Joint Ventures 2022

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth 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.

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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 and Emily Tanji of Frost Brown Todd LLC, for their continued assistance with this volume.

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Getting The Deal Through

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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?

Under Dutch law, a joint venture is not recognised as a distinct legal concept and the term 'joint venture' has no special statutory meaning.

The cooperation between two or more independent parties typical for a joint venture can be in the form of a purely contractual arrangement or by way of a jointly owned joint venture company. From a structuring perspective, a purely contractual joint venture is the simplest form of cooperation, as it does not require the establishment and maintenance of a separate entity and is formalised merely by entering into a joint venture agreement that sets out the main terms of the cooperation.

If the joint venture partners have decided to structure their cooperation through a separate jointly owned joint venture vehicle, they can opt for either a partnership, which under Dutch law has no legal personality, or a legal entity. The key advantage of using a partnership is that a partnership can be tax transparent, meaning that the joint venture partners rather than the partnership will be taxed on the partnership profits. The main disadvantages of a partnership are that owing to its lack of legal personality it cannot own assets and the fact that, in principle, the (general) partners are fully liable for the partnership's debts. The forms of partnership that can be used as a joint venture vehicle are the general partnership and the limited partnership.

If the joint venture vehicle is to be a separate legal entity, the available options are a private company with limited liability (BV) and a public company. The BV is by far the most common form of joint venture entity, even more so since October 2012, when a bill entered into force that transformed the BV into a very flexible legal entity. Until recently, cooperatives were also regularly used as joint venture vehicles, but their popularity has decreased significantly owing to changes in tax legislation.

Common sectors

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

In the Netherlands, joint ventures are commonly used across all sectors and industries. As in other jurisdictions, joint ventures are often created to share and combine knowledge, share costs, and limit risks and exposure. Consequently, many joint ventures are common in sectors where research and development play a key role, such as the telecoms, oil and gas, and technology and consumer goods sectors.

PARTIES

Rules for foreign parties

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

In the Netherlands, there are presently no rules that specifically relate to foreign joint venture parties. Moreover, there is no general regulatory framework on foreign direct investment (FDI) into the Netherlands. However, at the EU level, an EU regulation providing a new framework for the screening of FDI into the European Union and its member states (Regulation 2019/452/EU (the FDI Regulation)) was adopted in March 2019 and applies as of 11 October 2020. The FDI Regulation provides a framework for the screening of FDI by member states on grounds of security or public order. Under the FDI Regulation, member states will be allowed to implement an FDI screening mechanism subject to certain formal requirements. The FDI Regulation does not require member states to have an FDI screening mechanism. On 22 June 2020, a bill implementing the FDI Regulation was submitted to the lower house of the Dutch parliament. The bill does not include any investment review or screening mechanisms.

On 30 June 2021, a bill concerning the security screening of investments, mergers and acquisitions was, together with an explanatory memorandum, submitted to the lower house of the Dutch parliament. This bill introduces an FDI screening mechanism within the meaning of the FDI Regulation.

Specifically, the bill imposes an obligation on the target company and the acquiring company to report to the Minister of Economic Affairs and Climate an acquisition of control in target companies established in the Netherlands and active in the field of vital processes or sensitive technology. The bill contains a list of categories of companies that can be seen as vital providers within certain sectors, including companies active in the field of transport of heat, nuclear energy, banking, extractable energy and gas storage. Furthermore, the bill stipulates that sensitive technology includes military goods and dual-use products (ie, products that can be used for both military and civilian purposes) whose export is subject to licensing. By an Order in Council, vital providers in other sectors can be brought within the scope of the new act and other technologies can be designated sensitive technologies. The Minister of Economic Affairs and Climate can start an investigation into whether the investment can impose a risk to national security, after which he or she can allow for the investment to be made (subject to conditions) or prohibit the investment in extreme cases.

The Dutch government has indicated that when the bill becomes law it will apply retroactively as of 8 September 2020. However, a target company or acquiring company will only be obliged to report a transaction retroactively if it is ordered to do so by the Minister of Economic Affairs and Climate.

