

Joint Ventures 2021

Contributing editors

Kai Bitter, Kristen A Elia and Emily Tanji



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and October 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020
No photocopying without a CLA licence.
First published 2017
Fourth edition
ISBN 978-1-83862-356-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Joint Ventures 2021

Contributing editors

Kai Bitter, Kristen A Elia and Emily Tanji

Frost Brown Todd LLC

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Joint Ventures*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Russia, South Korea and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Kai Bitter, Kristen A Elia and Emily Tanji of Frost Brown Todd LLC, for their continued assistance with this volume.



London
October 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Argentina	3	South Africa	49
Pablo Garcia Morillo and Maria Laura Bolatti Cristóforo		Rudolph du Plessis	
Marval O'Farrell Mairal		Herbert Smith Freehills LLP	
China	11	South Korea	56
Yuan Wang		Heesung Ahn, Jaemyung Kim, Young Min Lee and Jeremiah Phillips	
DeHeng Law Offices		Kim & Chang	
India	18	Switzerland	63
Rahul Chadha, Neeraj Prakash and Syed Yusuf Hasan		Daniel Hayek and Mark Meili	
Chadha & Co		Prager Dreifuss	
Japan	26	Taiwan	69
Nobuo Nakata		Susan Lo and Yvonne Hsieh	
Hibiya-Nakata		Lee and Li Attorneys at Law	
Netherlands	32	Thailand	74
Rens MR Berrevoets, Suzanne S Beijersbergen and		Apinya Sarntikasem and Jirapong Sriwat	
Tim B Schreuders		Nishimura & Asahi	
Heussen BV		Ukraine	81
Saudi Arabia	40	Alexander Weigelt and Volodymyr Yakubovskyy	
Nicolas Bremer		NOBLES	
Alexander & Partner Rechtsanwälte		United States	88
		Kai Bitter, Kristen A Elia and Emily Tanji	
		Frost Brown Todd LLC	

Switzerland

Daniel Hayek and Mark Meili

Prager Dreifuss

FORM

Types of joint venture

- 1 | What are the key types of joint venture in your jurisdiction? Is the 'joint venture' recognised as a distinct legal concept?

'Joint venture' is recognised as a legal concept in Switzerland, although there is no statutory definition of this term or a body of law that is exclusively applicable on joint ventures. Swiss joint ventures take two distinct forms, depending on their legal structure:

- contractual joint ventures; and
- equity/corporate joint ventures.

The advantages and disadvantages of those two types originate predominantly from the fact that in one case the joint venture parties can act through a corporate structure. Contractual joint ventures often (but not always) qualify as simple partnerships in the sense of article 530 et seq of the Swiss Code of Obligations and are based on a set of relatively simple contracts. They allow for more flexibility in terms of formation, operation and termination than equity joint ventures. On the other hand, it is not always in the interest of the joint venture parties to operate as a group directly in the respective market, and there is no limited liability.

In contrast, equity joint ventures include an independent legal entity, which is often established for this very purpose. This means that mandatory Swiss law rules applicable to the formation, operation and termination of the joint venture company must be observed. While this is not particularly onerous to the joint venture parties, it is still a factor to consider. The equity joint venture has its main benefits when the common goal requires a distinct entity for marketing purposes or dealing with third parties, or limited liability is a key concern.

Common sectors

- 2 | In what sectors are joint ventures most commonly used in your jurisdiction?

Joint ventures are an instrument that is used in a variety of sectors in Switzerland, for example, construction, heavy industry, beverages, transport, sports marketing, energy and media.

PARTIES

Rules for foreign parties

- 3 | Are there rules that relate specifically to foreign joint venture parties?

Swiss law does not distinguish between foreign and domestic joint venture parties and it does not prohibit or complicate cross-border joint ventures. However, if the joint venture conducts a regulated business, foreign involvement may be subject to certain regulations. For example,

control of a Swiss bank by foreigners requires a special permit, and the direct or indirect acquisition of real estate used for living accommodation purposes by non-residents is subject to approval. In addition, nationals of third countries outside the EU and EFTA are subject to an immigration regime under which only a limited number of work permits are available. Therefore, joint venture parties from outside the EU and EFTA may find it difficult to staff a joint venture company with a workforce from their country of origin. However, highly trained employees and specialists will usually receive a working permit.

