Joint Ventures in Switzerland

Fact sheet dated December 9, 2024

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I. INTRODUCTION

In a joint venture (JV), the companies involved want to combine their resources to achieve goals that the individual company cannot achieve on its own or can only achieve at a much higher cost. Compared to the acquisition of a company, a JV has the advantage that neither of the companies involved has to raise capital for the acquisition of the other company and the two companies remain independent in their activities outside the JV. The advantage over doing it alone is that the JV can largely build on the existing resources of the companies involved or that additional investments can be shared.

In Switzerland, the JV is recognized as a legal concept, but there is no statutory definition of it or body of law specifically covering it.

Most JVs are typically structured as either equity JVs or contractual JVs, thus most applicable rules on their formation and operation are found in the Swiss Code of Obligations. Which form of a JV its partners choose depends largely on the JV's partners' needs. For projects limited in time and scope, the JV partners often prefer the ease of formation and flexibility of a contractual JV, whereas the more formal structure of an equity JV is typically chosen for long-term cooperation arrangements or where limited liability is a key concern.

II. CONTRACTUAL JOINT VENTURES

Contractual JVs often 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 contracts. There is no separate legal entity established.

Advantages of contractual JVs include:

- *Simple formation*: Conclusion of contract or set of contracts. No capital must be put up and no formal structure is required.
- *Flexibility:* Contracts can be quickly adapted to new circumstances or terminated.
- *Tax transparency:* Contractual JVs are not subject to taxation. They offer full tax transparency, and profits and losses accrue directly to the JV parties.
- *Lower costs:* The absence of a formal structure generally leads to lower costs.
- *Confidentiality:* If desired, the contractual JV offers absolute confidentiality.

Disadvantages of contractual JVs include:

- *Liability:* Liability is not limited. In principle, each party remains directly liable for JV debts and may even become jointly liable for debts incurred by the other party on behalf of the JV.
- *Relations to third parties:* Funding will be granted to the JV partners and not the JV itself. A separate legal entity with a track record is often preferred, especially when raising funds from third parties.
- *Less stability and permanence:* Contractual JVs are typically appropriate for short-term or project-specific collaborations. If the parties intend to enter into a long-term partnership, a corporate JV may be the better choice.
- *Governance potentially less clear:* Contractual JVs are based solely on the terms of the agreement between the parties. In the absence of a formal corporate structure, decision-making processes and control may be less clear, increasing the risk of disputes or inefficiencies.
- *Transferability of interest limited:* Swiss law does not permit the transfer of an interest in a simple partnership without the consent of the other partners.

The provisions of the Swiss Code of Obligations will fill gaps not governed by the agreement between the parties. Generally, the following topics are covered in a contractual JV: (i) parties; (ii) purpose and scope; (iii) funding and contributions; (iv) management; (v) profit and loss allocation; (vi) non-competition; (vii) confidentiality; (viii) transfer of interest; (ix) term and termination; (x) applicable law, jurisdiction.

III. EQUITY JOINT VENTURES

An equity JV (JV company) is an independent legal entity with distinct and separate interests from those of its members and shareholders. The shareholders usually enter into a shareholders' agreement to govern their relationship regarding the JV company. Certain provisions of the shareholders' agreement could also be included in the articles of incorporation of the

JV company. Reasons for not doing so may be confidentiality (articles of incorporation can be inspected at the commercial register) or the formal procedure for amending the articles of incorporation (a shareholders' meeting must pass the respective resolutions, a notarized deed must be drawn up and changes must be notified to the commercial register).

Advantages of equity JVs include:

- *Incorporation:* A JV company is easy to incorporate, and the process takes no more than two or three weeks.
- *Limited liability:* The liability of each JV party is limited to the amount of capital it has subscribed to the JV company. In Switzerland, the corporate veil is only pierced by Swiss courts in very rare cases.
- *Separate legal entity:* The ability to enter into contracts and to own property (including intellectual property rights) is a clear advantage over the contractual JV. Third parties (including banks and other lenders) generally prefer to deal with an equity JV.
- *Transferability of interest:* Shares of the JV partners can easily be transferred either to other partners or to a third party.

Disadvantages of equity JVs include:

- *Administration costs:* Setting up and operating an equity JV often involves higher administrative costs (especially recurring costs related to the board of directors, annual shareholders' meeting, accounting and audit, if required/desired).
- *Less flexibility:* Changes to share capital, organizational structure and governing bodies require a formal procedure (possibly amendment of articles of incorporation and registration with commercial register, etc.). The termination of a JV company follows a formal liquidation procedure.
- *Taxation:* The JV company is treated as a separate tax subject, which has tax implications (corporate and capital tax) and can lead to additional tax issues (double taxation). The tax rates vary depending on the location.
- *No confidentiality*: The JV company will be registered in the commercial register. Certain documents are publicly available. If the JV contributes certain assets to the JV company in exchange for shares, certain aspects will be publicly available information (nature and value of assets).

The shareholders' agreement and/or the articles of association are likely to cover the following key aspects: (i) name and registered office of JV company; (ii) scope of activities; (iii) share capital, number, type of shares and subscriptions; (iv) transfer of shares; (v) future funding; (vi) board of directors; (vii) minority protection; (viii) deadlock solutions; (ix) auditors; (x) term and termination; (xi) non-competition; (xii) confidentiality; (xiii) use of IP; (xiv) dividend policy; (xv) applicable law and jurisdiction.

IV. SUMMARY

The form of the JV chosen by the partners depends largely on the needs of the JV partners.

The contractual JV allows for great flexibility and is mostly used for projects limited in time and scope. Lower costs and tax transparency can be another reason to opt for a contractual JV.

However, for a JV in Switzerland, the equity JV is almost always chosen unless the nature of the planned activity is of a short-term nature or requires little or no contact with third parties.

Overall, the equity JV has clear advantages over the contractual JV, provided that the business project to be realized justifies the higher acquisition and operating costs.

V. OUR SERVICES

We advise, assist and represent individuals and companies in Switzerland and abroad in connection with joint ventures in Switzerland.

Should you have any questions, please do not hesitate to contact us.

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