Global Knowledge.
Linklaters

A Cross-Border Guide to Joint Ventures
2018

Purpose of this guide

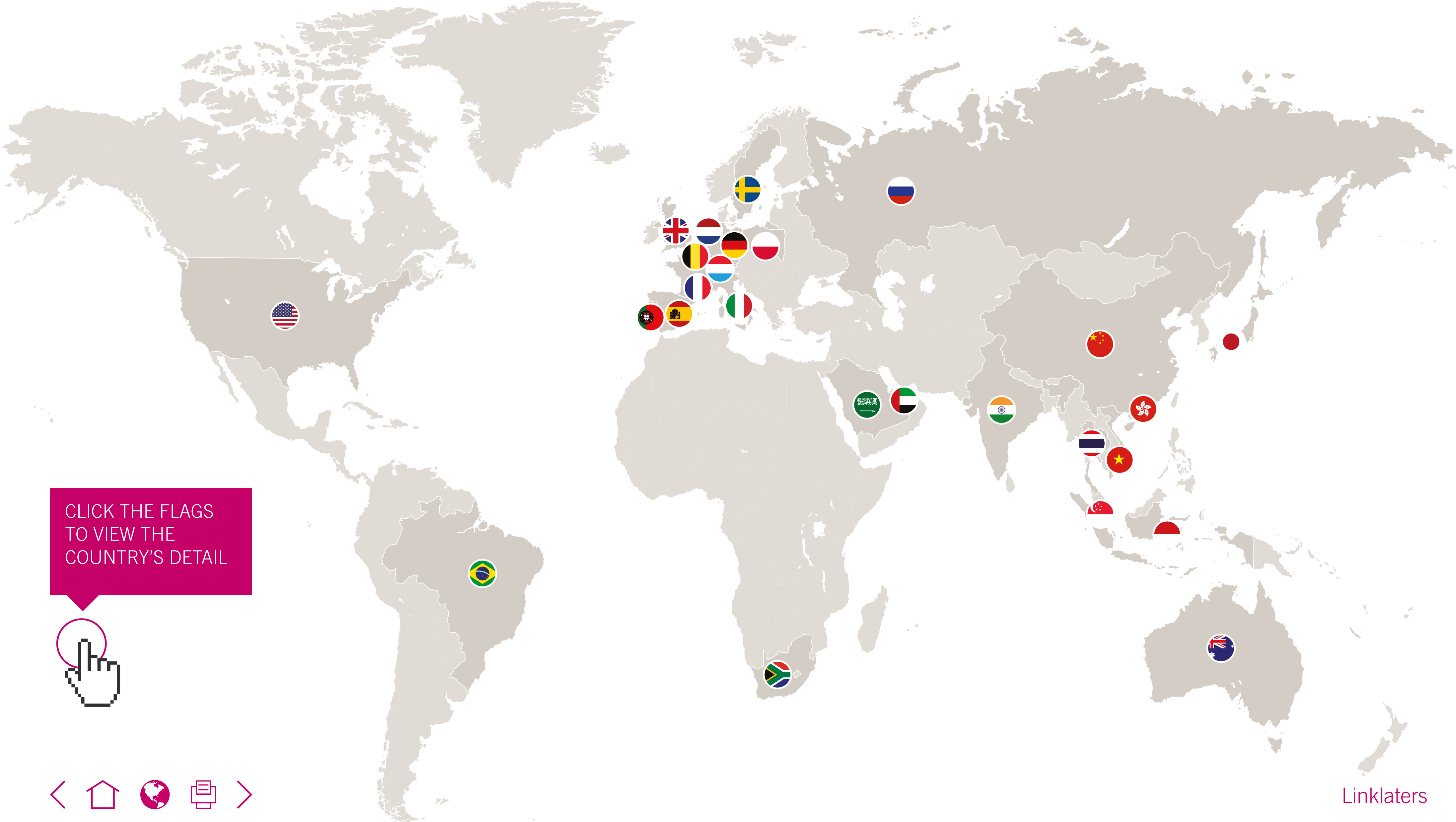
This Cross-Border Guide considers questions that commonly arise on joint venture deals and how they can be resolved in 26 jurisdictions.

While, no two joint venture deals are the same, we hope this is a useful guide to some of the main features of doing cross-border deals. We have included the contact details of some of our experts who have contributed to this guide. Please also feel free to get in touch with your own Linklaters contacts about any of the issues raised.

Information about Australia and Vietnam was contributed by Allens, Brazil by Lefosse Advogados, Indonesia by Widyawan & Partners and South Africa by Webber Wentzel.

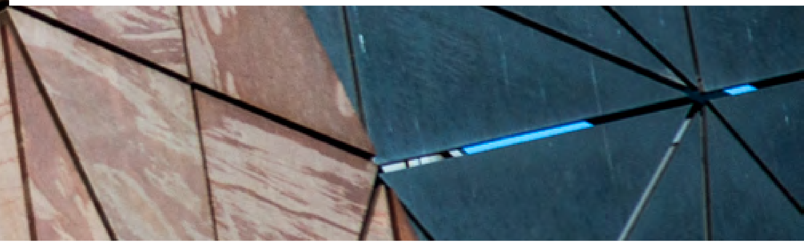
Contents

A Cross-Border Guide to Joint Ventures
2018



CLICK THE FLAGS TO VIEW THE COUNTRY'S DETAIL

01 / Australia



Mark Malinas
Allens Partner, Melbourne
Tel: +61 396 138 485
Mob: +61 409 389 789
Mark.Malinas@allens.com.au

Tom Story
Allens Partner, Sydney
Tel: +61 292 304 812
Mob: +61 404 024 526
Tom.Story@allens.com.au

What types of entities are generally used for Australian JVs?

In Australia, a JV is usually structured as an unincorporated JV or an incorporated JV. Partnerships tend to be less commonly used as an entity to pursue joint interests because of tax implications and because, in general, partners are jointly and severally liable for the debts and obligations of the partnership.

In the case of an unincorporated JV, the parties enter into contractual arrangements to pursue specific interests without forming a separate legal entity or partnership. The liability of the parties for the JV is unlimited, although the parties are typically severally (rather than jointly) liable and corporate groups may use special purpose vehicles to enter into unincorporated JVs. Advantages of this structure include the minimal regulation and flexibility of the possible arrangements.

In the case of an incorporated JV, the parties are shareholders of a company. The company may be a private company (known in Australia as a "**proprietary company**") or a public company. Advantages of this structure include the limited liability of the parties and the simpler nature of the corporate structure.

Are there foreign investment restrictions for Australian JVs?

Investments by "foreign persons" in Australian JVs are restricted by the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("**FATA**"). The Australian Treasurer (via the Foreign Investment Review Board) must be notified of "**notifiable actions**" taken by foreign persons. Notifications may attract a filing fee of up to A$101,500 per action (indexed annually). It is an offence not to notify the Treasurer of a notifiable action, or (having given notice) to proceed before a statutory period expires or approval is received. The Treasurer can also prohibit transactions which are contrary to the Australian national interest. Certain "**significant actions**" may also be voluntarily notified to the Treasurer. This is not compulsory but, where prior approval is not sought, the Treasurer can make an adverse declaration (including a divestment order) for actions contrary to the Australian national interest.

The following provides a very broad overview of the types of transactions that may give rise to notifiable actions. The regime is complex and the FATA should be thoroughly considered before a foreign person invests in an Australian JV. In general, a notifiable action arises where a foreign person acquires a "substantial interest" (20%+) in an Australian incorporated JV and the prescribed monetary threshold is satisfied (calculated by reference to the JV's share or asset values). Ordinarily, a A$261 million threshold applies (indexed annually), but this depends upon the type of investor and sector. Sensitive sectors include media, telecommunications, transport, military and nuclear. A notifiable action may also arise where a foreign person acquires any interest in an Australian "land rich" incorporated JV (i.e. where land asset values exceed 50% of total asset value) and a prescribed monetary threshold is satisfied. Foreign acquisitions of the assets of an Australian unincorporated JV are generally not notifiable (though may be significant actions), unless the assets include Australian land and a prescribed monetary threshold is satisfied.

A stricter regime applies to "foreign government investors", including foreign state pension funds and state-owned enterprises.

Special rules also apply to the acquisition of an Australian media or agribusiness. Separate legislation imposes other restrictions on foreign investment in certain industries, including banking, airports and shipping.

Are there any publicity or other specific formalities e.g. registration or notarisation?

An incorporated JV is a company which must be registered with the Australian Securities and Investments Commission ("**ASIC**").

All companies are required to notify ASIC of certain matters, including changes to company details (e.g. change of company name, address, changes of officeholders and changes in share capital).

If an incorporated JV is registered as a public company (rather than as a proprietary limited company), the constitution of the incorporated company, and any modifications to it, must be lodged with ASIC. There is no requirement to lodge the constitution if the company is incorporated as a private company, unless ASIC requests it to do so. There is no requirement to register publicly the shareholders' agreement or JV agreement.

As an unincorporated JV is not a company, there is no requirement for it to be registered with ASIC.

If a party to an Australian JV is listed on the Australian Securities Exchange ("**ASX**"), the ASX Listing Rules will need to be considered. For example, the listed party will need to consider the application of the ASX continuous disclosure obligations if it becomes aware of information that would be expected to have a material effect on the price or value of its securities. The disclosure of information concerning the JV will need to be carefully managed.

Notarisation is not required to establish an Australian JV.

Note that security interests over personal property (which may include JV assets or shares of an incorporated JV) must be registered on the Personal Property Securities Register.

How can a shareholder exercise influence over an Australian JV?

A common way for shareholders to exercise influence on an Australian JV is through reserved matters, being matters which must be approved by a requisite majority shareholder vote before such action is authorised. Reserved matters commonly include material acquisitions or disposals of assets or entering into or terminating material contracts.

Different voting thresholds may apply for the approval of shareholder reserved matters, including the unanimous or majority consent of shareholders, or requiring the consent of specific shareholders.

In the case of an incorporated JV, the Australian Corporations Act also prescribes minimum voting thresholds or different requirements for certain matters (e.g. amendment of the constitution of the incorporated JV, the variation or cancellation of rights attached to shares and the payment of dividends).

Shareholders may also require that certain matters are reserved for the board, rather than management being permitted to approve such matters (e.g. capital expenditure or transactions over a prescribed value). Board reserved matters may overlap with shareholder reserved matters. In addition, the shareholders' agreement may provide for shareholders to have the right to appoint directors to the board (e.g. on a basis proportional to the number of shares held).

For an incorporated JV, reserved matters are generally contained in the shareholders' agreement, to which the JV company is likely to be a party but may also be included in the JV's constitution.

In the case of an unincorporated JV, reserved matters will be provided for in the joint venture agreement.

Are there any issues or restrictions in relation to the transfer of shares in an Australian JV?

In general, there are no limitations on the types of restrictions to the transfer of shares that may be agreed between the parties to an Australian incorporated JV.

The common restrictions in a shareholders' agreement or a constitution include pre-emption rights, rights of first refusal or rights of first offer, drag-along or tag-along rights or an initial "lock-in" period during which shareholders are not permitted to transfer shares.

If the incorporated JV is a listed company, or an unlisted company with more than 50 shareholders, the transfer of shares in the company may be subject to the takeover provisions in the Australian Corporations Act. The application of these provisions is unusual in a JV setting.

In general, there are no limitations on the types of restrictions to the transfer of interests that may be agreed between the parties to an Australian unincorporated JV.

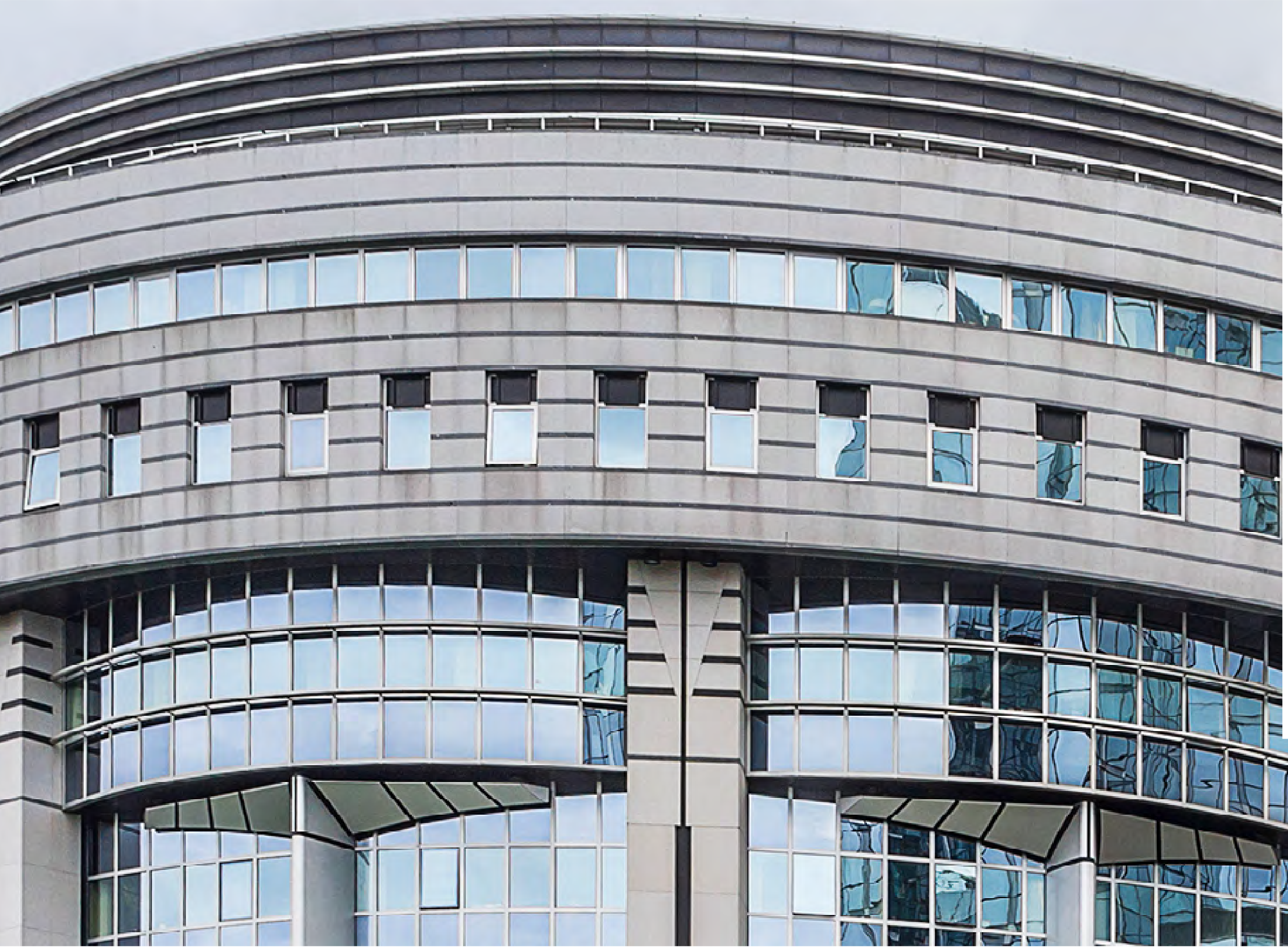
Are there any issues in relation to the enforcement of a shareholders' agreement?

In the case of an incorporated JV, the most common remedy for breach of the shareholders' agreement is damages. A party may also seek an injunction for breaches that cannot adequately be compensated by damages. Shareholders' agreements may contain exit provisions which compel a party in breach of the agreement to sell its shares to a non-defaulting party. Shareholders' agreements may also contain deadlock provisions which allow for one party to transfer its shares to another, for the winding up of the company or the referral of a deadlock matter to an independent expert.

In the event of a conflict between the shareholders' agreement and the JV's constitution, either document can prevail depending on the stated intention of the parties. It is usual for the shareholders' agreement to state that the shareholders' agreement prevails if there is any inconsistency with the constitution.

In the case of an unincorporated JV, the joint venture agreement will typically outline the remedies available to a non-defaulting party including rights to compensation or to acquire (wholly or partially) the JV interest of a defaulting party. Other remedies may include account of profits for misuse of joint venture assets and proprietary claims such as relief against forfeiture or a constructive trust where an interest in joint venture property is sought to be recovered or retained.

02 / Belgium



Arnaud Coibion
Partner, Brussels
Tel: +32 2 501 90 18
Mob: +32 479 215 776
arnaud.coibion@linklaters.com

Eric Pottier
Partner, Brussels
Tel: +32 2 501 94 48
Mob: +32 475 398 268
eric.pottier@linklaters.com

Philippe Remels
Partner, Brussels
Tel: +32 2 501 91 44
Mob: +32 477 639 024
philippe.remels@linklaters.com

Ilse Brouwers
Counsel, Brussels
Tel: +32 2 501 93 25
Mob: +44 7 500 796 390
ilse.brouwers@linklaters.com

What types of entities are generally used for Belgian JVs?

A company limited by shares (*société anonyme/naamloze vennootschap* or "**SA/NV**") is the type of entity most generally used for Belgian JVs, although other forms can be used, such as a private limited liability company (*société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid* or "**SPRL/BVBA**").

Are there foreign investment restrictions for Belgian JVs?

No.

Are there any publicity or other specific formalities e.g. registration or notarisation?

Yes. The articles of association and any amendments must be drawn up in Dutch and/or French, notarised and filed with the clerk's office of the commercial court where they are available for public inspection. At a minimum, an extract of the articles of association must be published in the Annex to the Belgian State Gazette.

On the other hand, shareholders' agreements can be drawn up in English and do not need to be notarised or filed with the clerk's office of the commercial court, or published in the Annex to the Belgian State Gazette and, as a consequence, are not publicly available.

If produced, a code of governance must be drawn up in Dutch and/or French. A code of governance does not need to be filed with the clerk's office of the commercial court, or published in the Annex to the Belgian State Gazette and, as a consequence, is not publicly available. A code of governance may (but need not) be referenced in a publication in the Annex to the Belgian State Gazette.

A delegation of powers of the board of directors is usually published in the Annex to the Belgian State Gazette to make it enforceable against third parties.

How can a shareholder exercise influence over a Belgian JV?

Different classes of shares may be used to grant different financial and/or management rights to different classes of shareholders (e.g. the articles of association of a Belgian JV can provide that each of these classes is entitled to nominate one or more directors or that certain decisions require a certain quorum and/or majority within certain or all classes of shares).

The Belgian Companies Code exclusively reserves specific powers for the shareholders' meeting, such as amendments to the company's articles of association, the approval of the annual accounts and the appointment of directors/managers and the auditor.

A shareholders' agreement or articles of association may provide that certain powers which are normally within the scope of the board of directors will be reserved for the shareholders' meeting or will require the prior approval of the shareholders.

However, powers that are specifically reserved by the Belgian Companies Code for the board of directors (e.g. making use of the authorised capital, distributing interim dividends, convening a shareholders' meeting or drawing up the annual accounts) cannot be restricted.

In addition, the powers of the board of directors cannot be restricted in a manner that would disproportionately reduce its powers (e.g. by requiring the prior approval of the shareholders for all board decisions). Any such restrictions on the powers of the board of directors would only operate internally and could not be enforced against third parties.

Are there any issues or restrictions in relation to the transfer of shares in a Belgian JV?

As a general rule, shareholders of an SA/NV may freely transfer all or part of their shares to another shareholder or to a third party. Share transfers may, however, be restricted by the company's articles of association or a shareholders' agreement (e.g. by clauses requiring stand-still, or prior approval or giving a right of first refusal). Share transfer restrictions are valid, provided that they are limited in time and satisfy the corporate interest test at all times. In most cases transfer restrictions with a duration of less than five years are acceptable. In exceptional circumstances, even transfer restrictions of up to 20 years could be possible.

If share transfers are subject to approval (e.g. by the board of directors) or to a right of first refusal of the other shareholders, the procedure cannot take more than six months. This six-month term does not apply to other types of share transfer restrictions (e.g. stand-still clauses).

In a SPRL/BVBA, share transfers require the consent of at least half of the shareholders by number owning at least three quarters of the registered capital (after deduction of the shares to be transferred). Unless the articles of association provide otherwise, this restriction does not apply to transfers to other shareholders, close relatives, or other persons designated in the articles of association. A potential transferee may not be refused on arbitrary grounds. The articles of association may provide for additional or more stringent transfer restrictions.

Are there any issues in relation to the enforcement of a shareholders' agreement?

The most common remedy for a breach of the articles of association or the shareholders' agreement is damages, but alternatives may be available, such as annulment of share transfer or voting in line with court decision. In practice, most issues relate to either breaches of share transfer restrictions or voting arrangements.

In the case of breach of the share transfer restrictions, the beneficiary of such restriction must demonstrate, in order to obtain the cancellation of the transfer, that the third party which acquired the shares was or should have been aware of the transfer restriction.

If the company is aware of the transfer restriction, the company, via its board of directors, should refuse to register the share transfer in the shareholders' register. Vis-à-vis the company, the former shareholder will still be considered the shareholder.

In the case of breach of a voting arrangement, provided that the voting arrangement is sufficiently specific, a court petition could be filed to require the violating shareholder to vote in line with the arrangement. If the company knows or should have known about the voting arrangement, a court petition may also be filed to direct the company to pass the resolution in line with the agreement.

If a vote has an impact on the decision at a shareholders' meeting, the annulment of the decision may be requested by court petition. However, it is generally thought that an agreement that is not enforceable against the company (i.e., if the company did not know and could not have known of the existence of the voting arrangement) cannot lead to an annulment of the decision.

03 / Brazil

Christian Roschmann
Lefosse Partner, São Paulo
Tel: +55 11 3024 6153
Mob: +55 11 99400 4159
christian.roschmann@lefosse.com

What types of entities are generally used for Brazilian JVs?

The two most common types of entity used for Brazilian JVs are the:

> *Sociedade de Responsabilidade Limitada* ("**Ltda**"), which has lower maintenance costs and benefits from more flexible governance rules, and

> *Sociedade Anônima* ("**SA**"), which has a legal framework that enables the creation of a more complex governance and financing structure.

The Ltda is regulated by Law No. 10.406/02 (the "**Brazilian Civil Code**") and has to be incorporated by, and maintain throughout its existence, at least two partners. An exception to this rule exists for a period of 180 days if one of the partners decides to leave the Ltda. The liability of each partner is limited to the value of the quotas such partner holds in the capital stock of the company. All partners, however, are jointly liable for paying up the company's corporate capital.

The SA is regulated by Law No. 6.404/76 ("**LSA**") and must have at least two shareholders, whose liabilities are also limited to the issue price of the shares such shareholder has subscribed or acquired.

Partners of Ltdas and shareholders of SAs generally do not need to be Brazilian citizens or residents in Brazil. That said, a few restrictions apply to investments by foreigners in sectors considered strategic by the Brazilian government (as detailed in the next section).

A Brazilian JV may also be established between two or more parties on a purely contractual basis (e.g. pursuant to a consortium, silent partnership agreement or co-operation agreement).

Are there foreign investment restrictions for Brazilian JVs?

In Brazil, foreign ownership of Brazilian companies is restricted in regulated sectors, such as banking, media (radio and TV broadcasting, newspapers and magazines), rural real estate and businesses located close to Brazil's border.

For example, in media companies, foreign investment, whether direct or indirect, of up to 30% of the voting and total share capital is permitted. In civil aviation companies, the maximum percentage of foreign ownership is 20% of the voting share capital, whether direct or indirect.

Foreign ownership of Brazilian financial institutions is permitted only where it is considered to be in the "national interest" and such ownership must be authorised by a decree issued by the Brazilian president.

Acquisition of rural real estate by Brazilian companies with foreign controllers and exceeding a certain size also requires prior approval from the competent governmental authority.

Foreign investments in Brazil are subject to the filing of an electronic form with the Brazilian Central Bank. This form has a declaratory nature and therefore should not be seen as prior authorization from the Central Bank. The form is also necessary for remittance of profits, return of capital and reinvestment registration.

Are there any publicity or other specific formalities e.g. registration or notarisation?

A Brazilian JV structured as a Ltda must register its articles of association (and any amendments) with the Commercial Registry. A Brazilian JV structured as an SA must also register its constitutional documents and certain minutes of shareholders' meetings and board minutes with the Commercial Registry and also publish such documents in the Official Gazette and a national newspaper.

The obligation for a Ltda to publish constitutional documents in the Official Gazette and a national widely circulated newspaper is limited to corporate transactions, such as, the reduction of capital stock, winding up, liquidation, merger, amalgamation or spin-off of the company.

An SA must also annually publish its financial statements and management reports in the Official Gazette. There is ongoing judicial discussion as to whether the mandatory publication of financial statements is also applicable to large Ltdas, which are companies with total assets exceeding R$240 million in the last fiscal year or annual gross revenue exceeding R$300 million.

Additionally, a Brazilian JV structured as a publicly-held SA must be registered with the Brazilian Securities and Exchange Commission and comply with the publicity rules and formalities established by such federal authority.

Notarisation may also be required by certain Commercial Registries, e.g. the Commercial Registry of the State of Rio de Janeiro. There is no obligation to register a shareholders' agreement with the Commercial Registry or to publish it in the Official Gazette. The only requirement is to file it at the JV's head office, although this does not mean that it is available for public inspection.

How can a shareholder exercise influence over a Brazilian JV?

The Brazilian Civil Code and the LSA, which regulate the Ltda and SA, respectively, state that certain matters must be reserved to shareholders (including the partners of a Ltda). In general, shareholders have the power to decide on matters concerning the organisation of the company and the supervision of management, including issues relating to corporate restructuring, increase or reduction of the company's capital, appointment and dismissal of management and review and approval of management actions at the end of the fiscal year.

The articles of association or constitutional documents may also establish additional matters to be subject to shareholder approval, e.g. obligations exceeding certain thresholds or the disposal of material assets of the JV.

In most cases, such matters must be approved by a simple majority of the shareholders present at the respective meeting. However, there are certain matters that under law must be approved by a qualified quorum, e.g. for an SA, shareholders representing at least 50% of the company's voting shares are necessary for changing the company's corporate purpose, and in case of a Ltda, three-quarters of the corporate capital is required for amendments to the articles of association or corporate restructuring.

It is also possible to set different quorum requirements for certain matters in the articles of association or constitutional documents, provided that such quorum requirements comply with the minimum quorum requirements under law.

Reserved matters may also be included in the partners'/shareholders' agreement, to which the JV is often a party.

Are there any issues or restrictions in relation to the transfer of shares in a Brazilian JV?

In general, partners/shareholders of a Ltda or an SA may freely transfer all or part of their quotas/shares to another partner/shareholder or to a third party.

Quota or share transfers may, however, be restricted by the company's articles of association, the constitutional documents or a partners'/shareholders' agreement (e.g. approval clause, pre-emption right, right of first refusal and drag along and tag along rights).

Quota and share transfer restrictions are valid, provided that they are reasonable and not contrary to the company's corporate interest.

In the case of an SA, the transfer of shares is only effective upon the execution of a transfer deed recorded in the company's share transfer book.

Are there any issues in relation to the enforcement of a shareholders' agreement?

For breach of a shareholders' agreement, the LSA provides certain mechanisms of specific performance, provided that the shareholders' agreement is filed at the JV's head office.