Ultimate beneficial ownership

- 4 | What requirements are there to disclose the ultimate beneficial ownership of a joint venture entity?

In the majority of cases, Swiss equity joint ventures include a company limited by shares (*Aktiengesellschaft*). Any person who acquires shares in a company limited by shares that is not listed on a stock exchange and thus reaches or exceeds the threshold of 25 per cent of the share capital or votes (alone or acting in concert) must, within one month, give notice to the company of the first name, surname and address of the natural person for whom it is ultimately acting.

SETTING UP AND OPERATING A JOINT VENTURE

Structure

- 5 | Are there any particular drivers in your jurisdiction that will determine how a joint venture is structured?

The structure of the joint venture is mainly driven by the joint venture parties' needs.

Tax considerations

- 6 | When establishing a joint venture, what tax considerations arise for the joint venture parties and the joint venture entity? How can tax charges be lawfully mitigated?

Contractual joint ventures are not subject to taxation, offer full tax transparency, and profits and losses accrue directly to the joint venture parties.

In the case of an equity joint venture, the incorporation of the company is subject to Swiss stamp duty of 1 per cent for its nominal share capital exceeding 1 million Swiss francs. This stamp duty may be mitigated if the joint venture entity is established by contribution in kind of parts of the joint venture parties' businesses.

Corporate profits are taxed at federal, cantonal and communal levels. The federal profit tax rate is 8.5 per cent (effective tax rate 7.83 per cent). Tax rates vary between the 26 cantons and between the communes within the cantons, which allows for tax planning. Overall effective profit tax rates (2020) are between 11.9 per cent (Canton of

Zug) and 21.6 per cent (Canton of Berne). Many cantons have lowered profit tax rates due to the Federal Act on Tax Reform and AHV Financing, which Swiss voters adopted on 19 May 2019 (eg, Canton of Geneva from 24.16 per cent to 14 per cent).

Capital tax is raised on the company's equity at variable rates depending on the canton where the company is domiciled, but it is usually below 5 per cent.

A company may apply for a tax holiday if certain conditions are met. Tax incentives are granted on a case-by-case basis, and their extent and duration largely depends on the size of the investment and the importance attributed to the economic development of the canton or region concerned. Such incentives may be either relief or exemption from income and annual capital tax for up to 10 years.

Overall, the joint venture parties should carefully analyse the situation and obtain tax advice before they establish the joint venture entity. The Swiss tax regime is very competitive. Searching for a beneficial tax structure within Switzerland will most certainly lead to an attractive result.

Asset contribution restriction

7 | Are there any restrictions on the contribution of assets to a joint venture entity?

There are no restrictions on the contributions of assets to a joint venture entity, provided that the relevant assets are tradeable, are available to the company immediately after the contribution, can be capitalised in the balance sheet and the company can liquidate them, if necessary. Contrary to foreign jurisdictions, the obligations of third parties to provide services to the company are not considered contributable assets.

Interaction between constitution and agreement

8 | What is the interaction between the constitution of the joint venture entity and the agreement between the joint venture parties?

The articles of association (constitution) of the joint venture entity and the agreement between the joint venture parties are, in principle, separate items and they do not directly interact with one another. The joint venture parties will mirror their agreement in the articles of association to safeguard certain aspects of their agreement. In particular, this includes the purpose of the joint venture entity, maintaining the balance of power (ie, the shares the parties hold) between the parties, transfer restrictions of shares, the number of board members, the overall composition of the board and termination of the company if a specific goal is reached. The extent to which this is possible is limited by applicable law. However, since the articles of association are publicly available in Switzerland but the joint venture agreement is not (and there is also no requirement for registration), joint venture parties usually prefer not to include too many details in the articles of association. Additional organisational matters are usually included in the organisational by-laws, which is an internal document. Conflicts between the articles of association and the agreement between the joint venture parties often create a conflict of interests for the board.