In certain sectors that are considered to be of vital importance to the Netherlands, such as the financial, electricity and gas sectors, there

are investment screening mechanisms in place. On 1 October 2020, an act introducing a review mechanism to prevent undesirable control in the telecommunications sector entered into force. Under this act, any intended acquisition by a domestic or foreign investor of shares or assets in the Dutch telecommunications sector must be reported to the Minister of Economic Affairs and Climate if the investor acquires predominant control and such control may lead to a threat to national security. The Minister of Economic Affairs and Climate can start an investigation, which may result in the acquisition being prohibited.

Ultimate beneficial ownership

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

On 27 September 2020, the implementation act for the introduction of the ultimate beneficial owner (UBO) register entered into force. Under the implementation act, the UBOs of most entities formed or existing under Dutch law must be registered in the UBO register, which is part of the Dutch Chamber of Commerce's trade register. Existing entities will be subject to a transitional period of 18 months following the entry into force of the implementation act, within which period they must comply with the obligation to register their UBOs. However, newly formed entities will be obliged to do so immediately. If the UBO of an entity changes, this must be reported to the trade register within one week of the change taking effect.

The introduction of the UBO register is part of the transposition of the Fourth and Fifth European Anti-Money Laundering Directives into Dutch legislation.

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?

Typically, tax considerations are important drivers that will determine how a joint venture is structured. Other key factors that may drive the structure of a joint venture are:

- the accounting treatment of the joint venture (in particular, whether the joint venture partners wish to include the joint venture in their consolidated accounts);
- the respective ownership percentages of the partners;
- the duration of the joint venture;
- competition law aspects;
- corporate governance considerations;
- the jurisdictions where the joint venture partners are based; and
- the jurisdictions in which the joint venture will be investing.

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?

One of the most important aspects to consider from a tax perspective when establishing a joint venture is the legal form of the joint venture vehicle and its qualification under Dutch and foreign tax law. This qualification of the joint venture vehicle is decisive when determining whether the joint venture parties or the joint venture vehicle are subject to taxation in the Netherlands. The legal form of the joint venture vehicle can also be relevant for Dutch dividend withholding tax purposes. Generally, only entities with a capital divided into shares are subject to the Dutch dividend withholding tax act.

The Dutch legislator has proposed new rules for the qualification of certain Dutch and foreign legal forms, including vehicles that could be used for joint ventures such as the Dutch limited partnership (CV). The purpose of these rules is to align the Dutch qualification with the international tax standard to avoid mismatches. The new rules are expected to take effect on 1 January 2023.

A transfer of shares or assets and liabilities from a joint venture party to the joint venture vehicle can trigger corporate income tax or real estate tax, or both. However, Dutch tax law includes several provisions that could effectively allow for a tax-free contribution by the joint venture parties to the joint venture vehicle. Apart from several rollover facilities, the participation exemption could provide relief for situations in which qualifying shareholdings are contributed by Dutch-resident joint venture parties.

If a joint venture party transfers a business to the joint venture, this will generally be considered a transfer of a business going concern for Dutch value added tax (VAT) purposes and deemed not to fall within the scope of Dutch VAT.

Under the foreign taxpayer rules, foreign joint venture parties can be subject to Dutch corporate income tax for holding an interest in the Dutch joint venture vehicle. In addition, any interest on a loan between the joint venture vehicle and the joint venture parties can also be captured by these rules. In most cases, it is relatively straightforward to structure around these rules, but it is important to consider the potential tax implications when setting up the joint venture structure.

Tax planning strategies for setting up a joint venture structure that involve the use of hybrid mismatch arrangements should be revisited as the Netherlands has implemented the amendment of the EU anti-tax avoidance directive (ATAD 2), in effect as of 1 January 2020.

The reverse hybrid entity rule must be transposed into national legislation only by 1 January 2022. A reverse hybrid entity is an entity that is regarded as opaque in the jurisdiction of its shareholders, partners or members, but as transparent in the jurisdiction in which the entity was incorporated or is registered. The reverse hybrid entity rule effectively eliminates the difference in tax qualification in the relevant jurisdictions. The reason for this is that, on the basis of this new rule, reverse hybrid entities that are incorporated, registered or resident in the Netherlands will be fully liable to Dutch taxation. This rule can, for example, be relevant for joint venture structures in which the joint venture entity is a CV. Now that ATAD 2 has been implemented, it is more difficult to set up a structure with double deductions or to claim a deduction without corresponding inclusion by using hybrid mismatches. Instead, tax planning strategies should focus on the possibilities to claim rollover facilities or exemptions where possible and needed, shifting profits from high-tax jurisdictions to low-tax jurisdictions using debt instruments, and on withholding taxes for which no credit is available.

