joint venture, the joint venture company (hereinafter "jvc") is an independent legal entity with distinct and separate interests from those of its members and shareholders (the "joint venturers"). The relationship between the joint venturers is generally governed by a shareholders' agreement. Some of the provisions of the shareholders' agreement could also be incorporated in the articles of association of the jvc, but parties are usually reluctant to do so, mainly because the articles of association: (i) can only be changed by means of formal procedure[29]; and (ii) may be inspected by anyone at the commercial register.

The shareholders' agreement may be signed prior or subsequent to the formation of the jvc: in the former case, the agreement may also address the formation of the jvc. Joint ventures can also be formed by means of a subscription for new shares or transfer of shares in an existing company. The special aspects of such a jvc (and its contrac-

[24] In German "Aktiengesellschaft" (abbreviated "AG"), in French "Société Anonyme" (abbreviated "SA").

[25] "Gesellschaft mit beschränkter Haftung" ("GmbH"), "Société à responsabilité limitée ("Sàrl"), Articles 772 to 827 CO.

[26] The equity of a company with limited liability may furthermore not exceed CHF 2'000'000 (Article 773 CO).

[27] Article 790 CO. A list of the shareholders must be deposited with the commercial register and is publicly available for inspection. The transfer of the shares must be published in the commercial gazette.

[28] The shares (respectively the "parts" of "quotas" as the law calls them) can only be transferred by means of a notarized deed of assignment to be made in a public deed.

[29] A shareholders' meeting must pass the respective resolutions, a notarized deed must be drawn up and changes must be notified to the commercial register.

tual basis) are not specifically dealt with in the text that follows. The documentation for such structures is rather similar to the documentation used in the formation of a new jvc. The principal difference lies in the fact that the "old" partner will typically be required to give warranties and representations with respect to the (existing) company to its new partner(s) upon the subscription for or transfer of the shares.

3.2 Advantages

(i) *Ease of formation:* A Swiss jvc is relatively easy to incorporate, the process taking no more than two to three weeks. Counsel will often advise the use of standard articles of association (since, *inter alia,* parties generally place all commercially sensitive provisions in the shareholders' agreement)[30] which adds to the ease of formation.

(ii) *Separate entity.* The fact that the jvc is a distinct legal entity enhances the stability of the joint venture structure; this has advantages for the joint venturers in their relationships *inter se* as well as in the jvc's dealings with third parties. The ability to enter into contracts and to own property (including intellectual property rights) is a clear advantage over the contractual joint venture.

(iii) *Limited liability.* The liability of each joint venturer is limited to the amount subscribed in the share capital of the jvc[31]. However, a joint venturer will often not be able to take advantage of this limited liability, because (a) the insolvency of the jvc will damage the standing of the joint venturer in the capital

[30] *See* § 3.1 supra and § 3.5 infra.

[31] More precisely, if shares are not fully paid up, the shareholders remain liable for the balance owning on their shares. Because joint venturers will often make a contribution in kind, there may also be a liability if the contribution is overvalued, Article 753 CO.
On the other hand, if the contribution is undervalued, or if the shareholders contribute more than the nominal share capital (a so-called "agio" or surplus), this amount is not recoverable by the shareholders in the event of an insolvency.

market, possibly also triggering cross default clauses in loans to the joint venturer; and (b) one or more joint venturers may have personally guaranteed the debts of jvc. In rare cases, Swiss courts may also either pierce the corporate veil, holding one of the joint venturers directly liable, or hold one of the parent companies liable under a theory of a group liability.

(iv) *Transferability of interest.* Shares of the joint venturers can easily be transferred either to other joint venturers or to a third party.

(v) *Commercial understanding/familiarity.* Third parties would undoubtedly prefer to deal with a structure with which they are more familiar than one such as a contractual joint venture. Furthermore, a jvc will often appear as a "domestic" company, even if it is controlled by foreign joint venturers. This may be especially helpful where the jvc bids for public works.

(vi) *External finance.* A jvc is generally much better placed to deal with banks and other lenders than a contractual joint venture, where finance is usually provided by the joint venturers themselves.