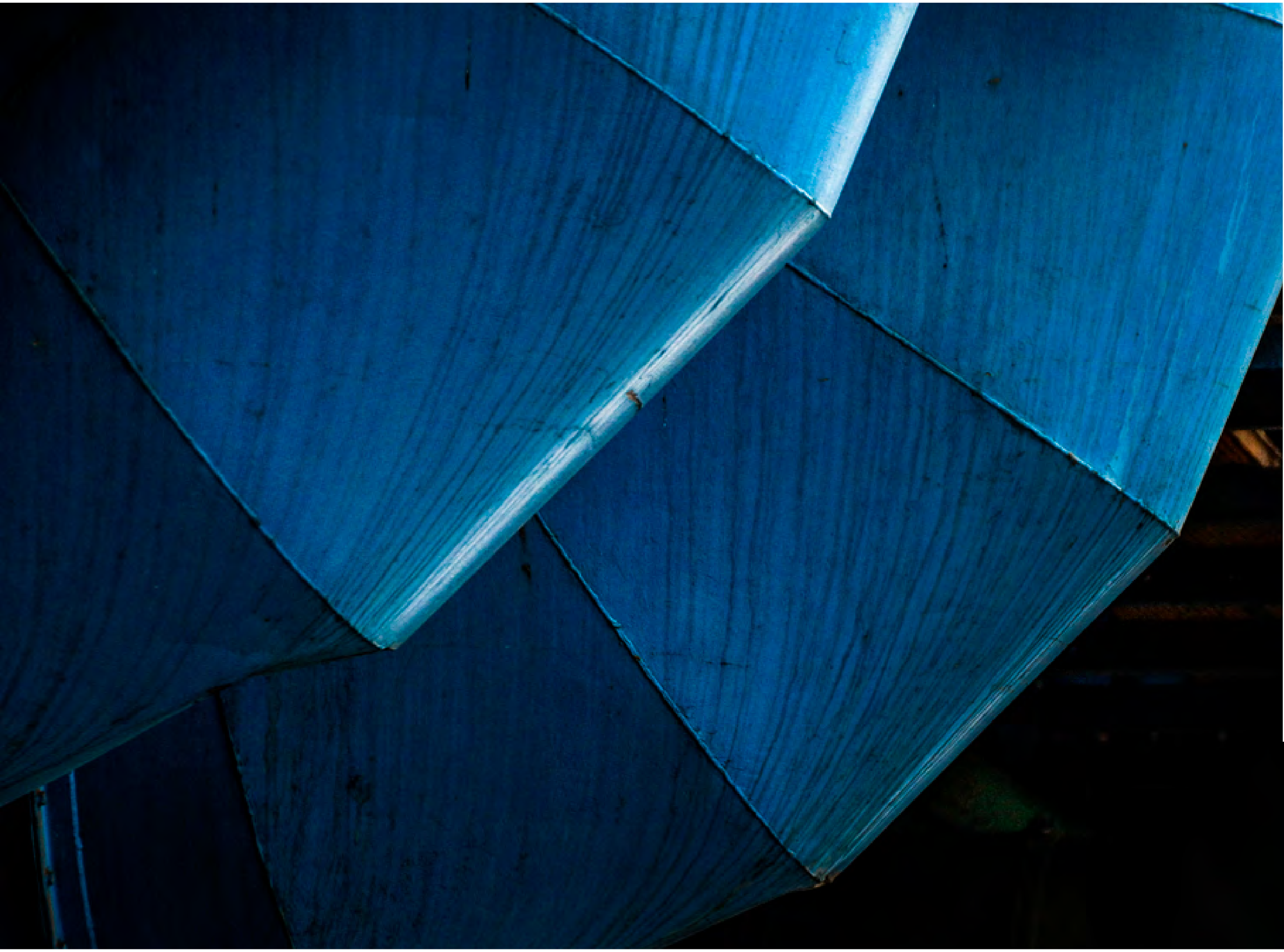
If the shareholders' agreement is duly filed at the JV's head office, the company has the duty to promote the effectiveness of the shareholders' agreement. If resolutions are passed in breach of the shareholders' agreement, the president of the shareholders' meeting may void any conflicting vote made by a shareholder bound by such agreement. In addition, where a shareholder bound by the shareholders' agreement abstains from a vote or is absent from a general meeting or meetings of the corporation's management bodies, the other shareholders may vote the shares belonging to the shareholder who is absent or remiss. This principle also applies to board meetings.

Such mechanisms do not prevent the possibility of going to court or arbitration to seek specific performance of certain provisions under the shareholders' agreement or losses and damages resulting from such breach.

In addition, shareholders' agreements often contain exit provisions or specific penalties which may provide that shareholders in breach of certain terms of the agreement must sell their shares to non-defaulting shareholders or pay compensation to them.

A Ltda may also have a partners' agreement and, to the extent its articles of association expressly provide for the supplementary regulation of the LSA, the same protections above will apply once the partners' agreement is filed at the company's head office. A partners' agreement is not available for public inspection.

04 / France



Bruno Derieux
Partner, Paris
Tel: +33 1 56 43 59 27
Mob: +33 6 10 10 16 54
bruno.derieux@linklaters.com

Alain Garnier
Partner, Paris
Tel: +33 1 56 43 57 02
Mob: +33 6 10 85 08 37
alain.garnier@linklaters.com

What types of entities are generally used for French JVs?

There are many different entities which can be used for French JVs. These entities may have limited liability (e.g. the *société anonyme* ("**SA**") or the *société par actions simplifiée* ("**SAS**") or the *société à responsabilité limitée* ("**SARL**")) or unlimited liability (e.g. the *société en nom collectif* ("**SNC**")). Another entity which could be used is the *groupement d'intérêt économique*.

The SA is the most common entity used in France for sizable businesses (and is by far the standard form for listed companies as an SAS cannot be listed). However, the SAS has become extremely common for joint ventures due to its almost unfettered flexibility, in particular in respect of governance structure.

Other forms of entities, particularly tax transparent entities (which are always unlimited liability entities, such as the SNC), may be appropriate in specific circumstances. However, their use remains less common, except in specific sectors.

Are there foreign investment restrictions for French JVs?

Foreign investments in French JVs may require the prior authorisation of the French Minister of Economy under foreign investment rules, if made in certain sensitive sectors.

These sensitive sectors (certain of which are only relevant for investments made by non-EU investors) include activities linked to national defence, gambling, private security, weapons and ammunition, and activities essential to the preservation of the national interests with respect to:

> the integrity, security and continuity of the supply of energy or water,
> the integrity, security and continuity of the operation of transport networks and services, electronic communication networks and services, and of any infrastructure considered to be of vital importance within the meaning of the defence code, and
> public health protection.

Foreign investments rules are likely to be extended soon, to the following sectors: production of semiconductors, spatial activities, drones, artificial intelligence, cyber-security, robotics and mass data storage.

In those sectors, the prior authorisation of the French Minister of Economy is required if the investment results in either the acquisition of a controlling stake in, or of all or part of the business of, a French company or, for non-EU investors only, of more than one-third of the share capital or voting rights of a French company. A reshaping of sanctions has been announced by the French Government as present sanctions were considered too severe to be effectively applied.

Beyond those general foreign investment regulations, there exist rules relating to maximum foreign ownership in certain sectors and the establishment of a French JV may require prior governmental or regulator consent under EU, French or other applicable merger control rules and under applicable laws specific to certain regulated business sectors (such as financial services), as in many other jurisdictions.

Are there any publicity or other specific formalities e.g. registration or notarisation?

The articles of association of a company incorporated in France must be filed with the commercial registry and are publicly available. Any amendment to the articles of association and any modification to the company's management must also be published and filed with the commercial registry.

No notarisation is required except if real estate is contributed and/or sold to the French JV.

Since 2017, companies and legal entities registered in France, other than companies admitted to trading on a regulated market, must file with the commercial registry a document which discloses the identity of their ultimate beneficial owner(s). In summary, the beneficial owner of a company is any natural person who either owns, directly or indirectly, more than 25% of its share capital or voting rights, or otherwise controls the company. The filing with the commercial registry is not publicly available, but may be obtained by certain persons, including tax, judicial and governmental authorities.

How can a shareholder exercise influence over a French JV?

Shareholders can exercise influence on the JV mostly through the right to appoint directors to the board (or similar body) and the right to appoint and remove management (as the case may be through the board) as well as by restricting the powers of the management.

The restriction of the powers of the management usually takes the form of prior approval by the board (or similar body) or by the shareholders of certain decisions (reserved matters) to be made and/or implemented by management.

These restrictions are set out in the articles of association of the company (in which case the management may be held liable in case of breach) or only in the shareholders' agreement (thereby remaining confidential, but in that case they may not necessarily be imposed on management).

In an SA, the articles of association cannot restrict the powers specifically reserved to the board by statute.

It is important to note that the legal duties of French corporate officers (including board members) mean that they must act in the best interests of the company and cannot blindly follow the instructions of the shareholder who has appointed them.

Are there any issues or restrictions in relation to the transfer of shares in a French JV?

In general, shareholders of an SA or an SAS may freely transfer all or part of their shares to another shareholder or to a third party.

Such share transfers may, however, be restricted by the company's articles of association or a shareholders' agreement (e.g. by clauses providing for a temporary lock-up, approvals, rights of first refusal, tag-along right and so on).

Where the company's articles of association provide for share transfers to be subject to the approval of the board or a similar body, if the transfer to the prospective purchaser is not approved, the board (or similar body) must procure that the shares of the selling shareholder are bought within three months following the board's decision either by another shareholder, a third-party or the company itself. The three-month term may be extended by the president of the commercial court at the request of the company. Any transfer made in breach of an approval clause set out in the company's by-laws may be nullified.

In an SNC, any transfer of shares (even to a shareholder) is subject to the unanimous consent of the shareholders. In an SARL, any transfer of shares to a third party is subject to an approval procedure by virtue of law.

Are there any issues in relation to the enforcement of a shareholders' agreement?

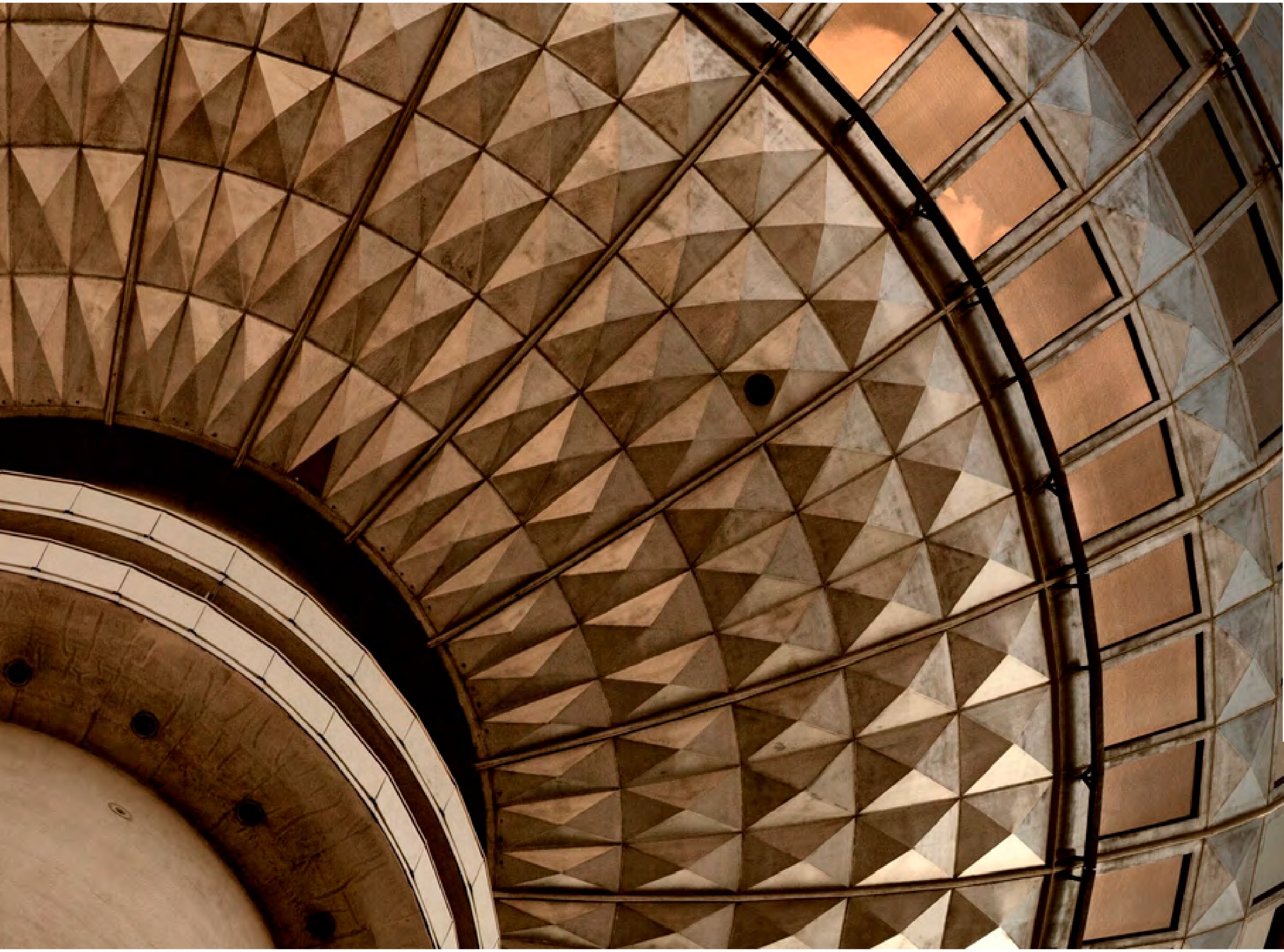
The most common remedy for breach of a shareholders' agreement is damages. However, alternatives may be available in some cases (e.g. specific performance or cancellation of share transfers).

Where there has been a breach of share transfer provisions, the remedies will vary depending on the nature of the relevant provision (e.g. a commitment not to sell, call options, or right of first refusal or similar right).

Where a party fails to comply with a put or call option, the beneficiary may obtain specific performance.

The issue is more complex where shares have been transferred to a third party in breach of share transfer restrictions set out in a shareholders' agreement. In order to obtain the cancellation of a transfer in breach of a right of first refusal or similar right, the beneficiary must prove that the third party which acquired the shares not only knew of the existence of the restriction clause but also of the intention of the beneficiary to exercise such right. In practice, this is difficult to prove because most shareholders' agreements are confidential.

05 / Germany



Achim Kirchfeld
Partner, Düsseldorf
Tel: +49 211 22 977 183
Mob: +49 17 221 19 670
achim.kirchfeld@linklaters.com

Ulrike Wollenweber
Senior KML, Frankfurt
Tel: +49 69 710 03 210
Mob: +49 17 364 99 054
ulrike.wollenweber@linklaters.com

Cornelius Wilk
Managing KML, Frankfurt
Tel: +49 69 710 03 603
Mob: +49 17 216 52 481
cornelius.wilk@linklaters.com

What types of entities are generally used for German JVs?

The most common type of entity used for a German incorporated JV is a limited liability company (*Gesellschaft mit beschränkter Haftung* or "**GmbH**"). Other types of entity are also possible and occasionally used, in particular, a limited partnership with a limited liability company as general partner ("**GmbH & Co. KG**").

JVs in the form of a stock corporation (*Aktiengesellschaft* or "**AG**") are rare, as this entity limits the governance rights of the joint venture parties.

A German JV may also be established between two or more parties on a contractual basis, e.g. pursuant to a co-operation or a consortium agreement.

It is important to note that the choice of joint venture vehicle or arrangement might have significant tax implications, which therefore need to be taken into account at an early stage of the project.

Other key factors to consider include: the type of the venture (e.g. single project, ongoing business, independent entity), the scope of liability of the investors and the degree of flexibility to adapt the internal structure of the JV to the joint venture partners' needs.

Are there foreign investment restrictions for German JVs?

Sector-specific regulations may apply in various regulated business sectors such as financial services, energy, infrastructure or defense. However, an acquisition in a JV vehicle, or by the JV acquiring an existing business or business unit (by share or asset purchase), may also be subject to foreign investment control provisions under the German Foreign Trade Act (*Außenwirtschaftsgesetz*) and Foreign Trade Ordinance (*Außenwirtschaftsverordnung*). Under these provisions, any direct or indirect acquisition by an investor that is not domiciled in the EU or EFTA of a German business, or of 25% or more of the voting rights in any German entity, may be investigated by the German Federal Ministry for Economic Affairs and Energy ("**Ministry**"). The Ministry is entitled to prohibit (and thereby void) any such acquisition, or to impose conditions or obligations on the investor, if public policy or security is at risk.

An amendment to the Foreign Trade Ordinance, in July 2017, introduced a list of industry sectors where the acquisition by a foreigner is by law considered a potential threat to public security. These sectors include, for example, information technology or critical infrastructures like water or energy supply, healthcare and telecommunications. For such acquisitions, the parties must notify the Ministry at the signing of a transaction and the Ministry will decide on a case-by-case basis whether the acquisition actually endangers public security.

Furthermore, in July 2017, certain deadlines for potential examination procedures were prolonged. These extensions could lead to uncertainty regarding the time-frame for the closing of a transaction. In sensitive cases we, therefore, recommend parties take precautionary measures, such as applying for a so-called clearance certificate. Clearance certificates from the Ministry are an established route if it cannot be ruled out that the transaction may be considered a threat to public security. Certificates can be applied for at an early stage of the transaction.

Are there any publicity or other specific formalities e.g. registration or notarisation?

An incorporated JV must generally be registered in the commercial register (unless a type of entities uncommon for a JV is used).

If the JV entity is a GmbH or an AG, the articles of association and other by-laws must be filed with the commercial register. This does not include the shareholders' agreement or other agreements between the joint venture partners. Furthermore, documents relating to any structural changes (e.g. amendments to the articles of association, including capital measures and reorganisations) must be filed. All filed documents are available for public inspection. Furthermore, in October 2017, a transparency register of beneficial owners of companies was introduced in Germany where individuals who hold more than 25% of the shares or voting rights of a company or exercise control in a similar way need to be registers. Therefore, in a JV, it might be necessary to consider control structures to identify the beneficial owners.

If the JV is a GmbH or an AG, notarisation is required for its formation and the adoption of its articles of association, as well as for any structural changes. Often the shareholders' agreement (including any subsequent amendments to it) must be notarised as it typically contains obligations to transfer shares, e.g. pre-emption rights.

In general, there are no notarisation requirements if a KG or other form of partnership is used as a JV (except for a GmbH & Co. KG, where a GmbH is the general partner) or in the case of a simple contractual JV (unless the sale or transfer of real estate is involved).

If one or more of the joint venture partners is a listed company, it may be obliged to make an announcement in relation to matters of the JV constituting insider information, i.e., information that is not publicly known and may have a noticeable impact on the share price of the joint venture partner.

How can a shareholder exercise influence over a German JV?

Unless the JV is established as an AG or is subject to employee co-determination (where the company has employee representatives on its supervisory board), there is a high degree of flexibility for shareholder reserved matters, including the possibility to set higher than statutory majority thresholds for consent requirements. Unless a decision is reserved for shareholders under law, such arrangements are only binding on the management internally, as the authority of the management to represent the company vis-à-vis third parties cannot be validly restricted. Furthermore, it is possible to provide for the right of joint venture parties to appoint managing directors/or members of a supervisory or advisory board, if any. The joint venture parties also have almost unlimited discretion to instruct the management.

If the JV is subject to employee co-determination and, consequently, must always have a supervisory board, the joint venture parties cannot retain responsibilities which are referred to the supervisory board under law (essentially relating to the supervision of the management and the review of the financial statements).

If the JV is an AG, the ability of the joint venture parties to exert shareholder influence is very limited because the competence to supervise the management generally lies exclusively with the supervisory board and there are only few, mainly structural, matters for which the law provides for shareholder approval. Shareholder influence can only be exerted indirectly by way of electing or, if allowed under the articles of association, appointing members of the supervisory board. Where matters are subject to shareholder decision, higher than statutory majority thresholds can be set to ensure a minimum degree of influence of minority shareholders.

Are there any issues or restrictions in relation to the transfer of shares in a German JV?

If the JV is a GmbH or an AG, the transfer of shares is customarily made subject to the consent of the JV and/or individual or all shareholders. Furthermore, it is common to provide for rights of first offer or first refusal and/or drag/tag-along rights. If such restrictions are included in the articles of association, a transfer cannot be validly effected unless the respective restrictions are complied with.

If the JV is a GmbH & Co. KG or other partnership, the transfer of interests is statutorily subject to the consent of all other joint venture parties, except as otherwise provided in the partnership agreement. Other restrictions, such as rights of first offer or first refusal and/or drag/tag-along rights, may be included in the partnership agreement and can be structured so that a transfer cannot be validly effected unless the restrictions are complied with.

Exemptions from transfer restrictions under statutory law or the JV's constitutional documents may be provided to ensure compatibility with any auction/shoot-out clauses which may be agreed between the joint venture parties.

In addition, antitrust clearance may be required for transfers exceeding certain thresholds, and certain other regulatory approvals may be required in certain circumstances.

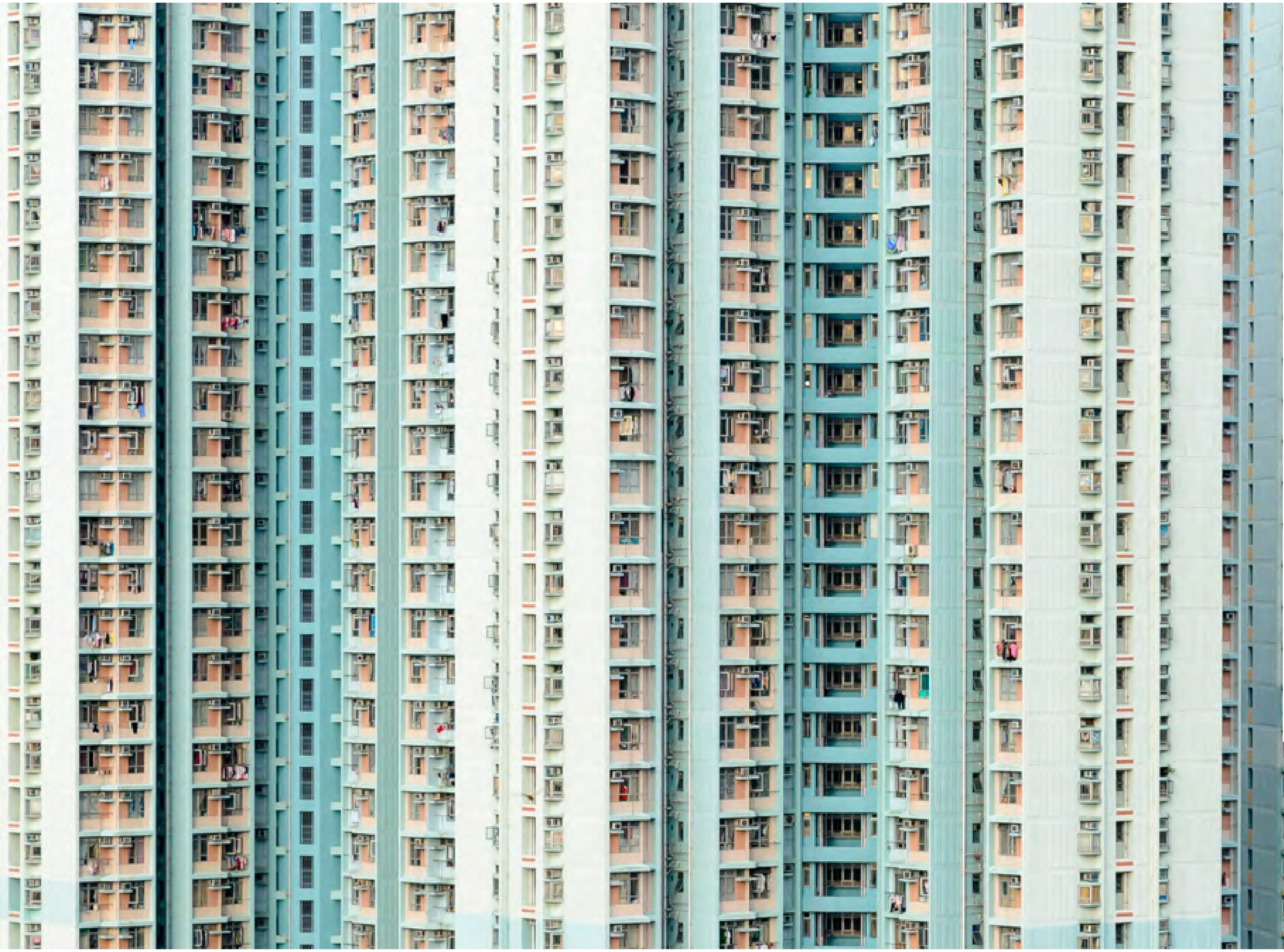
Are there any issues in relation to the enforcement of a shareholders' agreement?

The remedy for a breach of a specific obligation (e.g. to provide financing or contribute assets) is specific performance. Damages can only be claimed if specific performance is impossible, rejected or not made within a time limit set by the claimant. For other breaches the general remedy is damages.

It is within the discretion of the joint venture parties to determine remedies for breaches of certain obligations in the shareholders' agreement and it is common to provide for rescission or termination rights, or liquidated damages, for severe breaches of certain obligations, indemnities for certain scenarios, as well as details concerning the calculation of damages or limitations on liability.

In the case of an incorporated JV, there may be inconsistencies between the shareholders' agreement and the articles of association or, respectively, the partnership agreement. As there is no general rule as to which of these documents prevail, it is common to include a clause in the shareholders' agreement providing that the shareholders' agreement will prevail.

06 / Hong Kong



Robert Cleaver
Partner, Hong Kong
Tel: +852 2901 5525
Mob: +852 9443 4613
robert.cleaver@linklaters.com

What types of entities are generally used for Hong Kong JVs?

A private limited liability company is the type of entity most commonly used for Hong Kong JVs.

Other types of entities used for Hong Kong JVs include partnerships and limited partnerships.

Limited partnerships must have at least one partner who is a general partner with unlimited liability and may also have limited partners.

Are there foreign investment restrictions for Hong Kong JVs?

There are generally no foreign investment restrictions for JVs in Hong Kong. There are, however, foreign investment restrictions in the broadcasting and telecommunications sectors and, to a lesser extent, in the banking and civil aviation sectors.

JVs would require assessment under competition law, including potential merger control issues.

Are there any publicity or other specific formalities e.g. registration or notarisation?

For JVs that are:

> incorporated in Hong Kong, or
> incorporated outside Hong Kong but registered in Hong Kong as non-Hong Kong companies,

the articles of association and any changes to them must be registered with the Registrar of Companies and be available for public inspection.

In practice, shareholders' agreements are rarely publicly registered. Strictly a shareholders' agreement should be registered if it purports to take precedence over the company's articles of association or if the articles of association cannot be interpreted without reference to the shareholders' agreement.

Depending on the nature of the Hong Kong JV, certain other information must also be filed with the Companies Registry (e.g. accounts and the identity of a director of an incorporated JV).

Since March 2018, HK incorporated companies must maintain a register of significant individuals, governments and legal entities which hold more than 25% of a Hong Kong incorporated company's shares or voting rights or can appoint or remove a majority of the directors or otherwise have the right to exercise or actually exercise significant influence or control. The register is not public and it does not need to be filed with the Companies Registry, but law enforcement officers can have access to it upon demand. In a Hong Kong JV, it will be necessary to consider control structures to identify the significant controllers which may need to be included in the register.

Notarisation is not required.

How can a shareholder exercise influence over a Hong Kong JV?

A common way for shareholders to exercise influence on a Hong Kong JV is through reserved matters, being matters which must be approved by the shareholders before the JV is authorised to take such action. Shareholder reserved matters could include items such as changes to share capital and entering into or terminating key contractual arrangements. In general, shareholder reserved matters will be set out in the shareholder's agreement, to which the incorporated JV is often a party. They can also be included in the articles of association of the JV (although note that the articles of association will be available to the public). Different thresholds can be set for the approval of shareholder reserved matters, such as unanimous or majority consent, or requiring the consent of specific shareholders.

The Hong Kong Companies Ordinance also prescribes shareholder approval for certain matters such as changes to constitutional documents and the company name. Generally it is not possible to set an approval threshold higher or lower than that specified in the legislation.