Finally, when establishing a joint venture structure, the tax transparency rule in the new EU directive on cross-border tax arrangements (DAC6) should be considered. Based on DAC6, an intermediary or the relevant taxpayer itself will be required to disclose information on a cross-border arrangement to the Dutch tax authorities if such arrangement potentially qualifies as an aggressive cross-border tax arrangement. The Dutch tax authorities must exchange this information with other EU member states through a European centralised database, from which member states can leverage information under certain circumstances. Non-compliance with DAC6 could result in heavy fines being imposed (in the Netherlands up to €870,000).

Asset contribution restriction

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

Under Dutch corporate law, there are no restrictions on the contribution of assets to a joint venture entity. However, if the joint venture vehicle is a private company with limited liability (BV) or a public company (NV),

additional formalities apply if the contribution is made in exchange for one or more shares in the capital of the company.

If the joint venture entity is a BV, the management board of the BV must prepare a management description that must state the value of the assets to be contributed and the valuation method applied. The management description must refer to the condition of the relevant assets on a date that must be within the six months before the date of the share issue. If the joint venture entity is an NV, in addition to the preparation of a management description, an auditor must issue a certificate confirming that the value of the assets to be contributed is at least equal to the aggregate par value of the shares to be issued. In practice, this requirement proves to be quite burdensome, especially if the aggregate par value of the shares to be issued is substantial.

No similar requirements as to the value of the assets to be contributed exist if the contribution is made without the joint venture issuing any shares in exchange (ie, the contribution is made as a share premium contribution), except in the event that the contribution is made to an NV that has been in existence for less than two years.

If the joint venture vehicle is a partnership, no requirements exist as to the valuation of the assets to be contributed.

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?

If the joint venture vehicle is an entity with legal personality, the articles of association are its constitution. Since the articles are available for public inspection at the Chamber of Commerce's trade register, all arrangements between the joint venture parties that are included in the articles are public information. For this reason, joint venture parties often decide to include all arrangements containing privileged information in the joint venture agreement only and not also in the articles. There is no requirement to register or file the joint venture agreement.

It is common practice to include a clause in the joint venture agreement stipulating that, in case of a discrepancy between the joint venture agreement and the articles of association, the joint venture agreement prevails. The joint venture partners should be aware that, unlike the joint venture agreement, the articles of association have corporate effect, which means that the articles are binding not only on the joint venture partners but also on any third parties. It also means that any actions taken or resolutions made in breach of the articles of association will be null and void, whereas actions taken or resolutions made in breach of the joint venture agreement only constitute a breach of contract. Although the articles provide more protection and more certainty for the joint venture parties than the joint venture agreement, in practice it is not considered problematic to include specific arrangements between the parties in the joint venture agreement only.

Party interaction

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

Information sharing and any other interactions between the joint venture entity and the joint venture parties are subject to the contractual arrangements included in the joint venture agreement and, in the case of an entity with legal personality, the provisions of the articles of association. In the case of a BV or an NV, there is the statutory rule that the company's management board and supervisory board or the one-tier board, as the case may be, is required to provide all information requested by the general meeting, unless providing such information is contrary to an overriding interest of the company. It is unclear to what extent individual shareholders also have a right to information. Restrictions on information sharing may apply under rules of competition law or under the General Data Protection Act.

Exercising control

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

One of the most common and effective mechanisms allowing a joint venture partner to exercise control over the joint venture company is the right of a joint venture partner to nominate its own representatives to the company's management board, supervisory board or one-tier board. A shareholder's right to nominate a member of a corporate body is usually structured as a binding nomination right and can be included in the joint venture agreement or the company's articles of association. In the case of a BV, a shareholder can even be given the right to directly appoint its own representatives in the company's corporate bodies. The right to nominate (or appoint) is often combined with specific quorum requirements and a provision in the articles stipulating that the company can only be represented in relation to third parties and important decisions can only be taken with the minority investor's involvement.