3.3 Disadvantages

(i) *Formation and running costs.* A jvc has higher formation and running costs than a contractual joint venture. Attorney's fees, notarisation costs and registration fees usually amount to approximately CHF 5'000–10'000. There is furthermore a capital duty (referred to as "stamp tax") of 3% payable on the issue of share capital[32]. The requirement for a board of directors, the costs of book-keeping and auditors must all be taken into consideration when comparing the running costs of a jvc to those of a contractual joint venture. Costs associated with the

[32] Respectively on the fair market value of the consideration received if the joint venturers contribute their business. This tax may be avoided under specific circumstances. Furthermore, the rate will fall to 2% starting 1996 when there will also be an exemption for companies with a capital of less than CHF 200'000.

shareholders' agreement may be comparable to the costs of drafting and negotiating the agreement for a contractual joint venture.

(ii) *Termination.* The termination of a jvc is a formal procedure that involves – *inter alia* – the threefold publication of such intention to potential creditors in the *Swiss Commercial Gazette.* Assets of the company may only be distributed after the expiry of one year after the third publication[33].

(iii) *Taxation.* The jvc is taxed as an independent entity; there is consequently no tax transparency. Dividends paid to the joint venturers[34] are subject to a 35% withholding tax which may be fully reclaimed by Swiss joint venturers, and partially – i.e. by virtue of double taxation treaties – by foreign joint venturers[35]. Because Swiss tax law does not tax groups on a consolidated basis – but treats each corporation as an independent entity[36] – a joint venturer will be unable to set off a loss from the jvc against other income unless a write-off of the participation in the books of the joint venturer is permitted for tax purposes.

(iv) *Lack of flexibility.* A jvc has to comply with certain minimum legal requirements, namely with respect to its share capital (at least CHF 100'000)[37], the payment of dividends[38], and the internal organisation (book-keeping requirements, auditors, board of directors with a majority of Swiss citizens residing in Switzerland). A change in the capital structure or in the articles of association of the jvc will require a formal procedure[39].

[33] Certain exemptions may apply. Article 745.3 CO.

[34] Including constructive dividends, i.e. distributions of assets that are treated as if they were a dividend.

[35] The applicable withholding tax rate is one of the first issues to be examined before choosing the legal form of a joint venture. Double taxation treaties usually foresee a reduction to a net tax of 0–15%. *See* SPORI/BUCHER, op. cit. (N.10), p. 177.

[36] There is, however, a relief on dividends received by a parent company; *see* § 3.6 for details.

[37] Article 621 CO.

[38] Article 671 CO; The jvc must build up certain reserves.

[39] A shareholders' meeting in the presence of a notary public and the changes must be notified to the company registrar. *See* § 3.5.

(v) *Lack of secrecy.* The disclosure requirements of Swiss companies are not stringent in comparison to other jurisdictions. However, certain requirements apply if the joint venturers contribute a business, know-how or certain assets to the jvc in exchange for shares[40].

3.4 When to Select

The jvc is almost always selected for a joint venture in Switzerland unless the type of activity contemplated: (i) is of short-term nature; or (ii) requires little or no contact with third parties. Tax considerations may, however, lead to a selection of contractual joint venture.[41]

3.5 Formation Documentation, Key Aspects

If the jvc is established for the purpose of cooperation between two (or more) joint venturers, the latter will usually enter into a shareholders' agreement[42] for the formation and running of the jvc. Certain provisions of this agreement may be entered in the articles of association of the jvc (e. g. clauses regarding the powers of the shareholders' meeting); such incorporation in the articles of association has certain advantages over a purely contractual arrangement (with standard articles of association), namely with respect to third party rights; third parties are deemed to have knowledge of the contents of the articles of association;[43] the principal disadvantage of placing

[40] Article 628 et seq. CO. In essence the nature and value of the assets must be identified in a report which will also be checked by the auditors.

[41] *See* § 2.6 and § 3.6 for details.

[42] The term "shareholders' agreement" is actually too narrow; when entering into the agreement, the parties are not yet shareholders but plan to become shareholders of the jvc. It is maybe for this reason that some authors prefer to refer to the contractual arrangement as the "basic contract" ("contrat de base"). The contents of shareholders' agreements vary widely in practice. If the agreement if concluded prior to the formation of the jvc (which is generally the case) a draft of the contemplated articles of association should be annexed to the agreement.

[43] Third parties are deemed to have knowledge of the articles of association since they are placed in the commercial register and third parties have unrestricted access to their terms.

commercial terms in the articles of association lies in the fact that clauses in the articles of association are open to public inspection; they can furthermore only be changed by means of a formal procedure.[44] Standard articles of association include (Article 626 CO): (i) the corporate name and the registered office of the company; (ii) an objects clause; (iii) the nominal amount of the share capital and the number, type and nominal value of the shares; (iv) the notice period for shareholders' meetings and the manner in which a meeting is convened; (v) the manner in which directors may represent and bind the company (sole signatory rights/joint signatory rights); (vi) the manner in which shareholders are to be notified.