Shareholders may also require that certain matters are reserved for the board of directors, rather than management being permitted to approve such matters (e.g. capital expenditure or transactions over a certain amount). Board reserved matters may overlap with shareholder reserved matters. In addition, the shareholders' agreement may provide for shareholders to have the right to appoint directors to the board (e.g. on a basis proportional to the percentage of shares held).

Shareholders can also exercise influence over the JV through contractual arrangements or by specifying restrictions in the articles of association of the entity. For example, the shareholders and the JV may set out in a contractual arrangement that the JV will only enter into transactions in a particular sector or in particular regions.

However, it is important to note that the legal duties of Hong Kong company directors mean that they cannot blindly follow the instructions of the shareholder who has nominated their appointment. In particular, directors have a duty to act in the best interest of the company for the benefit of the members as a whole. In practice, the legal requirements are often manageable but should be borne in mind, including when deciding which powers to reserve to the shareholders and which to the board.

Are there any issues or restrictions in relation to the transfer of shares in a Hong Kong JV?

The articles of association of a company and a shareholders' agreement may restrict the right to transfer shares. The Hong Kong Companies Ordinance also expressly requires a Hong Kong private company to restrict the right to transfer its shares as one of the requirements in order to be classified as a private company. It is common for the articles of association of Hong Kong companies to specify that the directors have absolute discretion to refuse to register a transfer of shares. Stamp duties are chargeable on a transfer of shares in a Hong Kong incorporated company and a transfer of shares cannot be registered until it has been stamped.

Restrictions can include a right of first refusal or a right of first offer, drag-along or tag-along rights or an initial "lock-in" period during which shareholders are not permitted to transfer their shares.

Where one or more parties to the JV is a Hong Kong listed issuer, it is important to consider the requirements of the applicable Hong Kong Listing Rules (e.g. relating to classifying notifiable transactions and connected transactions).

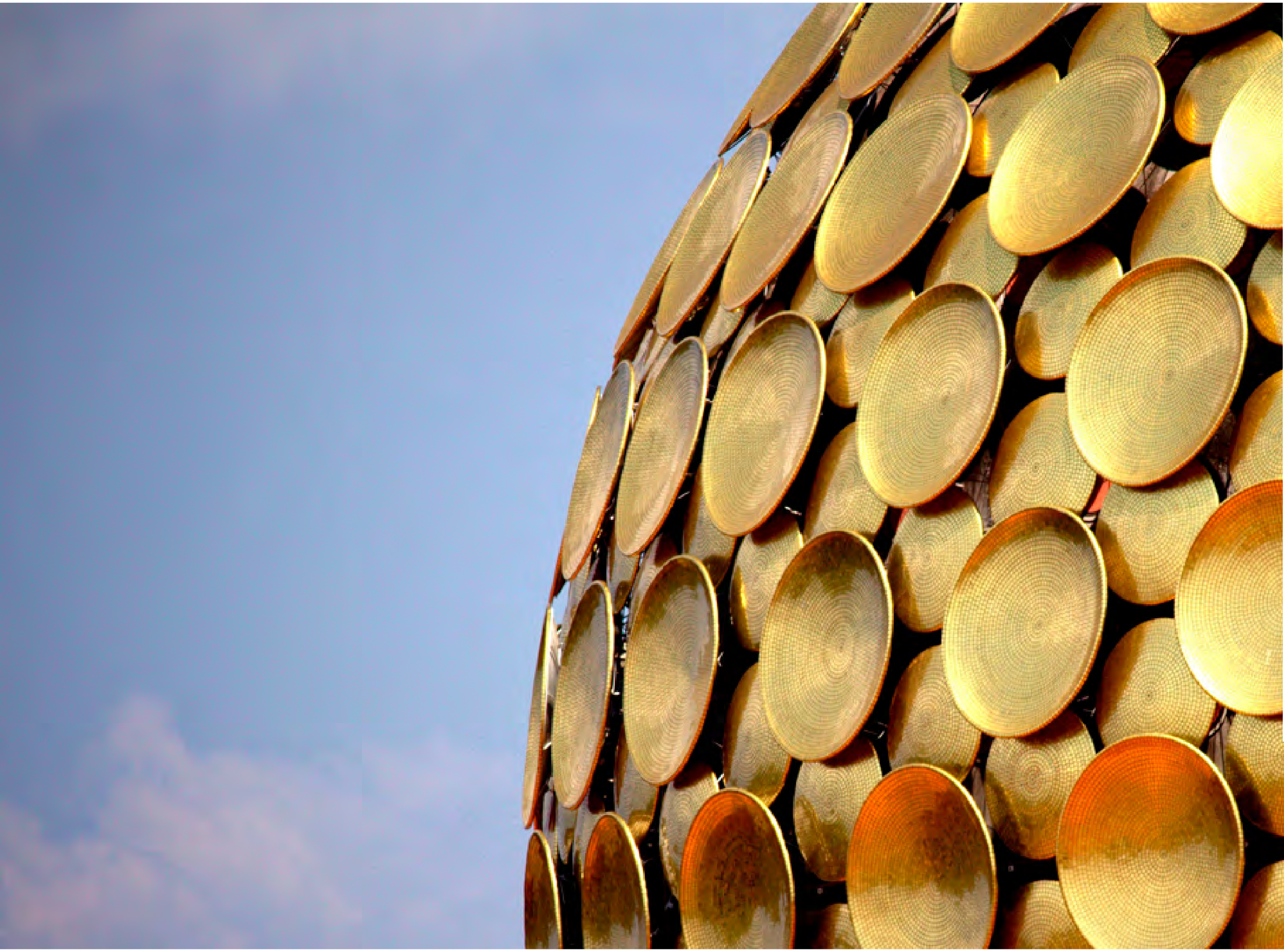
Announcement or shareholder approval requirements may be triggered depending on the size of the transfer.

Are there any issues in relation to the enforcement of a shareholders' agreement?

Any provisions which fetter the JV on matters where there is an express reservation of power to shareholders to vary them (e.g. the power to amend the articles by special resolution) will be unenforceable against the JV but may be enforceable between the shareholders if the restriction on the JV can be severed.

The most common remedy for breach of a shareholders' agreement is damages but an injunction may be available at the discretion of the court, e.g. to ensure that each party takes the necessary voting action when voting as a shareholder of the JV to give effect to the terms of the shareholders' agreement. Shareholders' agreements often contain exit provisions which may provide that parties in breach of certain terms of the agreement are forced to sell their shares to non-defaulting parties.

07 / India



Savi Hebbur
Partner
Tel: +44 20 7456 3388
Mob: +44 79 1712 3101
savi.hebbur@linklaters.com

Sushil Jacob
Partner
Tel: +44 20 7456 2031
Mob: +44 79 1768 7777
sushil.jacob@linklaters.com

What types of entities are generally used for Indian JVs?

Typically, private limited companies are used for Indian JVs. However, it is not uncommon to see Indian JVs being set up as unlisted public companies where the majority shareholder is a public company or a government company. The use of Limited Liability Partnerships ("**LLPs**") for an Indian JV is becoming more common, given liberalisation on the rules of foreign investment into and through LLPs in India, as well as certain tax benefits from the use of LLPs, however, this continues to be the exception rather than the rule.

The shareholder arrangements in the JV can continue, so far as it relates to rights and obligations between the joint venture partners, even after it is listed, where the joint venture partners continue as principal/promoter shareholders.

Indian JVs can also take the form of unincorporated JVs in certain sectors, e.g. oil and gas exploration, where contractual arrangements are put in place to pursue identified commercial arrangements. The liability of the parties for the JV is unlimited, although the parties are typically severally (rather than jointly) liable.

Are there foreign investment restrictions for Indian JVs?

There is no general restriction on foreign investment in JVs in India. However there are caps and restrictions on foreign investment for certain identified sectors such as insurance, retail trading, defence and news media.

The Government of India sets out the foreign direct investment policy (the "**FDI Policy**"), which is updated from time to time.

Any foreign investment which requires the approval of the Government is to be notified through a central filing portal. The application would be considered by the relevant Ministry or Department of the Government of India (the "**Competent Authority**") which shall involve the Reserve Bank of India (India's central bank). The Competent Authority is required to grant its approval within eight to ten weeks of the application.

Documents being filed by a foreign investor as part of such approval process may have to be notarised and apostilled in the foreign investor's home jurisdiction, and so this should be factored into any timetable.

Are there any publicity or other specific formalities e.g. registration or notarisation?

The memorandum and articles of association of the JV must be registered with the registrar of companies ("**ROC**"). Additionally, any changes to the constitutional documents of the JV must also be registered with the ROC.

The shareholders' agreement does not need to be registered and remains a private document. However, Indian jurisprudence has developed such that to ensure that the shareholders' agreement is enforceable by or against the JV and by the shareholders inter se, the provisions of the shareholders' agreement must be reflected in the articles of association. Therefore, in practice, all the key terms of the shareholders' agreement are incorporated into the articles of association of the JV, which will be publicly available.

Notarisation or registration of the shareholders' agreement is not required, however stamp duty would be payable, with the rate of stamp duty being different, depending on the state in India where the documents are executed or held.

How can a shareholder exercise influence over an Indian JV?

Under the Indian Companies Act 2013, certain significant decisions (e.g. the sale of an entire undertaking or a substantial asset and amendments to the constitutional documents) require the approval of the shareholders, either by way of special resolution (where at least three-fourths of the votes of those present and voting are cast in favour) or ordinary resolution (where a majority of the votes of those present and voting are cast in favour).

In addition to the above, a common way for shareholders to exercise influence on an Indian JV is through reserved matters, being matters which must be approved by a requisite majority of shareholders.

Another way to exercise influence is for the shareholders' agreement and/or the articles of association to require the presence of a specific shareholder to form a quorum.

Shareholders may also exercise their influence through board representation and require that certain matters are reserved for board approval, rather than by management. Additionally, shareholders may exercise their influence through the right to appoint and/or veto the appointment of key senior management personnel.

In general, reserved matters, quorum requirements, board and senior management appointment rights will be set out in the shareholders' agreement, to which the JV is often a party. They should also be included in the articles of association of the JV in order to make them fully enforceable.

Are there any issues or restrictions in relation to the transfer of shares in an Indian JV?

In general, there are no limitations on the types of restrictions to the transfer of shares that may be agreed between the parties to an Indian JV. To ensure that they are fully enforceable (particularly vis-à-vis the JV), the restrictions agreed in the shareholders agreement should be mirrored in the articles of association of the JV.

Restrictions on transfers commonly seen in shareholders' agreements include a right of first refusal/offer, drag-along or tag-along rights, or an initial lock-in period. In addition, call option and put option structures are very common, however, where a party is a foreign investor, the option has to have a minimum lock-in period of one year and put options cannot be structured in a way to give an assured return to the foreign investor.

Any transfer of shares between an Indian resident and a person not resident in India will be subject to the Reserve Bank of India's pricing regulations, which state that

> the price at which a transfer of shares from an Indian resident to a non-resident takes place must be at or above the fair value (i.e. the fair value sets a floor price), and
> the price at which a transfer from a non-resident to an Indian resident takes place must be at or below the fair value (i.e. the fair value sets a cap price).

Fair value of shares of an unlisted company is the value determined using any internationally accepted valuation methodology, as certified by a chartered accountant or investment bank in India.

Are there any issues in relation to the enforcement of a shareholders' agreement?

To ensure enforcement of a shareholders' agreement in India, the key provisions should also be reflected in the articles of association of the JV.

The remedy for a breach of shareholders' agreement is normally damages, though in certain circumstances parties could obtain injunctions or specific performance.

The key risk for enforcement of shareholders' agreements in India is the ineffective determination of contractual issues in lower level courts. The problem is aggravated because of a heavily overburdened judicial system that is unable to cope with a backlog of cases. Commercial cases generally take seven to eight years to determine in the high courts and real estate cases can take 20 years or more to resolve.

The preferred method of dispute resolution for foreign investors is arbitration outside India. Singapore and London are the preferred arbitral venues. In theory, the enforcement of foreign arbitral awards in India is straightforward. In practice, however, it is possible to seek court intervention into the enforcement process, by arguing for the reopening of the award on public policy grounds, which can result in a delay. However, the courts in India have recently shown less willingness to intervene in international arbitral awards and have upheld the sanctity of the arbitral process.

The slow pace of resolution has led to the widespread use of injunctions as a method of gaining redress/impeding competitors. The injunction process can last up to six months. Indian law allows for costs to be awarded against a person seeking an injunction, although recently this has rarely been done.

The contents set out above do not constitute any opinion or determination on, or certification in respect of, the application of Indian law. Any comments concerning India are based on our transactional experience and our understanding of the practice in India. Linklaters LLP is not licensed to practise law in India.

08 / Indonesia

David Holme
Partner, Indonesia
Tel: +62 21 2995 1509
Mob: +62 815 8600 0355
david.holme@linklaters.com

Yolanda Hutapea
Widyawan & Partners, Partner, Indonesia
Tel: +62 21 2995 1596
Mob: +62 815 8600 0109
yolanda.hutapea@linklaters.com

Sophie Mathur
Partner, Singapore
Tel: +65 6692 5703
Mob: +65 9657 3882
sophie.mathur@linklaters.com

What types of entities are generally used for Indonesian JVs?

The most commonly used entity is a limited liability company ("**PT**"). Where the JV does not have any foreign investors, the PT would generally be referred to as a "**PT Biasa**".

Where a JV is to be incorporated with foreign investors, or where foreign shareholders subscribe for shares in an existing 100% Indonesian owned company, approval from the relevant regulators is required. Where the PT is engaged in businesses or sectors that are regulated by:

> the Indonesian Capital Investment Coordinating Board ("**BKPM**"), BKPM approval is required, following which the PT will generally be referred to as a "**PT PMA**", or

> a sector-specific regulator, approval from the sector-specific regulator (e.g. the *Otoritas Jasa Keuangan*, in the case of insurance) is required.

Are there foreign investment restrictions for Indonesian JVs?

In general, Indonesia has an open foreign investment regime, but this is subject to investment restrictions in certain sectors. Some sectors are completely closed to foreign investment (e.g. the veneer industry), while others are either completely open (e.g. management consultancy) or open subject to foreign ownership limits or conditions (e.g. insurance). These restrictions are set out in the Negative Investment List and/or in certain sector-specific restrictions (e.g. for banking and mining).

A foreign investor looking to invest in a restricted sector must first obtain the approval of BKPM or the relevant sector-specific regulator, in order to establish a JV or to transfer an interest from an existing JV. Consequently, the composition of a JV would need to comply with the foreign ownership restrictions applicable to the relevant business sector.

Are there any publicity or other specific formalities e.g. registration or notarisation?

If the JV is engaged in a business or sector that is regulated by the BKPM, BKPM approval is required:

> when converting an Indonesian entity to a PT PMA in order for it to have a foreign shareholding,

> for any proposed foreign investment in an existing PT PMA, and

> for any change of shareholder in an existing PT PMA.

For certain sectors, approval of the sector-specific regulator for establishment of and/or changes in the shareholding structure must be obtained.

The JV's articles of association must be approved by and registered with the Ministry of Law and Human Rights ("**MOLHR**"). Where the articles of association require amendment the MOHLR may need to be notified or its consent may need to be obtained. Articles of association are generally not publicly available, but a copy can be obtained from the State Publishing House by submitting a formal written request to the MOLHR. This can be quite a lengthy process.

In practice, shareholders' agreements are rarely publicly disclosed. Shareholders' agreements typically provide that the shareholders will use their voting rights to amend the articles of association in the event of a conflict between the shareholders' agreement and the articles of association.

Notarisation is only required in respect of certain transaction documents. For example, where there is an "acquisition" of shares under Indonesian law (i.e. a change of control of the JV), the share purchase agreement must be executed by way of notarial deed. Shareholders' agreements do not need to be notarised. Any transfer of land title to or by the JV requires registration at the local Land Office.

How can a shareholder exercise influence over an Indonesian JV?

Indonesian companies are required to have two boards: a board of directors ("**BOD**") and a board of commissioners ("**BOC**"). The BOD is responsible for the management of the company and the BOC is required to supervise and advise the BOD. A shareholder can exercise influence on a JV by nominating representatives to the BOC and/or the BOD. Nevertheless, members of the BOD and the BOC are required to perform their duties in the best interest of the JV (not the individual shareholders).

Certain matters could be classified as BOD, BOC and/or shareholder reserved matters. Therefore, such matters will require prior approval at the relevant level (e.g. shareholder approval in the case of a shareholder reserved matter) before they can be taken and/or implemented by the JV.

Different thresholds can be set for approval of reserved matters such as unanimous or majority consent or requiring the consent of specific persons (whether at the BOD BOC or shareholder level). Statute also prescribes minimum approval thresholds for certain matters.

In general, BOD and BOC nomination rights and reserved matters will be set out in the shareholders' agreement (thereby remaining confidential, but not binding on third parties). They can also be included in the articles of association.

In addition, shareholders can also exercise influence over the JV through contractual arrangements or by specifying additional restrictions in the articles of association.

Are there any issues or restrictions in relation to the transfer of shares in an Indonesian JV?

In general, shareholders may freely transfer all or part of their shares to another shareholder or to a third party.

However, share transfers may be restricted by the JV's articles of association or shareholders' agreement (e.g. through approval clauses, pre-emption rights, rights of first refusal, drag-along or tag-along rights and initial "lock-in" periods during which share transfers are not permitted).

Share transfers must also comply with the foreign investment limits (if any) applicable to the relevant business(es) and/or sector(s) in which the JV is involved.

As stated above, where a JV is engaged in a business or sector that is regulated by the BKPM (and is therefore a PT PMA), approval is required in respect of any change of shareholder in the PT PMA.

Further, where the articles of association require amendment in connection with a share transfer, consent may need to be obtained from, or notification may need to be made to, the MOLHR, depending on the type of amendments made.

For certain sectors (e.g. insurance), the approval of the sector-specific regulator for establishment and/or changes in shareholding structure will need to be obtained.

Are there any issues in relation to the enforcement of a shareholders' agreement?

Enforcement of a shareholders' agreement in Indonesia can be difficult. This is particularly so in the case of complex commercial transactions and where transaction documents need to be translated from English to Bahasa Indonesia (thereby increasing the risk of inaccuracy and uncertainty). The choice of a foreign governing law for transaction documentation has previously been ignored by Indonesian courts which have instead applied Indonesian law. Foreign court judgments are not enforceable in Indonesia. They are only admissible as non-conclusive evidence in an Indonesian court.

For foreign investors, arbitration outside Indonesia (frequently Singapore) is the preferred method of dispute resolution. International arbitration awards are in theory recognised in Indonesia. However, there may be practical difficulties with enforcement as local courts need to be involved to enforce a foreign arbitral award. These courts have broad discretion to refuse to enforce the award on grounds such as morality or lack of commerciality. In addition, in practice it is not uncommon for lower courts to take jurisdiction even though there is a valid arbitration clause. Although there are examples of the Supreme Court ruling that the lower courts did not have jurisdiction and ordering for the parties to submit to arbitration as agreed in the relevant contracts, an appeal to the Supreme Court is a lengthy process.

Suggested routes to minimise enforcement risks are to:

- structure deals to reduce, so far as possible, the need to rely on purely contractual rights (e.g. by aligning commercial interests),
- verify that a shareholder has assets outside Indonesia in a country which recognises the enforcement of arbitral awards, and
- make the key agreements (including the shareholders' agreement) subject to arbitration (as opposed to court proceedings) outside Indonesia.

09 / Italy

Roberto Casati
Partner, Milan
Tel: +39 02 88 393 5471
Mob: +39 33 526 8435
roberto.casati@linklaters.com

Giovanni Pedersoli
Partner, Milan
Tel: +39 02 88 393 5245
Mob: +39 33 5693 3395
giovanni.pedersoli@linklaters.com

Giorgio Fantacchiotti
Partner, Milan
Tel: +39 02 88 393 5337
Mob: +39 33 5547 8086
giorgio.fantacchiotti@linklaters.com

Pietro Belloni
Partner, Milan
Tel: +39 02 88 393 5267
Mob: +39 34 6121 0219
pietro.belloni@linklaters.com

What types of entities are generally used for Italian JVs?

JVs may be implemented through a number of different structures under Italian law. In general, incorporated companies are the most common structure used as investors in the JV benefit from a limited liability regime.

The two most common types of incorporated companies used for JVs are the joint stock company (*società per azioni* or "**SpA**") or the limited liability company (*società a responsabilità limitata* or "**Srl**"). The type of company chosen depends on the size of the business, its internal governance needs and the preferences of the investors. The Srl form is usually preferable for small businesses and/or for companies with a limited number of shareholders. However, the decision of which structure to use is generally made on a case-by-case basis.

Other types of incorporated company structures which may be used to create a JV include the *società in accomandita semplice* ("**Sas**") and the *società in accomandita per azioni* ("**Sapa**"). These structures only permit limitation of liability in favour of specific classes of investors and, for this reason, are generally used only in family holding companies.

Are there foreign investment restrictions for Italian JVs?

In general, foreign investments are permitted in Italy based on the principle of reciprocity, i.e. to the extent that a similar right is granted to Italian investors operating in the foreign investor's country of origin. However, it is not always necessary to verify such reciprocity, for example, where the investor is from an EU member state or a country with which Italy has a bilateral investment treaty.

In addition, under the so-called "Golden Powers" regulation (amended by Law Decree No. 148/2017), the Italian Government has special veto powers (including the power to impose conditions) in respect of certain M&A transactions. They apply to Italian companies which are active in certain strategic sectors (defence and national security) or which own certain strategic assets in the energy, transport, communication, digital and fintech sectors, to the extent such transactions are perceived as a threat of serious prejudice to essential national interests.

These powers apply regardless of whether such companies are owned in whole or in part by the state, other Italian public entities or are entirely privately owned. The powers also vary from sector to sector, as well as with the nationality of the investor (whether from an EU or non-EU member state). The powers include the power to:

- veto or add conditions to the acquisition of an interest in affected companies, and
- veto certain corporate resolutions adopted by such companies (including approvals of mergers, transfers of businesses and the creation of encumbrances over the company's assets).

Are there any publicity or other specific formalities e.g. registration or notarisation?

The JV's deed of incorporation and articles of association (including any amendments to them) must be executed before a notary public and filed with the competent companies' register. Such documents are publicly available.

Specific formalities (e.g. a third-party appraiser's evaluation of the contributed assets) may be required where investors provide contributions other than cash to the JV's capital.

In general, only certain documents and information relating to the JV are subject to publicity formalities and need to be filed with the companies' register. For example, the deed of incorporation, the articles of association and certain resolutions of the JV, including permanent delegations of power by the board, need to be filed with the companies' register.

However, other documents and agreements relating to the JV (e.g. shareholders' agreements) are not subject to any publicity requirement even if they refer to, or are mentioned in, publicly available documents, such as the articles of association, and their validity is not subject to any specific formality requirement. A different regime in terms of publicity requirements applies to Italian companies listed on Italian or other European stock exchanges.

How can a shareholder exercise influence over an Italian JV?

Shareholders have different means to influence the management of a JV.

In general, directors of a JV company will have the general power to manage it and a specific duty to pursue the JV's interest, irrespective of any instruction to the contrary from the shareholders or third parties.

A limited number of matters which are expressly identified by Italian law (e.g. changes to the JV's articles of association, mergers and approval of the JV's financial statements) are reserved by law for shareholders' approval. In addition, the JV's articles of association may require prior shareholders' authorisation to the board for certain management activities.

Where the JV is incorporated in the form of a Srl, one or more shareholders may be granted the power to carry out certain specific management activities.

Are there any issues or restrictions in relation to the transfer of shares in an Italian JV?

As a general rule, share interests in SpAs and Srls are freely transferrable. The articles of association or the shareholders' agreement may, however, provide for certain transfer restrictions. In particular, transfers may be conditional upon the satisfaction of certain requirements (e.g. the approval of other shareholders or of the JV's board of directors) or prohibited for a period of time (e.g. during a lock-up period). In addition, the transfer of shares may be subject to specific rights given to other shareholders (e.g. a right of first offer or first refusal) or to the occurrence of a pre-determined event (e.g. a put or call option being exercised or drag-along and tag-along rights being triggered).

Investors should note that lock-up provisions included in the articles of association of a JV are subject to strict time constraints and cannot exceed five years in a SpA and two years in a Srl (although, according to legal scholars / notaries, the term may be longer in Srls). More flexibility is allowed when a lock-up is included in a shareholders' agreement in respect of a SpA JV which is fully owned by the parties. In this case, the agreement can last longer than five years.

If transfer restrictions are not limited in time, the parties may be entitled to withdraw from the shareholders' agreement by giving 180-days prior notice.

The transferability of shares in an Sapa is subject to the same constraints applicable to SpAs. Conversely, shares in an Sas may be transferred only with the consent of the holders of a majority of the share capital (if limited liability attaches to such shares) or with the consent of the holders of the entire share capital (if such shares do not confer any limitation of liability), unless a different regime is provided for in the relevant articles of association.

Are there any issues in relation to the enforcement of a shareholders' agreement?

Shareholders' agreements are enforceable/effective only between the parties and cannot be enforced/effective against third parties and the relevant company. Therefore, generally the only remedy available in case of breach of a shareholders' agreement is a claim for damages: any transfer in breach of transfer restrictions of a shareholders' agreement or any corporate act carried out with the decisive participation of a shareholder in breach of a shareholders' agreement (e.g. a shareholders' resolution passed without the majorities set forth under the shareholders' agreement) cannot be challenged and annulled for this reason.

Conversely, provisions contained in the articles of association are enforceable/effective against third parties and the company. As a consequence, transactions and corporate acts performed in breach of the articles of association may be challenged and annulled. For example, any transfer of shares in breach of the transfer restrictions in the articles of association will not be effective against the JV and any third parties and, consequently, the relevant purchaser will not be entitled to act as a shareholder of the JV or to enjoy the relevant rights. Likewise, any shareholders' resolutions which are passed without the requisite majorities in the articles of association may be challenged and annulled by the dissenting or non-participating shareholders, the directors and the statutory auditors.

For this reason, the terms of a shareholders' agreement (e.g. provisions regulating the requisite majorities to pass resolutions, drag-along and tag-along rights and transfer restrictions) are often and to the extent possible, incorporated in the JV's articles of association.

10 / Japan

Hiroya Yamazaki
Partner, Tokyo
Tel: +81 3 6212 1435
Mob: +81 90 4411 6574
hiroya.yamazaki@linklaters.com

What types of entities are generally used for Japanese JVs?

A *kabushiki kaisha* ("**KK**"), which is a stock company under the Japanese Companies Act, is the most common type of entity used for Japanese JVs. A KK is managed by the directors who are appointed by the shareholders. The responsibilities of the shareholders are limited to the amount of their investment.

An alternative type of entity for JVs is a *godo kaisha* ("**GK**"), which is a limited liability company under the CA. The responsibilities of the shareholders of a GK are limited to the amount of their investment. Shareholders can directly manage the GK.

Another option (which is rarely used) is a *yugen sekinin kumiai*, which is a limited liability partnership ("**LLP**"). The responsibilities of the limited liability members are limited. A LLP is a scheme of contractual relationship among the members and is not a corporate entity under Japanese law.

Are there foreign investment restrictions for Japanese JVs?

Investment (in the form of equity or debt) by a foreign investor into a Japanese company may require a pre-transaction filing with the Bank of Japan for approval by the Minister of Finance and other competent ministers. This is required if the business of the Japanese company (or of its subsidiaries) is of a particular type in certain sectors (e.g. agriculture, forestry, fisheries, petroleum mining and refining, telecommunication services, broadcasting, utility, transportation and the manufacture of equipment/products related to petroleum, leather goods, aircraft, weaponry, atomic energy and space development).