The other most common control mechanism in a joint venture company is to include – in the joint venture agreement or the articles of association – a list of reserved matters. Decisions on reserved matters can only be taken with the consent of the minority shareholders.

Governance issues

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

The most common governance issues arising in connection with joint ventures are related to the allocation of powers to the joint venture partners, and how the joint venture partners can effectively exercise control over the joint venture and its business. If the joint venture entity is structured through a legal entity, typically the allocation of powers is partly laid down in the entity's articles of association and partly in the joint venture agreement. Especially in the case of joint ventures where the ownership is not divided equally between the joint venture partners, both the articles of association and the joint venture agreement are often extensive and detailed. The reason for this is that the Dutch Civil Code provides little protection to minority shareholders, which means that minority shareholders will have to protect themselves through the joint venture agreement and the articles of association, if, for instance, they want to prevent being outvoted in respect of key decisions or being diluted in cases of capital increases.

Other important governance issues are concerned with how to balance the interests of the joint venture partners on the one hand and the interests of the joint venture on the other, and how to deal with deadlock situations.

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?

Each director of a Dutch company has a fiduciary duty towards the company and should at all times perform his or her duties in good conscience. The Dutch Civil Code prescribes that in the performance of their duties, directors must be guided by the interests of the company. This implies that a nominee director is not allowed to act merely as a direct representative of the joint venture partner that nominated or appointed him or her and, in cases of potentially conflicting interests of

the joint venture company and the appointing shareholder, the director cannot let the interests of the appointing shareholder prevail.

Competition law

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

If a joint venture qualifies as a concentration under the Dutch Competition Act and certain turnover thresholds are exceeded, the joint venture must be notified to the Netherlands Authority for Consumers and Markets (ACM). The ACM will investigate whether, as a consequence of the joint venture being established, a dominant position is created or strengthened that significantly restricts competition on the Dutch market. Such a joint venture may only be formed after consent from the ACM has been obtained. A joint venture is considered a concentration as defined in the Dutch Competition Act if:

- two or more joint venture partners can jointly exercise control over the joint venture; and
- the joint venture performs, on a continuing basis, all the functions of an autonomous economic entity.

If the joint venture does not qualify as a concentration, it may fall within the scope of the general cartel prohibition. In that case, the joint venture agreement will be null and void, unless one of several EU group exemptions applies, such as the group exemption for specialisation agreements or the group exemption for research and development agreements.

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?

It is quite common that joint venture partners provide services to the joint venture. The terms under which the services are rendered can be included in the joint venture agreement or in separate agreements. The key consideration in structuring the provision of services to the joint venture entity by the joint venture parties is that these services must be provided on an arm's-length basis. This is important both commercially and from a tax (transfer pricing) perspective.

Employment rights

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

Various aspects of Dutch employment law have a significant impact on joint ventures. The impact of statutory employment rights on joint ventures is no different from other types of entities.

Worker mobility between the joint venture parties and the joint venture is subject to the general provisions of the Dutch Civil Code. Various rules apply, depending on the manner in which worker mobility is structured. In the event of a transfer of an employee from one of the joint venture parties to the joint venture, the latter is to be regarded as a successive employer. The legal consequences are far-reaching, with regard to, for example, the order of dismissal in the event of collective dismissal, the amount of the transition payment and the length of the notice period to be observed by the employer.

If cross-border employment is involved, it should be noted that all statutory employment provisions must be applied to employees who perform their work in the Netherlands. In addition to this, all employees seconded to the Netherlands to work for the joint venture are entitled to a limited number of basic employment conditions, such as the minimum wage, minimum paid annual leave and protection against discrimination, regardless of the law applicable to the employment contract.

In the event that a joint venture party contributes significant tangible assets to the joint venture (including employees), this may qualify as a 'transfer of an undertaking' under EU and Dutch law. In that event, employees employed by the joint venture party and working for the business to be transferred will become employed by the joint venture by operation of law, and under the same terms and conditions. In addition, dismissal following such a transfer of an undertaking is subject to more stringent rules. This also applies to a possible harmonisation of the terms and conditions of employment following a transfer.

