

# Joint ventures and cross-border co-operations

## *EU Company Law*

### Exam question

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Explain and discuss various forms of cross-border co-operations, including joint ventures, and legal issues to be aware of in such co-operations. Explain and discuss topics often treated in joint venture contracts.

### Introduction

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#### How are economic decisions of business enterprises coordinated?

2 extremes:

- Coordination by the market via contracts to buy or sell, lend or hire, etc.
  - Apart from reaching an agreement on terms of a contracts, this form of cooperation **requires little cooperation** between business enterprises.
- Full integration in the form of full business / asset transfer, share transfer, merger
  - complete control by one business enterprise over the activities of another business enterprise

#### Strategic co-operation

Challenges in international markets:

- Large exposure to new competitors
- Large investment requirements for development and research
- Product cycles are shortened by new innovations urging businesses to realize quicker return on investment
- Modern technology complex, expensive
- Need for building cross-border exchange of knowledge

→ for this reason (cross-boarder) cooperation may be indispensable (uundgåelig)

- (e.g. hereby cooperating enterprises can share the cost of research and development, can strengthen manufacturing, marketing and distribution position, etc)

Where cooperation has a long-term impact on the competitiveness of enterprises involved while retaining their independence and identity.

- → identified as strategic co-operation. E.g. Joint ventures is a specific form hereof.

#### The narrow definition of a joint venture:

- Cooperation between two or more business enterprises that together **create a separate business** enterprise.

Cooperating parties supply know-how and/or capital to the separate business enterprise but remain independent outside the scope of the cooperation itself.

- Incorporated joint venture / equity joint venture (i.e. participation in a public or private company)
- Unincorporated joint venture / contractual joint venture (i.e. participation in a partnership)
- The joint venture company may be a newly established company or previously owned / acquired company.
- Often: a joint venture contract

#### Example

2 engineers.

What issues should be regulated?

- Who are the parties?
  - Direct partners, or holding company inbetween.
- What kind of company?
  - Partnership, limited liability
- Amount of start-up share-capital
  -
- Ownership
  - Dividends
- Voting right
- Control of power
- Attribution
- Leaving rights.
  - When goals are met close down the company.
  - Leaving rights for each party.
    - Lock up period
  - Forced to leave?
- Contribution
  - Of time
  - employees
  - knowledge.

## **Joint venture agreements**

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Contract regulating the internal relationship between the participating parties (shareholder agreement, partnership agreement) will often contain (the below focuses on provision normal in a shareholder agreement):

- Parties
  - Can holding companies own the parties' shares?
  - If there are limitations of transferability of the shares in the company the same limitations will often also be on the transferability of the shares in the holding company.
- Share capital (the start up capital of the company)
- Shareholdings
- Financing of the cooperation
  - Plan for introduction of further capital.
- Dividends / dividend policy
  - When? To what extent?
- Dutch auction clause
- Board of director / management
- Voting rules
  - Certain material decisions may require qualified majority or even unanimity.
  - Board or general meeting decision?
- Non competition clause
  - Agreed penalty?
- Non solicitation clause

- Agreed penalty?
- A renegotiation clause

Will often be concluded prior to the formation of a company.

- In some countries the joint venture agreement

## Double company

- The Joint venture **contract itself** will establish a company, according to German law.
  - Not necessarily so in danish law. → but might result in a partnership.

## Right of first refusal – exemptions right

- What conditions will be fair?
  - Interesting is the price.
    - Fair to be offered at the same price a irrevocable offer from 3<sup>rd</sup> party.
      - Depend on the period of time to consider the offer.
    - Prefixed price.
      - Fixed by independent expert
      - Pros: no need to find a third party to buy.
    - Prefixed at a low price
      - Often times for family members.
        - To ensure the company stays on family hands.
    - Price fixed by the seller
      - alla dutch auction

## Drag and tag option

- Rules regarding transfers
  - lock-up period
  - consent requirement from board of directors / management
  - right of first refusal
  - drag and tag option
  - put and call option
- Often work together with right of first refusal.
- Tag
  - Buyer is obliged to buy other parties shares at same price, if the other party choses to sell.
- Drag
  - Seller can force the other parties to sell their shares.

## Texas shootout clause (musefælde klausulen)

- ? p. 233 in main book.
- It occurs where both parties are interested in buying the joint venture vehicle company and provides that in this case they both submit sealed bids to an “auctioneer” and the party who makes the higher bid buys the company at that price. → Has the effect of terminating a joint venture.
  - It is a variation of a Russian roulette provision (where either party can serve notice on the other

offering either to buy the other's shares or to sell its own shares to the other party at a specified price).

## Special rules for shareholders employed in the company

- Rules that if you no longer want to be employed, you can be forced to sell out your shares.

## Confidentiality obligation

- Agreed penalty?
- Art. 10 of the Takeover Directive:
  - Full transparency of all provisions – whether in the statutes or in contracts – which may impede the takeover of a listed company through a public bid.

## Breach

- Legal effect of breach
  - => termination of the contract !
  - Might agree for a put or call option.
    - Might be price fixed.

## Put and call option

- Put
  - A right to sell, combined with a obligation to buy the shares.
- Call
  - A right to buy the shares of the other party, which is obliged to sell.

## Deadlock

- How to solve a deadlock?
  - X has the casting vote (in turns)
  - 3<sup>rd</sup> party decides (arbitration tribunal, “Swing-man director”)
  - Dissolution of the joint venture company (liquidation or sell it to a 3<sup>rd</sup> party)
  - Call options / put options (e.g. the shareholder using his veto right shall sell its shares to the other shareholder)
  - Texas shoot out clause.

## Choice of forum

- Which courts are competent.
- Arbitration (voldgift)
- Local courts
- Alternative dispute resolution (mediation clause)
- Case C-214/89
  - Choice of forum in statutes: Choice of forum clause in the articles of association pertaining to disputes between shareholders and the company is governed by Art. 17 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil cases. [NB! Today this issue governed by Art. 23 of Regulation 44/2001]. EJ states that the relationship between a company and its shareholders – as embodied in the articles of association – is a contractual one. Therefore a jurisdiction clause in articles qualifies as an agreement under the convention.

## Choice of law

- Company statute vs. contract statute
- The joint venture agreement is not necessarily governed by the same law as that which applies to the joint venture company.
- Good to fixate which interpretation is used.

## **Principal rights regulated by a joint venture agreement**

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A joint venture agreement will seek to regulate the participating parties':

- administrative rights
  - (rights to vote on the general meeting, participate and vote in the board of directors and similar organs)
- economic rights
  - (rights to receive dividends etc.)
- dispositional rights
  - (rights to transfer shares)
- rights to receive information etc.

## **Joint venture agreements vs. statutes**

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The statutes of a joint venture company rarely regulate the issues treated in the previous slides.

Why?

- Confidentiality
- Systematic reasons