The following key aspects are likely to be addressed in the shareholders' agreement or in the articles of association:

(i) *Name and the registered office of the jvc*. Certain rules apply under Swiss law with respect to the names of the companies; they must not be designed solely for publicity purposes and must not deceive third parties. Parties sometimes use a combination of their own names for the jvc;[45] often, the name will be registered in German, French, Italian and English (X AG/SA/Ltd.). The registered office does not have to coincide with the location of the company's headquarters and is often chosen as a result of tax considerations. However, if the business is conducted in a location other than that of the registered office, the business will generally qualify as a permanent establishment in such location and will therefore be subject to taxation there and not (or only to a certain extent) at the company's headquarters.

(ii) *Objects clause of the jvc.* The objects clause limits the scope of activity in which the jvc may engage. Sometimes the clause is drafted as widely as possible (and thus rendered practically meaningless) in order to allow an expansion into other areas of business. Sometimes the clause is very narrowly drafted in order to ensure that the jvc limits itself or clearly defined activities.

[44] A shareholders' meeting must be convened. Generally a simple voting majority is required although the bye-laws may specify otherwise: Art. 704.2 CO.

[45] E. g. ABB Asea-Brown Boveri AG.

After the formation of the company the objects clause can only be changed if the holders of two-thirds of the share capital agree.[46]

(iii) *Share capital, number and type of shares*. The articles of association must contain a provision regarding the amount of the share capital. The minimum share capital is CHF 100'000.–, 50'000.– of which must be fully paid-up. The share capital is often divided into shares of CHF 1'000 each.[47] The joint-ventures usually agree to issue registered shares, although the law also permits bearer shares.[48] The articles of association may limit the transferability of registered shares, e. g. by granting the board of directors or the shareholders' meeting the right to refuse to enter the acquirer into the shareholders' register, provided however that certain criteria (which must be enumerated in the articles of association), are met.[49]

Swiss law also permits the use of different classes of shares, e. g. "A" shares and "B" shares, entitling the holders of each type of share to propose a number of directors for election at the shareholders' meeting.[50] The shareholders' meeting may then only refuse to elect the proposed director for "valid reasons".[51]

Parties may furthermore agree to create shares with super voting or special dividend rights,[52] or shares without voting rights, so-called participation certificates. These differing share structures can be used to reflect and reward differing contribu-

[46] Article 704.1 CO. This rule is mandatory, i. e. the articles of association may not lower this threshold.

[47] The minimal nominal value is CHF 10.–.

[48] Note that the transfer of "bearer" shares cannot be controlled. Like a £ 1 note, possession alone confers title. There will be no register of holders of bearer shares – the identity of holders will be unknown.

[49] Article 686 CO.

[50] Article 709 CO.

[51] Such valid reasons would, for example, exist if the proposed director did not have the necessary professional experience or background. *See also* § 3.5 (vii) infra.

[52] Shares with super voting rights can only be issued by creating shares with a different nominal value (e. g. shares with a nominal value of CHF 100 and CHF 500.–) and given each share one vote. In other words, super voting rights can only be achieved by increasing the number of shares and therefore available votes. Shares with super dividend rights are regulated by Articles 654 to 656 CO.

tions made to the jvc by the joint venturers.[53]

A subsequent change in the share capital necessitates approval by the shareholders. Shareholders have a statutory option to purchase newly issued share capital *pro rata* to their existing shareholding at the issue price fixed by the board of directors. This option may be waived (for all shareholders) by a majority vote of two thirds, provided that there are valid reasons to do so.

(iv) *Subscription of the joint venturers to share capital.* This clause will address the amount of equity each joint venturer holds in the jvc. Often, the joint venturers will contribute a business, intellectual property rights, know-how or other assets to the jvc. In such cases, the parties will need to agree upon a valuation of these contributions which must also be checked by the auditors. Parties may agree to give warranties and representations as to title, value and condition of the contributions either to their fellow joint venturers and/or to the jvc.

If there is to be a contribution in kind (or if the shares are subscribed for cash, but there is an understanding that the jvc will purchase certain assets from a shareholder), there are disclosure requirements in the articles of association that must be complied with; the board of directors must, in addition, draw up a report on the nature, condition and adequacy of the contribution which will then be checked by the auditors[54].