Lastly, if the joint venture has a works council, its employees in the Netherlands must be involved in certain decisions of the management of the joint venture.

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?

When setting up the joint venture, intellectual property (IP) rights owned by the joint venture partners can either be transferred to the joint venture or the joint venture partners will retain ownership and grant a licence to the joint venture. The joint venture parties should also agree from the outset on how to deal with newly created IP rights, not only for the duration of the joint venture but also upon termination of the joint venture.

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?

When determining how to fund a joint venture, tax considerations usually play an important role. In the Netherlands, joint ventures structured through a legal entity are generally funded through capital contributions, shareholder loans or third-party financing, or through a combination of these ways of funding. Typically, the joint venture agreement will contain detailed provisions on the funding of the joint venture, including the consequences for a party failing to comply with its funding obligation as agreed between the partners.

Partnerships are usually funded by way of capital contributions recorded in capital accounts maintained by the partnership for each individual partner and partner loans or a combination of the two.

There are no particular requirements relating to the funding of the joint venture and security packages.

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?

There are no legal or regulatory restrictions on the injection of capital into a joint venture. Whether there are any legal restrictions on distributions will, however, depend on how the joint venture is structured.

If the joint venture entity is a public company (NV), distributions are only allowed if this is explicitly permitted in the company's articles of association and only to the extent that freely distributable reserves are available. Whether there are indeed sufficient freely distributable reserves must be evidenced by way of a recent interim balance sheet.

A private company with limited liability (BV) is more flexible than an NV as far as distributions are concerned: distributions to the BV's shareholders may be made without the requirement for a minimum amount of equity to remain within the company, except for the reserves that must be maintained under the law or the articles of association (if any). An additional requirement, however, is that distributions may be made only with the consent of the management board. The management board may only refuse to give its consent if it has determined that, after the distribution, the BV will not be able to continue paying its due and payable debts.

In practice, joint ventures are often partially funded through shareholder loans to allow for funds to be paid to the joint venture partners by way of a repayment of principal or the payment of accrued interest, or both. Such payments are not subject to any restrictions or other formalities from a legal or regulatory perspective.

If the joint venture is structured through a partnership, there are no restrictions on distributions to be made to its partners.

Tax considerations

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

Depending on the legal form of the joint venture vehicle, Dutch dividend withholding tax could be due on dividend distributions to the joint venture parties. The statutory rate is 15 per cent, but exemptions can apply for joint venture parties that are tax resident in an EU member state or in a country that has a tax treaty with the Netherlands.

As of 1 January 2021, there is a conditional withholding tax in the Netherlands on interest and royalty payments for payments made to low-tax jurisdictions. However, payments to hybrid entities can also be covered under these new rules. The same applies to payments made to entities that are regularly taxed in case of abuse. For the deductibility of the interest paid by the joint venture, it is important to consider the earning stripping rules that were implemented in the Netherlands following the issuance of the EU anti-tax avoidance directive. On the basis of these rules, the deductibility of net borrowing costs is limited to the higher of 30 per cent of the earnings before interest, taxes, depreciation and amortisation or €1 million.

There is no group relief in the Netherlands, but there is a possibility for consolidation of the results of companies that are part of a fiscal unity. Generally, this regime is not relevant for joint venture structures, as one of the requirements is that there is a (direct or indirect) 95 per cent legal and economic ownership between the parent and the subsidiaries in the fiscal unity. If no fiscal unity can be formed, it is not possible to offset joint venture losses with the results of the joint venture parties unless the joint venture vehicle is transparent for Dutch tax purposes.

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?

If a legal entity is at the head of a group, then this entity will, in principle, be required to prepare consolidated financial statements in addition to its standalone accounts. In these consolidated financial statements, it should include not only its own financial data, but also the financial data of the legal entities and companies belonging to its group. A group exists when a company can exercise decisive control over one or more other legal entities (the group companies), which together form an economic unit through organisational interconnectedness. Whether a shareholder may include the financial data of another company in its consolidated financial statements will, in principle, depend on whether such a shareholder can effectively exercise control over the other company. Dutch law provides an exception to this rule for joint ventures: if certain statutory requirements are met, a joint venture partner may include the financial information of the joint venture in its consolidated accounts in proportion to the interest it holds in the joint venture.