Party interaction

9 | How may the joint venture parties interact with the joint venture entity? Are there any restrictions?

If the joint venture entity is a company limited by shares, the joint venture parties will typically be the shareholders and benefit from all of the shareholders' rights, including the right to obtain the annual report and the audit report (article 696 of the Swiss Code of Obligations (CO)) and the limited right of information (article 697 CO), which may

only be refused where providing such information would jeopardise the company's trade secrets or other interests warranting protection. Under certain circumstances, the board of directors will want to withhold some information if this is required in the interest of the joint venture entity. However, the board of directors may, in principle, share all information with the shareholders informally, as long as all shareholders are treated equally, there are no conflicts with the interests of the joint venture entity and the information is not restricted for other reasons (eg, data protection in relation to customer information). In any event, each joint venture party should ensure that it may nominate a board member. By contrast, in contractual joint ventures, the parties have the right to information on the status of the joint venture's affairs, to inspect its books and documents and to obtain a summary statement of its financial position (article 541 CO).

Exercising control

10 | How may the joint venture parties exercise control over the joint venture entity's decision-making?

For the protection of the joint venture parties, the joint venture agreement may, for example, require that shareholders' meetings are duly constituted only if all shareholders (ie, joint venture parties) are present in the meeting or that specific decisions require an elevated quorum (eg, changes to the joint venture vehicle such as liquidation or a merger or changes to the capital structure). Furthermore, casting votes in favour of a joint venture partner can be provided for in the agreement in the case of deadlock.

Minority shareholders do not enjoy strong protection under Swiss law. However, any shareholder – including minority shareholders – may challenge the validity of resolutions that violate statutory law or the articles of association. In addition, the joint venture agreement can provide for the additional protection of minority investors by, for example, requiring the consent of all joint venture parties for particularly important decisions, such as those relating to capital expenditure exceeding a specified amount or the sale of important assets.

Governance issues

11 | What are the most common governance issues that arise in connection with joint ventures? How are these dealt with?

Joint venture corporations face different governance challenges to, for example, public companies. While public companies may be concerned with stopping self-dealing, the major goal of a joint venture will be to balance the goals of the joint venture undertaking with the individual goals of the partners. Balancing these interests may become a challenge where the founders of a joint venture have representatives on the board of directors and these representatives endorse the interests of the founders. Independent committees and codes of conduct could be used to level out the interests. Further, specialised committees may be helpful, especially where the joint venture engages in the technology or manufacturing business. Focusing on technical issues and resolving disputes relating to technical matters can then be dealt with by such committees.

Nominee directors

12 | With an incorporated joint venture, what controls exist in your jurisdiction in relation to nominee directors? How should a nominee director balance the potentially conflicting interests of the joint venture company and the appointing shareholder?

The members of the board of directors of a Swiss company limited by shares are elected by a meeting of shareholders. From that perspective, a board member nominated by a shareholder is no different from his or

her fellow board members. In practice, such a nominee director often has an agreement with the appointing shareholder, which may result in conflicting duties towards the appointing shareholder on the one hand and the joint venture entity on the other. When the nominee director decides within his or her margin of discretion, it is considered acceptable that he or she acts based on the instructions of the appointing shareholder. If, however, there is a conflict of interest, the interests of the joint venture entity must take precedence or the nominee director may incur personal liability. This risk can be mitigated to expressly define the support of the joint venture business as a purpose of the joint venture entity in its articles of association.

Competition law

13 What competition law considerations are engaged by the formation and operation of the joint venture? Is approval needed?

Generally speaking, two types of joint ventures can be distinguished from a competition law perspective. They are subject to different competition rules.