(v) *Transferability of shares.* The transferability of shares in a jvc is often restricted. Swiss law permits such restrictions to be incorporated in the articles of association, provided that the reasons to refuse recognition of a transfer are enumerated in the articles of association. If the acquirer and seller do not abide by these rules, the acquirer will not be entered into the shareholders' register and will not be able to vote his shares in a shareholders' meeting.[55] Restrictions in the joint venture agree-

[53] *See* ROLF WATTER, Die Problematik der Einbringung im Joint-Venture, in: MEIER-SCHATZ, op. cit. (N.3), p. 61 et seq.

[54] Article 630 CO. The disclosure covers a list of all assets contributed, the method and appropriateness of valuation, the number of shares, the contributing shareholder received.

[55] Articles 685/6 CO.

ment often go further and may require that a majority – of say, 80% – of the shareholders agrees to any proposed transfer. Such a clause can in practice confer a power of veto upon each joint venturer with respect to a proposed transfer. A right of first refusal is also often used in joint venture agreements.[56] Sometimes, these agreements will even provide that the remaining partners may purchase the shares at book value if one party intends to sell its shares to a third party. There are various means by which a right of first refusal can be secured vis-à-vis of third parties. Since 1992, the articles of association may no longer include such rights. Perhaps, the most common solution is to place the shares of all joint venturers in escrow with a trusted third party. The terms of the escrow arrangements will provide, *inter alia*, that no shares can be transferred unless they have first been offered to existing shareholders.

The agreement sometimes also contains a "take-me-along" clause which requires a joint venturer, willing to sell his stake, to find a purchaser for the shares of all joint venturers.

(iv) *Future funding*. Swiss tax law generally requires that the debt-equity ratio does not exceed 6:1.[57] If loans are granted by shareholders, tax authorities furthermore define a maximum interest rate. Tax considerations will often force the joint venturers to consider further equity funding for the jvc, even though such funding is subject to a 3% (soon to be reduced to 2%) capital duty. Generally, the joint venturers will agree in the shareholders' agreement to subscribe for newly issued share capital under certain conditions, for example, to make up for losses incurred by the jvc.[58]

Financing by third parties (namely banks) is often only possible if the joint venturers guarantee repayment of the loan.

[56] In the sense that a shareholder wishing to transfer his shares must first offer them to the club of existing joint venture shareholders. Such rights may also be found in the articles of association.

[57] If the ratio is exceeded, the tax authorities will not recognise the deduction of interest payments.

[58] There is a statutory option under Swiss law to subscribe for newly issued shares, Article 652 CO. This option can be waived by a majority vote in a shareholders' meeting.

Such a guarantee clearly increases the personal exposure of the joint venturers and alters fundamentally the limited liability aspect of the jvc.

The parties may also raise finance through the issue by the jvc of non-voting shares (so-called "Participation Certificates") to third parties. Such shares carry dividend rights and an entitlement to future liquidation proceeds.

(vii) *Constitution of the board of directors.* The number of board members is usually defined in the articles of association. Swiss law requires that a majority of the directors be Swiss citizens residing in Switzerland.[59] Sometimes the articles of association provide for two classes of shares (e. g. "A" shares and "B" shares) giving the holders of each class the right to propose a number of directors.[60] Swiss law does not require that the shareholders' meeting formally elects these board members; the shareholders' meeting may refuse to elect a board member proposed by the holders of one class of shares only if there are valid reasons for doing so.[61] The law provides further that the right of the shareholders' meeting to remove directors from office at any time cannot be waived by contractual arrangements.[62]

The joint venture agreement often contains detailed rules as to the election of the president and the vice-president of the board. Contrary to the practice in other companies,[63] the articles of association of a jvc often provide for an election of the president by the shareholders. The articles of association (or the shareholders' agreement) may also define the minimum number of directors necessary to form a quorum and may furthermore address the question of whether or not the president will have a casting vote. The shareholders' agreement are, finally, likely to limit the types of transactions that the board can enter into

[59] Article 708 CO. An exception applies to holding companies.
[60] *See also* § 3.5 (iii) for the possibility of shares with super-voting rights.
[61] *See* supra.
[62] *See* Article 705 CO.
[63] Where the board constitutes itself.

without shareholders' approval (*see* below).[64] If the board issues regulations as to the frequency, quorum and other administrative aspects of its meetings and with respect to the rights of its members to represent the jvc in legal transactions, such regulations are usually made conditional upon approval by the joint venturers.

