Switzerland

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Introduction

Switzerland has always been considered a favorable environment for the establishment of domestic or cross-border joint ventures. Due to its competitive corporate tax regime, established legal and political environment, high-quality financial services, qualified workforce, and central geographical location, Switzerland often serves as an operational base for foreign joint venture partners.

Furthermore, contrary to other jurisdictions, Switzerland offers a very liberal legal framework for joint venture partners to structure the joint venture according to their needs.[2] One of the reasons why foreign investors in Switzerland may wish to set up a joint venture is to have the local support of a reliable Swiss partner when entering the Swiss market.

Whereas, in Switzerland, joint venture structures are mainly found in construction and industrial projects, R&D, and financing, there has been an intensification of FinTech-driven joint ventures in recent years. Other industries, such as retail, are expecting an accelerated development of e-commerce joint ventures reflecting a similar trend in many other countries. In addition, the Covid-19 pandemic has prompted several pharmaceutical companies to increase their collaboration and pool their manufacturing capacities, notably through joint ventures.

Swiss law does not specifically address or regulate joint ventures. In general, the formation and operation of a joint venture is governed by the general rules applying to contracts and companies as set forth by the Swiss Code of Obligations.

Swiss doctrine distinguishes between two basic forms of joint ventures: the contractual joint venture and the corporate/equity joint venture. This chapter provides an overview of these two legal structures.

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2 For more detailed information on joint venture contracts under Swiss law and a template in English (and French), see Prof. Dr. Jean-Paul Vulliéty, "Contrat de Joint Venture", in Sylvain Marchand / Christine Chappuis / Laurent Hirsch (editors), *Recueil de contrats commerciaux* (Helbing Lichtenhan, 2013), pp. 1097 *et seq*.

Structuring Joint Venture

Contractual Joint Ventures

The backbone of contractual joint ventures is the agreement between the partners/parties to combine their efforts in order to reach a common objective. The so-called "joint venture agreement" (*Gesellschaft(er)vertrag* or *contrat d'entreprise commune*) will in particular address the following items:

- The purpose of the joint venture;
- Each party's contribution to the joint venture (financial or in kind);
- The internal organization of the joint venture, including the representation rights; and
- Distribution of loss and profits.

Contribution in kind, such as a lease, a loan, or an intellectual property license, can be contributed in the form of ancillary agreements entered into by the partners/parties, as further specified in the joint venture agreement.

The contractual joint venture will usually qualify as a simple partnership (*einfache Gesellschaft* or *société simple*) as governed by articles 530 *et seq* of the Swiss Code of Obligations.[3] Such qualification is relevant in order to determine what (mandatory or statutory) rules of Swiss law may apply.

A contractual joint venture is often chosen by parties who intend to enter into a project that is limited in scope and time and that does not require a permanent structure.

Corporate Joint Ventures

Alternatively, parties to a joint venture agreement may choose to fulfill their common objective through a corporate vehicle established and managed in accordance with the terms of the joint venture agreement.

The essence of a corporate or equity joint venture is the agreement between the partners/parties to establish an independent corporate vehicle of which they will be the equity holders and through which they will fulfill their common objective.

Much like a shareholder agreement, the corporate joint venture agreement usually sets forth the main characteristics of the future corporate vehicle (type and nature of the company), the internal organization of the corporate vehicle, voting rights, share transfer restrictions, and the contribution to be given by every single joint

3 Decision of the Swiss Federal Tribunal 4C.22/2006 of 5 May 2006. Pascal Montavon et al., *Abrégé de droit commercial* (Schulthess 2017), pp. 136 and 1032; Thomas Probst, "Le contrat de joint venture", in: *La pratique contractuelle: actualité et perspectives* (Schulthess 2009), p. 52; *see also* Pierre Tercier/Laurent Bieri/Blaise Carron, *Les contrats spéciaux* (Schulthess 2016), paras 6878 *et seq*.

venture partner.[4] The corporate joint venture may also provide for the existence of ancillary (business) agreements that will be entered into by the corporate vehicle and the partners. In Switzerland, corporate joint ventures are usually organized in the form of a company limited by shares (*Aktiengesellschaft* or *société anonyme*) or a limited-liability company (*Gesellschaft mit beschränkter Haftung* or *société à responsabilité limitée*).[5] Joint ventures can also be created by means of a subscription for new shares or transfer of shares from a pre-existing company.[6]

Choice of Legal Form

In General

When choosing the joint venture form in Switzerland, the following aspects should be carefully considered:

- Formation, operation, and termination of the joint venture;
- Liability of the joint venture partner/parties;
- Confidentiality of the joint venture partners/parties;
- Tax aspects; and
- Flexibility of the joint venture.

Contractual Joint Ventures

As a general principle, under Swiss law, contractual joint ventures are useful in cases where no permanent structure is required or where flexibility is a key element for the success of the joint venture. A contract is, indeed, more flexible in terms of formation, operation, and termination than a corporate structure.

One common example of a contractual joint venture is a consortium intended to carry out a construction project.[7] A contractual joint venture is, as a rule, not subject to taxes itself and offers full tax transparency. However, the partners/parties to the contractual joint venture are taxed.

4 Thomas Probst, “Le contrat de joint venture”, in: *La pratique contractuelle: actualité et perspectives* (Schulthess 2009), pp. 48 *et seq*.
5 Pascal Montavon et al., “Abrégé de droit commercial” (Schulthess 2017), pp. 136 and 1033; Rudolf Tschäni/Hans-Jakob Diem/Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), p. 322.
6 Heini Rüdisühli, “Joint Ventures – steuerliche Probleme”, in: *Mergers & Acquisitions III* (Schulthess 2001), pp. 99 *et seq*; Jasmin Djalali, *Internationale Joint Ventures* (Stämpfli 1999), p. 61.
7 Decision of the Swiss Federal Tribunal 4C.22/2006 of 5 May 2006; *see also* Nicolas Duc/Nicolas Cottier, “Forme juridique d’un Joint Venture: SA ou Sàrl?” in: *Perspectives et risques de nouveautés juridiques 2009/2010* (Schulthess 2010), p. 36; Thomas Probst, “Le contrat de joint venture” in: *La pratique contractuelle: actualité et perspectives* (Schulthess 2009), p. 52.

Corporate Joint Ventures

In contrast to the contractual joint venture, the corporate joint venture is an independent legal vehicle with distinct and separate interests from those of its members (parties to the corporate joint venture) and shareholders. Corporate joint ventures often represent long-term cooperation arrangements between two or more parties.[8] The establishment of the joint venture company is relatively simple, the main advantages being that shareholders' liability may be limited to their respective equity holdings, shares can be transferred to third parties, and financing can be obtained more easily than with a contractual joint venture.

Disadvantages include limited flexibility (namely, as regards the relationship within the company which are — depending on the type of corporate vehicle — governed by mandatory corporate law rules), incorporation costs, double taxation, and the inevitable sharing of business secrets.[9] In addition, since 2015, new disclosure obligations regarding the reporting of beneficial owners of unlisted companies have entered into force in Switzerland. Should the corporate joint ventures be organized in the form of a Swiss company limited by shares, a shareholder that acquires 25 per cent or more of the share capital or voting rights (alone or acting in concert) must provide the company with the name, surname, and address of the natural person for whom it is ultimately acting (i.e., the ultimate beneficial owner).[10] Failure to do so results in severe consequences, including a forfeiture of monetary rights in relation to the shares (i.e., distribution of dividends) and a stay of voting and other rights until the UBO was disclosed.