In addition, for the following sectors and Japanese companies, foreign investment is restricted to no more than the following ratios:

- television and radio broadcasters and their authorised holding companies – 1/5
- airline companies and their holding companies – 1/3
- Nippon Telegraph and Telephone Corporation – 1/3

There are also requirements which could apply equally to foreign and Japanese investors, such as:

- prior approvals by the Financial Services Agency for any acquisition of 20% or more of shares in a bank or insurance company, and
- merger filing with the Japan Fair Trade Commission for certain large transactions.

Are there any publicity or other specific formalities e.g. registration or notarisation?

KKs and GKs are incorporated by filing the articles of association and certain other supporting documents with a company registrar of the legal affairs bureau. Private agreements for JVs, such as shareholders' agreements, do not need to be registered, filed or publicised.

In addition, the following specific requirements apply:

KK

- The articles of association must be executed by all of the founders and notarised.
- There must be one or more directors. A director must be an individual (not a body corporate). Some or all of the directors can be representative directors. One of the representative directors must be an individual who is resident in Japan.

GK

- The articles of association must be executed by all of the shareholders.
- There can be one or more shareholders. A shareholder can be an individual or a body corporate. Some or all of the shareholders can be representative shareholders. One of the representative shareholders must be resident in Japan.

How can a shareholder exercise influence over a Japanese JV?

In a GK, a shareholder can become a managing shareholder, who is able to directly influence the management of the company.

A common way for shareholders of a KK to exercise influence over the company is through reserved matters – i.e. some corporate actions (which do not require shareholder approval under law) can require shareholder approval. Reserved matters can be specified in the shareholders' agreement and the articles of association.

Minority shareholders in a KK can secure reserved matters by holding shares with veto rights. For this purpose, the KK must have two classes of shares, Class A without veto rights and Class B with veto rights (held by the minority shareholders). The articles of association will provide that certain corporate actions (i.e. reserved matters) require the approval of the holders of Class B shares.

Under law, shareholders do not have the power to instruct the directors to effect particular transactions. If the directors do not follow the shareholders' instructions, the shareholders can dismiss the existing directors by means of a shareholder resolution and replace them with new directors.

Are there any issues or restrictions in relation to the transfer of shares in a Japanese JV?

The transfer of shares in a GK is subject to the consent of the other shareholders.

The transfer of shares in a KK is subject to the prior approval of the company itself if the articles of association so state. In such case, the articles of association typically state which decision-making body of the JV needs to give such approval. Upon request from a shareholder to transfer its shares, the KK must decide whether to approve the proposed transfer. If the KK does not approve the proposed transfer, the KK or a person nominated by it must repurchase the shares. This means that it is impossible under Japanese law to place an absolute prohibition on transfer of shares in a KK. The price for repurchase will be agreed by the transferor and the KK or, if they fail to agree, determined by the court.

Contractual restrictions on the transfer of shares in a KK is possible – i.e. the shareholders can agree a variety of transfer restrictions in the shareholders' agreement (e.g. a requirement for consent, right of first refusal and tag-along right). It is also possible for the shareholders' agreement to place an absolute prohibition on transfers, but the relief available for breach of the prohibition is limited to damages and, possibly, an injunction.

Are there any issues in relation to the enforcement of a shareholders' agreement?

A shareholders' agreement is generally enforceable between the parties to it, except for clauses which are clearly in conflict with the Japanese Companies Act. For example, a clause which allows a shareholder to vote on behalf of the other shareholders at all shareholders' meetings is unenforceable because a power of attorney can be given only for a single shareholders' meeting.

The following is a summary of the remedies potentially available for breach of a shareholders' agreement:

- damages (but it may be difficult to quantify the amount of damages),
- revocation of a corporate action taken in breach (arguably possible if all the shareholders are parties to the shareholders' agreement),
- an injunction (arguably possible), and
- a court order requesting the breaching party to take the action required by the shareholders' agreement (arguably possible if the description in the shareholders' agreement of the required action is very specific).

11 / Luxembourg

Rémy Bonneau
Partner, Luxembourg
Tel: +352 26 08 8274
Mob: +352 69 110 8274
remy.bonneau@linklaters.com

Nicolas Gauzès
Partner, Luxembourg
Tel: +352 26 08 8284
Mob: +352 69 110 8284
nicolas.gauzes@linklaters.com

Manfred Müller
Partner, Luxembourg
Tel: +352 26 08 8272
Mob: +352 69 110 8272
manfred.muller@linklaters.com

What types of entities are generally used for Luxembourg JVs?

The public limited liability company ("*société anonyme*" or "**SA**") and the private limited liability company ("*société à responsabilité limitée*" or "**SARL**") are the types of entity most generally used for Luxembourg JVs.

Another option would be to form a Luxembourg JV as a limited partnership ("*société en commandite simple*" or "**SCS**") or a special limited partnership ("*société en commandite spéciale*" or "**SCSp**"), both having one or several limited partners (*associés commanditaires*) and one or several general partners (*associés commandités*).

A Luxembourg JV may also be established on a contractual basis, e.g. under a co-operation or a consortium agreement.

Key factors when deciding on the appropriate type of corporate vehicle when establishing a Luxembourg JV include tax, corporate governance, the liability of investors, the financing needs of the vehicle, regulatory requirements and the type of venture (e.g. single project, ongoing business or independent identity).

Are there foreign investment restrictions for Luxembourg JVs?

In general, there are no foreign investment restrictions for Luxembourg JVs.

However, there are certain regulated industries where investment is scrutinised and may, in certain circumstances, be subject to restrictions and/or prior authorisations. They include the acquisition of qualifying shareholdings in banks, insurance companies and other financial institutions.

Are there any publicity or other specific formalities e.g. registration or notarisation?

The articles of association of incorporated Luxembourg JVs, such as an SA or an SARL, and any related amendments may be drafted in English, but must always include a French or German translation. They must be adopted before a Luxembourg notary, filed with the Luxembourg Register of Commerce and Companies (*Registre de Commerce et des Sociétés de Luxembourg*) and published in the Luxembourg electronic platform for companies and associations (*Recueil électronique des Sociétés et Associations*).

In an SARL, the identity of each of the shareholder(s) (i.e. the (corporate) name, address (of the registered office), name of the register where the shareholder is registered and registration number) must also be filed and published in a similar way to the articles of association. This will also apply to the unlimited partners which are jointly liable (*associés solidaires*) in an SCS and an SCSp.

Shareholders' agreements can be drawn up in English and do not need to be notarised or filed with the Luxembourg Register of Commerce and Companies. They can be governed by a law other than Luxembourg law.

For partnership agreements, the formation of an SCS or an SCSp can take place under private seal. Only specific information will need to be filed with the Luxembourg Register of Commerce and Companies and published on the electronic platform for companies and associations.

How can a shareholder exercise influence over a Luxembourg JV?

Shareholders can exercise influence over a Luxembourg JV through contractual arrangements or by specifying restrictions in the JV's articles of association.

This usually takes the form of prior approval from the shareholders on a certain number of decisions (reserved matters) to be made and/or implemented by management, it being understood that the management remains ultimately responsible for implementing such reserved matters.

These restrictions are set out in the articles of association of the company (which bind the management) or in a shareholders' agreement (thereby remaining confidential). Such restrictions on the powers of the board of directors/managers only operate internally and cannot be enforced against third parties.

Every director/manager has the power to perform any acts necessary or useful for the accomplishment of the object and purpose of the company. This power covers all acts that are not expressly assigned by Luxembourg law or the articles of association to the decision of the shareholders.

Luxembourg company law reserves specific powers to the general meeting of shareholders, such as amendments to the company's articles of association, the approval of the annual accounts and the appointment of directors/managers and the auditor (if any).

Shareholders must not interfere with the day-to-day management of the company. If they do, they might be considered as de facto directors/managers (*gérants de fait*) and be liable to the same extent as duly appointed directors/managers.

Partners of an SCS or an SCSp, other than the general partner(s) (*associé(s) commandité(s)*), must not be directly involved in management activities to avoid unlimited liability.

Are there any issues or restrictions in relation to the transfer of shares in a Luxembourg JV?

As a general rule, shareholders of an SA may freely transfer all or part of their shares to another shareholder or to a third party.

Shareholders of an SARL may freely transfer all or part of their shares to another shareholder but a transfer to a non-shareholder is subject to the approval of shareholders representing at least three-quarters (or half; to the extent provided by the articles of association) of all the issued shares.

Share transfers may be restricted by the company's articles of association and/or a shareholders' agreement (e.g. by a lock-up clause, right of first refusal and pre-emption right or tag/drag-along right). If the restrictions are only contained in a shareholders' agreement, they might be difficult to enforce against third parties who are acting in good faith.

Unless otherwise provided for in the partnership agreement, partnership interests in an SCS and SCSp can only be transferred by:

> limited partners (*associés commanditaires*), with the prior approval of the general partner(s) (*associé(s) commandité(s)*), or

> general partners (*associés commanditaires*), with the prior approval of the partners, resolving as for the amendment of the partnership agreement.

Are there any issues in relation to the enforcement of a shareholders' agreement?

According to the principle of contractual freedom and the principle of good faith applicable under Luxembourg corporate law, shareholders are generally free to enter into any agreement, as long as such agreement is not contrary to Luxembourg law and/or Luxembourg public policy.

Luxembourg corporate law neither expressly prohibits nor expressly regulates shareholders' agreements, save for shareholders' voting arrangements. The validity of these is now expressly confirmed, subject to certain restrictions, such as where shareholders' voting arrangements breach provisions of the Luxembourg law or are contrary to the corporate interest of the company.

There is not much Luxembourg case law which gives guidance on the subject of shareholders' agreements and their enforceability, although it cannot be entirely excluded that specific performance (*exécution en nature*) will not be granted by the courts in all cases.

Since the shareholders' agreement is not publicly available, it has no binding effect on third parties. This would be particularly relevant if a third party entered into an agreement with a party to the shareholders' agreement where the provisions of that agreement were in violation of the shareholders' agreement.

12 / Netherlands

Bart Jan Kuck
Partner, Amsterdam
Tel: +31 20 799 6320
Mob: +31 61 192 3573
bartjan.kuck@linklaters.com

Guido Portier
Partner, Amsterdam
Tel: +31 20 799 6296
Mob: +31 61 089 8263
guido.portier@linklaters.com

Jan Willem de Boer
Partner, Amsterdam
Tel: +31 20 799 6348
Mob: +31 65 340 2833
janwillem.deboer@linklaters.com

Pieter Riemer
Partner, Amsterdam
Tel: +31 20 799 6230
Mob: +31 61 371 3455
pieter.riemer@linklaters.com

What types of entities are generally used for Dutch JVs?

The most common type of entity used for a Dutch JV is a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid* or "**BV**").

Other types of entity are also possible and occasionally used, in particular, a cooperative (*coöperatie* or "**Coop**") or a limited partnership (*commanditaire vennootschap* or "**CV**").

A Dutch JV may also be established on a contractual basis, e.g. under a co-operation or a consortium agreement.

Key factors when deciding on the appropriate type of vehicle when establishing a Dutch JV include tax considerations, the liability of investors, the financing needs of the vehicle and the type of venture (e.g. single project, ongoing business, independent identity).

Are there foreign investment restrictions for Dutch JVs?

There are no foreign investment restrictions for Dutch JVs.

However, the business of a Dutch JV may be subject to approvals and/or licences if the business of the JV relates to a regulated sector such as banking and other financial services, telecoms or energy. In certain circumstances, the relevant regulator may impose restrictions on the Dutch JV's business activities.

Are there any publicity or other specific formalities e.g. registration or notarisation?

BVs must be incorporated by a notarial deed of incorporation (*akte van oprichting*) executed before a Dutch civil law notary. The notarial deed of incorporation contains the articles of association (*statuten*) and must be in the Dutch language. Any amendment to the articles of association must also be set out in a notarial deed executed before a Dutch civil law notary and must be in the Dutch language. The Dutch civil law notary is required by law to retain the original notarial deeds. Certified copies as well as translations into English will be issued to the (founding) shareholders and/or the management board of the BV.

Within eight days of the incorporation of the BV, the company must be registered with the Dutch Trade Register of the Chamber of Commerce. A certified copy of the deed of incorporation must be deposited with this public register. In addition, certain other information on the company must be registered. This includes details of the company's share capital, managing directors, supervisory directors (if applicable) and sole shareholder (if applicable – if the BV has more than one shareholder, registration of the shareholders' details with the public register is not required). Details of any amendments to the company's articles of association must also be registered.

There is no legal obligation to register the shareholders' agreement, or to have it notarised. A shareholders' agreement can be drawn up in any language chosen by the parties to the agreement.

How can a shareholder exercise influence over a Dutch JV?

Dutch law reserves certain important powers for the general meeting of shareholders (*algemene vergadering*), e.g. amendments to the articles of association, share issues, capital reductions, dissolution/liquidation, statutory (de)mergers, adoption of annual accounts and appointment/removal of directors. A BV's articles of association may also stipulate that shareholders of a certain class, or specification within a class, will appoint/remove certain directors. However, each shareholder with voting rights must be able to participate in the decision-making process for appointing/removing at least one managing and at least one supervisory director (if applicable). The BV's articles may also require the Dutch JV's Management board to follow specific instructions given by the general meeting or another corporate body (e.g. supervisory board or shareholders of a certain class or specification). The management board must comply, unless the instructions are not in the BV's interests.

In addition, shareholders can influence the JV's management through reserved matters which must be approved by the shareholders in advance (e.g. borrowings or entering into/terminating key contracts). Alternatively, certain matters can be subject to approval by the supervisory board (*raad van commissarissen*), if any, which advises and supervises the management board. Such restrictions on the management board only operate internally and are generally not enforceable against third parties

Different voting thresholds can be set in the articles of association for adopting shareholder resolutions, including the approval of shareholder reserved matters, such as unanimous or majority consent. Minimum voting thresholds apply to certain matters, under the Dutch Civil Code (*Burgerlijk Wetboek*).

In general, reserved matters are set out in the shareholders' agreement, to which the Dutch JV is often a party. They can also be included in the articles (although note that these will be publicly available).

Shareholders can also influence the Dutch JV through contractual arrangements or by restrictions in the BV's articles of association. Dutch law allows contractual obligations towards the BV or third parties or between shareholders to be attached to a shareholding or class or specification of shares and for qualification criteria to apply to being a shareholder of the BV.

Are there any issues or restrictions in relation to the transfer of shares in a Dutch JV?

In general, a transfer of shares in a BV is subject to statutory transfer restrictions (providing a right of first refusal mechanic) and statutory price determination. However, the articles of association may also deviate from the statutory position to:

> provide that the shares are freely transferable (either completely or to a group of persons defined in the articles of association),

> provide for a "lock-in" period during which shareholders are not permitted to transfer their shares, and/or

> include a transfer restriction clause and/or a price determination clause that deviates from the statutory clauses (such as a requirement to obtain the prior approval of a corporate body or a right of first refusal or first offer).

The articles of association may also contain provisions which limit the transferability of shares, such as, qualification criteria for shareholders, an obligation to offer and transfer shares when certain conditions have been met, drag/tag-along rights, call options or put options.

A transfer restriction clause must not have the effect that a transfer of shares becomes highly onerous or impossible. The method by which a shareholder needs to offer and transfer shares and the qualification criteria must be objectively determinable and reasonable.

Transfer restriction clauses and provisions which limit the transferability of shares as set out above can also be set out in the shareholders' agreement.

Are there any issues in relation to the enforcement of a shareholders' agreement?

The most common remedy for breach is damages, but the non-breaching party may also seek other remedies available under Dutch contract law, such as an injunction or specific performance.

To the extent permitted by and not contrary to Dutch law, parties to the shareholders' agreement may also agree to include certain rights and obligations in the articles of association of the JV. As a result, the non-defaulting shareholder may benefit from provisions in the articles of association to the effect that the voting rights, dividend rights and meeting rights of a defaulting shareholder will be suspended. In particular, inclusion of contractual obligations, towards the BV or third parties or between shareholders, qualification criteria and specific offer and transfer obligations in the articles of association, may further enhance enforceability.

In the event of a conflict between the shareholders' agreement and the articles of association, either document can prevail depending on the stated intention of the parties. In the Netherlands it is common to state in the shareholders' agreement that the parties will, to the extent possible, act in accordance with the shareholders' agreement (i.e. the shareholders' agreement prevails).

13 / People's Republic of China

Richard Gu
Partner, Shanghai
Tel: (+86) 21 2891 1839
Mob: (+86) 13 6016 06156
richard.gu@linklaters.com

Bryan Chan
Senior Counsel, Shanghai
Tel: +86 21 2891 1811
Mob: +86 13 8178 78511
bryan.chan@linklaters.com

What types of entities are generally used for Chinese JVs?

The most common types of joint venture in the PRC are equity joint ventures ("**EJVs**") and cooperative joint ventures ("**CJVs**").

EJVs are separate legal entities in the form of limited liability companies. They are usually the entity of choice for Chinese joint venture parties and regulators due to their long history and "plain vanilla" nature. The economic rights of shareholders in an EJV are proportionate to their equity interests. Equity in an EJV is an interest in the registered capital, rather than shares.

CJVs share many characteristics with EJVs, but in addition to limited liability companies, they may take the form of partnership-type structures with no separate legal personality and unlimited liability assumed by the joint venture parties. CJVs also allow for the allocation of profits between joint venture parties, other than by reference to proportionate interests, as well as for the early recovery of investment by foreign joint venture parties.

Where none of the parties to a proposed Chinese JV are Chinese, a typical structure is for the parties to set up a holding company outside China with a Chinese subsidiary wholly overseas-owned enterprise ("**WFOE**"). A variation of this structure is for the non-Chinese parties to directly set up a JV in the PRC without an intermediate non-PRC holding company. Such a JV would also be treated as a WFOE. Few prescriptive requirements apply to the governance and management of WFOEs. Economic rights in WFOEs do not have to be proportionate to shareholdings.

Other entities used for Chinese JVs include a foreign-invested company limited by shares ("**FICLS**") and a foreign-invested partnership ("**FIP**"). A FICLS's profits and assets are distributed among shareholders in proportion to shares issued. It offers more flexible governance than an EJV or CJV and can function as a listing vehicle within the PRC but is subject to more stringent regulatory requirements. A FIP provides increased flexibility in its governance structure. Partners can structure their arrangements with relatively few constraints and no requirement for allocation of profit to be in proportion to capital contributions. However, the liability of some or all of the partners is unlimited.

A Chinese JV can also be formed by a non-Chinese joint venture party acquiring equity in a PRC-owned enterprise, or a Chinese joint venture party acquiring equity in an existing WFOE.

Are there foreign investment restrictions for Chinese JVs?

In general, any foreign investment in a Chinese entity requires filing with, or prior approval from, the relevant authorities. Direct foreign investment in Chinese JVs is normally at least 25%, as these JVs qualify for certain incentives and preferential treatment. The main PRC foreign investment regulator is the Ministry of Commerce ("**MOFCOM**"), together with other regulators. Setting up a FIP generally only requires registration with the State Administration for Market Regulation or State Administration for Industry and Commerce, (collectively the "**Registration Authority**"), unless it engages in projects requiring government approval. The Foreign Investment Industrial Guidance Catalogue, sets out whether investment in certain industries is encouraged, restricted or prohibited. "Restricted" activities may incur additional and higher-level scrutiny during the approval process. In some industries, control by the Chinese joint venture party(ies) may be required, with a cap imposed on the foreign holding. A "negative list", with minor variations in the 11 free trade zones, sets out current restrictions on foreign ownership, management and market access and industries in which foreign investment is prohibited.

In general, a non-Chinese entity cannot set up or invest in a Chinese entity without approval or filing with the National Development and Reform Commission, unless there is no associated investment in fixed assets projects (e.g. the establishment of a trading company or consulting firm). Further, an industry-specific regulator must approve foreign investment in certain sectors (e.g. banking, securities, insurance, automobile and power) and certain industry-specific rules may apply. Shares or assets can be transferred to a Chinese JV as part of a JV party's capital contribution. If the transferor is state-owned and the transferee is a foreign/foreign-invested/privately owned PRC entity, the approval of the State-Owned Assets Administrative Authority is generally required and the transfer must be conducted by public auction or bid process on a PRC state-owned assets and equity exchange.

A review by the Security Review Ministerial Committee of the State Council is required for any foreign:

> investment in a military-related enterprise of importance to national defence security, or

> acquisition of a controlling interest in a PRC company in a sensitive sector which may affect national security (e.g. key agriculture, energy and resources, infrastructure, transport, technology and critical equipment manufacturing).

Are there any publicity or other specific formalities e.g. registration or notarisation?

In general, the establishment of a Chinese JV is an intensive process involving the submission of key investment details and parameters, a business and financing plan, a joint venture contract (being the equivalent to a shareholders' agreement) and articles of association, the proposed company name, site selection and environmental impact assessment to various regulatory authorities.

If the JV is in a sector that is not within the negative list, the articles of association need to be filed on MOFCOM's on-line system. Approval by MOFCOM is not a condition to the effectiveness of these documents.

If the JV is in a sector within the negative list, the articles of association and (in the case of an EJV or CJV) joint venture contract must generally be approved by MOFCOM in order to be given legal effect. For FIPs, however, registration with the Registration Authority is sufficient to give legal effect to the partnership agreement without regulatory approval.

The articles of association (which are required to be in Chinese and must contain certain mandatory provisions), together with other information such as registered capital, details of shareholders/partners, directors, supervisor, general manager and legal representative, must be filed with the Registration Authority for the set up of all companies. Amendments to articles of association and (for JVs in sectors within the negative list) joint venture contracts also generally need to be filed with, or approved by, MOFCOM.

Notarisation is not generally required save that in certain cases a non-Chinese joint venture party's identity and qualification documents, required to be submitted as part of the application documents for setting up a Chinese JV, must be notarised in the joint venture party's home jurisdiction and authenticated by the Chinese embassy or consulate located in that jurisdiction.

If one of the parties to a Chinese JV is a listed entity, additional stock exchange disclosure and/or shareholder approval requirements may apply, depending on the size and nature of the transaction.

How can a shareholder exercise influence over a Chinese JV?

It is possible to provide in the joint venture contract and articles of association of a Chinese JV for certain matters to require the consent of specific shareholders or directors or a certain voting threshold to be met.

EJVs and CJVs do not hold shareholder meetings. The board of directors of an EJV or CJV (or the joint management committee of a CJV where no board of directors is set up) is its highest decision-making authority. Each director of an EJV or CJV, irrespective of the percentage interest of the appointing joint venture party, has a statutory veto right over mergers, divisions, termination and dissolution, changes in registered capital and amendments to the articles of association.

In a FICLS, FIP or WFOE, unlike a EJV or CJV, no decisions require unanimous shareholder consent as a matter of law. Amendments to the articles of association, mergers, divisions or dissolution of a FICLS require a two-thirds majority of voting rights of the shareholders present at the shareholders' meeting.

Shareholders can specify in the joint venture contract and the articles of association higher voting thresholds or even unanimity for defined matters, in excess of the statutory requirements.

Shareholders may also exert their influence through board representation and nomination of key management positions (for approval by the board of directors), and by way of contractual arrangements and restrictions, such as exclusive distribution/supply agreements. A shareholder's power to instruct the directors it appoints is not absolute, however, as directors have statutory duties to avoid conflicts of interest with the company and to act in the best interests of the company.

Are there any issues or restrictions in relation to the transfer of shares in a Chinese JV?

Transfers of equity interests in a EJV, CJV or WFOE to a third party who is not an existing shareholder are subject to the other shareholders' statutory rights of pre-emption, which (in the case of a EJV or CJV) cannot be waived as a matter of contract.

There are no statutory pre-emption rights in a FICLS, although founding shareholders cannot transfer their shares for one year after the establishment of a FICLS.

Partnership interests in a FIP are freely transferable, to the extent expressly provided for in the partnership agreement.

If the JV is in a sector within the negative list, prior approvals from MOFCOM and, if relevant, industry regulators, are generally required for all transfers of shares before they become effective. In the financial sectors, such approvals are issued by the financial regulators instead.

If the JV is in a sector that is not within the negative list, the transfer of shares needs to be filed on MOFCOM's on-line system. Approval by MOFCOM is not a condition to the effectiveness of the transfer.

Transfers of partnership interests in a FIP can, however, generally be effected by registration with the Registration Authority alone.

If the transferor is a state-owned entity and the transferee is a foreign shareholder or a PRC privately-owned entity, the approval by, and filing with or notification to, the competent state-owned assets administrative authority will generally be required and the transfer must be conducted by way of a public auction or bidding proves on a state-owned assets and equity exchange in the PRC.

Contractual restrictions can be placed on transfers of shares in a Chinese JV, changes of control of shareholders and transfers of rights attaching to the shares (there is no separation of legal and equitable title in the PRC). Other rights, such as call and put options and pre-emptive, tag-along and drag-along rights, can also be included, though regulatory approvals to the actual transfers via exercise of such rights will still be required.

Are there any issues in relation to the enforcement of a shareholders' agreement?

A shareholders' agreement for a Chinese JV (if the JV is in a sector that is within the negative list) is not effective until approved by MOFCOM. Non-material amendments to a shareholders' agreement may, however, be deemed valid without MOFCOM approval. The partnership agreement of a FIP is generally effective upon registration with the Registration Authority and does not require approval by MOFCOM.

Damages are the most common remedy for breach of a shareholders' agreement. In addition, injunctions may be available at the relevant court's discretion under certain circumstances (such as the winding up of a Chinese JV, fulfilment of capital injection obligations and co-operation in obtaining governmental approvals).

Shareholders' agreements must be governed by PRC law. Disputes are typically submitted to the exclusive jurisdiction of the PRC courts or referred to arbitration. To the extent such disputes involve foreign parties, they may be resolved in accordance with the rules of a foreign arbitration institution. An arbitral award of a foreign arbitration institution is generally enforceable in the courts of the PRC.

The contents set out above do not constitute any opinion or determination on, or certification in respect of, the application of PRC law. Any comments concerning the PRC are based on our transactional experience and our understanding of the practice in the PRC. Like all international law firms with offices in the PRC, Linklaters LLP and its affiliated firms and entities (including Linklaters in Hong Kong) are not licensed to undertake PRC legal services. We have standing arrangements with a number of PRC lawyers. If you would like advice on the application of PRC law or other PRC legal services, please let us know and we would be pleased to make any necessary arrangements on your behalf.

14 / Poland

Daniel Cousens
Partner, Warsaw
Tel: +48 22 526 5113
Mob: +48 60 106 6008
daniel.cousens@linklaters.com

Agnieszka Maj-Zuk
Managing Associate, Warsaw
Tel: +48 22 526 5040
Mob: +48 69 140 4441
agnieszka.maj-zuk@linklaters.com

What types of entities are generally used for Polish JVs?

The most common type of entity used for a Polish JV is a limited liability company ("**LLC**" or *spółka z ograniczoną odpowiedzialnością*). This is regarded as the most popular and flexible form of conducting business activity in Poland. Investors often decide to purchase an already incorporated off-the-shelf LLC without any history or liabilities in order to avoid the potentially burdensome formalities associated with the incorporation of a new LLC.

In some cases, a joint-stock company ("**JSC**" or *spółka akcyjna*) may be used. This is subject to stricter corporate governance requirements than an LLC. JSCs are most likely to be used where the Polish JV relates to a more complex and/or regulated sector, in which the JSC is sometimes required.

Finally, a Polish JV may be established as a limited partnership, a joint-stock limited partnership or a solely contractual JV, but these cases are much less common and are usually business or tax driven.

This section relates primarily to the most typical Polish JVs (i.e. formed as LLCs). Some aspects (for instance share transfer mechanism, board composition etc.) work differently in the case of JSCs, limited partnerships and joint-stock limited partnerships.