Full-function joint ventures are joint ventures that perform on a lasting basis all the functions of an autonomous economic entity. If the joint venture is a new entity, business activities from at least one of the controlling undertakings must be transferred to the joint venture for it to be caught by merger control. Such transactions must be notified to the Swiss competition authorities prior to their implementation if the following thresholds are both met:

- worldwide turnover of the undertakings concerned is at least 2 billion Swiss francs or the turnover in Switzerland is at least 500 million Swiss francs; and
- at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs (article 9 Federal Act on Cartels).

If the joint venture has no sufficient connection to Switzerland (ie, the joint venture has no intention to operate and generate turnover in Switzerland), a notification may not be required. In each case, however, this should be discussed with the competition authorities.

Cooperative joint ventures are joint ventures that are not full-function joint ventures. These are assessed under the rules applying to horizontal agreements. Such transactions can be notified pursuant to article 49a of the Federal Act on Cartels prior to their implementation.

Provision of services

14 What are the key considerations in your jurisdiction in structuring the provision of services to the joint venture entity by joint venture parties?

Generally, the provision of services to the joint venture entity should not create particular issues, to the extent that the board of directors does not outsource its non-transferable and inalienable duties (eg, the overall management of the company, and the organisation of the accounting, financial control and financial planning systems as required for the management).

Employment rights

15 What impact do statutory employment rights have in joint ventures?

The Swiss jurisdiction provides for a dual system for the granting of residence and work permits to foreigners, which distinguishes between EU and EFTA nationals (based on the Agreement on Free Movement of Persons) and non-EU or EFTA nationals, or third country nationals.

EU and EFTA nationals only require a work permit for gainful employment lasting for more than three months, irrespective of their qualifications.

By decree of the Federal Council, qualified employees from third countries are admitted to the Swiss labour market, in limited numbers only, if they are well qualified and fulfil certain statutory requirements such as being a qualified employee. Statutory requirements include, among others, providing proof that a person cannot be recruited from the labour market in Switzerland or another EU or EFTA member state. Certain exceptions can be made to the admittance requirements, for example, for the transfer of a cadre or specialists within international businesses or joint ventures. However, quotas for work permits exist on both the cantonal and the federal levels and also apply to such exceptional work permits for qualified workers.

Intellectual property rights

16 How are intellectual property rights generally dealt with on the creation, operation and termination of a joint venture in your jurisdiction?

All assets contributed to the contractual joint venture are then jointly owned by the joint venture parties. Therefore, intellectual property rights are often transferred to the joint venture by way of a licence agreement, whereby the ownership remains with the parties.

However, it is also possible to transfer an intellectual property right to the joint venture entity as a contribution in kind. The valuation of a contribution of an intellectual property right in kind may pose problems, in the event of the bankruptcy of the joint venture corporation or in the event that the contributing party leaves the joint venture corporation. In both cases, an initial under- or overvaluation may lead to liability towards creditors, shareholders or the leaving party.

Regardless of whether the joint venture is organised contractually or by corporation, it is highly advisable to agree on the rights and obligations of the joint venture parties in relation to the ownership and use derived from the joint venture's operations, both during the operational life of the joint venture and in the case of a termination of the joint venture. These should clearly be established in the partnership agreement or the licensing agreement.

Joint venture parties should keep in mind that Swiss law provides for the employer's ownership of inventions and designs created by employees (article 332 CO).

FUNDING THE JOINT VENTURE

Typical funding

17 How are joint ventures generally funded in your jurisdiction? Are there any particular requirements relating to funding and security packages?

In relation to contractual joint ventures, the joint venture agreement should specify the amount and the kind of contributions to be made by each party whereby such contributions can be made in the form of cash, assets or labour and services. Any contribution made to the contractual joint venture is jointly owned by the joint venture parties. Therefore, assets will often be transferred with the right to use or benefit while the ownership of the assets remains solely with the contributor. Usually, the contractual joint venture will cease to exist where one party exits the venture, but the parties are free to stipulate a deviation from that rule in the joint venture agreement. Therein, the parties may also stipulate how the assets contributed by the departing party shall be treated (ie, if they remain with the joint venture or if the leaving party shall be remunerated, in which case the amount of the remuneration or the method to calculate such remuneration shall also be stipulated in the agreement).