Frequently, two enterprises cooperate for R&D purposes of, and exploitation of a new technology. Similarly, a corporate joint venture may be established by two or more banks in order to provide internet services, such as financial portals or online banking platforms.[11] The corporate joint venture may choose to market and distribute its products or, alternatively, leave the manufacturing, marketing, and distribution up to the equity holders.

In the case of a corporate joint venture having the form of a company limited by shares or a limited-liability company, Switzerland levies direct federal corporate income tax at a flat rate of 8.5 per cent. In addition, each of the 26 cantons has its own tax regime and levies cantonal and communal income taxes at different rates.

On 19 May 2019, the Swiss voters adopted the Tax Reform and AHV Financing, which entered into force on 1 January 2020. As a result, many Swiss cantons have already implemented or are implementing lower profit tax rates. The range of the effective income tax rate on profit for federal, cantonal, and municipal taxes varies between approximately 12 per cent and 18 per cent, depending on the company's

8 Jasmin Djalali, *Internationale Joint Ventures* (Stämpfli 1999), p. 14.

9 Reinhard Klarmann, *A legal study with particular reference to the laws of Switzerland and the United Arab Emirates* (Schulthess 2003), p. 107.

10 Swiss Code of Obligations, art 697j.

11 Rudolf Tschäni, Hans-Jakob Diem, and Matthias Wolf; *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), p. 294.

place of incorporation. By way of illustration, the effective corporate income tax rate amounts to approximately 11.91 per cent in Canton of Zug, 12.30 per cent in Canton of Lucerne, 13.04 in Basel-Stadt, 13.79 per cent in Canton of Vaud, and 13.99 per cent in Canton of Geneva, while Canton of Zurich will gradually reduce its rate to 18.19 per cent in 2023.

Cantons also levy a capital tax, which is based on the corporation's capital and reserves. The tax rates vary from 0.01 per cent to 0.5 per cent.

Furthermore, the incorporation of a corporate joint venture having the form of a company limited by shares or a limited-liability company is generally subject to a one-time Swiss stamp duty of one per cent for its nominal share capital exceeding CHF 1 million.

In view of the foregoing, it is highly recommended to carefully consider the potential tax aspects before establishing a corporate joint venture.

Governing Law and Language

Governing Law

In General

When individuals or companies entering into a joint venture agreement are all Swiss residents or based in Switzerland, there is no issue regarding the law governing their contractual relationship. However, the situation is different for cross-border joint ventures where at least one party is a non-Swiss resident, or where a joint venture company incorporated in Switzerland is entirely composed of non-Swiss entities.

Contractual Joint Ventures

As a consequence of party autonomy, Swiss law allows the parties to a contractual joint venture to choose the law applicable to their contractual relationship. It is important that parties to cross-border joint venture agreements choose and clearly specify the governing law for their contractual relationship as there will inevitably be gaps to fill or questions of interpretation to answer.[12]

Where parties did not choose a law to govern their relationship, the Swiss Private International Law Act ("PILA") will apply and determine the law applicable to the cross-border joint venture agreement and to the additional relationship between the parties. Under the PILA, determining the law applicable to the joint venture agreement may not be as straight forward as for the joint venture vehicle or ancillary contracts (see below).

Under the PILA, only organized associations of persons and organized units of assets are considered as companies/legal entities, to which articles 150 *et seq* PILA apply.[13] In the case of a non-organized association of persons or units of assets, the legal

12 Hewitt, *Joint Ventures* (2005), p. 80.
13 Basler Kommentar IPRG – Stefan Eberhard/Andreas von Planta, arts 150–165 N 10.

provisions relating to contracts will apply, namely, articles 112 *et seq* PILA.[14] In the absence of a choice of law provision, a contract is governed by the law of the place of residence of the party that must perform the characteristic obligation.

For instance, in the case of a mandate, it is the law of the place of residence of the party performing the service. Likewise, in the case of a contract for the sale of goods, it is the law of the place of residence of the seller. For a joint venture agreement providing for mutual obligations, it can be difficult to determine the characteristic obligation, which may lead to different laws being applicable to the joint venture agreement.

Corporate Joint Ventures

While a joint venture vehicle incorporated and registered in Switzerland will be governed by Swiss law,[15] parties may choose another law to govern their corporate joint venture agreement.[16] Parties to a cross-border corporate joint venture may wish to avoid the hassle of having multiple laws governing their contractual relationship and the joint venture vehicle.

In order to avoid the above-mentioned uncertainty, it is highly recommended to insert a choice of law clause in the contractual agreement.

Language

A joint venture agreement is not subject to any formal requirements and can be drafted in whatever language.[17] Swiss law does not impose restrictions on this.

However, it should be noted that the documents which are needed for the incorporation of the corporate joint venture and which need to be submitted to the competent Commercial Registry need to be drafted in the official language of the canton of incorporation (German, French, or Italian).[18]

14 Basler Kommentar IPRG – Stefan Eberhard/Andreas von Planta, arts 150 N 4 and N 14 *et seq*.
15 Private International Law Act, art 154, para 1.
16 François Knoepfler/Olivier Merkt, "Les accords de joint venture et les limites du droit international privé", in: *Conflicts and Harmonization, Mélanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire* (Fribourg 1990), p. 758.
17 Rudolf Tschäni, "Joint Ventures – zivilrechtliche Probleme", in: *Mergers & Acquisitions III* (Schulthess 2001), p. 56.
18 Company Register Ordinance, art 16, para 4.

Scope of Business

Contractual Joint Ventures

Under Swiss law, parties to a contractual joint venture are free to define their common objectives and each partner's contribution (i.e., rights and duties). Of course, the law will not accept impossible, unlawful, or immoral objectives.[19]

Interestingly, a contractual joint venture can be for profit but cannot perform a commercial activity (since it has no own legal standing). As a result, the commercial activity will be exercised by the partners of the joint venture and not by the venture itself.[20]

Corporate Joint Ventures

Parties to a corporate joint venture are generally free to define the company's objectives. Those objectives are expressly drafted in the company's corporate purpose as set forth in the articles of association and communicated to the competent Commercial Registry, on the understanding that articles of association of Swiss companies are publicly available. As a rule, a commitment entered into on behalf of a Swiss company is binding on the company, to the extent it is covered by the corporate purpose. The expressed objective of the company does not, however, strictly limit the range of activity in which the corporate joint venture may engage. Indeed, any contract or activity which, by objective standards, has a remote link to the expressed objective of the company is permitted.[21]

It is generally recommended to define the company's corporate purpose as wide as possible and in a generic manner to allow the expansion of the company into other areas of business.[22] However, sometimes it is preferable to narrowly define the corporate purpose in order to clearly limit the scope of business activities of the joint venture.[23]

Often, the articles of association will make reference to the business plan of the corporate joint venture, which is typically annexed to the joint venture agreement. This shows the programmatic character of a joint venture agreement. If the economic activities are not carefully defined, it may be unclear who is allowed to carry out certain business activities, which may lead to misunderstandings or disputes between the parties. In addition, a loosely defined business activity may undermine the clarity

19 Pierre Tercier/Laurent Bieri/Blaise Carron, *Les contrats spéciaux* (Schulthess 2016), para 6900.

20 Commentaire Romand CO II – François Chaix, art 530 N 7; Pierre Tercier/Laurent Bieri/Blaise Carron, *Les contrats spéciaux* (Schulthess 2016), paras 6893 and 6837.