DEADLOCK, EXIT AND TERMINATION

Deadlock provisions

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

To avoid deadlock situations as much as possible, the joint venture parties should from the outset agree on key operational and procedural matters involving the joint venture, such as capital calls, external financing, the business plan, the annual budget and exit. Such agreements will typically be included in the joint venture agreement.

With respect to deadlock situations for which no arrangements are included in the joint venture agreement, the parties often rely on escalation provisions included in the joint venture agreement, pursuant to which the relevant matter is referred to an advisory committee, an investment committee or senior management of the joint venture parties for a decision. A deadlock matter can also be escalated to an expert or a mediator.

Other deadlock resolution mechanisms that are typically used in 50:50 joint ventures involve the forced sale of the shares held by a joint venture party in the joint venture, such as put and call options and shoot-out provisions. The latter include:

- the Russian roulette clause (where either joint venture party can make an offer to either buy the other party's shares or sell its own shares to the other party at a specified price; the offeree can either accept the offer or reject it and make a counter offer at the same specified price);
- the Texas shoot-out clause (where either joint venture party can make an offer to buy the other party's shares in the company for a quoted price and the other shareholder can either accept the offer or submit a higher bid to buy the offeror's shares – the process is repeated until a bid is accepted); and
- the Dutch auction clause (where both joint venture parties submit a sealed bid to an independent third party and the party that made the highest bid must buy the other party's shares at that price).

In the case of a 50:50 joint venture, the parties can also agree on a casting vote being granted to the chair of the management board in the case of a deadlock.

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 agreements typically include a number of mechanisms that allow a party to exit the joint venture or for the joint venture to be terminated in a regulated manner in specific situations. Commonly used exit mechanisms include put and call options, shoot-out provisions and rights of first refusal or rights of first offer. Tag-along and drag-along rights are very common in joint ventures where there is a minority investor.

Tax considerations following termination

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

Upon termination of the joint venture, all hidden reserves will become taxable at the level of either the joint venture vehicle or the joint venture parties. This is also the case when the joint venture vehicle is transparent and the joint venture partners sell their interest in the joint venture.

If the joint venture vehicle is treated as an entity, Dutch dividend withholding tax could be due on the distribution of the joint venture assets. A repayment of capital is generally not subject to Dutch dividend withholding tax.

Under the foreign taxpayer rules, dividends or sale proceeds could be subject to Dutch corporate income tax.

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?

Under Dutch law, there are no constraints on the joint venture partners' ability to choose the governing law of the joint venture agreement. The articles of association of a legal entity can, however, only be governed by Dutch law. Joint venture partners are also free to choose the method of dispute resolution in respect of the joint venture agreement.

Mandatorily applicable local law

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

There are certain special mandatory rules of Dutch law that will apply irrespective of the choice of governing law, but in only very limited situations will any of these rules be relevant for joint venture agreements. If the joint venture vehicle is a legal entity, however, Dutch company law will apply to the legal entity even if the joint venture agreement concerning the Dutch company is not governed by Dutch law.

In addition, the right of shareholders of a Dutch company to submit a request to the Enterprise Chamber of the Amsterdam Court of Appeal to initiate an investigation into the policy and affairs of the company cannot be set aside by choosing the law of another jurisdiction as the governing law of the joint venture agreement.

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?

Under Dutch arbitration law, a tribunal can, in principle, grant all remedies that an ordinary court can. There are no restrictions specifically applying to joint ventures or shareholder claims. An arbitral award is just as binding as a judgment of an ordinary court. However, unlike the judgment of an ordinary court, an arbitral award is, in principle, not enforceable. The enforcement of an arbitral award on assets located in the Netherlands requires the permission of a Dutch court, which will almost always be granted.

Generally, it is possible for a party to bring an action for revocation or annulment of an arbitral award before the Court of Appeal. The revocation or annulment of an arbitral award can only be claimed on the following grounds:

- there is no valid arbitration agreement;
- the arbitral tribunal has been constituted in violation of the applicable rules;
- the arbitral tribunal has not acted in compliance with its mandate;
- the arbitral award has not been signed or is not substantiated; or
- the arbitral award, or the manner in which it was established, is contrary to public order.