Joint venture entities in the form of companies limited by shares must have a minimum registered share capital of 100,000 Swiss francs. Contributions can be made in cash or in kind, whereby the valuation of contributions in kind may be an issue. Subsequent to the initial capital contribution, the corporate venture can be funded by issuing shares or by incurring debt. Subsequent funding bears the risk of a dilution of voting rights. Further to traditional debt financing (ie, borrowing from banks), instruments such as venture capital and project finance or capital market instruments can provide the required funding. Moreover, the shareholders' agreement of a company limited by shares may require the joint venture parties to provide further funding or guarantees.

Capital injection restrictions

- 18 | Are there any legal or regulatory restrictions on the injection of capital into, or the distribution of profits or the extraction of cash by other means from, the joint venture entity?

Any capital injection into a joint venture company, distribution of profits or other extractions of cash are subject to mandatory Swiss law.

Regarding capital injections, the Swiss Code of Obligations (CO) provides for three types of capital increase: ordinary capital increase (article 650 CO), authorised capital increase (article 651 CO) and contingent capital increase (article 653 CO). Capital may further be injected into the corporation by way of capital contributions by shareholders (*à fonds perdu* payments, ie, payments without consideration). However, since no shares are issued following a capital contribution, the joint venture parties will usually ensure that each party participates in the capital contribution pro rata to its holdings in the joint venture entity.

As for the distribution of profits, under Swiss law, corporate joint ventures may only distribute dividends on the basis of an audited balance sheet that has been approved at the shareholders' meeting. Further, the dividend must either be paid out of accrued profit or distributable reserves, subject to the allocation of profit to the general legal reserves under statutory law. Generally, shareholders do not have a right to request a corporation to repurchase its shares, and neither may the corporation deprive the shareholder of its shares. Certain exceptions to this principle exist, for example, in the event of a shareholder's failure to fully pay up the subscription price (article 681 CO) or in the event of a squeeze-out (in the context of a public tender offer or a merger).

Tax considerations

- 19 | What tax considerations should be taken into account in the operation of the joint venture?

The distribution of dividends is subject to 35 per cent withholding tax. Based on a double taxation treaty (if applicable), a full or partial refund of the withholding tax may be possible. For intra-group dividends, the notification procedure may be available. Switzerland has an excellent double taxation treaty network, with over 100 treaties currently in place for income tax purposes.

Interest payments on loans are subject to Swiss withholding tax only in the case of bonds, bond-like debts and collective fundraising.

There is no group relief or consortium relief between the joint venture entity and the joint venture parties available.

Accounting and reporting issues

- 20 | Are there any noteworthy accounting or reporting issues for the joint venture parties regarding their investment in the joint venture?

There are no noteworthy accounting or reporting issues.

DEADLOCK, EXIT AND TERMINATION

Deadlock provisions

- 21 | What deadlock provisions are commonly included in joint venture agreements in your jurisdiction?

In an equity joint venture, the parties can give the chairman a casting vote to unlock a deadlock at board level. However, in a 50:50 joint venture, this will give one party a considerable advantage. This effect can be mitigated by alternating the right of appointing the chairman at regular intervals or by electing an independent person to the board who acts as chairman. Sometimes, joint venture agreements provide for the appointment of an independent party who decides the dispute or to implement a joint committee of the joint venture parties (to the extent that the dispute does not relate to non-transferable and inalienable duties of the board or the meeting of shareholders), or even Russian roulette and blind bid clauses. However, the more innovative a solution appears, the higher the risk that it will not work in practice and lead to further issues. Unlocking a 50:50 deadlock is a delicate task and it is difficult to balance any solution with the concept of common control. Therefore, it is recommended to prioritise simple solutions or alternative means to avoid conflicts.

Exit provisions

- 22 | What exit provisions are commonly included? Does the law restrict any forms of mandatory transfer provision or any basis of calculation?