21 Basler Kommentar OR II – Rolf Watter, art 718a N 3.

22 Ronald Charles Wolf, *The Complete Guide to International Joint Ventures* (Kluwer Law International 2011), p. 164, who claims that the scope of the business activity should be drafted widely; Commentaire Romand CO II – Carlo Lombardini, art 626 N 26.

23 Friedrich Wächtershäuser, *Das Gesellschaftsrecht des internationalen Joint Venture* (Peter Lang 1992), p. 162.

and effectiveness of a non-compete obligation usually provided for in such agreements.[24]

The company's corporate purpose may be changed by way of a notarized resolution of the shareholders' meeting in case of a company limited by shares, respectively, by way of a notarized resolution of the partner's meeting in case of a limited-liability company. In both cases a majority of at least two-thirds of the present voting rights at the meeting is required.

Financing Joint Venture and Asset Contribution

Contractual Joint Venture

As a rule, contractual arrangements allow the parties to specify in the joint venture agreement the amount and kind of the contributions to be made by each partner. The contribution can be made in the form of cash, assets, or labor/services.[25] This is expressly provided for by article 531 of the Swiss Code of Obligations.

While the simple partnership does not have its own legal standing, any funding will be in favor of the partners and will be jointly owned by them. Therefore, a party may prefer not to transfer the ownership of assets, machineries, buildings, or intellectual property rights, but to merely transfer the right to use or benefit from the contribution by entering into a fiduciary agreement. In this scenario, the contributing partner remains the sole owner of the contributed asset.[26]

Frequently, contributions to the partnership, such as office space or machinery, will be made in form of a lease agreement.[27] Parties to the joint venture agreement are free to negotiate contributions that are not equal.[28] In any case, the parties to the contractual joint venture are not compensated for their contributions.[29]

The joint venture agreement may forbid the participation of a specific person/ entity. It may also provide that the joint venture will not terminate in case of bankruptcy or death of one of its parties. Where the joint venture survives despite the exit, exclusion, or death of one of its partners, the remaining partners will have to compensate the departing party for the value of the contribution at the time of the departure.[30]

By default, the law allows the exiting partner (or his/her heirs) to recover his/her contribution. Therefore, the joint venture agreement should stipulate whether to

24 Rudolf Tschäni, "Joint Ventures – zivilrechtliche Probleme", in: *Mergers & Acquisitions III* (Schulthess 2001), p. 59.
25 Commentaire Romand CO II – François Chaix, arts 531 N 3 *et seq*.
26 Commentaire Romand CO II – François Chaix, art 531 N 4.
27 Nedim P. Vogt/Rolf Watter, *Joint Ventures in Switzerland* (Helbing & Lichtenhahn 1995), p. 10.
28 Commentaire Romand CO II – François Chaix, art 531 N 6.
29 Commentaire Romand CO II – François Chaix, art 531 N 5.
30 Commentaire Romand CO II – François Chaix, arts 545–547 N 36.

deviate from that rule by retaining the contribution for itself, or to return it to the leaving party or his/her heirs.

If the contribution remains property of the continuing joint venture and if the contribution generates an income for the joint venture, the leaving party or his/her heirs are entitled to receive remuneration. Therefore, it is recommended that the joint venture agreement defines the amount of remuneration or the method for calculating this amount. A joint venture agreement that attempts to contract out this entitlement might be considered excessively binding (breach of article 27, paragraph 2 of the Swiss Civil Code).

Corporate Joint Venture

In General

In Switzerland, the minimum registered capital is CHF 100,000 for an SA (company limited by shares),[31] and CHF 20,000 for a Sàrl (limited-liability company).[32] Whereas all or part of the contribution can be made in kind, the obligations of third parties to provide services to the corporate joint venture vehicle are not considered contributable assets.[33] The valuation of a contribution in kind may be problematic in case of (i) bankruptcy or (ii) when a party leaves the corporate joint venture, especially if the contribution consists of intellectual property rights.

In the first scenario, the intellectual property right may lose all its value and the founders may face liability towards creditors. In the second scenario, the intellectual property right may have initially been undervalued, leading to an under-compensation of the party exiting the corporate joint venture.

In addition to the initial capital contribution, under Swiss law, the corporate joint venture enjoys a variety of funding methods. When deciding upon the right funding method, the joint venture company must choose between raising equity capital or debt financing. Whereas the latter option may offer interesting tax incentives, it does present the drawback of credit and bankruptcy risk. Under certain conditions, the equity partners may also raise finance by issuing non-voting shares (often referred to as participation certificates), the holder of which has only economic prerogatives.

Capital Increase

Once incorporated, a company may finance its operations through a capital increase. This financing method may affect the proportion of voting rights. In the context of a capital increase, each equity holder basically has a preferred subscription right (so-called pre-emptive right).[34] Usually, the joint venture agreement or shareholder agreement provides for an assignment of the unused pre-emptive right to the other equity holders, leading to a dilution of the voting rights of the non-subscribing party.

31 Swiss Code of Obligations, art 621.
32 Swiss Code of Obligations, art 773.
33 Commentaire Romand CO II – Carlo Lombardini/Caroline Clemetson, art 628 N 7.
34 Swiss Code of Obligations, arts 652b and 781, para 5, sub-para 2.

Cash Management

In the case where a successful joint venture company becomes a group, it can self-finance itself through internal measures, i.e., utilization and optimization of funds belonging to the group ("cash management").

Within a corporate group, certain companies may be highly profitable and have a cash surplus while others may face liquidity problems. Thanks to cash pooling, the cash surpluses of some companies of the group can be transferred to companies of the group facing liquidity issues.[35]

Debt Financing

A joint venture company can also finance itself by borrowing money, traditionally from banks. Other instruments such as capital market instruments, venture capital, and project finance are available depending on the complexity of the needed funding.[36]

The articles of association of the limited-liability company (but not those of a company limited by shares) or the shareholders' agreement may contain specific provisions obliging the equity partners to provide additional funding or to personally guarantee for bank loans. Such a guarantee increases the personal financial exposure and reduces the benefits of the corporate veil.[37]

A corporate joint venture having the form of a company limited by shares or a limited-liability company is normally much better placed than a contractual joint venture, even for obtaining loans from banks.[38] As for tax considerations, joint venture companies are taxed as any other Swiss company.

Competition Law

According to article 9 of the Swiss Federal Act on Cartels[39] and Other Restraints of Competition (the "Cartel Act"), a planned merger of enterprises by joint venture must be notified to the Swiss Competition Commission (the "Commission") if the following thresholds are met:[40]

35 Luca Jagmetti, *Cash pooling im Konzern* (Dike 2007), p. 58.
36 Hewitt, *Joint Ventures* (2005), pp. 156 *et seq.*
37 Nedim P. Vogt/Rolf Watter, *Joint Ventures in Switzerland* (Helbing & Lichtenhahn 1995), p. 24.
38 Nedim P. Vogt/Rolf Watter, *Joint Ventures in Switzerland* (Helbing & Lichtenhahn 1995), p. 17.
39 Cartels are defined as binding or non-binding agreements, which are able to influence the market of specific goods or services by means of a joint restriction of competition, especially by regulating the manufacturing, sale, and resale of goods or the prices or terms upon which they are offered.
40 Pascal Montavon et. al., *Abrégé de droit commercial* (Schulthess 2017), pp. 1040–1041; Dominik Suter, *Gemeinschaftsunternehmen im europäischen und schweizerischen Wettbewerbsrecht* (Schulthess 2000), pp. 92 *et seq.*

- The worldwide turnover of the enterprises concerned is in the aggregate of at least CHF 2 billion or a turnover in Switzerland of at least CHF 500 million; and
- At least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF 100 million.