Are there foreign investment restrictions for Polish JVs?

Authorisation requirements and foreign shareholding limits apply to a limited number of sectors. Notable examples of sectors subject to such restrictions are the:

> defence sector, which requires a licence that may only be granted to investors from the member states of the EU, the OECD or Switzerland,

> air transport sector, where foreign shareholding is limited to 49% (although this limitation does not apply to EU, OECD and Swiss investors),

> radio and television broadcasting sectors, where non-EEA ownership is limited to 49% and where the number of Polish citizens on the Management Board and, if relevant, the Supervisory Board must be higher than the number of foreign persons,

> insurance and banking sectors, where at least two members of the Management Board must speak Polish and

> real estate sector, where certain acquisitions by foreign entities are also subject to restrictions, which vary depending on the type of the land, its location within Poland and the origin of the acquirer.

In addition, certain sectors require a concession, licence, permit or registration for operation in that sector. Examples are mineral exploration and mining, production and trade in explosives, goods and technology for military or police use, production, storage, transmission, distribution and trading in fuel or energy, broadcast of radio or television programming, air, road and rail transport, production of spirits and tobacco products, bottling, trading and sale of alcoholic beverages and insurance and wholesale of pharmaceuticals and medical products.

The Polish government may also intervene in acquisitions of specified "protected companies" (which are those active in specified sectors, such as, energy, telecommunications and chemicals) and on public order and public safety grounds, as specified in the Act of 24 July 2015 on Control over Certain Investments (*ustawa o kontroli niektórych inwestycji*). Investors should note that this list can be updated at any time by a resolution of the Council of Ministers, on short notice and with no right of appeal. Such an update can even be triggered by a particular foreign investment into a company active in one of the specified listed sectors that may be regarded by the Polish government as subject to protection.

Are there any publicity or other specific formalities e.g. registration or notarisation?

The formalities relating to the incorporation or purchase of a LLC are fairly limited. The articles of association (and any amendments) generally need to be adopted before a Polish notary, as although a new, electronic registration is currently being rolled out, it is not often used. In addition, all transfers of shares in a LLC must be notarised. A LLC must also be registered in the National Court Register ("**NCR**"). Entries in the NCR are publicly available and electronically accessible. The shareholders' agreement does not have to be notarised or registered.

Other public authorities must be notified of the incorporation of a LLC (but not of an off-the-shelf purchase). They are: the tax office, the statistical office and the social security office (but, the latter only if a LLC has employees).

Additional formalities (e.g. the filing of additional documents with the relevant authority) may be required if a licence is needed (see the section on foreign investment restrictions). The more heavily a sector is regulated, the greater the number of formalities that are usually required.

How can a shareholder exercise influence over a Polish JV?

Certain matters (such as the sale of a business (*przedsiębiorstwo*), sale of real estate and approval of the annual financial statements) must be approved by a shareholders' meeting.

Other matters can be reserved to the shareholders to approve by amending the LLC's articles of association. However, it is important to note that in the case of these matters (as opposed to those that require the approval of shareholders under Polish law), if the Management Board of a LLC signs a contract with a third party without obtaining shareholder approval or despite shareholders' objections, such contract will still be binding upon the LLC (although the Management Board members may be liable to the LLC as a result).

The effectiveness of shareholders issuing direct instructions to the Management Board is highly questionable under Polish law. Most commentators believe that the Management Board is obliged to act in the best interests of the LLC rather than adhere to instructions from its shareholders. However, as the members of a Management Board are generally appointed and removed at shareholder meetings, they are in practice unlikely to dispute or deviate from the (majority) shareholders' informal instructions.

Finally, each shareholder has the right to supervise the LLC's activities (which entitles it to review all of its books and documents), unless:

> the LLC has appointed a Supervisory Board (usually not mandatory) and
> the right of supervision is specifically excluded in the articles of association.

Are there any issues or restrictions in relation to the transfer of shares in a Polish JV?

Shares in a LLC are freely transferable. Under Polish law restrictions on the transfer of shares may be included in the articles of association (although transfers of shares may not be excluded entirely). Common restrictions include introducing a specific sale procedure, pre-emption rights for existing shareholders and tag/drag-along rights.

All transfers of shares in a LLC must be notarised in order to be effective.

In addition, the consents of administrative authorities may be required for companies operating in a regulated sector.

Are there any issues in relation to the enforcement of a shareholders' agreement?

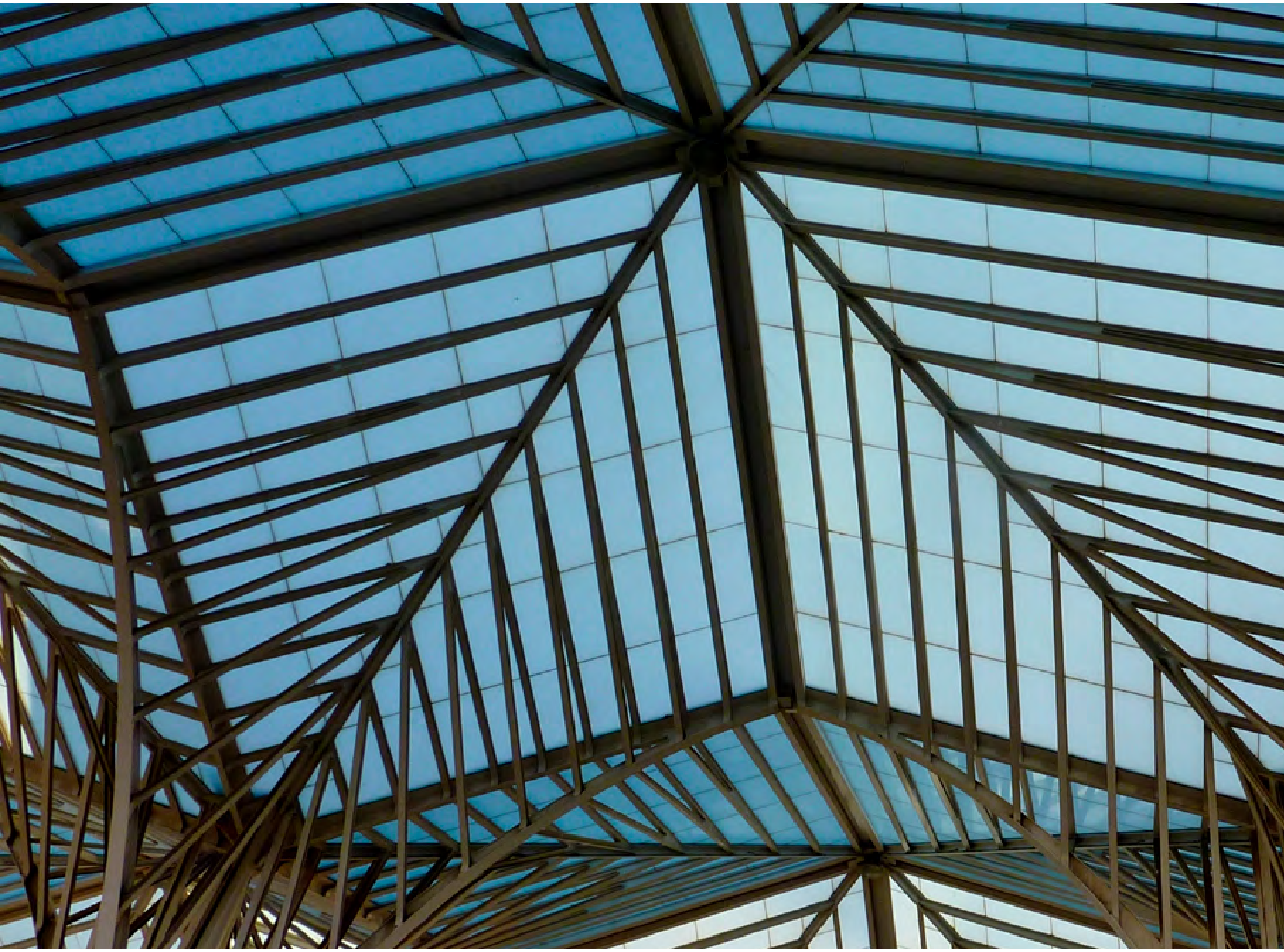
A shareholders' agreement is binding solely on the parties to the agreement. Obligations included in the shareholders' agreement are, therefore, enforceable solely by and against its parties (except that in certain cases selected individual entities explicitly mentioned in the agreement, for whose benefit the agreement was concluded, may also enforce its provisions).

A breach of the shareholders' agreement will not, in itself, cause the relevant act to be invalid or ineffective (although the party at fault will be contractually liable) because only the provisions of the LLC's articles of association are binding on all of its shareholders and Management Board members.

Articles of association have stronger effect where third parties are concerned (e.g. the validity of board appointments needs to be determined on the basis of the articles of association and any share restrictions need to be disclosed in the articles of association in order to be effective against third party buyers).

Shareholders' agreements on the other hand may lead to contractual liability if one of the parties breaches its undertakings, but will generally have no impact on the validity of actions performed with third parties in good faith.

15 / Portugal



Marcos Sousa Monteiro
Partner, Lisbon
Tel: +351 21 864 00 55
Mob: +351 91 871 29 87
marcos.sousa.monteiro@linklaters.com

What types of entities are generally used for Portuguese JVs?

The most common types of entities used for Portuguese JVs are limited liability companies by shares (*sociedades anónimas*) and limited liability companies by quotas (*sociedades por quotas*).

For specific transactions, other types of entities may be used such as economic interest groupings (*agrupamentos complementares de empresas*) or European economic interest groupings (*agrupamentos europeus de interesse económico*).

Alternatively, a Portuguese JV may be set up as an unincorporated JV, based on a contractual arrangement between the parties, e.g. in the case of a consortium or arrangements for participation in profits (*contratos de associação em participação*).

Are there foreign investment restrictions for Portuguese JVs?

In general, there are no foreign investment restrictions for Portuguese JVs.

However, there are certain regulated industries where foreign investment is scrutinised and may, in certain circumstances, be subject to restrictions. These include the acquisition of qualified shareholdings in financial institutions, insurance companies, companies connected with weapons and military goods, as well as in relation to strategic assets and other activities subject to public concession contracts.

Are there any publicity or other specific formalities e.g. registration or notarisation?

There are no specific formalities and the process of incorporating Portuguese JVs is straightforward. Shareholders must execute the deed of incorporation and articles of association (which, in general, do not require notarisation, although some formalities apply in respect of the signatures of the shareholders or their representatives). The deed of incorporation usually appoints the members of the company's corporate bodies. Registration of the company and the members of its corporate bodies is required. The registration is automatically published by the competent authorities.

The deed of incorporation and the articles of association are available for public inspection. Shareholders' agreements are, in general, not available for public inspection.

Certain documentation required for the incorporation of the JV company requires notarisation.

Documents notarised outside Portugal may need to be apostilled for the legal status of the document to be recognised. Alternatively, notarisation can be carried out at a Portuguese consulate in the relevant country and no apostille will be required.

Foreign directors require a Portuguese taxpayer number. If the directors are non-EU residents, they will also require a tax representative.

How can a shareholder exercise influence over a Portuguese JV?

All matters related to the Portuguese JV are regulated by applicable law and the JV's articles of association. It is advisable that the shareholders (in particular minority shareholders) enter into a shareholders' agreement to regulate their relationship as shareholders of the JV and obtain adequate protection in the articles of association to protect their interests

Sociedades anónimas and *sociedades por quotas* have different governance rules. For instance, in *sociedades anónimas* the management of the company is the exclusive responsibility of the directors, whereas in *sociedades por quotas* the shareholders also have certain management powers with which the directors, as representatives of the company, have to comply.

Certain matters are generally reserved for approval by shareholders or the board of directors, before the Portuguese JV is authorised to take such action. If a shareholders' agreement is not entered into and the articles of association do not impose specific majorities, decisions at shareholder and management levels are generally taken by a simple majority vote. There are some exceptions in which a specific majority is legally required (e.g. shareholders' resolutions on changes to the articles of association, mergers, demergers, transformation and dissolution of the company).

The management of a JV company has to be conducted by the respective directors (or managers in the *sociedades por quotas*). Note that, a company that fully controls a Portuguese company is generally entitled to give it binding instructions, even if these are unfavourable to it. The same result may be achieved if a subordination agreement is entered into between two companies, under which one of them submits its management activity to the other. Other than this, the management of a JV company has to be conducted by the respective directors and in the *sociedades por quotas* also by the shareholders.

Are there any issues or restrictions in relation to the transfer of shares in a Portuguese JV?

The joint venture parties may agree to include in the articles of association of a *sociedade anónima* or *sociedade por quotas* certain restrictions on the transfer of shares or quotas (as applicable).

If no restriction is included in the articles of association, the transfer of shares in a *sociedade anónima* is not subject to any restriction.

If no restriction is included in the articles of association, the transfer of quotas in a *sociedade por quotas* is subject to the consent of such *sociedade por quotas* unless the transfer of quotas is made to:

> another shareholder, or
> in the case of an individual, to the husband/wife, parent/grandparent or successor of a shareholder.

The transfer will only be effective after the transfer is communicated in writing to the JV company or the JV company acknowledges it. The articles of association may waive the JV company's consent as a requirement for the transfer of quotas.

Are there any issues in relation to the enforcement of a shareholders' agreement?

There are no specific issues in relation to the enforcement of a shareholders' agreement.

However, statute and the articles of association will always prevail over the shareholders' agreement.

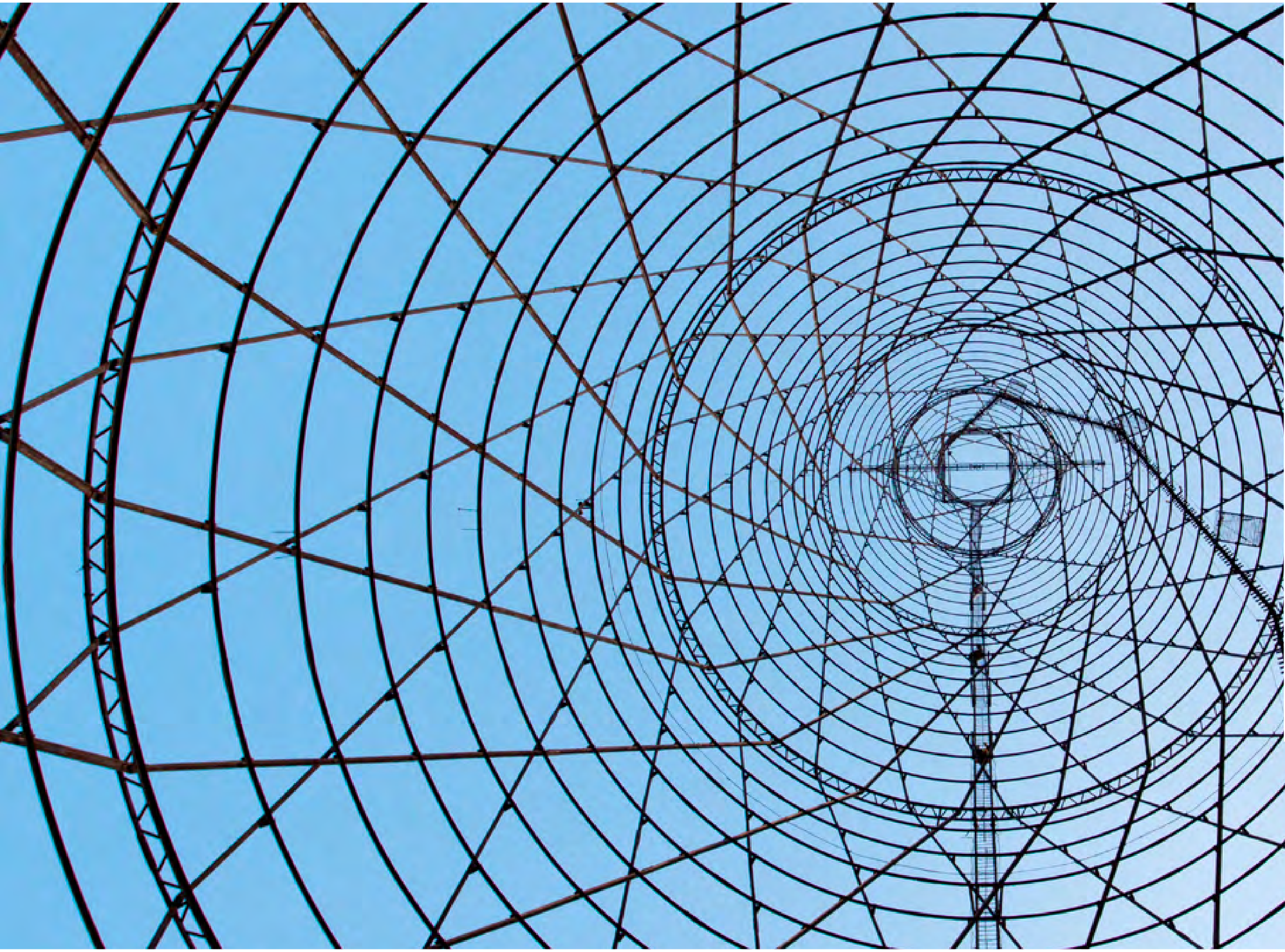
Additionally, a shareholders' agreement is only enforceable between the contracting parties. A breach of a shareholders' agreement will, in principle, only affect the contracting parties. This breach will have no direct impact on the relevant JV company, unless the relevant act/omission also violates a legal or statutory provision.

Portuguese law expressly states that any provision in a shareholders' agreement is automatically void if a shareholder undertakes to:

> always vote in accordance with the instructions of the JV company or one of its corporate bodies (e.g. the board of directors),
> always vote in favour of the proposals made by the JV company or one of its corporate bodies, or
> exercise or refrain from exercising its voting rights in exchange for special benefits.

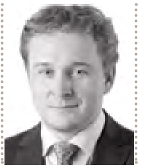
Finally, there are certain matters that may be considered invalid under Portuguese law, such as voting provisions that could be abusive or illegal provisions, such as clauses referring to conduct or behaviour to be taken by the members of the management and supervisory bodies of the Portuguese JV (e.g. voting or acting in a specific way).

16 / Russia



Grigory Gadzhiev
Partner, Moscow
Tel: +7 495 797 9718
Mob: +7 916 501 5325
grigory.gadzhiev@linklaters.com

Lev Loukhton
Partner, Moscow
Tel: +7 495 797 9283
Mob: +7 915 332 3543
lev.loukhton@linklaters.com



Denis Uvarov
Partner, Moscow
Tel: +7 495 797 9728
Mob: +7 916 693 7861
denis.uvarov@linklaters.com

Hugo Stolkin
Partner, London
Tel: +44 20 7456 3394
Mob: +44 77 9977 2310
hugo.stolkin@linklaters.com

What types of entities are generally used for Russian JVs?

If a Russian onshore company is used as a joint venture vehicle, the choice is generally between a limited liability company ("**LLC**") and a joint stock company ("**JSC**"). The latter can be either public or non-public.

Participants in an LLC hold "participatory interests", expressed as a percentage or a fraction, which normally grant voting rights in proportion to each participant's contribution to the LLC's charter capital (but that can be altered in the constitutional documents of the LLC). Participatory interests are not issue securities and cannot be divided into separate classes. Transfer or title to a LLC's participatory interests needs to be certified by a public notary.

The charter capital of a JSC comprises of shares which are issue securities and may be held in the form of ordinary shares and preference shares. Shares are transferrable upon an instruction given by the shareholder to the respective depositary or the registrar (as the case may be). No notarisation is required for such transfer.

The regulation of non-public JSCs and LLCs is quite similar. Both enjoy substantial flexibility in relation to corporate governance.

A public JSC is, on the contrary, very heavily regulated because its shares (securities convertible into shares) can be publicly placed through an open subscription and publicly traded.

In practice, Russian JVs are often structured using an offshore joint venture holding company, which in turn controls all the Russian subsidiaries and operating companies of the business.

Are there foreign investment restrictions for Russian JVs?

Prior approval of the Governmental Commission for Control over Foreign Investments is required for the acquisition by a foreign investor of "control" over a Russian "strategic company".

In this context, what is considered "strategic" can be very broad. In addition to the obvious sectors, such as weapons and military machinery, energy (including the nuclear industry), space and aviation, sectors such as transport security, telecommunications, the media (including TV, radio and publishing industry) may be considered "strategic" provided certain criteria are met.

A further layer of restrictions apply to the acquisition of control over the users of so-called "subsoil areas of federal significance" ("**SAFS**"), including certain oil and gas, metals and mining companies. "Control" in relation to SAFS users means direct or indirect acquisition of 25% or more of the voting shares, the right to appoint the CEO or 25% or more of the board members and the right to determine decision-making.

Sovereign investors (i.e. foreign states, international organisations or companies under their control) are not allowed to obtain control over SAFS users or other strategic companies. Prior consent is required for the direct or indirect acquisition of more than 5% of the voting shares in an SAFS user and more than 25% of the voting shares in any other strategic company by such sovereign investors.

Further foreign ownership restrictions exist in such areas as aviation, banking, insurance, fishing, agriculture and other industries, and generally concern the participation by foreign legal entities or non-Russian nationals in the share capital and/or in the management of Russian legal entities.

Are there any publicity or other specific formalities e.g. registration or notarisation?

A Russian company is deemed to exist from the moment it is registered with the Unified State Register of Legal Entities (the "**State Register**"), maintained by the Federal Tax Service of Russia.

A company's constitutional document (called the "**Charter**") and any amendments to it become effective with regard to third parties when they are filed with the State Register. Other documents (e.g. a resolution for the appointment of a new CEO) will be effective irrespective of whether they are filed with the State Register.

Shareholders' agreements do not require registration or notarisation.

Shareholders (participants) of a non-public JSC or LLC who have entered into a shareholders' agreement have to inform the company of the existence of such shareholders' agreement but do not need to disclose its contents.

For a public JSC, Russian law requires any person who, as a result of signing a shareholders' agreement, acquires a "right to determine voting" above certain ownership thresholds, to notify the company and the Bank of Russia (the Russian securities market regulator).

How can a shareholder exercise influence over a Russian JV?

The most common way for direct shareholders (or participants in an LLC) of an onshore Russian JV to exercise influence is by voting on the matters which under Russian law must be approved by the general shareholders' (or participants') meeting before the Russian JV is authorised to take such action.

The scope of decision-making powers of the general shareholders' meeting of a public JSC and voting thresholds established for passing resolutions on such matters are expressly set out under Russian law and cannot be revised.

The list of matters falling within the decision-making powers of the general participants' meeting of an LLC or a non-public JSC may be expanded and the respective voting thresholds may be increased by the Charter.

The other way for direct shareholders (or participants in an LLC) of a Russian JV to exercise their influence is by electing their nominees to the company's other management bodies (the board of directors, management board or CEO). The structure of such management bodies is prescribed by Russian law.

In offshore JVs, control at all levels of the holding structure can be achieved by introducing veto concepts into the shareholders' agreement and having such vetoes "hardwired" into the articles of association of all the key subsidiaries of the group. This can be used to deadlock effectively certain key subsidiaries and to give a veto right if a reserved decision is attempted at subsidiary level without approval by the foreign JV parent. Having the right to appoint directors to the boards of each of the key subsidiaries is important in making this hardwiring work.

Are there any issues or restrictions in relation to the transfer of shares in a Russian JV?

Russian law has rather limited flexibility in relation to share transfer provisions.

No restrictions whatsoever may be placed on the transferability of shares in a public JSC.

By default, the transfer of shares in a non-public JSC is not subject to the other shareholders' pre-emption rights but such rights may be specified by the Charter. In addition, the Charter of a non-public JSC may provide for the requirement to obtain a consent of other shareholders for sale of shares to third parties. Such requirement can only be in effect for a specific term set out in the Charter, which cannot be more than five years from the time the company, or the relevant amendments to its Charter, were registered.

Russian law provides for mandatory pre-emption rights for participants in an LLC, although the procedures and timing for the exercise of such rights may be made more flexible by the company's Charter. A number of additional restrictions may also be imposed, such as an express prohibition on disposals to third parties and a requirement for the prior consent of the participants and/or the company for the disposal of participatory interests to third parties and/or to the other participants.

In addition, an LLC's (but not a JSC's) Charter may provide for a right of a participant to withdraw from the LLC at any time without the consent of the other participants and to receive its proportion of the LLC's net asset value on the basis of the accounts for the year in which the application to withdraw is filed.

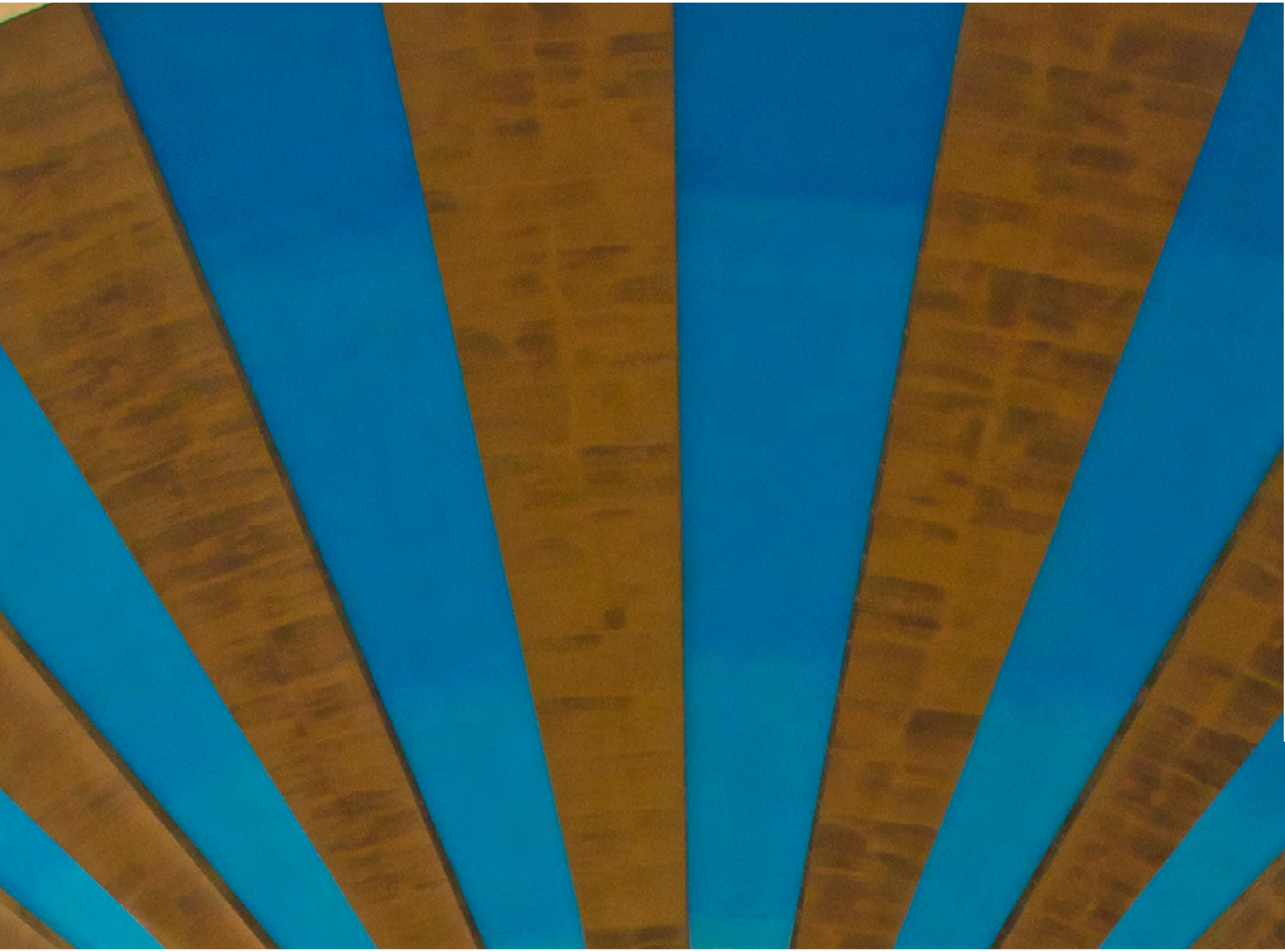
Are there any issues in relation to the enforcement of a shareholders' agreement?