In practice, the courts are reluctant to set aside an arbitral award.

Minority investor protection

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

There are no statutory protections for minority investors if the joint venture vehicle is a partnership. The Dutch Civil Code does, however, provide some protection for minority shareholders of a Dutch company by prescribing that certain resolutions can only be adopted unanimously or by an enhanced majority of votes in the general meeting. Such resolutions include:

- a resolution to make a distribution to shareholders of a private company with limited liability (BV) on a non-pro-rata basis requires the affirmative vote of all shareholders;
- a resolution to amend the articles of association of a BV in respect of a change in the voting rights can only be adopted unanimously at a meeting at which the entire issued capital is represented; and
- a resolution to convert the legal form of the company into another legal form requires an affirmative vote of at least 90 per cent of the votes cast.

Liabilities

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

If the joint venture is structured as a partnership, the partners (in the case of a general partnership) or general partners (in the case of a limited partnership) are jointly and severally liable for the partnership's debts. If a partner is held liable, he or she will have a compensatory claim on the other partners for their respective share in the liability.

If the joint venture vehicle is a company, the basic rule is that the shareholders are not liable for the company's debts. Generally, joint venture parties will only have liabilities to each other if this is expressly agreed in the joint venture agreement, except for liability pursuant to a wrongful act committed by a joint venture partner resulting in damages to another joint venture partner.

Disclosure of evidence

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

In principle, unless agreed otherwise, a joint venture partner does not have the right to inspect documents prepared or owned by the joint venture entity.

The discovery process of collecting information in the pretrial phase of a civil lawsuit, which is well known in common law jurisdictions, does not currently apply in the Netherlands. There is, however, a bill on the simplification and modernisation of evidence law being debated in the lower house of the Dutch parliament that includes the introduction of a pretrial discovery process.

The current Dutch rules of civil procedure provide for certain instruments that can be used to obtain information in civil proceedings.

Interested parties may require from the party who has records at his or her disposal, or in his or her possession, access to or a copy of specific records with regard to a legal relationship to which he or she or his or her legal predecessors are party. Such an action can not only be brought in pending proceedings on the merits but also in preliminary relief proceedings.

Furthermore, a party may request the court to hold a witness hearing or to appoint an expert witness. Such a request may be submitted even if there is no civil procedure pending.

MARKET OVERVIEW

Jurisdictional advantages

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

Although the Netherlands is a small country, it has a large and strong economy. It is an attractive and popular jurisdiction to invest in for a variety of reasons, including:

- it has a central geographical location and a superior infrastructure of ports, airports, roads and railways;
- it has a highly skilled workforce;
- the vast majority of the population speaks English;
- it has advanced telecoms and IT infrastructure; and
- it is politically stable.

Requirements and restrictions

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

In the Netherlands, there are no particular requirements or restrictions relating to joint ventures that could deter international investors.

UPDATE AND 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?

During the past year, there have not been any major developments that have had a material impact on joint ventures other than those concerning foreign direct investment screening. That said, on 1 July 2021, the Act on Management and Supervision of Legal Entities entered into force. The purpose of this new act is to supplement and clarify the rules for the management and supervision of associations, cooperatives, mutual societies and foundations, in line with the existing rules for public companies (NVs) and private companies with limited liability (BVs) in the Dutch Civil Code. The new act therefore has an impact especially on joint ventures using the cooperative as the joint venture vehicle. Key elements of the new act include:

- a statutory basis for the establishment of a supervisory board for foundations, associations, cooperatives and mutual societies has been introduced;
- foundations, associations, cooperatives and mutual societies may establish a one-tier board, which is a board consisting of executive and non-executive directors;
- certain rules on the liability of and mismanagement by managing directors and supervisory directors of NVs and BVs now also apply to managing directors and supervisory directors of associations, cooperatives, mutual societies and foundations;
- a conflict of interest involving a managing director or supervisory director of any legal entity (including cooperatives) will have consequences for the decision-making process (ie, internally) and not for the authority representing the legal entity (ie, externally); and
- a managing director or supervisory director may not cast more votes than the other managing directors or supervisory directors together (multiple voting right restriction).

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