If a preliminary assessment reveals that a proposed merger creates or strengthens a dominant market position, a merger that meets the above thresholds is placed under investigation by the Commission, the administrative agency responsible for the enforcement and supervision of the Cartel Act.

The Commission must investigate a merger or any other combination of enterprises (such as a joint venture) if their union leads to or enforces a dominant market position (i.e., qualifies as a quasi-cartel organization) and if there is an indication of economically or socially detrimental consequences as a result of such merger.[41]

According to article 10 of the Cartel Act, the Commission may prohibit or conditionally authorize a concentration if the investigation indicates that the concentration:

- Creates or strengthens a dominant position liable to eliminate effective competition; and
- Does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

Article 137 PILA provides that legal actions alleging an impermissible hindrance of competition are subject to the law of the marketplace in which the hindrance took effect. The Cartel Act could, therefore, theoretically apply to foreign joint ventures. The powers of the Commission are limited to the territory of Switzerland. In this respect, article 2 of the Cartel Act specifies that the Cartel Act applies to practices that have an effect in Switzerland, even if they originate in another country.

Formation Agreement

In General

In Switzerland, there is no statute that specifically covers the formation or operation of joint ventures. However, for the formation and structuring of a corporate joint venture in Switzerland, several documents are necessary, the purpose and inter-dependence of which are outlined hereafter.

There is no statutory or legal definition of the term “joint venture”.[42] Most rules on the formation and the operation of a joint venture are found in the Swiss Code of Obligations, which covers both the contractual and the company law aspects of corporate joint ventures.

41 Roger Zäch, *Schweizerisches Kartellrecht* (Stämpfli 2005), p. 10.
42 The German translation and common reference for “joint venture” is *Gemeinschafts- oder Partnerschaftsunternehmen*.

Joint Venture Agreement

In General

Parties to a corporate joint venture will usually enter into a joint venture agreement for the effective duration of the joint venture vehicle.[43] The joint venture agreement constitutes only a contractual relationship between the parties to the joint venture and, therefore, has no corporate effects and does not bind the corporate vehicle itself. The relationship between the parties to the joint venture and the corporate vehicle itself is governed by the articles of association of the corporate joint venture, which have absolute binding effect.

When drafting the joint venture agreement, special attention must be given to the purpose of the joint venture, the funding, the profit and loss allocation, the management and decision-making as well as the respective obligations of the partners. The following list contains some basic issues that the joint venture agreement should normally address.[44]

Purpose and Domicile of Joint Venture

The joint venture agreement should include a general description of the business purpose and functions of the joint venture. The provision on objectives limits the scope of activity in which the joint venture vehicle may engage.

Sometimes, the clause is drafted as widely as possible in order to allow an expansion into other areas of business. The joint venture agreement should also indicate the domicile of the corporate vehicle.

Legal Form of Corporate Vehicle

The joint venture agreement should define the legal form of the corporate vehicle. Swiss joint venture companies are generally organized as corporations limited by shares, regulated by articles 620–763 of the Swiss Code of Obligations, or as limited-liability companies, regulated by articles 772–827 of the Swiss Code of Obligations.

Relative Equity Holdings of Parties to Corporate Vehicle

This clause will address the amount of equity held by each joint venture party in the corporate vehicle. However, the exact amount of the share capital, the number, and the type of shares must also be regulated in the articles of association. Often, the parties will contribute a business, intellectual property rights, know-how, or other assets to the corporate joint venture.[45]

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43 Rudolf Tschäni/Hans-Jakob Diem/Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), p. 317.

44 The following paragraphs follow the model agreement of Philipp Ritz, *Der Joint-Venture-Vertrag* (Schulthess 2010), as well as the guidelines of the ITC Contractual Joint Venture Model Agreements (International Trade Centre 2004).

45 Rudolf Tschäni, “Joint Ventures – zivilrechtliche Probleme”, in: *Mergers & Acquisitions III* (Schulthess 2001), p. 63.

Financing

If the operations of the corporate joint venture require financing in addition to the initial share capital, the joint venture agreement should address the source of additional financing and any conditions thereupon.

The reason is that the articles of association of a company limited by shares cannot oblige a shareholder to make any additional contribution other than to pay in the shares he subscribed. A shareholder can only be obliged to make an additional contribution by entering into a joint venture agreement (or shareholder agreement) that provides for such additional contribution.

The situation is different in case of a limited-liability company, where the articles of association may impose additional duties upon the partners (non-compete obligation, duty to pay additional capital contribution, and others).

Transferability of Shares/Equity Participation

As a general rule, shares may be freely transferred under Swiss law. The transfer of shares held in a corporate vehicle is, however, often restricted.[46] In case of unlisted (restricted) registered shares, a company limited by shares may refuse to give its consent to the transfer of shares provided that it states a valid cause enumerated in the articles of association. In that case, any share transfer requires the approval of the board.

The transfer of equity participation of a Swiss limited-liability company requires the approval of the general partners' meeting. The company's articles of association can, however, provide that the transfer of such equity participation can be made without the approval of the general partners' meeting.

Under Swiss law, there is no requirement to issue tangible share certificates. If not issued, the shares have to be transferred by written assignment. However, if physical share certificates have been issued, the seller may transfer them in one of the following two ways:

- For bearer shares (*Inhaberaktien* or *actions au porteur*) by delivery (handover) of the certificates. This being said, as of 1 January 2020, bearer shares were abandoned in principle. Swiss companies that so far were able to issue bearer shares will no longer be able to do so, except for listed bearer shares or bearer shares issued in the form of intermediated securities; or
- For registered shares (*Namensaktien* or *actions nominatives*) by endorsement in favor of the (new) acquirer on the back of the share certificates and delivery of the certificates (handover).

46 Philipp Ritz, *Der Joint-Venture-Vertrag* (Schulthess 2010), pp. 45 *et seq*; see also Rudolf Tschäni/Hans-Jakob Diem/Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), p. 329.

According to article 686 of the Swiss Code of Obligations, if the purchaser and seller (of the share) do not abide by these rules, the purchaser will not be listed in the shareholders' register and will not be entitled to vote at a shareholders' meeting.[47]

In practice, it is common that the joint venture parties agree to include a "preemptive right" provision into the joint venture agreement and/or the shareholder agreement.

A "right of first refusal" is also often used in joint venture agreements/shareholder agreements in the sense that a shareholder wishing to transfer his shares must first offer them to the existing shareholders.[48] Sometimes, the agreement may also provide that the remaining partners may purchase the shares at preferential book value if one party intends to sell its shares to a third party.