The parties may also agree on the manner in which directors and officers may execute agreements that bind the jvc.[65]

It should be noted in this context that directors are personally liable for damages caused by their unlawful conduct (including a breach of their fiduciary duty towards of jvc). Directors may find themselves in a conflict between the interests of "their" joint venturer and the interests of jvc; if their decision is solely made in favour of the joint venturer, they may – according to this rule – become personally liable to the jvc or to creditors of the jvc in case of a bankruptcy of the jvc.[66]

(viii) *Minority protection*. Minority protection in a typical joint venture agreement is achieved by requiring approval by: (i) either both (or all) parties; or (ii) by all board members for a range of transactions specified in the shareholders' agreement. Such transactions typically include:

- the hiring of senior management;
- loan agreements exceeding a certain threshold;
- contracts with a joint venturer or a party associated with a joint venturer;
- capital expenditure exceeding a certain amount;
- the sale of important business assets.

[64] Such restrictions will usually not be binding upon third parties.

[65] It is common that the articles of association provide that not less than two signatures of directors are required.

[66] Of course, in such circumstances the joint venturers would have to indemnify a director who was ordered to act in a certain manner. In addition, under specific circumstances the joint venturer may also become liable if it is de facto managing the jvc. *See* LUCIUS HUBER, Vertragsgestaltung: Gründungsstruktur, Gründung, Willensbildung und Auflösung, in: MEIER-SCHATZ, op. cit. (N.3), p. 29.

A change in the articles of association will often require a special quorum (e. g. 80%).

(ix) *Deadlock devices.* Especially in 50:50 joint ventures, the parties may agree on certain deadlock devices for cases where the articles of association or the shareholders' agreement require approval by both parties and they fail to reach agreement. Parties sometimes agree to a form of arbitration procedure, in which each party may elect an additional board member who will in turn propose a third member. The newly composed board of directors will then decide on the issue. Alternatively, some agreements provide that one party will prevail on certain questions in one year, while the other will, in the next. Some agreements also state that if the parties still fail to agree after a cooling-off period, the jvc must be wound up, or that so-called "Russian Roulette" clauses will apply. Under Russian Roulette clauses, one party will need to specify the price at which it is willing to purchase or sell the shares to the other party. The other party may then choose to acquire or dispose of the shares at that price. This mechanism is destined to ensure that the shares change hand at a fair price.

(x) *Auditors*. A Swiss jvc must have qualified auditors. Parties will generally choose a well-known, possibly international, accounting firm for this task.

(xi) *Termination*. The shareholders' agreement (or the articles of association) may provide for a number of instances in which the jvc must be dissolved.[67] Generally, shareholders must decide on the liquidation of the company in a shareholders' meeting. The meeting will also elect liquidators, who will – among other duties – have to publish three notices to creditors in which creditors are asked to file any claims they might have. Generally, the proceeds of the liquidation may only be distributed to the share-

[67] Article 736 CO states four reasons for dissolving a company: (i) reasons enumerated in the articles of association (ii) bankruptcy (iii) judgement if shareholders representing 20% of the share capital demand liquidation in the event of the oppression of a minority (such cases are very rare) and (iv) in certain special cases, such as if the company fails to elect a board of directors.

holders one year after publication of the last of the three notices to creditors.[68]

(xii) *Non-competition.* Parties will usually undertake not to compete with the business of the jvc. Under Swiss competition law it will generally be possible to give such an undertaking.[69]

(xiii) *Confidentiality.* Parties often undertake to keep confidential all information relating to the business of the jvc and relating to the business and affairs of other joint venturers.

(xiv) *Contractual arrangements with joint venturers.* Parties will often require that all joint venturers consent to agreements between the jvc and one of the joint venturers. According to the specific circumstances, the parties may also undertake to provide certain services to the jvc. Rules on taxation of deemed dividends usually require that contracts be made at arm's length.

(xv) *Use of intellectual property rights created by the jvc.* Parties will generally agree that the jvc will grant licences free of charge to the joint venturer unless there are competition considerations to be taken into account.

(xvi) *Dividend policy.* The dividend policy of a jvc is typically interrelated with the question of future funding and the abstraction of the profits. Swiss companies generally have a policy of paying out only a small portion of their net income in order to finance "internally" expansion into new areas. Tax considerations (in particular, withholding tax) may also lead to a low payout ratio.