A shareholders' agreement is only enforceable between the contracting parties.

A breach of the shareholders' agreement can serve as a ground for the invalidation of a resolution of the company's management body at the claim of a party to the shareholders' agreement, provided that at the time such resolution was passed all the company's shareholders (participants) were a party to such agreement. The invalidation of such a resolution does not by itself lead to the invalidation of a third-party contract made on the basis of such resolution.

A contract made in violation of the shareholders' agreement may be invalidated in court under a claim brought by a party to the shareholders' agreement, only if it can be proved that the other party to the contract knew, or should have known, of the limitations provided for by the shareholders' agreement.

17 / Saudi Arabia



Scott Campbell
Managing Partner, Middle East
Tel: +971 4 369 5811
Mob: +971 5 0552 6206
scott.campbell@linklaters.com

Nicholas Edwards
Partner, Abu Dhabi
Tel: +971 2 659 2124
Mob: +971 5 6996 9260
nicholas.edwards@linklaters.com

Waleed Rasromani
Managing Associate, Dubai
Tel: +971 4 369 5817
Mob: +971 5 0652 6281
waleed.rasromani@linklaters.com

What types of entities are generally used for Saudi JVs?

The limited liability company ("**LLC**") is the vehicle most commonly used for a private JV in the Kingdom of Saudi Arabia. The LLC does not offer as much flexibility in its corporate structure as a UK private company and there are several key legal differences from such companies (e.g. the process for share transfers, management and statutory reserves).

In practice, it is common for government entities to use a closed (unlisted) joint stock company ("**JSC**") when establishing JVs to which they are a party (although this is not specified in the Saudi Arabian Companies Law). JSCs are more formal and structured entities than LLCs but have greater flexibility (e.g to issue debt instruments and buy back shares).

The Saudi Arabian Companies Law also refers to a type of establishment which is usually translated into English as a "joint participation" or "joint venture". Although described as a company, this is not a distinct legal entity and is akin to an unincorporated JV. Accordingly, other legal forms (i.e. companies) are more commonly used for joint ventures in Saudi Arabia. In any event foreign investors cannot invest in Saudi Arabia through such a joint venture establishment and must establish an LLC or JSC.

Are there foreign investment restrictions for Saudi JVs?

Foreign (non-GCC) investment in Saudi Arabia may only be carried out through a Saudi entity with a foreign investment licence from the Saudi Arabian General Investment Authority ("**SAGIA**").

Foreign investors seeking to establish companies or enter into JVs in Saudi Arabia are categorised by SAGIA by the activities they wish to conduct. Restrictions may be imposed on the foreign shareholding in a company based on its type of activity. For example, foreign investors are allowed to own in full companies which conduct services and industrial activities, but for other activities, such as insurance or telecommunications, companies may be required to have not less than a specified amount of their share capital owned by Saudi nationals.

Foreign ownership restrictions may be reduced if the company meets certain standards set by SAGIA to for example, increase the private sector's contribution to the Saudi economy (e.g. investing the equivalent of SAR 300 million over five years to own in full a company conducting retail activities).

SAGIA also maintains a negative list of activities (including oil exploration and military equipment manufacturing) for which there is a total prohibition on foreign ownership.

Are there any publicity or other specific formalities e.g. registration or notarisation?

If the Saudi JV is an LLC, its articles of association must be approved by the Ministry of Commerce and Investment ("**MoCI**") and executed before a notary public before the company is entered into the commercial register.

Companies with a foreign shareholder must obtain an SAGIA licence before seeking approval for the articles of association. The company's details will then be registered in the commercial register of MoCI and a commercial registration certificate will be issued. The company can then register with the relevant Chamber of Commerce and Industry and other related government entities (e.g. the General Organisation of Social Insurance, the Ministry of Labour and others).

The articles of association must be signed by all shareholders before the notary and published on the MoCI website.

While LLCs are required to register their articles of association (together with any amendments) in the commercial register, the articles of association in the commercial register are not searchable by the public. It is not possible for members of the public to obtain from the competent authority a copy of a company's constitutional documents or to check if a company is subject to insolvency procedures. However, a member of the public can request copies of a company's commercial registration certificate by providing its number. The commercial registration certificate includes the companys objects, capital and directors.

The shareholders' agreement is a private document between the shareholders (to which the company may also be a party) and, therefore, there are no approval, registration or notarisation requirements relating to such agreements.

How can a shareholder exercise influence over a Saudi JV?

A common way for shareholders to exercise influence over a Saudi JV is through reserved matters imposed by the Saudi Arabian Companies Law and the shareholders' agreement, being matters which must be approved by the shareholders before the JV is authorised to take action in relation to such matters. Shareholder reserved matters could include items such as changes to the articles of association, entering and exiting of shareholders, changes to share capital and changing a company's name or headquarters.

Different thresholds can be set for approval of shareholder reserved matters such as unanimous or majority consent. The Companies Law also prescribes minimum thresholds for certain matters (including dissolving or merging the company and disposing of the "project" established by the company), which must also be complied with.

Shareholders may also require that certain matters are reserved for the board, rather than management being permitted to approve such matters (e.g. capital expenditure or transactions over a certain amount). Board reserved matters may overlap with shareholder reserved matters.

In general, reserved matters will be set out in the shareholders' agreement, to which the JV company is often a party. Certain shareholders' agreements should, if possible, be incorporated in the articles of association, which will need to be be approved by MoCI before they are notarised. The board's powers will also be set out in the articles of association.

Are there any issues or restrictions in relation to the transfer of shares in a Saudi JV?

LLCs have statutory pre-emption rights on share transfers and in any event the co-operation of the joint venture partner is nearly always required for the transfer and issue of shares in a Saudi JV that is an LLC. These processes can be time-consuming and highly procedural. In practice, share transfers or issues require all shareholders to sign an amendment to the articles of association reflecting the change in shareholders and shareholdings before a notary.

This is problematic in adversarial-type situations (e.g. deadlock, put/call etc.) where the other party has to cooperate in order to achieve the desired result. Generally, powers of attorney in advance might not work as intended, as they can be revoked and specific performance is often not available. In addition, certain exit arrangements, such as "Russian roulette" type clauses, might also be problematic due to the foreign ownership restrictions described above which restrict to whom shares can be transferred. In addition, such share transfer provisions, which are common in international JV's, may be unenforceable in Saudi Arabia because they may be interpreted under Islamic law (*Sharia*), the basis of all law in Saudi Arabia, as a future promise rather than a binding commitment.

To miligate the above issues, foreign investors are increasingly adopting structures that involve:

> using a JSC for the local entity,
> having an offshore holding company established in a common law jurisdiction, and
> having the JV documents governed by the law of a common law jurisdiction and subject to international arbitration.

Are there any issues in relation to the enforcement of a shareholders' agreement?

Partners in Saudi JVs have historically used a range of bespoke measures to mitigate the effect of foreign ownership restrictions. These allow minority foreign shareholders, in practice, to have the benefits that full or near full ownership of a JV would offer. The use of such measures is, however, risky. If they allow a foreign shareholder to practice a commercial activity that would otherwise require a licence, the shareholder will be in breach of the Saudi Arabian Anti-Concealment Law which has heavy penalties and is being increasingly enforced by the authorities.

If the shareholders' agreement is governed by foreign law and foreign courts have jurisdiction to hear disputes, there is a high risk that a Saudi court will ignore such election, hear the case and apply Saudi law. In addition, there are difficulties surrounding the recognition and enforcement of a foreign judgment in the Saudi courts. Such a judgment may be recognised and enforced by a Saudi court (subject to it not breaching Islamic law (*Sharia*) and reciprocity with the other state), but a Saudi counterparty may raise procedural issues to cause a case to be heard before the Saudi courts, rather than having the foreign judgment enforced (e.g. claiming that there is an existing case in Saudi Arabia on the same subject matter). This could lead to a very different outcome than that anticipated by the parties.

Saudi Arabia is a party to a number of (mostly regional) enforcement treaties, including the GCC Convention 1996 and the Riyadh Arab Agreement for Judicial Co-operation 1983. International arbitration may be considered as an alternative method of resolving shareholder disputes, where reciprocal enforcement arrangements apply, e.g. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Saudi Arabia is a signatory. However, recognition and enforcement is restricted to arbitral awards of contracting States which in turn recognise and enforce Saudi awards and the procedural issues referred to above would also apply here.

Linklaters works closely with Zamakhchary & Co in the Kingdom of Saudi Arabia through a formal agreement, as is the practice for all international law firms operating in Saudi Arabia. As part of our arrangements, Linklaters lawyers are based in Zamakhchary & Co's offices in Riyadh.

18 / Singapore

Niranjan Arasaratnam
Partner, Singapore
Tel: +65 6692 5858
Mob: +65 8869 1821
niranjan.arasaratnam@linklaters.com

Sophie Mathur
Partner, Singapore
Tel: +65 6692 5703
Mob: +65 9657 3882
sophie.mathur@linklaters.com

Parthiv Rishi
Partner, Singapore
Tel: +65 6692 5866
Mob: +65 9734 3011
parthiv.rishi@linklaters.com

Kwok Hon Yee
Counsel, Singapore
Tel: +65 6692 5884
Mob: +65 9645 8422
kwok_hon.yee@linklaters.com

What types of entities are generally used for Singapore JVs?

A private limited company is the most common type of entity used for Singapore JVs.

Other types of entities which can be used include limited partnerships and limited liability partnerships.

A partnership, limited or limited liability, cannot have more than 20 partners except in cases where the JV is carrying on professional services e.g. the provision of accounting or medical services.

Limited partnerships must have at least one general partner (a partner with unlimited liability for all debts and obligations of the partnership) and at least one limited partner.

Limited liability partnerships are required to have at least two partners and one full time manager who is ordinarily resident in Singapore. Partners together with the limited liability partnership, are liable for their own wrongful acts and omissions and cannot be held responsible for the wrongful acts and omissions of other partners.

A Singapore JV can also be unincorporated and exist purely as a contractual agreement (e.g. pursuant to a co-operation agreement) between two or more parties.

Key factors which will determine the choice of the JV vehicle include tax implications, the liability of the investors, the financing needs of the vehicle, the ease of making distributions to investors and the type of venture.

References to a JV in this chapter are to a JV which takes the form of a private limited company.

Are there foreign investment restrictions for Singapore JVs?

In general, there are no investment restrictions on the level of foreign ownership of companies (listed or unlisted) or businesses in Singapore.

However, certain sectors are regulated in Singapore insofar as there are statutes which limit or require prior regulatory approval for share ownership in companies engaged in those sectors. These approvals are required regardless of the nationality of the investor. The sectors which are subject to such controls are those generally perceived to be critical to national interests, such as banking, finance, insurance, media and telecommunications. There are also some sectors, such as the newspaper sector, in which only Singaporeans can be directors.

In all cases, a Singapore private limited company is required by law to have at least one director who is "ordinarily resident" in Singapore.

Are there any publicity or other specific formalities e.g. registration or notarisation?

The Accounting and Corporate Regulatory Authority ("**ACRA**") is the national regulator of business entities, including incorporated JVs, in Singapore.

The constitution of the JV must be registered with ACRA. The shareholders' agreement, which is a private document, does not to be need be registered even if it is cross referred to in the constitution.

Any amendment made to the constitution of the JV and any resolution passed or any order made by the High Court of Singapore that affects the constitution of the JV must be filed by the company with ACRA.

ACRA also maintains an electronic register of members and an electronic register of directors and officers for all Singapore companies. These registers are available for public inspection. Singapore companies (subject to certain exceptions) are required to maintain registers of controllers (i.e. an individual or legal entity with a significant interest in or a significant control over the company) and nominee directors (i.e. a director who is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of another person). These registers are not available for public inspection. They can only be accessed by ACRA and Singapore public agencies such as the Commercial Affairs Department, the Corrupt Practices Investigation Bureau and the Inland Revenue Authority of Singapore.

Notarisation of the shareholders' agreement or constitution is not required.

How can a shareholder exercise influence over a Singapore JV?

As a matter of law, there are a few shareholder reserved matters which will allow shareholders to exert influence over a Singapore JV. Corporate actions such as the alteration of a company's constitution, reduction of its share capital and winding up all require a special resolution of the shareholders.

The Companies Act also provides minority shareholders with the ability to exercise influence over a Singapore JV. Under the Companies Act, shareholders have the right to file an application before a Singapore court requesting that the company in question be wound up on the ground that it is "just and equitable" to do so. The Companies Act also provides that any shareholder who has been adversely affected by oppressive or discriminatory actions by the company or its board or management actions may approach the courts for redress.

As a matter of contract, the parties may also provide in the shareholders' agreement for additional reserved matters, veto rights, weighted voting rights and class rights. A minority shareholder may have rights over and above the statutory requirements. Whether such provisions are incorporated into the JV's constitution will depend on how sensitive the parties are about having such provisions in a public document. However, even if such provisions are included in the constitution, this would have a limited effect in relation to third parties dealing with the company, as the Companies Act provides that notwithstanding the constitution being a public document, third parties are not affected by, or deemed to have notice or knowledge of the contents of the constitution.

Are there any issues or restrictions in relation to the transfer of shares in a Singapore JV?

Shares in a Singapore JV can be transferred, subject to the parties executing an instrument of transfer, paying stamping duty and updating the electronic register of members maintained by ACRA.

In a JV, it is usual for rights of first refusal or first offer to be included in the shareholders' agreement. Other restrictions such as the stipulation of an "initial lock-in period", restrictions on the sale of part of one party's share in the JV and restrictions as to the identity of any third-party buyer are not uncommon in shareholders' agreements. Tag-along rights and drag-along rights may be incorporated as clauses in the shareholders' agreement to ensure that no sale of one party's share in the JV adversely affects the other parties involved.

It is recommended that any transfer restrictions be included in both the constitution and the shareholders' agreement of the JV. If such restrictions are only included in the shareholders' agreement and not in the constitution, then the sole remedy for a transfer of shares leading to a breach will be an action for breach of contract. If the restrictions are included in the constitution, the transfer may be rendered void if not carried out in accordance with the constitution.

Are there any issues in relation to the enforcement of a shareholders' agreement?

It is usual in a Singapore JV for the company to be a party to the shareholders' agreement so that the parties of the JV have recourse to the company for breach of contract. This is important especially if the JV is autonomous from the parties and has certain obligations under the shareholders' agreement.

The shareholders' agreement, like most contracts, will, if breached, give rise to a claim in damages. However, specific performance of a shareholders' agreement is also available at the court's discretion (where this is "just and equitable").

The parties also need to provide which document will prevail in the event of a conflict between the constitution and the shareholders' agreement. The typical approach is to provide that the shareholders' agreement will prevail.

19 / South Africa

Leroux Odendaal
Partner, Webber Wentzel
Tel: +27 11 530 5639
Mob: +27 82 687 2224
leroux.odendaal@webberwentzel.com

Elodie Maume
Senior Professional Support Lawyer, Webber Wentzel
Tel: +27 21 431 7322
Mob: +27 82 698 9888
elodie.maume@webberwentzel.com

What types of entities are generally used for South African JVs?

South African JVs may take the form of a partnership, a joint venture company or a contractual joint venture.

A profit company is the most common type of entity used for incorporated JVs in South Africa. Profit companies include private companies and public companies.

An unincorporated JV (a partnership or contractual JV) is typically used for a specific project rather than for a continuing relationship where an incorporated JV is usually preferred.

The choice of joint venture vehicle will depend on a variety of factors, including legal implications, the liability of the joint venture parties, commercial objectives, tax considerations, the financial needs of the vehicle and funding techniques.

Are there foreign investment restrictions for South African JVs?

South Africa's exchange control laws regulate the flow of capital into and out of South Africa. Exchange controls affect all cross-border transactions, which are subject to approval by the exchange control regulator or authorised dealers (a local bank licensed to deal in foreign exchange).

Non-residents of the Common Monetary Area (comprising Lesotho, Namibia, South Africa and Swaziland) may invest or disinvest from South Africa and may remit income from local investments, subject to certain restrictions.

There are no restrictions on non-residents owning shares in South African JVs. However, the share certificates will need to be endorsed "non-resident" by an authorised dealer.

The remittance of dividends declared from profits to non-resident shareholders does not require approval from the exchange control regulator and may be approved by authorised dealers.

Non-resident shareholder loans are subject to prior consent from the exchange control regulator or authorised dealer acting in terms of its delegated authority, which may also impose such other terms as it deems appropriate.

Non-resident ownership is restricted in certain sectors or requires approval by or a notification to the relevant regulator (e.g. financial services, aviation, insurance, collective investment schemes and security exchanges).

Black economic empowerment legislation, as well as certain industries (e.g. mining), also set certain requirements for black ownership of South African companies. The granting of licences to operate in certain industries is subject to meeting and maintaining these ownership levels (e.g. mining permits and electronic communication network services licences).

Are there any publicity or other specific formalities e.g. registration or notarisation?

For incorporated JVs, the JV's memorandum of incorporation and any amendments to it must be filed at the Companies and Intellectual Property Commission (the "**Commission**"). These documents are available for public inspection.

Certain other information will also be required to be filed at the Commission, such as changes to directors, change of name of the company and change of registered office.

A shareholders' agreement does not need to be filed at the Commission.

An unincorporated JV is a private arrangement and therefore is not subject to public scrutiny like the memorandum of incorporation of an incorporated JV.

Where one or more parties to the JV is a listed issuer then the relevant provisions of the applicable listing rules will apply (e.g. relating to categorisation and disclosure of significant transactions and related party transactions).

Joint ventures may need to be notified under the merger control provisions of the South African Competition Act 89 of 1998 if the relevant thresholds for notification are met and there is an acquisition of control. However, not all joint venture transactions will constitute a merger, as this will depend on how the joint venture is structured.

Notarisation is not required.

How can a shareholder exercise influence over a South African JV?

Shareholders may exercise influence over a JV through reserved matters. The memorandum of incorporation of an incorporated JV may provide that matters which would otherwise typically be decided by the board of the JV must first be approved by the shareholders. Reserved matters will usually include matters such as entering into material contracts, obtaining financing, issuing shares or amending the memorandum of incorporation.

Shareholders may also agree special voting arrangements in respect of certain matters by increasing the required level of shareholders' approval (e.g. a super-majority or unanimous decision). The default position is that for an ordinary resolution to be approved, it must be supported by more than 50% of the voting rights, whilst 75% approval is required for a special resolution. However, different thresholds for approval may be set in the memorandum of incorporation, provided that a margin of at least 10% exists between the highest established requirement for approval of an ordinary resolution on any matter and the lowest established requirement for approval of a special resolution.

The memorandum of incorporation or the shareholders' agreement of an incorporated JV may grant shareholders or other persons the right to appoint a certain number or the majority of the directors to the board and other committees and/or other senior executive officers of the company. At least 50% of the directors of a profit company must be elected by the shareholders. Shareholders of a profit company are statutorily entitled to remove directors by ordinary resolution. Shareholders of a profit company may also require that certain acts must be approved by the board or that certain restrictions are placed on the ability of the board to delegate their functions.

Are there any issues or restrictions in relation to the transfer of shares in a South African JV?

In general, shareholders of South African JVs have the right to deal freely with their shares. However, the memorandum of incorporation of an incorporated JV may restrict the transferability of its shares. In the case of private companies, the memorandum of incorporation must restrict the transfer of its securities (e.g. by requiring board approval for the registration of transfers of shares or by way of pre-emptive rights in favour of other shareholders).

The memorandum of incorporation or the shareholders' agreement of an incorporated JV may impose further restrictions on the transfer of shares (e.g. lock in periods, drag-along and tag-along rights or put and call options). South African courts interpret provisions limiting transferability restrictively.

If one of the parties to the JV is a listed issuer, the application of the applicable listing rules will need to be considered. Announcement requirements may be triggered depending on the size of the transfer.

If a JV is a "regulated company" (i.e. a public company or a private company in respect of which more than 10% of the issued shares have been transferred in the previous 24 months), the takeover provisions in the South African Companies Act and Companies Regulations will apply to a transfer of shares if it is effected as part of an "affected transaction". In such a case, the transaction will require a compliance certificate or exemption from the takeovers regulator and certain disclosure requirements will apply. In addition, other takeover provisions may apply (such as mandatory offers if a person acquires an interest of 35% or more in a regulated company).

The disposal of shares in a South African JV by a South African tax resident and in certain circumstances a non-resident, will be subject to capital gain tax or income tax.

Are there any issues in relation to the enforcement of a shareholders' agreement?

A shareholders' agreement is a private agreement governed by the normal principles of the law of contract. It typically contains provisions governing the breach of the agreement by any of the parties and the resolution of disputes between the parties in relation to the agreement.

The most common remedies for breach of a shareholders' agreement are damages and/or specific performance (an order by the court against the defaulting shareholder to perform its obligations under the shareholders' agreement).

A shareholders' agreement often contains provisions forcing a shareholder in breach of certain provisions of the agreement to sell its interest in the JV to the non-defaulting shareholders.

Any provision of a shareholders' agreement which is inconsistent with an incorporated JV's memorandum of incorporation or the South African Companies Act is void to the extent of the inconsistency. The JV's memorandum of incorporation will therefore prevail over the shareholders' agreement in the case of a conflict. It is essential to ensure that the provisions of the shareholders' agreement are consistent with the memorandum of incorporation.

Where a shareholders' agreement in respect of a South African JV is governed by the laws of another jurisdiction (e.g. English law), any potential conflict of laws between the relevant jurisdiction and the enforceability of the terms of the shareholders' agreement in South Africa will need to be considered.

20 / Spain

Alejandro Ortiz
Senior Partner, Madrid
Tel: +34 91 399 61 40
Mob: +34 68 746 73 84
alejandro.ortiz@linklaters.com

Lara Hemzaoui
Partner, Madrid
Tel: +34 91 399 61 84
Mob: +34 67 062 73 62
lara.hemzaoui@linklaters.com

Alexander Kolb
Partner, Madrid
Tel: +34 91 399 61 75
Mob: +34 60 055 55 59
alexander.kolb@linklaters.com

Victor Manchado
Partner, Madrid
Tel:+34 91 399 61 63
Mob: +34 66 745 14 34
victor.manchado@linklaters.com

What types of entities are generally used for Spanish JVs?

A number of legal entities can be used for setting up a Spanish JV. By far the most common types of entities used for Spanish JVs are limited liability companies, mainly private limited companies (*Sociedad de Responsabilidad Limitada* or "**SL**") and, to a lesser extent, public limited companies (*Sociedad Anónima* or "**SA**"). Unlimited liability companies are rarely used.

An SA is required if the JV will be listed or carry on certain regulated activities (e.g. banking or insurance services). The SL is subject to lower share capital requirements (€3,000 compared to €60,000 for an SA) and has a slightly more flexible legal framework from a corporate perspective.

There are other legal entities or forms of collaboration that can be used to establish a Spanish JV which may be appropriate in certain cases, such as temporary business alliances formed for a specific project or service (*Unión Temporal de Empresas* or "**UTE**"). The main characteristic of UTEs, commonly used for engineering and construction projects, is that they do not have a separate legal personality from that of their members and, therefore, they are unlimited liability entities.

It is important to note that the choice of joint venture vehicle or arrangement will have tax implications, which are likely to be very significant. Tax considerations, therefore, need to be taken into account at an early stage and may in fact drive the structure.

Other key factors to consider include type of business, liability of investors, the financing needs of the vehicle and the type of venture (e.g. single project, ongoing business, independent identity).

Are there foreign investment restrictions for Spanish JVs?

As a general rule, there are no restrictions on foreign investment in Spanish entities.

However, Spanish law sets out certain restrictions regarding investment by non-EU based investors in certain key sectors(e.g. energy, gas, aviation, telecommunications and certain utilities. Generally, these require a non-EU investor to obtain an authorisation for an acquisition of shares providing a significant influence in such companies. The thresholds which trigger the need for authorisations vary in each case.

In addition, foreign investments and divestments in Spain must be reported to the Foreign Investments Registry of the Ministry of Economy and Competitiveness. As a general rule, these filings are for information purposes only and can be made within one month after the investment has been completed.

However, as an exception:

- foreign investments made from tax havens must be declared six months in advance (still for information purposes), and
- certain foreign investments must be authorised in advance, namely those in connection with activities directly related to national defence or real estate assets acquired by non-EU nationals for diplomatic purposes.

Are there any publicity or other specific formalities e.g. registration or notarisation?

Formalities depend on the type of entity used.

Formation of an SA or SL requires notarisation of a deed of incorporation (which includes the company's articles of association). The deed is filed with the Commercial Registry.

Any subsequent amendments to the company's articles of association must be notarised and filed with the Commercial Registry. Certain other corporate information must also be filed with the Commercial Registry, such as the appointment and removal of the directors, annual accounts and general powers of attorney.

Unlike the company's articles of association, shareholders' agreements are not publicly available and Spanish law does not require them to be notarised or filed at the Commercial Registry (except in the case of listed companies, where certain shareholders' agreements must be filed with the Commercial Registry and notified to the Securities Market Commission).

Spanish companies are obliged to identify their ultimate "beneficial owner" (i.e. person who ultimately owns or controls, directly or indirectly, 25% or more of its share capital or voting rights). Obliged persons under Spanish Anti-Money Laundering rules (e.g. auditors, notaries and credit entities) must verify the identity of the beneficial owner of any company before entering into business relations or executing any transactions (which includes the entry into of Spanish public documents before a Spanish notary). If no individual can be identified as a beneficial owner, the identity of the directors of the company should be disclosed, together with copies of their passports.

In addition, any joint venture may need to be notified under EU, Spanish or other applicable merger control rules.

How can a shareholder exercise influence over a Spanish JV?

The Spanish Companies Act, which applies to both SAs and SLs, reserves decisions on certain matters for the shareholders (e.g. the approval of the annual accounts, appointment/removal of directors, amendments to articles of association and share capital increases/reductions). Recent amendments extended the exclusive competences of the shareholders' meeting to take decisions in relation to the acquisition, disposal or contribution of core assets. There is a rebuttable presumption that an asset is a core asset if the amount of the transaction exceeds 25% of the value of the company's total assets on its latest balance sheet.

Shareholders may agree to expand the list of matters reserved for their decision. In addition, the shareholders' meeting may issue instructions to the management body or determine that certain management matters will be subject to shareholder approval. However, any restrictions on the management body's powers will not be effective against third parties.

Shareholders may also agree to establish reinforced voting majorities in relation to those matters reserved for them, which may grant one or more shareholders the capacity to veto resolutions.

Are there any issues or restrictions in relation to the transfer of shares in a Spanish JV?

Regulations applicable to transfers of shares vary depending on the type of entity.

Spanish law does not restrict the transfer of shares in an SA. Share transfers may however be restricted by the company's articles of association and/or shareholders' agreement. However, the articles of association must not include restrictions which effectively render the shares non-transferable.

In contrast, Spanish law does however restrict the transfer of shares in an SL. Where not regulated by the SL's articles of association, voluntary transfers of shares are subject to the prior consent of the JV company (which consent cannot be withheld unless either an existing shareholder, a third party nominated by the company or the company itself is interested in acquiring the shares). An SL's articles of association must not include a provision which effectively renders the shares freely transferable.

In general, provisions in the company's articles of association prohibiting the voluntary transfer of shares are not valid unless the lock-in is for a fixed period of time (up to two years for an SA or five years for an SL). A longer period of time may be agreed in an SL but shareholders who did not vote in favour of the lock-in and those with no right to vote are entitled to withdraw from the company at any time.