Shareholders'/Partners' Meetings and Decision-Making by Parties to Joint Venture

In order to protect the interests of the parties, the joint venture agreement should provide that:

- The shareholders'/partners' meeting is duly constituted only if all or a specific quorum of the shareholders/equity holders is present or represented in the meeting; and/or
- Certain important decisions (e.g., changes to the capital structure of the joint venture vehicle, merger, and/or liquidation of the joint venture vehicle) will be possible only with the consent of all or a qualified majority of the shareholders/ equity holders; and
- "Deadlock" situations should be addressed (typically in case of 50:50 joint ventures), for instance, by providing for a specific deadlock resolution mechanism or a casting vote in favor of one of the joint venture partners.

Board of Directors

The joint venture agreement often contains detailed rules as to the election of the president and the vice-president of the board. The joint venture agreement (and the articles of association) may also define the minimum number of directors to form a quorum and may furthermore address the question of whether or not the president will have a casting vote.

Minority Protection

Swiss law offers only a minimal protection of minority shareholders. In certain situations, in particular when a resolution at the general meeting was adopted in violation of the law or the articles of association, any shareholder can challenge the validity of that resolution.[49]

47 Basler Kommentar OR II – Rolf Watter, art 686 N 5–N 7.
48 Nedim P. Vogt/Rolf Watter, *Joint Ventures in Switzerland* (Helbing & Lichtenhahn 1995), p. 23.
49 Swiss Code of Obligations, art 706 and 706b.

In a joint venture agreement, minority protection may be expanded by requiring approval by all parties or by all board members for a range of transactions specified in the joint venture agreement. Such transactions typically include:

- Hiring of senior management;
- Loan agreements exceeding a certain threshold;
- Contracts with a party to the joint venture or a third party associated with a party to the joint venture;
- Capital expenditure exceeding a certain amount; and
- Sale of important business assets.

Sharing of Profits and Losses

The joint venture agreement should stipulate whether to distribute profits and losses between the parties in equal shares or in proportion to their relative contributions. The parties are, in principle, free in this regard, however, where either the allocation of losses or that of profit is regulated, the same allocation rule will apply for both.[50]

Other arrangements are also possible, such as allocating an agreed amount of profits in equal shares and distributing the remaining profits by reference to specific criteria.[51]

In a corporate joint venture, the parties may wish to include provisions requiring that a certain part of the profits must be reinvested or retained as reserve capital. Dividends (of a company limited by shares) are distributed among shareholders according to their quotes. A different distribution of dividends is, to a certain extent, only possible for limited-liability companies.

Non-Compete and Confidentiality Covenants

Parties to the joint venture usually undertake not to compete with the joint venture. They furthermore often agree to keep all information relating to the business of the corporate joint venture and of their partners confidential.[52]

Duration and Termination of Joint Venture Agreement

A joint venture agreement may or may not be limited for a definite period of time. In practice, partners will not determine the duration of their joint venture agreement, however, they will agree on procedures to follow and situations in which a party can unilaterally terminate the agreement.[53]

50 Swiss Code of Obligations, art 533.
51 Philipp Ritz, *Der-Joint-Venture-Vertrag* (Schulthess 2010), pp. 27 and 83.
52 Philipp Ritz, *Der Joint-Venture-Vertrag* (Schulthess 2010), pp. 86 and 87.
53 Thomas Probst, “Le contrat de joint venture”, in: *La pratique contractuelle: actualité et perspectives* (Schulthess 2009), pp. 62 and 64.

Swiss law lists conditions under which a simple partnership terminates.[54] Parties to the joint venture agreement can derogate to this list and agree on specific conditions upon which a party will have the right to terminate the joint venture agreement:[55]

- A change of control of one of the joint venture parties;
- A party does not perform his obligations set out in the joint venture agreement; and
- The seizure of assets or a bankruptcy is decided against one of the parties.

In addition, a party can request the termination of the joint venture agreement for good cause.[56] In the case of a contractual joint venture, the joint venture will terminate upon the occurrence of a condition of termination, as mentioned above.

However, in case of a corporate joint venture, although the joint venture agreement may terminate, the joint venture vehicle will not be affected, nor will ancillary contracts between the joint venture vehicle and its shareholders (unless otherwise provided in the ancillary contracts).

However, the articles of association may provide that the joint venture vehicle will be dissolved if the joint venture agreement terminates.[57] In addition, the shareholders may agree at a general meeting to dissolve the company.[58]

Miscellaneous Provisions

In an international context, it is necessary to specify the law applicable to the joint venture agreement. Generally, the parties select the law of the country where the joint venture vehicle is incorporated.

However, other solutions are conceivable, *e.g.*, if two German companies set up a joint venture vehicle in Switzerland, the parties may like to specify that German law governs their relationship. Furthermore, parties often agree on an arbitration clause or even a forum selection clause.[59]

Relationship between Joint Venture Agreement and Articles of Association

The joint venture agreement merely constitutes a contractual relationship between the parties of the joint venture. As such, it has no corporate effect and, as a general rule, does not bind the joint venture vehicle itself.

The relationship between the partners (shareholders/equity holders) on the one side, and the joint venture vehicle on the other side, is exclusively governed by the articles of association of the joint venture vehicle. To the extent permitted under Swiss

54 Swiss Code of Obligations, art 545.
55 Commentaire Romand CO II – François Chaix, arts 545–547 N 3.
56 Swiss Code of Obligations, art 545, para 2.
57 Swiss Code of Obligations, art 736, para 1, sub-para 1.
58 Swiss Code of Obligations, art 736, para 1, sub-para 1.
59 Matthias Oertle, *Das Gemeinschaftsunternehmen (Joint Venture) im schweizerischen Recht* (Schulthess 1990), pp. 90 *et seq* and 175 *et seq*.

law, the crucial elements of the relationship between the partners should also be mirrored in the articles of association.[60]

Establishing Corporate Vehicle

In General

Swiss corporate joint ventures are generally organized as companies limited by shares, regulated by articles 620 *et seq* of the Swiss Code of Obligations.

However, as of 1 January 2008, new provisions have been adopted regulating limited-liability companies, namely articles 772 *et seq* of the Swiss Code of Obligations. The new regulations are better adapted to the requirements of corporate joint ventures.[61]

Determining the most convenient legal vehicle (company limited by shares or limited-liability company) for a joint venture depends on several factors. In general, the key concerns are confidentiality and the rights and duties of the partners at a corporate level.

A company limited by shares is more convenient if confidentiality is the primary concern. On the other hand, a limited-liability company is more appropriate if the parties to the corporate joint venture wish to impose to the equity holders of the company additional obligations other than the initial contribution. The procedure for establishing a corporate vehicle organized in the form of a company limited by shares or a limited-liability company is for both types similar and described below.

Issues Faced in Establishing Corporate Joint Venture

In General

The following issues should be examined:

- Determine the legal structure of the joint venture (corporate vehicle);
- Check the availability of the chosen joint venture/company name;
- Choose the business domicile;
- Deposit the required paid-in share capital into a bank account in Switzerland;
- Determine the members of the governing bodies;
- Submit notarized documents certifying the creation of the joint venture;
- Clarify value-added tax (VAT) liability with the Federal Tax Administration;

60 Tschäni Rudolf, “Joint Ventures – zivilrechtliche Probleme”, *Mergers & Acquisitions III* (Schulthess 2001), pp. 73 and 74.