(xvii) *Costs.* Formation costs of the jvc will generally be borne by the jvc; such costs are often capitalised and written off over a period of 5 years. [70]

[68] An earlier distribution is possible, *see* Article 745.3 CO.
[69] *See* § 3.9 infra in competition law aspects.
[70] Article 664 CO.

(xviii) *Applicable law, jurisdiction.*[71] In an international context, it is necessary to specify the law applicable to the shareholders' agreement. Generally, the parties select the law of the country where the jvc is domiciled. But other solutions are conceivable, e. g. if two German companies form a jvc in Switzerland: in such case, parties are likely to specify that German law covers their relationship.[72] Parties furthermore often agree on the jurisdiction of an arbitral tribunal in case of a dispute.

3.6 Taxation

A jvc is taxed just like any other Swiss company. In particular, the following taxes will be levied.[73]

(i) *Stamp duty* (Security Issuance Tax). There is a stamp duty of 3% (expected to be 2% from 1996) on the nominal value of newly issued share capital. If there is a contribution in kind, the 3% is levied on the fair market value of such contribution. Under special circumstances, namely if the joint venturers both contribute parts of their business, the creation of a jvc qualifies as a reorganisation which will be stamp tax free. The debt equity ratio may not exceed certain thresholds[74]; furthermore, nominal equity may generally not exceed the nominal equity of subsidiaries contributed.

(ii) *Corporate income tax.* Corporate income is taxed by the Federal Government and by the Cantons (States). The tax rate at the federal levels is progressive and ranges from 3.63% to 9.8% of the income (after cantonal taxes). No exemptions or deductions are granted for foreign source income except if derived from a permanent establishment or real estate located

[71] For details *see* ANTON K. SCHNYDER, Internationale Joint-Ventures verfahrens-, anwendungs- und schiedsgerichtliche Fragen, in: MEIER-SCHATZ, op. cit. (N.3), p. 81 et seq.

[72] However, the parties will need to seek advice from a Swiss lawyer whether their agreement is in conformity with mandatory provisions under Swiss law.

[73] *See* for details SPORI/BUCHER, in: MEIER-SCHATZ, op. cit. (N.3), p. 163 et seq.

[74] 6:1 under "normal" circumstances.

abroad. Cantons each have their own tax laws which vary with respect to tax base, tax period and tax rates. [75] Whereas the maximum income tax rate in the Canton of Zug amounts to approximately 12% of the net income, other Cantons may charge income taxes of more than 30%. In contrast to the federal government, many Cantons grant a privileged tax treatment to foreign-controlled companies which mainly generate foreign source income (*see also* (iv) infra for holding companies and dividends received from subsidiaries).

(iii) *Capital tax.* The federal capital tax is annually levied at a rate of 0.0825% of shareholders' equity. Capital tax levied by the Cantons varies (generally 0.3 to 0.6% per year).

(iv) *Special rules for holding companies*. Income received from subsidiaries of a jvc is generally tax free due to an intercompany dividend received exemption; there are also reduced capital taxes on such companies at the Cantonal level.

(v) *Group relief.* There is no group relief under Swiss law; losses of a jvc may therefore not be offset against other income of a joint venturer unless the participation in the jvc can be written off which is often not allowed for tax purposes. However, as stated above, there is an exemption on dividends received by holding companies.

3.7 Foreign Involvement

There are no rules prohibiting foreign involvement in a Swiss jvc; however, certain rules and regulations apply.

(i) *Regulated businesses.* Certain regulated business – namely banks – need a special permit or licence if they are controlled by foreigners.

(ii) *Exchange control.* There are, as a general rule, no restrictions on capital transactions between Switzerland and other countries. The Swiss National Bank may, however, regulate the

[75] Most rules – but not the rates – will have to be harmonized by December 31, 2000.

country's money supply and implement credit and currency policies. While foreign entities who want to raise capital in the Swiss market must notify the Swiss National Bank,[76] a Swiss jvc would generally not be required to notify or to file for permission. The sale of any type of securities issued by Swiss companies may be prohibited by the Swiss Government under certain circumstances. Such prohibition was in force in 1978 in order to maintain a certain exchange rate level of the Swiss franc.[77] No such rules are currently in force.

(iii) *Other restrictions on foreign investment.* Non-residents may acquire all types of domestic assets or shares in domestic companies without obtaining special approval with the exception of (i) companies engaged in certain regulated businesses (such as banking or insurance) and (ii) real property or companies that hold real property (*see* below for details). The contribution of a business to a jvc which requires a licence (or a concession) to operate (i. e. business involved in transportation, the health sector or the import of certain agricultural goods) may be subject to approval by the competent authorities.