Joint venture projects usually include rather detailed buy and sell arrangements, which grant the parties the right or the obligation to sell their share in the joint venture entity upon the occurrence of certain pre-defined events (eg, a breach of contract). The law does not restrict the mandatory transfer of shares or a specific basis for calculation. However, it may be necessary to enforce the respective provisions before court if there is a dispute between the joint venture parties.

Tax considerations following termination

- 23 | What are the tax considerations on termination of the joint venture?

On the level of the joint venture entity, federal, cantonal and communal profit tax will become due following the realisation of all gains on hidden assets in the event of a liquidation of the joint venture entity. Any distribution of dividends by the joint venture entity to its shareholders (including any transfer of assets that is not done at arm's length) will be subject to 35 per cent Swiss withholding tax. On a Swiss shareholder level, liquidation surpluses represent taxable income unless they are a repayment of existing capital contributions. A participation exemption may be applicable to this income as well.

DISPUTES

Choice of law and resolution methods

- 24 | In your jurisdiction, are there constraints on the choice of law or the method of dispute resolution provided for in joint venture agreements?

In relation to the joint venture agreement, the parties are free to choose the applicable law and the method of dispute resolution (eg, courts of a particular state or an arbitral tribunal).

Mandatorily applicable local law

25 | What mandatory provisions of local law will apply irrespective of the choice of governing law?

Under Swiss law, the enforceability of any agreement is limited by the principle of public policy. The enforcement of foreign judgments made by a court of a state bound by the Lugano Convention are subject to the provisions of the Lugano Convention. Foreign judgments made by a court of a state not bound by the Lugano Convention may not be recognised by the courts of Switzerland, if:

- the judgment was made by a court that has no jurisdiction;
- the judgment is not final and binding; or
- a ground for refusal according to article 27(2) of the Swiss Federal Code on International Private Law is established.

Remedy restrictions

26 | Are there any restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes? Are there any restrictions on the arbitration of shareholder claims?

If the joint venture parties resort to litigation and the arbitral award provides for a specific performance of the joint venture entity, such specific performance may not be enforceable. Instead, the joint venture agreement should provide for liquidated damages.

Minority investor protection

27 | Are there any statutory protections for minority investors that would apply to joint ventures?

The minority shareholders of a company limited by shares enjoy only a few specific statutory rights. While Swiss law does not provide for their right to nominate a representative to the board of directors, minority shareholders do have the right to request a shareholder's meeting or to request that an item be added to the agenda of the meeting, where the minority shareholders represent at least 10 per cent of the share capital or represent shares with a nominal value of 1 million Swiss francs, respectively (article 699 paragraph 3 of the Swiss Code of Obligations (CO)). Minority investors are further protected by article 704 CO, which stipulates that a double majority is necessary for certain important decisions in the shareholders' meeting, and by article 706 CO, which allows all shareholders to challenge the validity of shareholders' resolutions violating statutory law or the company's articles of association.

By contrast, in contractual joint ventures where the parties have a simple partnership, the minority investors have by default (and unless stipulated otherwise) additional rights: resolutions are made with the consent of all partners, each party has an equal share in profits and losses regardless of the nature and amount of his or her contributions, each party has a right to receive information, etc.

Liabilities

28 | How can joint venture parties have liabilities to each other beyond what is expressly agreed in the joint venture agreement?

In a contractual joint venture, each party is liable to the other parties for any loss or damages caused through his or her fault (article 538 para 2 CO). Towards third parties, the partners have personal, unlimited, joint and several liability for obligations contracted jointly or through representatives, unless stipulated differently in the joint venture agreement (article 544 para 3 CO). Restriction of liability is only possible where a party expressly acts in its own name. However, such liability among the parties is not given if a party acted tortiously.

By contrast, only corporate assets are liable for the obligations of a corporate joint venture. Swiss law provides for personal liability of members of the board of directors and persons engaged in business management or auditing for any damages or losses arising from an intentional or negligent breach of their duties. Corporate law distinguishes the following types of liability:

- liability for administration, business management and liquidation (article 754 CO);
- liability for the issue prospectus (article 752 CO); and
- liability of auditors (article 755 CO).