61 Beat Brechbühl/Daniel Emch, “Die neue GmbH als massgeschneidertes Rechtskleid für Joint Ventures”, SZW 2007, pp. 271 *et seq*; furthermore, Peter Böckli, *Schweizer Aktienrecht* (Schulthess 2009), p. 1736. Nicolas Duc/Nicolas Cottier, “Chancen und Risiken 2009/10”, *Rechtsform eines Joint Venture: AG oder GmbH*?, pp. 41 and 42.

- Define audit procedures; and
- Register with the Federal Social Security Authority.

Checking Availability of Envisaged Corporate Joint Venture Name

Under Swiss law, the name under which the corporate joint venture intends to carry out its business can be chosen freely. However, the name must clearly indicate the legal form of the entity (whether it is a company limited by shares or a limited-liability company).[62]

Additionally, the chosen name must be clearly distinguishable from the names of other companies. One should always check the Central Business Names Index provided by the Federal Company Registry Office[63] for the availability of potential company names.

Depositing Capital

The minimum capital for a limited-liability company is CHF 20,000, whereas the minimum registered capital of a company limited by shares is CHF 100,000. Both amounts need to be deposited/paid entirely into a Swiss bank account.

When a company limited by shares is established, capital equivalent to at least 20 per cent of the nominal value of each share must be paid in and, in any case, at least CHF 50,000.

Determining Governing Bodies

The joint venture must determine the corporate bodies, such as the members of the board and auditors (if applicable). Foreign individuals may be appointed as members of the board.

However, for example, at least one of the directors or managers if vested with individual signatory power, or two directors or managers if vested with joint signatory power by two, must reside in Switzerland.[64] Further, the joint venture may opt to give signatory power also to others besides the members of the board.

Determining Auditors

Under Swiss law,[65] an audit is required for companies which are listed on the stock exchange, companies which are required to prepare consolidated accounts, or companies that exceed two of the following thresholds in two successive financial years:

- Balance sheet total of CHF 20 million;

62 Swiss Code of Obligations, art 950, para 1.
63 The Central Business Names Index can be found at http://www.zefix.ch.
64 Swiss Code of Obligations, art 814, para 3.
65 Swiss Code of Obligations, arts 727 and 727a.

- Sales revenue of CHF 40 million; and
- More than 250 full-time employees on annual average.

The limited-liability companies and companies limited by shares not meeting the above requisites have their annual accounts reviewed by an auditor in a limited audit. An exception to this rule are so-called “micro-companies”. These companies, which have less than an average of 10 full-time employees over the year, can waive every audit requirement (so-called “opting-out”).

Estimated Establishment Costs

Public notary fees and administrative costs for registration with the Commercial Registry amount to approximately CHF 3,000 for a limited-liability company and CHF 4,000 for a company limited by shares.[66] The cost for legal advice and assistance for a standard incorporation typically ranges from approximately CHF 4,000 to CHF 8,000, depending on the structure of the company and the complexity of the preparatory documents.

Establishment Phases

Incorporation Meeting

The incorporation meeting must be held in the presence of a Swiss public notary; however, the founders may appoint a proxy for such a meeting. The documents empowering the proxy must be signed, certified by a public notary abroad, and bear the 1961 Hague Convention Apostille (the “apostille”) or be certified by the Swiss Embassy/Consulate.

At the meeting, the founders adopt a set of corporate resolutions. They approve the articles of association and appoint the members of the board of directors and the auditors. All these resolutions must be embodied in a notarized deed of incorporation. The deed of incorporation confirms that all shares have been subscribed and that the contributions to the share capital have been made.

If contributions to the share capital of the corporate joint venture are made in kind (by contributing assets other than cash), or the subscribed share capital is paid in by setting off claims against the corporation, or the corporation intends to acquire assets with the subscription proceeds after its formation (intended acquisition of property), or special benefits are conferred to the founders, the founders must further render a written report on the above-mentioned contributions or acquisitions. The founders’ report must provide information on the type and condition of the assets to be contributed or to be acquired and the reasonableness of the valuation of such assets, the existence of a debt that may be set off, or the reasons for special rights in favor of founders or other persons and the reasonableness of such rights. An auditor must review and certify in writing that such report is complete and accurate.

66 This is an estimate only. Public notary and Commercial Registry fees vary among the cantons.

Application for Registration with the Commercial Registry

After the founders' meeting, an application for registration of the joint venture vehicle must be submitted to the Commercial Registry at the corporate joint venture's seat. The application sets forth essential information relating to the joint venture vehicle. This information will be published at the Commercial Registry. The application must be accompanied by the following documents:

- The notarized deed of incorporation;
- The articles of association;
- The declarations of acceptance from the initial board members and auditors;
- A confirmation by the Swiss-based bank stating that the initial share capital has been paid in and held in a special purpose blocked account, to be opened by the joint venture company being in the process of incorporation;
- Documents recording the nomination of the president and determining the signatory authority of the various representatives; and
- Certain other declarations relating, for instance, to the contributions made to the share capital.

The application must be signed by one or two members of the board depending on their signatory authority. This/These person(s) must sign the application with the Commercial Registry and its/their signature must be certified and if necessary apostilled.

Registration with the Commercial Registry

The joint venture vehicle becomes a legal entity only upon its registration with the Commercial Registry. The Notice of the registration is published in the *Swiss Official Gazette of Commerce*. The information published includes the legal form of the venture (company limited by shares or limited-liability company); the corporate name; the identification number; the registered address; the corporate structure; the date of the articles of association; the purpose and duration of the joint venture vehicle; the amount of the registered capital and the amount paid in; the contributions in kind or other property received in payment of shares; the type and par value of the shares as well as transfer restrictions thereon, if any; special rights granted to the founders, if any; names, residence, and citizenship of the board members and persons authorized to act on behalf of the joint venture vehicle; the nature of the audit (if any) and the name and registered address of the auditors; and the manner in which official announcements are to be made by the corporation.

The entire incorporation process normally takes approximately two to four weeks from the date of the founders' meeting, but it may be shortened to approximately three to five business days upon consultation with the Commercial Registry.

Necessary Documents

The following documents must be produced in order to establish and incorporate a joint venture in Switzerland:

- Documents proving the existence and identity of the founders;[67]
- Certificate of incumbency, i.e., a document indicating who are the individuals authorized to act on behalf of the company, and their signatory authority (individual signatory power or joint signatory power by two, three, and so on);
- Resolution, signed by the persons authorized to act on behalf of the company, to subscribe to the share capital in the new company, and to issue accordingly a power of attorney;
- Power of attorney to represent the founder during the incorporation process of the Swiss company; and
- For all individuals involved, a certified copy of their passport.

All the above documents must be notarized and apostilled. Additionally, the parties to the joint venture must provide the following documents:

- Company domiciliation acceptance letter (if the company does not plan renting/owning its own premises);
- Bank confirmation for deposit of capital; and
- If applicable, auditors' letter of acceptance of their appointment.

Preparation of Ancillary Documents

In General

This section applies to both contractual and corporate joint ventures. For practical reasons, reference is mainly made to the corporate joint venture agreement. Whereas the joint venture agreement provides the main characteristics of the partnership, the parties to the contractual joint venture may personally enter into ancillary contracts in order to meet certain needs of the joint venture.