(iv) *Rules regarding the acquisition of real property by foreigners.* The Federal Law on the Acquisition of Real Property by Foreigners of December 16, 1983 (usually referred to as the Lex Friedrich) limits not only the acquisition of real property but also the purchase of shares or the participation in companies which own real property.[78] The Lex Friedrich applies to a purchase or subscription of shares in a jvc that owns real property only if (i) the purchaser is a foreigner, a foreign corporation or a Swiss corporation which is controlled by foreigners, (ii) such purchaser obtains or re-enforces a controlling position (the test for such control is met – *inter alia* – if foreign ownership exceeds one third of all shares), and (iii) the market value of the real property is more than one-third of the market value of the

[76] This permission is generally granted.
[77] Article 16i I.3 of the Federal Law on the National Bank.
[78] As further defined in Article 4 Lex Friedrich and Article 1 of the implementing ordinance.

total assets of the jvc. Unless the value is clearly below this threshold, the purchaser must seek a decision of the competent authorities that the Lex Friedrich is not applicable to the purchase of shares. If the value of the real property exceeds one third of the total assets, the foreign joint venturer must seek the approval of the competent authorities to purchase a controlling interest. Such authorization is granted if the real property is necessary for the corporation to conduct its business (e.g. for manufacturing purposes or to meet office space requirements). The authorization will often only be granted under certain conditions such as a prohibition resale or a requirement that the shares be deposited with the competent Cantonal authorities or agencies. No authorization will be granted if the real property is near a military installation or if the acquisition is considered contrary to the public interest. A purchase of shares in a company holding Swiss real estate without the necessary approval is considered null and void under the Lex Friedrich.

(v) *Rules on the employment of foreign nationals.* Switzerland imposes strict limitations upon the granting of work permits to foreign employees. Each Canton (and the Federation) has (according to the size of its economy) a yearly quota of work permits it may grant. If a foreign group enters into a Swiss joint venture, the jvc cannot expect to be staffed entirely with management from the home country of the joint venturer. However, work permits for top executives, skilled technicians and specialist essential to the establishment and the smooth operation of a business will usually be granted, subject however to the availability of such permits in that Canton or at Federal level.

3.8 Acquisition and Use of Business Assets and Intellectual Property Rights

Business assets are often transferred to the jvc. There are certain disclosure requirements[79] and tax consequences[80] if such a transfer is

[79] *See* § 3.5 (iv) supra.
[80] *See* § 3.6 (i) supra.

made in return for shares.[81] Parties may of course also consider leasing assets to the jvc; this not only avoids disclosure requirements but may also be advantageous from a tax perspective.

Intellectual property rights are often licensed rather than transferred to the jvc. If intellectual property rights are transferred outright, the jvc may need to enter into licence agreements with the joint venturers in order to allow them to continue to make use of such rights. However, competition considerations may render necessary an exclusive use of the intellectual property rights by the jvc. Intellectual property rights (with the exception of copyright) created by employees of the jvc belong – by operation of law – to the jvc.[82] In some instances, the jvc will licence such rights to the shareholders.[83]

3.9 Competition Law Considerations

The present Federal Law on Cartels[84] ("FLC") came into force on July 1, 1986. It is actually being revised and substantial changes are expected. In contrast to the national laws of most European jurisdictions – and in particular Articles 85/86 of the EEC treaty[85] – Swiss law in principle permits companies to enter into agreements that may restrict or distort competition[86] unless such agreements or measures exclude third parties from competition[87] or considerably hinder them

[81] Or against cash shortly after a capital increase against cash.
[82] Article 332 CO.
[83] *See* § 3.5 (xv).
[84] Cartels are, inter alia, defined as agreements, or non-binding agreements which influence or are liable to influence the market for specific goods or services by means of a joint restriction of competition, especially by regulating the manufacturing, the sale and resale of goods or the prices or terms upon which they are offered.
[85] Parties must always seek advice from a specialized lawyer if the agreement is likely to have effect within the EC. *See* for details, MEIER-SCHATZ, op. cit. (N.3), p. 105 et seq.
[86] The so-called "principle of abuse prevention".
[87] Elimination of competition occurs when existing competitors are forced out of the market or when potential competitors are prevented from participating in this market.

from competing (Article 6 FLC), or have socially or economically detrimental consequences (Articles 29, 32 FLC). So-called quasi-cartel organisations – defined *inter alia* as undertakings with a dominant market position – are subject to the same regulations (Article 4 FLC). The shareholders' agreement or the jvc itself may therefore be subject to the FLC.