The founders of a corporation, members of the board of directors and all people engaged in the founding of the corporation become liable towards the corporation, the individual shareholders and creditors for any losses if they:

- wilfully or negligently conceal, disguise or give inaccurate or misleading information on contributions in kind, acquisitions in kind or the granting of special privileges to shareholders or other persons in the articles of association, statutory report or a capital increase report, or otherwise act unlawfully in approving such a measure;
- wilfully or negligently induce the incorporation of the company on the basis of a certificate or deed containing inaccurate information; or
- knowingly contribute to the acceptance of subscriptions from insolvent persons.

As a consequence of the limited liability, shareholders will at most lose their proportion of the share capital in the case of a bankruptcy of the corporation. However, the shareholders may have entered into a pooling agreement, in which case they constitute a simple partnership among themselves.

Disclosure of evidence

29 | Are there any particular issues that can arise in joint venture disputes in your jurisdiction concerning disclosure of evidence?

Swiss law does not provide for pre-trial disclosure. Rather, the parties determine which evidence they will present to the court in their written briefs. If such a document is, however, in the possession of the other party, the court may order production on request. Pre-trial requests are only possible where evidence may become unobtainable over time or where one party has a legal duty to produce documents. Under Swiss law, certain individuals (a party's family members and certain professionals, such as attorneys or journalists) are not required to give testimony or to produce documents. However, these privilege rights differ in scope. In-house counsels (including attorneys working in an operating joint venture) do not benefit from this legal privilege.

MARKET OVERVIEW

Jurisdictional advantages

30 | What advantages does your jurisdiction offer for parties wishing to set up and operate joint ventures?

The Swiss jurisdiction offers a quick and easy system for establishing joint venture companies and the necessary flexibility to create a joint venture agreement tailor-made for the joint venture parties' needs. A favourable tax regime and easy access to a qualified workforce are also incentives for establishing a joint venture in Switzerland.

Requirements and restrictions

- 31 | Are there any particular requirements or restrictions relating to joint ventures in your jurisdiction that could deter international investors?

A joint venture entity is subject to mandatory Swiss corporate law, which may limit the structure the joint venture parties would like to implement. For example, article 716a of the Swiss Code of Obligations (CO) lists a number of non-transferable and inalienable duties of the board of directors, such as the overall management of the company, the determination of the company's organisation and notification of the court in the event that the company's balance sheet shows negative equity. This concept of self-management of a company does not always go well together with a joint venture: if the joint venture parties are in agreement, the board will, to a large extent, execute decisions made elsewhere. If the joint venture parties are in disagreement, the board may find itself in deadlock. However, this issue is mitigated by the fact that article 716a CO is applied rather selectively. Overall, it seems that these issues are not really a problem in practice.

UPDATES & TRENDS

Key developments of the past year

- 32 | What are the current trends affecting joint ventures in your jurisdiction? What recent developments in legislation and case law have had an impact on joint ventures?

Against the backdrop of the rise of new technologies and new players (eg, China), it seems that established players have an increased appetite for joint ventures.

As most joint ventures resort to arbitration in case of disputes, there is no recent published case law relevant to joint ventures.

Coronavirus

- 33 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The emergency legislation in Switzerland is mainly addressed to aid companies that have run into serious financial difficulties because of covid-19. In particular, companies are given easy access to loans without interest or at a very low interest rate, unemployment benefits have been extended and the instrument of the moratorium has undergone certain adjustment for companies that require restructuring. Thus, companies with financial problems can benefit from a wide array of solutions, depending on their individual situation.



ATTORNEYS AT LAW

Daniel Hayek

daniel.hayek@prager-dreifuss.com

Mark Meili

mark.meili@prager-dreifuss.com

Mühlebachstrasse 6

CH-8008 Zürich

Switzerland

Tel: +41 44 254 55 55

Fax: +41 44 254 55 99

www.prager-dreifuss.com

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)