In the case of a corporate joint venture, the ancillary contracts are entered into between the corporate vehicle and the partners. Typical ancillary contracts are lease, know-how, or license agreements. At the outset of ancillary contracts, the parties to the joint venture should consider the following general issues:

67 If the founder is a company, an excerpt of the company register relating to the founding company must be produced. If such document is not available in the place of incorporation of the founding company, a certificate of good standing must be produced.

Conflicts of Interest

A party to the joint venture who contributes goods, services, capital, or technology to a corporate joint venture may create a conflict of interest between individuals' own interest and the corporate vehicle's interest.

Swiss law provides that members of the board of directors and third parties engaged in managing the company's business must perform their duties with due diligence and safeguard the best interests of the company.[68] The parties to the joint venture must therefore be careful to ensure the absence of any conflict between performance and consideration.

Termination

The joint venture agreement and the ancillary contracts, though independent, are closely linked. Swiss legal scholars are of the opinion that the ancillary contracts will automatically terminate, unless otherwise stated, if the joint venture agreement were to terminate.[69] On the other hand, if an ancillary agreement terminates, neither the other ancillary agreements nor the joint venture agreement will terminate automatically.

The Supreme Court has not yet ruled on this issue. Therefore, it is recommended to expressly agree in the joint venture agreement and its ancillary contract that the latter will terminate upon termination of the joint venture agreement, but not the contrary.

Governing Law

Ancillary contracts and the joint venture agreement may be governed by different laws. It will indeed generally make sense for each ancillary contract to be governed by the most appropriate law. The disadvantage remains of course the complexity of the legal relationship between parties to different contracts governed by different laws.

In certain situations, however, the parties may not be entitled to choose the applicable law. For example, Swiss law limits the choice of the law when it comes to employment contracts. In order to foster clarity and consistency, it is recommended that each ancillary contract is coherent with the governing law and dispute resolution clause chosen for the joint venture agreement.[70]

68 François Chaudet, *Droit suisse des affaires* (Helbing & Lichtenhahn 2010), pp. 129 *et seq.*

69 Philipp Ritz, *Der Joint-Venture-Vertrag* (Schulthess 2010), pp. 53 and 54; Matthias Oertle, *Das Gemeinschaftsunternehmen (Joint Venture) im schweizerischen Recht* (Schulthess 1990), pp. 143 *et seq*; Rudolf Tschäni, Hans-Jakob Diem, Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), pp. 348 *et seq*.

70 Bernard Dutoit, *Droit international privé suisse, commentaire de la loi fédérale du 18 décembre 1987* (Helbing & Lichtenhahn 2016), art 121 N 5.

Incentives for Foreign Joint Venture Partners

Some cantons offer a comprehensive set of investment incentives to foreign companies planning to establish operations in the region, as well as to newly formed companies. At cantonal or municipal level, a tax relief or exemption may be granted on a case-by-case-basis for up to 10 years for profit and capital gains taxes, depending on the size of the investment and the importance attributed to the local economy development of the canton concerned.

The sector of activity, revenues, creation of new jobs, technological development, investments, international activities or exports, and presence of competitors are criteria used for this evaluation. Depending on the project and the overall structure of the company, there will be a number of tax issues to discuss, define, and negotiate with the local tax authorities. At the federal level, partial and total tax exemption may be granted in addition to cantonal and municipal tax exemptions. Depending on the nature of the project, these incentives may take the form of tax relief or tax exemptions for up to 10 years, or contributions towards investment, training, or research and development programs. These incentives can represent significant cost savings for the short and long term.

Restrictions on Activities of Foreign Joint Venture Partners

In General

Only for certain very specific businesses areas is a special business license required in Switzerland (for instance, banking, certain financial services, insurance business, real estate activities, certain businesses in the health sector, and those trading with specific goods). There is, however, no rule prohibiting or limiting the participation of foreigners in a Swiss joint venture.

No Exchange Control Regulation

There are, as a general rule, no restrictions on capital transactions between Switzerland and other countries.

Restrictions on Employment of Foreign Nationals

Switzerland imposes strict limitations upon the granting of work permits to foreign employees. In general, two significantly different regimes govern Swiss residence and work permits:

- For European Union (EU) nationals (based on the Agreement on the Free Movement of Persons between Switzerland and the European Union); and
- For non-EU nationals.

Until now, persons from EU or European Free Trade Association (EFTA) member states, regardless of their qualifications, are granted facilitated access to the Swiss labor market under the Agreement on the Free Movement of Persons. By Decree of the Federal Council, workers from all other (non-EU) states (third states) are admitted in limited numbers to the labor market in Switzerland only and must be well qualified.

Each canton has a yearly quota of work permits it may grant. If a foreign group enters into a Swiss joint venture, the corporate joint venture cannot expect to be staffed entirely with management from the "third" home country of the joint venture party.

However, work permits for top executives, skilled technicians, and specialists essential to the establishment and the optimal operation of a business will usually be granted, subject, however, to the availability of such permits in that canton or at Federal level.[71]

Acquisition of Real Property by Persons Abroad

The Federal Law of 16 December 1983 on the acquisition of real estate by persons abroad (the "Real Estate Act") limits not only the acquisition of real property (residential premises only) but also the purchase of shares or the participation in companies that own real estates. Consequently, the purchase of just one share in an unlisted company involved solely or substantially in acquiring residential property or dealing therein requires prior authorization under the Real Estate Act. This also applies to the acquisition of a participation of non-voting shares.[72]

In the context of a joint venture, the Real Estate Act applies to any purchase or subscription of shares in a joint venture vehicle that owns real property only if the purchaser is a foreigner, a foreign company, or a Swiss company controlled by foreigners and such purchaser obtains or re-enforces a controlling position.

A person is deemed to have a controlling position when that person controls more than one-third of a company's capital, holds one-third of the voting rights of the company, or when he has granted substantial loans to the company.[73]

If the parties to the joint venture cannot immediately rule out the potential need for prior authorization, they must apply to the appropriate regulatory authority for authorization or for a declaration that no authorization is required.[74] In the case of a transaction requiring prior authorization, no Land Registry entry can take place without legal authorization. The cantonal authority within whose jurisdiction the real estate or the portion of the real estate with the highest value is located is responsible for establishing whether or not prior authorization is required.[75]

71 *See* https://www.sem.admin.ch/sem/en/home/themen/arbeit/nicht-eu_efta-angehoerige/grundlagen_zur_arbeitsmarktzulassung.html.

72 Guidelines of the Federal Office of Justice — Acquisition of Real Estate by Persons Abroad, July 2009, pp 6 and 7.

73 Real Estate Act, art 6.

74 Real Estate Act, art 17, para 1.

75 Real Estate Act, art 2, paras 1, and 15, para 1, sub-para a, and para 2. The guidelines of the Federal Office of Justice "Acquisition of real estate by persons abroad" contain further

Dispute Resolution

Two main methods of dispute resolution are available to the joint venture and its parties. Parties may agree on arbitration. Switzerland is party to the New York Convention, which was ratified on 1 June 1965 and entered into force on 30 August 1965. Pursuant to article 178(1) of the Private International Law Act, an arbitration agreement is valid if made in writing (including by telegram, telex, telecopy, or any other means of communication, such as email, which permits it to be evidenced by a text).[76]

Parties may also agree that a state court will have jurisdiction. If the foreign parties to the joint venture have not agreed on a choice of forum clause, private international law will apply. In Switzerland, either the Private International Law Act or the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention") are applicable. Basically, one must distinguish whether the dispute arises with the joint venture vehicle itself or whether the dispute is based on a joint venture agreement and relates to the joint venture parties.