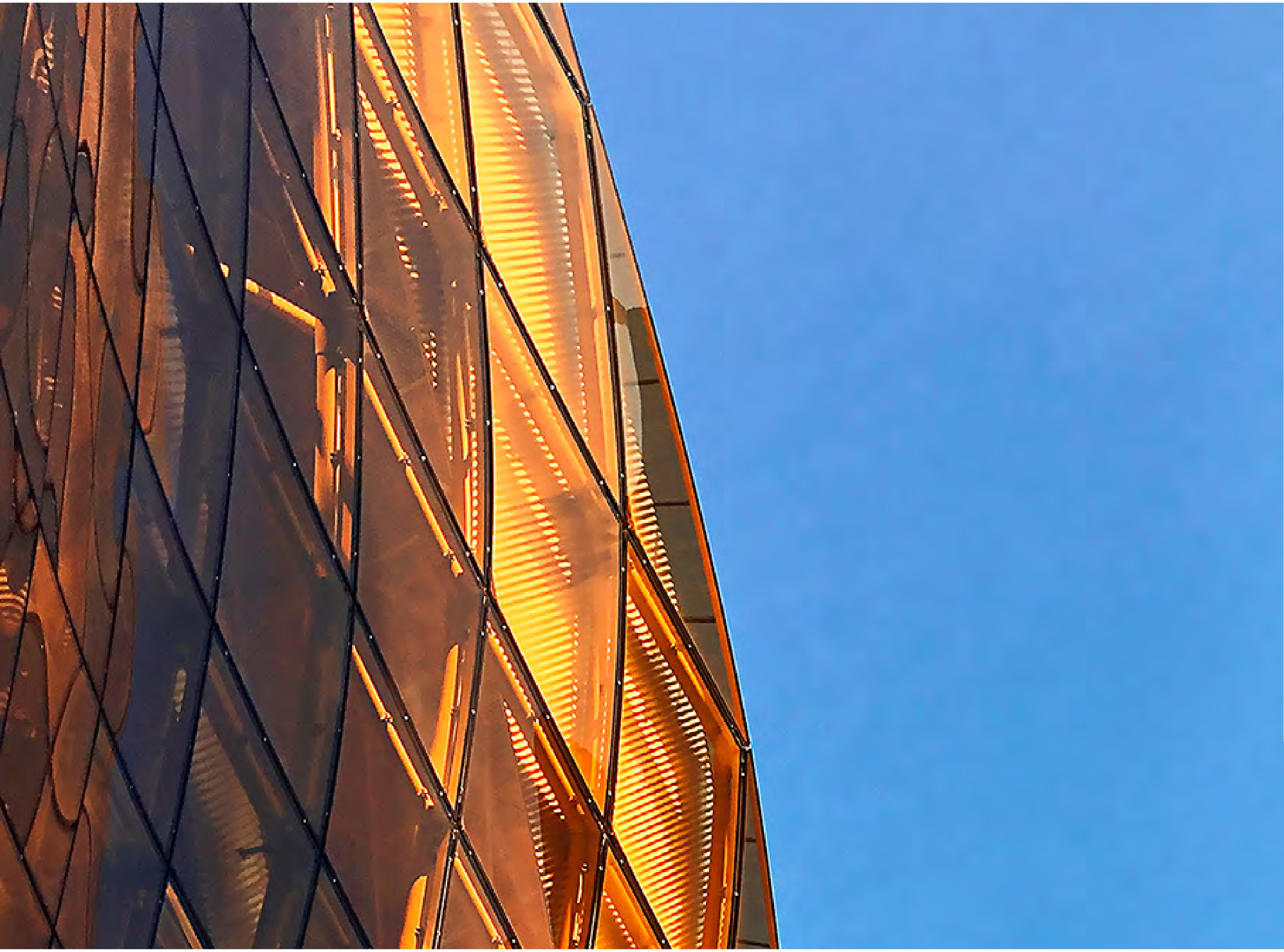
Are there any issues in relation to the enforcement of a shareholders' agreement?

In the event of a conflict between the shareholders' agreement and the company's articles of association, it is common to state in the shareholders' agreement that, between the parties, the arrangements in the shareholders' agreement will prevail.

Under the Companies Act, restrictions or arrangements agreed in a shareholders' agreement are only enforceable against the JV company if they are also recorded in its articles of association. This means that, for example, where there is a breach of a shareholders' agreement containing a share transfer restriction or a voting arrangement, the non-breaching parties could seek damages – or any other remedy to which they may be entitled under applicable law, such as specific performance or an injunction – but not cancellation of the transfer or the decision taken in breach of such agreement. However, most legal scholars are of the opinion that, in general, shareholders' agreements are enforceable against the JV company if all the shareholders have signed the agreement and enforcement of the agreement does not affect the rights of bona fide third parties.

Given the above, in order for the shareholders' agreement to be enforceable against the JV company (and not only among the parties), it is common for the parties to the shareholders' agreement to undertake to reflect its provisions in the JV's articles of association (to the extent permitted by and not contrary to law).

21 / Sweden



Fredrik Lindqvist
Managing Partner, Stockholm
Tel: +46 8 665 66 21
Mob: +46 70 663 74 20
fredrik.lindqvist@linklaters.com

Elisabet Lundgren
Partner, Stockholm
Tel: +46 8 665 67 77
Mob: +46 70 326 67 77
elisabet.lundgren@linklaters.com

What types of entities are generally used for Swedish JVs?

A private limited liability company is the most common type of entity used for Swedish JVs.

Other types of entities that can be used include public limited companies, partnerships or limited partnerships. Limited partnerships must have at least one partner who is a general partner with unlimited liability and may also have limited partners.

A Swedish JV can also be established between two or more parties on a contractual basis (e.g. pursuant to a consortium or co-operation agreement).

Key factors when deciding on the appropriate type of corporate entity when establishing a Swedish JV include tax considerations, the liability of investors, the financing needs of the vehicle and the type of venture (e.g. single project, ongoing business, independent identity).

Are there foreign investment restrictions for Swedish JVs?

Sweden does not have a stand-alone regime directly controlling or restricting foreign investments in Swedish entities.

However, there are various regulated sectors in Sweden where regulatory consent may be necessary, including financial services, insurance, broadcasting and network concessions. Such consent might be needed for establishing a Swedish JV or transferring an interest in an existing Swedish JV.

Are there any publicity or other specific formalities e.g. registration or notarisation?

If the Swedish JV is a limited liability company, certain company information needs to be registered with the Swedish Companies Registration Office, e.g. the articles of association, annual accounts and details on board composition and share capital. The register of the Swedish Companies Registration Office is public.

The shareholders' agreement does not need to be registered.

Where one or more parties to the Swedish JV is a listed issuer then it will be necessary to bear in mind the relevant provisions of the applicable listing rules (e.g. relating to disclosure of significant transactions and related party transactions).

Notarisation is not required.

How can a shareholder exercise influence over a Swedish JV?

If the Swedish JV is a limited liability company, some matters are specifically reserved for the shareholders under the Swedish Companies Act. Such matters, where specific minimum thresholds are required for binding resolutions, include changes to the articles of association, declaring dividends and issues of shares and other financial instruments.

Shareholders commonly exercise influence over a Swedish JV by restricting the powers of the management of the company. This usually takes the form of a prior approval from the shareholders for certain decisions (reserved matters) to be taken and/or implemented by management. These restrictions are normally set out in the shareholders' agreement (binding between the joint venture parties) and in the written work procedures governing the work of the board of directors. These are adopted by and binding on the respective board of directors of the Swedish JV and any subsidiaries.

Are there any issues or restrictions in relation to the transfer of shares in a Swedish JV?

As a general rule, shareholders of a limited liability company may freely transfer all or part of their shares to another shareholder or to a third party. However, the right to transfer shares may be restricted according to the articles of association or the shareholders' agreement.

The articles of association of a private limited liability company may include a clause under which one or more shares may be transferred to a new owner only subject to the company's consent, a right of first refusal clause or a right of first offer clause.

A shareholders' agreement commonly contains drag-along or tag-along rights or an initial "lock-in" period during which shareholders are not permitted to transfer their shares. The shareholders' agreement may also stipulate what happens if the parties fail to agree, e.g. it could provide that the company be liquidated after a certain period of time.

It is not uncommon for joint venture parties to pledge their shares to each other as security for the respective party's due fulfilment of the transfer restrictions/obligations.

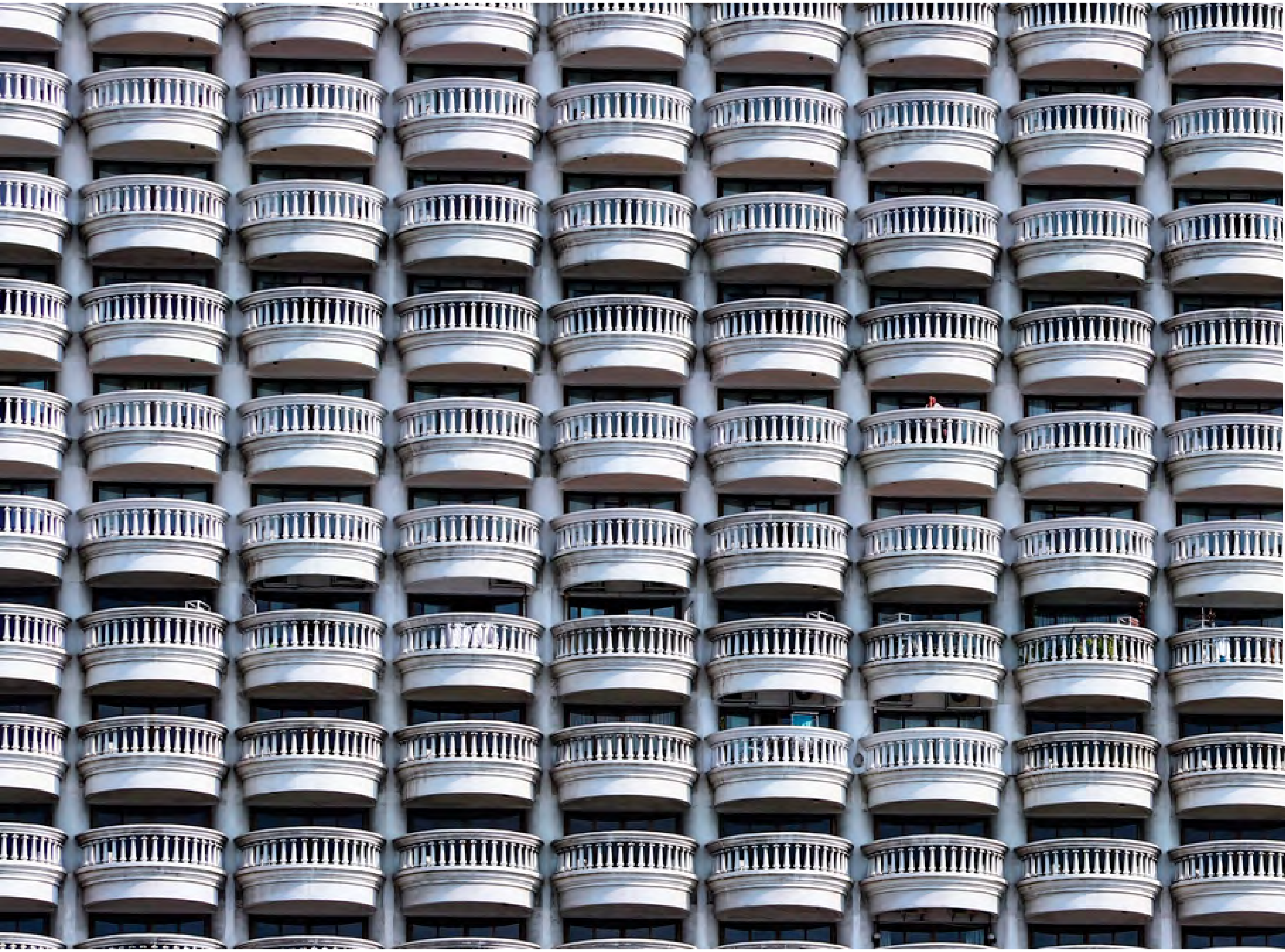
Are there any issues in relation to the enforcement of a shareholders' agreement?

The most common remedy for breaches of a shareholders' agreement is damages. However, an injunction may be an alternative where specific performance is required.

In the event of a conflict between the shareholders' agreement and a company's articles of association, either document can prevail as between the parties (although the shareholders' agreement will not bind third parties). Shareholders' agreements usually contain a provision saying that the parties intend that the agreement will prevail in the event of a conflict, and that the parties will procure that the articles of association are amended accordingly.

However, it should be noted that a resolution passed by the board of directors or by the shareholders' meeting in accordance with the provisions of the Swedish Companies Act and the company's articles of association, but in breach of the provisions of the shareholders' agreement, will be a legally binding resolution. The available remedy is to seek damages under the shareholders' agreement from the defaulting party. The shareholders' agreement should contain a provision stating that the parties are obliged to ensure that their representatives on the board of directors act in accordance with the shareholders' agreement. A resolution made in breach of the shareholders' agreement by any shareholder-appointed director will then constitute a breach by that party of the shareholders' agreement.

22 / Thailand




Wilailuk Okanurak
Senior Partner, Bangkok
Tel: +66 2305 8024
Mob: +66 818 28 01 04
wilailuk.okanurak@linklaters.com

Sutthipong Koohasaneh
Counsel, Bangkok
Tel: +66 2305 8060
Mob: +66 818 35 78 09
sutthipong.koohasaneh@linklaters.com

What types of entities are generally used for Thai JVs?

Thai JVs are generally formed as private limited liability companies and, to much lesser extent, partnerships.

Private limited liability companies in Thailand must be incorporated with at least three shareholders who each must hold at least one share. In general, there are no restrictions as to the nationality or residency of the directors of private limited liability companies. However, companies that are engaged in certain commercial activities may be subject to requirements regarding the nationality of their directors,, e.g. commercial broadcasting and television and insurance businesses, must have a board composed of not less than 75% Thai directors.

A partnership may be an ordinary partnership or a limited partnership. In an ordinary partnership, all partners jointly have unlimited liability for the debts and obligations of the partnership. In a limited partnership, at least one partner must have limited liability, and at least one partner must have joint and unlimited liability for all the debts and obligations of the partnership.

Are there foreign investment restrictions for Thai JVs?

The Foreign Business Act B.E. 2542 (1999) ("FBA") restricts the conduct of or investment in certain businesses by foreign persons. This applies to:

(i) foreign nationals,
(ii) foreign incorporated entities,
(iii) Thai incorporated entities of which 50% or more of the share capital is held by (i) or (ii), and
(iv) Thai incorporated entities of which 50% or more of the share capital is held by any person in (i), (ii) or (iii)).

Certain exemptions apply, e.g. where a foreign person is entitled to a privilege under an international treaty to which Thailand is a party or an investment promotion is obtained from the Board of Investment of Thailand.

FBA Annex 1 strictly prohibits foreign persons from participating in certain businesses for "special reasons".

FBA Annex 2 restricts foreign persons from participating in certain businesses unless they obtain a foreign business licence ("**FBA Licence**") from the Ministry of Commerce with approval from the Thai government. Nevertheless, even if the FBA Licence and the Thai government's approval are granted, the business must have at least 40% of its shares owned by Thai nationals and 40% of its directors must be Thai. To date, no foreign entity has successfully obtained the FBA Licence under Annex 2.

FBA Annex 3 restricts foreign persons from conducting certain businesses or holding 50% or more of share capital in the entity which conducts any such business, where it is believed that Thai nationals are not ready to compete with foreign persons unless the foreign person or relevant business obtains an FBA licence from the Ministry of Commerce.

In addition to the FBA, several other laws impose restrictions on foreign investment in Thai JVs which operate certain regulated businesses, e.g. financial institutions and insurance.

Subject to certain exceptions, a foreign person (including a Thai company which has more than 49% of its capital owned by a foreign national) is restricted from land ownership (under the Land Code B.E. 2497 (1954)).

Are there any publicity or other specific formalities e.g. registration or notarisation?

Incorporation documents and the memorandum and articles of association must be registered with the Ministry of Commerce and are made available to the public.

If the registration application is executed outside Thailand, it must be notarised.

Public disclosure of shareholders' agreements or partnership agreements is not required in Thailand.

How can a shareholder exercise influence over a Thai JV?

In general, shareholders are able to exercise influence over a JV through reserved matters, which are matters that must be approved by the shareholders before the JV is authorised to take such action.

Reserved matters may be included in the shareholders' agreement and may also be included in the articles of association of a private limited liability company.

If the JV company is not a party to the shareholders' agreement, including the reserved matters in the articles of association will place a direct obligation on the directors to comply with these reserved matters when conducting the business of the company.

In general, under Thai company law, items that are material to the operations, financial position or governance of a company require the approval of at least 75% of the total number of shares held by attending shareholders with voting rights, e.g. resolutions relating to a capital increase or reduction, amendments to the memorandum and articles of association, amalgamation and dissolution. In addition, further shareholder reserved matters may be specified in the articles of association.

Directors are required to act in the best interest of the company, and not any specific shareholder. Shareholders do not have the direct legal authority to instruct the directors of the company.

Are there any issues or restrictions in relation to the transfer of shares in a Thai JV?

In general, shares can be freely transferred without any restriction unless a restriction is included in the shareholders' agreement or the articles of association of a private limited company.

Such restrictions may include a right of first refusal or a right of first offer, drag-along or tag-along rights or an initial "lock in" period during which shareholders are not permitted to transfer their shares.

An issue of new shares by a private limited liability company is subject to pre-emptive rights in proportion to each shareholder's existing shareholding.

Are there any issues in relation to the enforcement of a shareholders' agreement?

In order for the Thai courts to enforce a shareholders' agreement which is governed by foreign law, the choice of law will be recognised and applied only to the extent to which such law:

> is proven to the satisfaction of the Thai courts, and
> is not considered contrary to the public order or good morals of the people of Thailand (which is subject to the Thai courts' interpretation on a case-by-case basis).

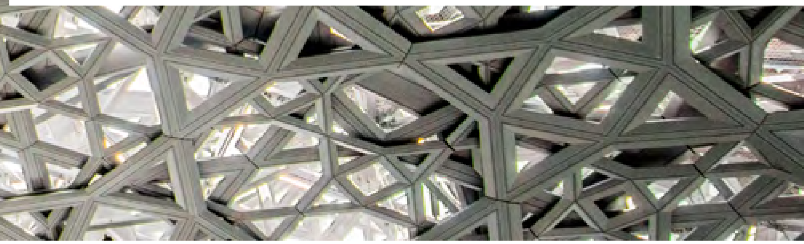
Any judgement or order originating from a foreign court under a foreign governing law would not itself be enforceable against a JV company or the parties to a shareholders' agreement by the Thai courts, but may at the discretion of the Thai courts be introduced as evidence in new proceedings initiated in a Thai court.

A shareholders' agreement can be enforced only between the contracting parties, and the remedy for a breach is damages. Specific performance remedies are very rare in Thailand. Based on a judgment of the Supreme Court of Thailand, provisions of a shareholders' agreement which impose an obligation on the company to undertake any action in contradiction to the provisions of Thai law that stipulate the form of company, the returns to shareholders or the relations between the company and its shareholders may be considered contrary to the public order and may not be enforceable against the company.

If there is a conflict between the shareholders' agreement and the articles of association, the shareholders' agreement would prevail if this was specified in the shareholders' agreement. However, the shareholders' agreement cannot be enforced against a person or company which is not a party to the agreement, unless the relevant provision is also stated in the articles of association of the company.

Linklaters operates in Thailand through Linklaters (Thailand) Ltd, an affiliate of Linklaters LLP.

23 / United Arab Emirates (excluding free zones)



Scott Campbell
Managing Partner, Middle East
Tel: +971 4 369 5811
Mob: +971 5 0552 6206
scott.campbell@linklaters.com

Nicholas Edwards
Partner, Abu Dhabi
Tel: +971 2 659 2124
Mob: +971 5 6996 9260
nicholas.edwards@linklaters.com

Waleed Rasromani
Managing Associate, Dubai
Tel: +971 4 369 5817
Mob: +971 5 0652 6281
waleed.rasromani@linklaters.com

What types of entities are generally used for UAE JVs?

The limited liability company ("**LLC**") is the vehicle most commonly used for a private JV in the United Arab Emirates ("**UAE**"). LLCs are established and regulated by the Federal Commercial Companies Law No.2 of 2015 ("**CCL**")

LLCs combine elements of an English private limited company and an English partnership. LLCs are generally less flexible than an English private company and there are several key legal differences from UK private companies (including foreign ownership restrictions and pre-emption rights on share transfers).

An LLC can be formed by a minimum of one and a maximum of 50 persons, known as members. The liability of members is limited to the extent of their shares. Distribution of profit and loss can be mutually agreed by them. LLC members have uncertified "interests" in the company, rather than certified shares. LLCs may not offer shares to the public and list shares on an exchange. The activities LLCs are permitted to carry out are restricted and they may not carry out banking and insurance activities or investing money for the account of third parties.

An LLC is managed by one or more managers, who may or may not be members. There is no requirement for a specific percentage of managers to be UAE nationals, as there is for UAE joint stock companies. An LLC therefore allows foreign investors to maintain control of its management.

It is common practice for UAE government entities to use a private joint stock company when establishing JVs to which they are a party.

Are there foreign investment restrictions for UAE JVs?

UAE law restricts the level of foreign ownership of domestic companies, including LLCs. This approach is common across many jurisdictions in the Middle East.

The CCL requires an LLC to have not less than 51% of its share capital owned by UAE nationals (subject to certain limited exceptions). The CCL allows the UAE Cabinet to restrict classes of activity/sectors to UAE nationals only, or to permit foreign investors to own more than 49% (and up to 100%) of an LLC.

Foreign ownership restrictions may be greater in certain sectors where additional restrictions apply, including the insurance, banking, commercial agency and energy sectors.

In practice, there may also be other restrictions which could affect the overall investment environment. These may include restrictive licensing mechanisms, sponsorship and distributorship requirements and restrictions on land ownership by foreign entities. Entry barriers can also arise for other reasons, including state ownership in key sectors.

Foreign ownership restrictions do not apply to companies:
> incorporated in free zones in the UAE,
> operating in certain sectors (including the oil, electricity, gas and water industries where greater foreign investment restrictions apply), and
> that receive a specific exemption from the Cabinet of Ministers of the UAE (which is very difficult to obtain as it requires support across all of the Emirates).

Reform of the foreign investment restrictions has been proposed by the UAE Government. There is no official consultation on the draft law and the legislative timetable is not known.

Are there any publicity or other specific formalities e.g. registration or notarisation?

In order to establish a new LLC, the JV parties must prepare the Memorandum of Association in Arabic (to be signed by all shareholders before a notary) and obtain the approval of the Department of Economic Development in the relevant Emirate.

Once the relevant Department of Economic Development has issued the certificate of incorporation and commercial licence, the LLC will be registered on the commercial register maintained by the relevant Department of Economic Development, its details will be published in the Ministry of Economy & Commerce's Companies Bulletin and it will register with the relevant Emirate's Chamber of Commerce & Industry. Setting up an LLC can be time consuming.

While LLCs are required to register their Memoranda of Association (together with any amendments) in the commercial register maintained by the relevant Department of Economic Development, the commercial registers are not searchable by the public. It is not possible for members of the public to obtain from the competent authority a copy of a company's commercial registration certificate, copies of constitutional documents or to check if a company is subject to insolvency procedures.

The shareholders' agreement is a private document between the shareholders (to which the company may also be a party) and, therefore, there are no approval, registration or notarisation requirements relating to these agreements.

How can a shareholder exercise influence over a UAE JV?

Economic interest does not necessarily have to follow the level of registered shareholdings in the context of a UAE LLC. A range of measures in the region are used to enable shareholders to exercise influence over the LLC, which may mitigate the effect of the foreign ownership restrictions. The nature of the measures varies from structure to structure, but they would typically involve a combination of bilateral contractual arrangements (including a shareholders' agreement) between the shareholders and the entrenchment of the rights in the UAE company's Memorandum of Association.

A common way for shareholders to exercise influence over a UAE JV is through reserved matters, being matters which must be approved by the shareholders before the UAE JV is authorised to take such action. Shareholder reserved matters could include items such as changes to the Memorandum of Association, changes to share capital and entering into or terminating key contractual arrangements.

Different thresholds can be set for approval of shareholder reserved matters such as unanimous or majority consent, or the consent of specific key shareholders. The CCL also prescribes minimum thresholds for certain matters (including dissolving or merging the company), which must also be complied with.

Shareholders may also require that certain matters are reserved for the board, rather than management being permitted to approve such matters (e.g. capital expenditure or transactions over a certain amount). Board reserved matters may overlap with shareholder reserved matters.

In general, reserved matters will be set out in the shareholders' agreement, to which the JV company is often a party. Certain shareholders' agreements should, if possible, be incorporated in the Memorandum of Association, which will need to be agreed with the notary before they are notarised.

It is, therefore, important to consider foreign investment issues from the beginning to enable the parties to consider structuring the JV arrangement.

Are there any issues or restrictions in relation to the transfer of shares in a UAE JV?

The co-operation of the joint venture partner is nearly always required for the transfer and issue of shares in a UAE JV. These processes can be time-consuming and highly procedural. In practice, share transfers require all shareholders to sign a new Memorandum of Association reflecting the change in shareholders and shareholdings before a notary.

This is problematic in adversarial-type situations (e.g. deadlock and put/call) where the other party has to comply in order to achieve the desired result. Generally, powers of attorney in advance might not work as intended, as they can be revoked and specific performance is often not available. In addition, certain exit arrangements, such as "Russian roulette"- type clauses, might also be problematic due to the foreign ownership restrictions described above which restrict to whom shares can be transferred.

Shareholders in a UAE LLC have mandatory pre-emption rights on the transfer of shares (subject to certain limited exceptions). It should be possible for shareholders to waive their pre-emption rights by agreement. However, this kind of agreement may not be considered irrevocable in the UAE and there would be a residual risk that the shareholders may not co-operate when it came to effecting the transfer before a notary. Without the signature of all shareholders, the transfer would not be valid.

Where foreign share ownership restrictions under local law prevent a party from exercising its share transfer rights, some shareholders' agreements require joint venture partners to use efforts to give effect to such rights by way of alternative structures in compliance with applicable law.

There is no requirement to transfer or issue new share certificates (as LLCs do not issue share certificates). The LLC's share register and the commercial register maintained by the relevant Department of Economic Development must be updated to reflect the change in ownership.

Are there any issues in relation to the enforcement of a shareholders' agreement?

Partners in UAE JVs often use a range of bespoke measures to mitigate the effect of foreign ownership restrictions, allowing minority foreign shareholders, in practice, to have the benefits that full or near full ownership of the UAE JV would offer. The use of such measures is not without risk. Firstly, these arrangements may be found to be contrary to UAE law or public policy. In particular, nominee arrangements could be challenged under the UAE Federal Anti-Concealment Law which prohibits nominee or fronting arrangements that allow foreigners to undertake economic or professional activities which they are not permitted to carry out. However, the level of risk depends on the nature of the JV's business. We are not aware of any instances where that law has been enforced and understand that the application of the law has been deferred by the UAE Ministry of Economy. Secondly, there is a risk of the counterparty breaching the terms of the bespoke contract.