The Federal Cartel Commission ("the Commission"), the administrative agency responsible for the enforcement of the FLC, must investigate a merger or any other combination of enterprises (such as a joint venture)[88] if the combination leads to or enforces a dominant market position (i.e. qualifies as a quasi-cartel organisation) and (cumulatively) if there is an indication of economically or socially detrimental consequences as a result of such merger[89]. The Commission investigates a number of mergers[90] every year.

The Commission can make preliminary inquiries (Article 28 FLC) which may lead to an informal settlement; it can also start formal investigations (Articles 29, 30 FLC). The Commissions may then issue recommendations, (Article 32 FLC). If the parties concerned do not accept these recommendations (which are in essence non-binding) the Federal Economic Department ("FED") may issue orders[91]. The FED is responsible for monitoring whether the parties comply with such orders or recommendations.

It is important to note in the present context that neither the Commission nor the FED have the power to order the divestiture or

[88] *See* SCHUERMANN/SCHLUEP, Kartellgesetz, Preisüberwachungsgesetz, Zurich 1988, p. 697.

[89] Legal commentators point out that the provision as enacted is not very meaningful; if the newly created entity qualifies as a cartel-like organisation (which produces the detrimental consequences mentioned in Article 30 FLC), the Commission may start an investigation anyway (Article 29, 32 FLC).

[90] One of the most significant cases is still the investigation opened in the merger between Schindler Holding AG and Flug- und Fahrzeugwerke Altenrhein AG in 1987. In 1994 the Commission investigated the Swisscare merger (health insurance), but the Commission concluded there were no economically or socially detrimental consequences of the "Swisscare" merger. *See* for details: Veröffentlichungen der Schweizerischen Kartellkommission und des Preisüberwachers (Berne 1995), p. 48 et seq.

[91] Such orders may be appealed to the Federal Supreme Court in Lausanne.

break-up of a jvc. There are no criminal penalties provided for in the FLC for hindering third parties from competing[92].

Third parties who are excluded from competition (or considerably hindered from competing) may claim damages or other appropriate relief.

Article 137 of the new Federal Statute on Private International Law of December 18, 1987 (which entered into force on January 1, 1989) provides that claims arising out of the hindrance of competition are subject to the law of the market place in which such hindrance took effect. The FLC could therefore theoretically apply to a foreign jvc[93]. The powers of the Commission are, however, limited to the territory of Switzerland.

Statutory defences vary slightly between the civil and administrative law parts of the FLC. A jvc that hinders third parties from competing may claim that legitimate interests justify its acts (Article 7 FLC). Defences to an investigation by the Commission may consist of claiming that the positive effects of the jvc for example, on costs, prices, quality, supply of goods or services, competitiveness of Swiss enterprises abroad or the interests of consumers or workers outweigh its harmful effects. The Commission must by law weigh these positive factors against the negative effects on competition of the arrangements. The law deems the exclusion (as opposed to mere hindrance) of third parties from competition as detrimental, unless there is an overriding benefit to the public interest.

[92] There are criminal penalties if recommendations accepted by the parties or orders issued by the FED are not observed.

[93] This provision presupposes that a Swiss court has jurisdiction. A Swiss company that is excluded from competition on the Swiss market by acts of foreign-based companies may, e.g. obtain jurisdiction if these companies have branch offices in Switzerland or if the claimant obtains an attachment (freezing order) on the assets of the foreign companies.

3.10 Conclusions

The jvc has clear advantages over the contractual joint venture provided that the business project to be achieved justifies the higher formation and running costs. Foreign joint venturers will generally incorporate a jvc if they intend to do business in Switzerland.

Annex: Typical Content of a Swiss Joint Venture Agreement

While it is impossible to establish a check-list which will cover all issues that need to be addressed in a given joint venture agreement, the following table of contents of a typical joint venture agreement may serve as a guideline:

JOINT VENTURE AGREEMENT

between

XXX (hereinafter referred to as "XXX")

and

YYY (hereinafter referred to as "YYY")

regarding

The joint formation and operation of a joint venture company
which will operate **ZZZ**
(hereinafter referred to as "Newco")

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