In absence of a specific agreement, the Lugano Convention and the Private International Law Act refer disputes within the joint venture vehicle to the courts of the place of incorporation of the company.[77] Therefore, it is recommended to adapt the joint venture agreement accordingly.

Changes in Law Subsequent to Formation

Like Common Law, Civil Law evolves, bringing changes that affect contractual relationships and the organization/functioning of legal entities.[78] In order to give sufficient time to authorities as well as individuals to adapt themselves and their legal relationships to the new law, the new legislation usually entails transitional provisions (*Übergangsbestimmungen* or *droit transitoire*).[79]

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information regarding the procedure for application. The Appendix to the Guidelines furthermore provides the address, email, and telephone and telefax numbers of the cantonal authorizing bodies of first instance and, in the case of cantons with several authorizing bodies, of the cantonal supervisory body.

76 An example of an arbitration clause is provided by the Swiss Chambers of Commerce: "Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, will be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. The number of arbitrators will be _ (one or three); The seat of the arbitration will be _ (name of city in Switzerland, unless the parties agree on a city abroad); The arbitral proceedings will be conducted in _ (insert desired language)."

77 Bernard Dutoit, *Droit international privé suisse, commentaire de la loi fédérale du 18 décembre 1987* (Helbing & Lichtenhahn 2016), art 151 N 2.

78 *See also* Yves Le Roy/Marie-Bernadette Schoenenberger, *Introduction générale au droit suisse* (Schulthess 2015), pp. 151 *et seq*.

79 Yves Le Roy/Marie-Bernadette Schoenenberger, *Introduction générale au droit suisse* (Schulthess 2015), p. 152.

Transitional provisions relating to a contract or company law traditionally provide for a certain period of time during which individuals or companies can make the necessary modifications in order to comply with the new requirements.

The same applies to joint ventures. Therefore, in the case of a change of law, a joint venture company will have to undergo the same changes as every other company of the same nature and will be treated the same, unless specific legal prerequisites are met.[80] In conclusion, the impact on joint ventures of changes in the law will depend on what is provided for in the transitional provisions.

Double-Taxation Agreements

Switzerland has entered into bilateral double-taxation treaties with various countries.[81] As a result, one can make no general statements in regard to the taxation of joint ventures and of its participants since the tax regime may be different in each single case.[82]

The general relief granted by double-taxation treaties for residents of signatory countries is that they can obtain a partial or total refund of taxes withheld at the source on the Swiss revenue. Swiss withholding taxes may be fully refunded to Swiss partners and are partially or fully refundable to foreign shareholders if the recipient is domiciled in a country with which Switzerland maintains a double-taxation treaty. Where there is no double-taxation treaty in force, withholding taxes deducted in the foreign jurisdiction on revenues paid to a Swiss entity give rise to a tax credit in Switzerland.[83]

The joint venture vehicle is taxed as a legal entity; consequently, there is no tax pass-through. Dividends paid to the joint venture parties are subject to a 35 per cent withholding tax that may be fully reclaimed by Swiss joint parties, and partially, i.e., by virtue of double-taxation treaties, by foreign joint venture parties.

Double-taxation treaties usually allow for a reduction. However, the reduction depends on the applicable double-taxation treaty and, therefore, foreign joint venture parties are recommended to examine the applicable withholding tax rate before choosing the legal form of a joint venture.[84]

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80 *See, for example*, art 23, para 3, of the Direct Taxes Harmonization Act, which vests Swiss cantons with the right to grant tax exemption to newly established companies for a period of up to 10 years.

81 *See,vforvexample*,vhttps://www.estv.admin.ch/estv/de/home/internationales-steuerrecht/fachinformationen/quellensteuer-nach-dba.html.

82 Rudolf Tschäni, Hans-Jakob Diem, and Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht* (Schulthess 2013), p. 351.

83 *Die eidgenössische Verrechnungssteuer*, ESTV (Bern 2014), p. 25.

84 Heini Rüdisühli, “Joint Ventures – steuerliche Probleme”, *Mergers & Acquisitions III* (Schulthess 2001), p. 114.

Interest or license fees paid by the corporate joint venture to a party to the joint venture or any other foreign person are not subject to Swiss withholding taxes.[85] Finally, 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. In the context of a contractual joint venture, no company is established. Profits and losses of the joint venture accrue directly to the parties who are personally taxed. In practice, matters are of course complex and the parties are well advised to consult a tax specialist before choosing the legal form for their joint venture and determining its structure.[86]

Protection of Foreign Investors

In General

Switzerland is a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force in Switzerland on 14 June 1968. Article 54(1) of the ICSID Convention provides for ICSID awards to be enforced as if they were final court judgments in the country where enforcement is sought.

Switzerland has entered into numerous bilateral investment treaties ("BIT"),[87] of which over 100 are in force.[88] As a general principle, Swiss BITs do not follow a model but result from individual negotiations.[89] Thus, their structures and wordings vary, depending on when and with whom the BIT was signed. Swiss BITs usually provide for a full range of substantive protection; the more recent BITs invariably include access to investment arbitration. Swiss BITs have been relied upon in 12 cases before ICSID.[90]

Expropriation

Expropriation is defined as the confiscation of a foreign asset with no or minimal payment, depriving the owners of their reasonable expectations of profits and returns. Swiss BITs address this issue and include a provision prohibiting direct expropriation (defined as the drastic and conspicuous action of taking a foreign investment property by assuming title over the property) and indirect expropriation (where a state's actions

85 Heini Rüdisühli, "Joint Ventures – steuerliche Probleme", *Mergers & Acquisitions III* (Schulthess 2001), pp. 115 and 116.

86 Nedim P. Vogt/Rolf Watter, *Joint Ventures in Switzerland*, (Helbing & Lichtenhahn 1995), p. 13.

87 *See* https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz.html.

88 *See* https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz/overview-of-bits.html.

89 Hoffmann, *Bilateral Investment Treaty Overview - Switzerland, Investment Claims* (2008).

90 https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx.

leave the investor's title to property untouched but usurp the right to utilize the investment in a meaningful way) of the investment.

Under Swiss BITs, an expropriation is legal if done in the public interest, if not discriminatory, if carried out under due process of law, and if accompanied by the payment of compensation to the investor.[91]

In certain situations, however, the distinction between expropriation and the right of a government to change its regulatory policies can be unclear. Indeed, the fact that a regulatory measure serves some legitimate public purpose cannot automatically lead to the conclusion that no expropriation has occurred and that, therefore, no compensation is due.

Transfer of Funds

Rules on the transfer of funds define the right of the investor to make transfers and payments. Swiss BITs specifically provide that free transfer of funds related to an investment must be guaranteed and give a non-exhaustive list of the types of funds concerned by this provision.[92]

91 *See, for example*, article 42 of the European Free Trade Association States-Singapore Bilateral Investment Treaty; article 6 of the Switzerland-Kenya Bilateral Investment Treaty; and article 5 of the Switzerland-Argentina Bilateral Investment Treaty.

92 *See, for example,* art 6 of the Switzerland-Saudi Arabia Bilateral Investment Treaty.