If the shareholders' agreement is governed by foreign law and foreign courts have jurisdiction to hear disputes, there are difficulties with foreign court judgments being recognised and enforced by UAE courts. A foreign court judgment may be enforced by a UAE court subject to conditions which, in practice, tend to be applied restrictively. Broadly speaking, a UAE court is unlikely to enforce a foreign judgment unless there is a reciprocal enforcement treaty and more likely to assert jurisdiction and re-hear the merits of the case, applying UAE law, irrespective of the parties' agreement as to jurisdiction and choice of governing law. The UAE is a party to a number of (mostly regional) enforcement treaties, including the GCC Convention 1996 and the Riyadh Arab Agreement for Judicial Co-operation (1983). There is no reciprocal enforcement treaty in place between the UAE, and, e.g. the United Kingdom or the United States.

Arbitration may offer greater certainty for resolving shareholder disputes and enforcing contractual rights, without a re-hearing of the dispute. There should be a greater chance that a foreign arbitral award (as opposed to a foreign judgment) will be enforced by a UAE Court where reciprocal enforcement arrangements apply (e.g. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958). However, there is limited caselaw to indicate how the New York Convention would be applied and it is not certain that UAE courts will enforce foreign arbitral awards.

24 / United Kingdom

Simon Branigan
Partner, London
Tel: +44 20 7456 3309
Mob: +44 79 0005 7894
simon.branigan@linklaters.com

Jessamy Gallagher
Partner, London
Tel: +44 20 7456 4255
Mob: +44 77 4747 0559
jessamy.gallagher@linklaters.com

Michael Honan
Partner, London
Tel: +44 20 7456 5488
Mob: +44 79 1746 1813
michael.honan@linklaters.com

Wilma Rix
Senior Associate, London
Tel: +44 20 7456 4914
Mob: +44 79 1753 1168
wilma.rix@linklaters.com

What types of entities are generally used for UK JVs?

A limited liability company is the type of entity most commonly used for UK JVs. In particular, parties will often choose to use a private company limited by shares.

Other types of entities used for UK JVs, especially for tax reasons include limited partnerships and limited liability partnerships.

Limited partnerships must have at least one partner who is a general partner with unlimited liability and may also have limited partners. A limited liability partnership is a corporate entity with limited liability plus certain features of a partnership.

A UK JV can also be established between two or more parties on a contractual basis (e.g. pursuant to a consortium or co-operation agreement).

It is important to note that the choice of joint venture vehicle or arrangement will have tax implications, which are likely to be very significant. Tax considerations, therefore, need to be taken into account at an early stage and may in fact drive the structure.

Other key factors to consider include: the liability of investors, the financing needs of the vehicle and the type of venture (e.g. single project, ongoing business, independent identity).

Are there foreign investment restrictions for UK JVs?

The UK does not have a stand-alone regime directly controlling or restricting foreign investments in UK entities. However, there are some indirect restrictions. It is, therefore, important to consider foreign investment issues from the beginning to allow for the possibility of government review.

There are various UK business sectors where government or regulator consent may be necessary, including financial services, broadcasting, utilities and railways. Such consent would apply to establishing a UK JV or transferring an interest in an existing UK JV.

The UK Secretary of State may intervene in an investment in a UK JV where it believes:

- the investment may raise national security issues, or
- there are other strictly defined “special public interest” or “public interest” issues at stake, such as the plurality of the media/press freedom, or the stability of the UK financial system.

These powers (in the UK Enterprise Act 2002 and Article 21(4) of the EU Merger Regulation) vary in scope depending on whether the investment is caught by the UK or EU merger control regimes (or neither) and such interventions have been relatively rare.

Recent amendments strengthen the power of the government to intervene in deals involving the military, dual-use, computing hardware and quantum technology sectors by lowering the intervention thresholds. The government is also considering how it can tighten up its review process in the longer term. Mandatory notification may be required in the future for certain strategic sectors including, as a minimum, energy, nuclear, defence, telecommunications and transport.

In a small number of UK companies, particularly in the defence sector, the UK Government holds “golden shares” which could be used to control foreign investment in such companies.

The UK Industry Act 1975 allows the UK Government to prohibit the sale of a 30%+ investment stake in an “important manufacturing undertaking” to a non-resident, if:

- the entity is considered by the Secretary of State to be of special importance to the UK or any substantial part of the UK, and
- the change of control would be contrary to the national interest.

However, this power has never been used.

Are there any publicity or other specific formalities e.g. registration or notarisation?

For incorporated JVs, the articles of association and any changes to them must be registered with the Registrar of Companies. They are available for public inspection. Partnership agreements are not available for public inspection.

In practice, shareholders’ agreements are rarely publicly registered. Strictly a shareholders’ agreement between all the shareholders should be registered if it purports to take precedence over the company’s articles of association or if the articles of association cannot be interpreted without reference to the shareholders’ agreement. However, registration will not be required if the shareholders’ agreement does not itself amend the articles of association.

Depending on the nature of the UK JV, certain other information must also be filed with the Registrar of Companies (e.g. accounts and the identity of each director if an incorporated JV). In addition, since 2016, UK companies and limited liability partnerships must hold and maintain a register of people with significant control (PSCs). Registrable PSCs include individuals, state entities and UK corporate entities which hold more than 25% of a UK entity’s shares or voting rights or can appoint or remove a majority of the directors or otherwise have the right to exercise or actually exercise significant influence or control. PSC information must be filed with the UK Registrar of Companies and made available for public inspection. In a joint venture, it will be necessary to consider control structures to identify the PSCs and other intermediate entities which may need to be registered.

Where one or more parties to the JV is a listed issuer then it will be necessary to bear in mind the relevant provisions of the applicable listing rules (e.g. relating to classifying and disclosure of significant transactions and related party transactions).

In addition, any joint venture may need to be notified under EU, UK or other applicable merger control rules.

Notarisation is not required.

How can a shareholder exercise influence over a UK JV?

A common way for shareholders to exercise influence over a UK JV is through reserved matters, being matters which must be approved by the shareholders before the JV entity is authorised to take such action. Shareholder reserved matters could include items such as changes to constitutional documents, changes to share capital, and entering into or terminating key contractual arrangements. Different thresholds can be set for approval of shareholder reserved matters such as unanimous or majority consent or requiring the consent of specific key shareholders. The UK Companies Act 2006 also prescribes minimum majorities for certain matters, such as changing constitutional documents, which must be complied with.

Shareholders may also require that certain matters are reserved for the board, rather than management being permitted to approve such matters (e.g. capital expenditure or transactions over a certain amount). Board reserved matters may overlap with shareholder reserved matters. In addition, the shareholders' agreement may provide for shareholders to have the right to appoint directors to the board (e.g. on a basis proportional to the number of shares held) so that shareholders have indirect control over board matters. However, it is important to note that the legal duties of UK company directors mean that they cannot blindly follow the instructions of the shareholder who has appointed them. In particular, directors must act in the way that they consider most likely to promote the success of the company for the benefit of the members as a whole. In practice, the legal requirements are often manageable but should be borne in mind, including when deciding which powers to reserve to the shareholders and which to the board.

In general, reserved matters will be set out in the shareholders' agreement, to which an incorporated JV is often a party. They can also be included in the JV's articles of association (although note that the articles of association will be publicly available).

Shareholders can also exercise influence over the JV through contractual arrangements or specifying restrictions in the articles of association. For example, the shareholders and the JV may set out in a contractual arrangement that the JV will only enter into transactions in a particular sector or in particular regions.

In all cases it will be necessary to consider the tax implications of the arrangements put in place.

Are there any issues or restrictions in relation to the transfer of shares in a UK JV?

The basic premise in the UK is that shares are freely transferable and any rights of pre-emption or restrictions on transfers will be narrowly construed by the court.

There is no limit to the number of restrictions which can be imposed by the articles of association or a shareholders' agreement although these must be clearly described to be enforceable. Restrictions can include a right of first refusal or a right of first offer, drag-along or tag-along rights or an initial "lock-in" period during which shareholders are not permitted to transfer their shares. If a restriction is to be effective, it should provide that the relevant rights apply to any attempt to transfer or otherwise dispose of any interest, whether legal or equitable, in the shares. Restrictions might also distinguish between disposal of control over the voting rights attaching to the shares and of the right to receive dividends.

If one of the parties to the UK JV is a listed issuer, the application of the UK Listing Rules will need to be considered. Announcement or shareholder approval requirements may be triggered depending on the size of the transfer.

Stamp taxes are chargeable on a transfer of UK shares and a new owner can only be registered as a member of the JV company once these formalities have been dealt with.

Are there any issues in relation to the enforcement of a shareholders' agreement?

The most common remedy for breach of a shareholders' agreement is damages but an injunction may be available at the discretion of the court, e.g. to ensure that each party takes the necessary voting action when voting as a shareholder of the JV to give effect to the terms of the shareholders' agreement. Shareholders' agreements often contain exit provisions which may provide that parties in breach of certain terms of the agreement are forced to sell their shares to non-defaulting parties.

Where the agreement provides for shareholder costs to be borne by a UK JV company, it will be necessary to consider whether this may amount to a distribution to shareholders. A UK company can only make a distribution if it has profits available for that purpose.

In the event of a conflict between the shareholders' agreement and an incorporated JV's articles of association, either document can prevail depending on the stated intention of the parties. In the UK it is common to state in the shareholders' agreement that the shareholders' agreement will prevail.

Where a shareholders' agreement is governed by English law but the JV is incorporated outside England & Wales (which is a common structure where a JV operates in developing markets), parties need to carefully consider any potential conflicts of laws and the enforceability of certain terms of the shareholders' agreement in the foreign jurisdiction.

25 / United States

Scott Sonnenblick
Partner, New York
Tel: +1 212 903 9292
Mob: +1 917 514 9552
scott.sonnenblick@linklaters.com

Peter Cohen-Millstein
Partner, New York
Tel: +1 212 903 9424
Mob: +1 917 494 8182
peter.cohen-millstein@linklaters.com

What types of entities are generally used for US JVs?

A limited liability company is the most prevalent type of entity used for US JVs, due to its structural and tax flexibility.

Other types of entities commonly used for US JVs include corporations, limited partnerships and limited liability partnerships, among others.

A US JV can also be established between two or more parties on a non-incorporated contractual basis (e.g. pursuant to a consortium or co-operation agreement).

In the case of a US JV established as a separate entity, the constitutional documents needed for such entity will depend on the entity type. Regardless of the form of entity chosen, JV parties will typically enter into a shareholders' agreement (which may be integrated into the LLC operating agreement in the case of a limited liability company) setting forth the contractual agreement among the JV partners on certain management and operational aspects of the JV.

Key factors when determining the appropriate type of corporate vehicle when establishing a US JV include tax considerations, governance structure, the liability of investors, the financing needs of the vehicle and the type of venture (e.g. single project, ongoing business, independent identity).

Are there foreign investment restrictions for US JVs?

Federal laws place restrictions on foreign investment in a limited number of circumstances. These laws can include required competition clearance or national security clearance.

Most notably, the Committee on Foreign Investment in the United States ("**CFIUS**") may review and order divestment where a transaction threatens to impair the national security of the United States. "National security" has been broadly interpreted and may be implicated by transactions in diverse sectors, including infrastructure, telecommunications and manufacturing. In recent years, CFIUS has been more active in reviewing certain transactions. Further pending legislation is intended to reform the CFIUS regime in ways that may increase its impact on certain US JVs, including by:

> expanding the scope of the transactions within the direct purview of CFIUS (including its authority to review non-passive foreign investments in US critical technology and critical infrastructure companies even if the foreign company is not obtaining control of the US company), and

> mandating notification for certain transactions involving a foreign government's "substantial interest" in the investing company or as specified by regulations prescribed by CFIUS.

The new legislation also contemplates the review of certain foreign investments through expanded export controls whereby the US Department of Commerce may determine licensing or other authorization requirements for the export, re-export, or in-country transfer of to be identified "emerging and foundational technologies" that may affect JVs where contributions of such technologies are involved. Passage of such legislation is not a certainty but is expected, and its final form remains to be determined.

In addition, federal law directly limits foreign ownership of companies in certain sectors (e.g. aviation, telecoms and utilities).

Finally, federal sanctions may restrict the ownership of US assets from sanctioned jurisdictions (e.g. Iran or Cuba) or by sanctioned individuals.

Are there any publicity or other specific formalities e.g. registration or notarisation?

Specific requirements will depend on the entity used to form the JV. Many states, including Delaware, do not have publicity requirements and public information typically does not include information on members (shareholders) or directors.

Where one or more parties to the US JV is a listed issuer, then it will be necessary to bear in mind the relevant provisions of the applicable disclosure obligations and listing rules (e.g. relating to classifying significant transactions and related party transactions). Depending on the materiality of the US JV to a listed issuer, formation of the JV itself may trigger disclosure obligations, and the JV's continuing operations may trigger additional ongoing disclosure requirements, including in relation to financial reporting.

How can a shareholder exercise influence over a US JV?

US JV parties may agree on various voting thresholds or special voting procedures to exercise control on how and when a JV can take action. Depending on the entity type and governance structure chosen by the JV parties, the parties may appoint a board of directors or managers to manage the JV or separately delegate management. If the members are not managing the JV directly, a common way for members to exercise indirect influence over a US JV is through the identification of certain reserved matters, being matters which must be approved by the members or the board members appointed by certain members before the US JV is authorised to take such action. Reserved matters could include items such as changes to constitutional documents, changes in management personnel, or entering into or terminating key contractual arrangements. Board reserved matters may overlap with member reserved matters.

Different thresholds can be set for approval of such reserved matters such as unanimous or majority consent, or requiring the consent of specific key members.

In general, reserved matters will be set out in the operating/shareholders' agreement, to which the JV company is often a party.

Depending on the type of JV entity used, there are few limits to the ways in which a member may exercise influence over the JV. It is important to note, however, that directors, managers, officers and members may or may not have fiduciary duties obliging them to act in the interests of all members and the JV as JV parties are permitted to modify or eliminate such fiduciary duties in certain instances (e.g. in the case of a Delaware LLC).

Are there any issues or restrictions in relation to the transfer of shares in a US JV?

Operating agreements are flexible and can impose restrictions on ownership transfer. Restrictions can include a right of first refusal or a right of first offer, drag-along or tag-along rights or an initial "lock-up" period during which members are not permitted to transfer their shares.

Federal securities laws impose certain restrictions on the transfer of securities, but in practice, an exemption from such securities laws is often available. In addition, regulatory concerns (e.g. competition and CFIUS) may apply.

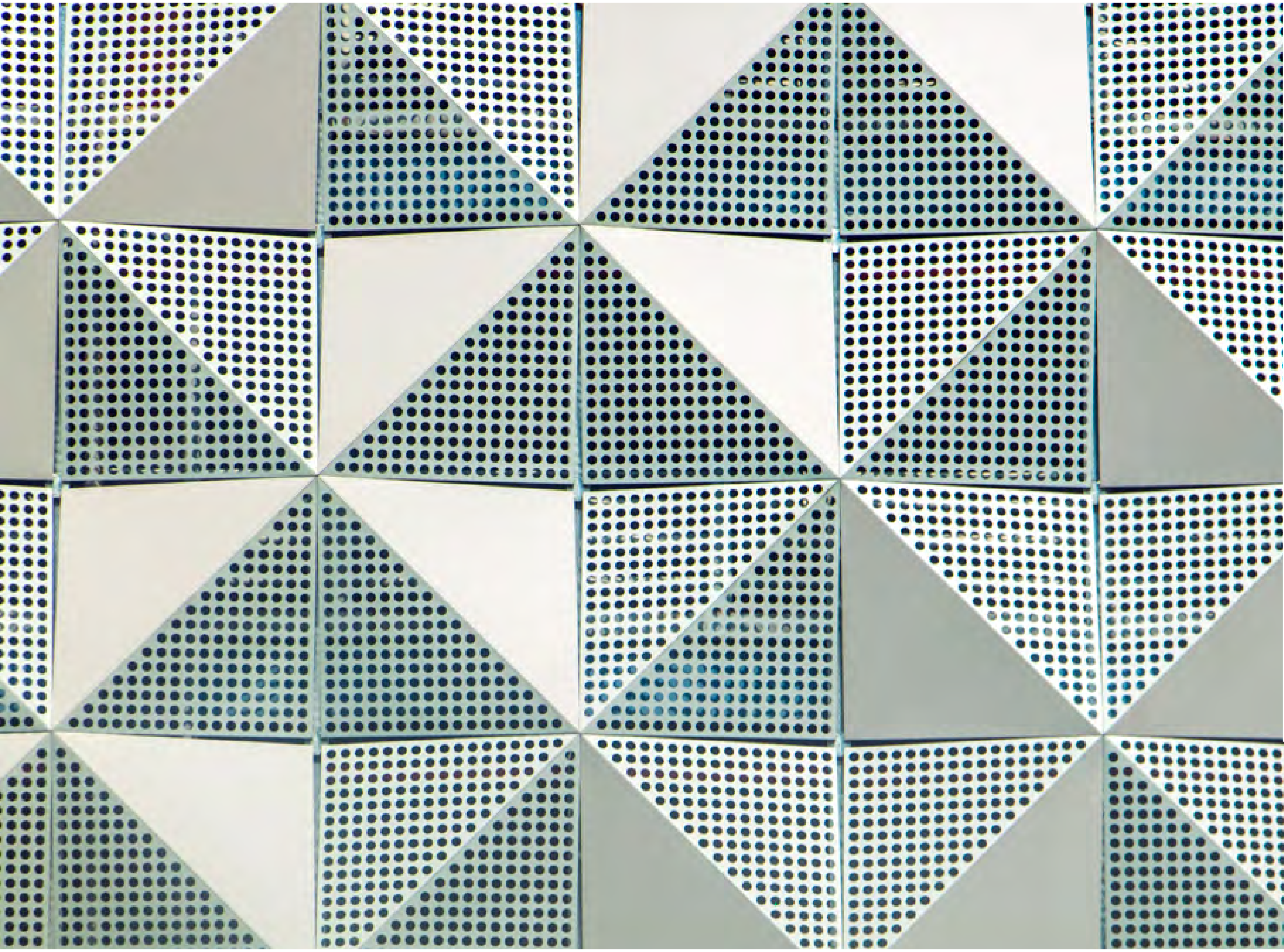
Are there any issues in relation to the enforcement of a shareholders' agreement?

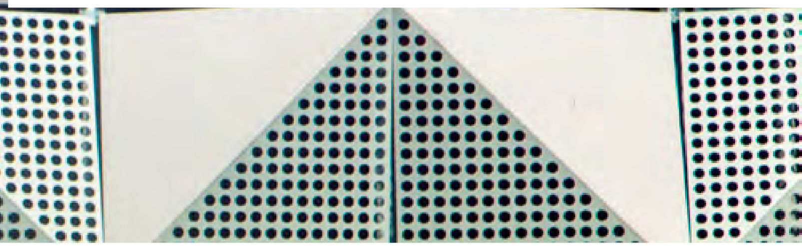
There are generally no enforcement issues in relation to a well drafted shareholders'/operating agreement (though non-compete provisions may not be enforceable in certain circumstances).

The most common remedy for breach of a shareholders'/operating agreement is damages but an injunction may be available at the discretion of the court – e.g. to ensure that each party takes the necessary voting action when voting as a member of the JV to give effect to the terms of the operating agreement. Additionally, in limited circumstances, an *ultra vires* claim may be made that an action of the JV is invalid by reason of the fact that the JV acted outside of its authority (particularly if the JV parties have expressly limited the JV's powers in its operating agreement).

Operating agreements often contain exit provisions which may provide that parties in breach of certain terms of the agreement are forced to sell their shares to non-defaulting parties.

26 / Vietnam





Robert Fish
Allens Partner, Ho Chi Minh City
Tel: +84 28 3822 1717
Mob: +84 90 979 5800
Robert.Fish@allens.com.au

Linh Bui
Allens Partner, Ho Chi Minh City
Tel: + 84 28 3822 1717
Linh.Bui@allens.com.au

What types of entities are generally used for Vietnamese JVs?

The multiple-member limited liability company ("**MLLC**") is the most common corporate entity used for Vietnamese JVs. A MLLC must have two or more investors who hold capital contributions in the company. A MLLC cannot issue shares and cannot be listed.

The other common corporate entity used for Vietnamese JVs is the shareholding, or "joint stock", company ("**SC**"). A SC must have three or more investors, who hold shares in the company. A SC must have ordinary shares but may also issue preference shares, including voting preference shares, dividend preference shares and redeemable preference shares, as well as potentially other more bespoke preference shares. A SC can be listed.

Liability in both a MLLC and a SC is limited to the extent of the capital agreed to be contributed by the investor.

Whilst less common and, in practice, limited to certain sectors, a third option is a Business Co-operation Contract ("**BCC**"). This is a form of unincorporated JV. A BCC is a written agreement between a foreign investor and a Vietnamese partner in which the parties agree to cooperate to undertake certain business activities in Vietnam and to share the revenue or profits arising from those activities. No separate legal entity is established and there is no limitation on liability for participants.

Are there foreign investment restrictions for Vietnamese JVs?

For the purpose of foreign investment in JVs, the two main issues to consider are foreign ownership restrictions and merger control rules.

Foreign ownership is a complex issue in Vietnam requiring case-by-case consideration of local law and international commitments (e.g. the World Trade Organisation). Caps on the level of foreign investment may apply depending on the business sector of the JV. Generally, the following restrictions may apply to foreign investment in Vietnam:

- **Prohibited sectors:** foreign investment in a limited number of specific activities is prohibited (such as projects detrimental to national defence or involving the production of toxic chemicals).
- **Capped sectors:** foreign investment is limited to a maximum percentage ownership in certain sectors (e.g. for banking, a maximum of 20% for a single, qualifying investor).
- **Conditional sectors:** foreign investment in a number of sectors, including broadcasting, transport, real estate, mining and tele-communications is subject to satisfaction of specific conditions. These conditions can include consultation with the relevant ministry, the Prime Minister's approval or specific business restrictions.
- **Public companies:** previously there was a blanket 49% cap on aggregate foreign ownership of all public (which includes all listed) companies (subject to any lower threshold that applies in the relevant sector). It is now possible for a public company to go through procedures to lift that cap to the maximum level allowed by their registered business lines. However, few public companies have done so and, therefore, in practice, most public companies still have a 49% aggregate foreign ownership cap.

In terms of merger control, currently, M&A activities of foreign investor must be notified to the Vietnam Competition Authority if the relevant parties' combined share of a particular market is from 30% to 50%. M&A activities may be blocked if the combined market share exceeds 50%.

Effective from 1 July 2019, under a new Competition Law, an M&A transaction may need to be notified to the competition authorities depending on one of the following factors:

- total assets in the Vietnamese market,
- total turnover in the Vietnamese market,
- transaction value, or
- combined market share of the parties in the relevant market.

An M&A transaction may be prohibited if it has, or may have, significant competition restraining impact.

Are there any publicity or other specific formalities e.g. registration or notarisation?

Establishing, subscribing for or transferring an interest in an incorporated Vietnamese JV generally involves an application to the relevant licensing authority for investment and enterprise registration and, in certain regulated sectors, regulatory approval. Merger control filings may also be required. The licensing process can be lengthy and the licensing authorities have a wide discretion in their decision as to whether or not to approve the application.

The enterprise registration application includes providing various documents to the licensing authorities, though these are not generally made publicly available.

Certain documents issued outside Vietnam which are required to be included in the application to either establish or transfer an interest in a Vietnamese JV must be "legalised". This process usually involves certification by a notary public, the relevant joint venture party's Ministry of Foreign Affairs (or equivalent) and the Vietnamese embassy or consulate in that country.

How can a shareholder exercise influence over a Vietnamese JV?

Joint venture parties can exercise their management rights in a Vietnamese JV by appointing representatives to sit on the Members Council of an MLLC ("**MC**") or to attend a General Meeting of Shareholders of an SC ("**GMS**"), which are the highest authorities in the MLLC and SC respectively. Whilst a joint venture party may appoint more than one representative, the aggregate weight of each joint venture party's vote is proportionate to their percentage of equity in the JV. In the case of a SC, the joint venture party can also nominate candidates to the Board of Management ("**BOM**"). Joint venture parties can also influence the management of the JV by reserving the right to nominate the General Director who manages the day-to-day business of the JV.

All Vietnamese incorporated companies must also have at least one "legal representative" who is entitled to represent and bind the entity. There is no concept of ostensible authority in Vietnamese law. The legal representative of a Vietnamese JV is usually either the General Director or the Chairman, as set out in the charter. The Chairman of an MC is elected by the MC, while the Chairman of a BOM is elected either by the BOM or the GMS, as set out in the charter.

The threshold for passing general decisions at the MC is ordinarily 65% and 51% for a GMS. A higher threshold of 75% (for an MC meeting) or 65% (for a GMS) applies for certain important decisions, such as amendment of the charter. Different thresholds for MC meetings and higher thresholds for GMS may be set out in the JV's charter. Additional matters, beyond those required by law, can also be reserved for MC or GMS approval in the JV's charter. Also, in both MLLCs and SCs, joint venture parties with a minority interest can seek additional protection by including a requirement for a unanimous decision of the MC or GMS, or a right of veto, on certain matters.

Are there any issues or restrictions in relation to the transfer of shares in a Vietnamese JV?

Statutory pre-emption rights apply in favour of existing members of an MLLC. Joint venture parties wishing to transfer all or part of their capital contribution must first offer to sell such share of capital contribution to the other joint venture parties proportionately.

For SCs, under law, shares are generally freely transferable except for certain limitations which apply to the founding shareholders in the first three years of establishment. Voting preference shares, however, may not be transferred.

For both MLLCs and SCs, a transfer of interests or shares may be subject to pre-emption rights set out in the JV's charter or the joint venture agreement.

While parties are free to stipulate their own rules for transfers, e.g. as a deadlock mechanism for the resolution of internal disputes, regard should be had to the likely enforceability of such rules. In particular, it is doubtful whether provisions in a charter or the joint venture agreement which seek to "deem" transfers or invoke a standing power of attorney or proxy in order for such transfers to take place, would be enforced by Vietnamese courts or Vietnamese licensing authorities. In particular, the provisions for transfer of interests in an MLLC (including the statutory right of first refusal) provide for significant involvement of the authorities, and all parties (including any reluctant transferor) will be required to provide extensive documentation.

Further, certain sectors apply statutory "lock-up" periods post-acquisition during which shares may not be transferred. Contractual lock-ups are also commonly requested by counterparties to Vietnamese JVs.

Finally, there is a one-year lock-up period (subject to some exceptions) for shares issued by private placement to investors in a public company.

Are there any issues in relation to the enforcement of a shareholders' agreement?

It is common for a JV with foreign shareholders to have both a charter and a "joint venture agreement" (or shareholders' agreement). The joint venture agreement and the charter have a certain level of shared content. Joint venture parties may include deal-tailored provisions in the shareholders' agreement and, while Vietnamese law broadly recognises freedom of contract, there are a number of other considerations.

Firstly, the law is silent as to which of the two documents prevail. As such it is usual to see a statement included which states that one will prevail over the other to the extent of any inconsistency. The joint venture parties' preference may be for the shareholders' agreement to prevail, given that investment-specific matters such as agreed voting arrangements, are more likely to be contained in the shareholders' agreement than the charter. However, it is debatable whether such a clause would have legal effect given that the general approach of the Vietnamese authorities may be to place emphasis on the charter, being a document common to all types of companies, including those without foreign investment.

Secondly, Vietnamese law will not enforce a contract which is contrary to the "fundamental principles" of Vietnamese law. This concept is not defined and has, on occasion, been treated very broadly by the courts. As such, it is conceivable that rights included in a shareholders' agreement (e.g. agreed voting arrangements or a disproportionate distribution of profit or losses), which are not specifically provided for or contemplated in Vietnamese law, may be seen as altering the way in which Vietnamese law intends a company to be governed and, therefore, contrary to the "fundamental principles" of Vietnamese law. Such an agreement may not be enforced by a Court or recognised by Vietnamese authorities.

linklaters.com

8296_F/07.18