

Joint Ventures

Contributing editors

Gavin Williams and James Farrell



2018

**GETTING THE
DEAL THROUGH** 

GETTING THE
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Joint Ventures 2018

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South Africa

Rudolph du Plessis

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Form

1 What are the key types of joint venture in your jurisdiction? Is the 'joint venture' recognised as a distinct legal concept?

The most common type of joint venture in South Africa is an incorporated entity, normally a private company, but sometimes a public company. These companies are incorporated under, and regulated by, the South African Companies Act. Unincorporated partnerships are also sometimes used, but there are distinct disadvantages in using a partnership for a joint venture. For example, the partners are jointly and severally liable for the partnership debts. South African law does not provide for limited liability partnerships or partnerships registered under a statute. Partnerships are regulated by the South African common law.

The term 'joint venture' is not a distinct legal concept in South Africa, but it is commonly referred to in commerce. Because the term joint venture does not have a technical legal meaning it is sometimes used inconsistently, referring to anything from a cooperation arrangement between two parties to a joint venture arrangement involving a legal entity. Purely contractual joint ventures (such as cooperation or co-ownership agreements) are also common in South Africa. These arrangements have to be documented carefully so that they do not classify as a partnership.

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

Joint ventures are used in most sectors in South Africa, but are particularly popular in the mining, construction and project finance sectors. It is possible to implement joint ventures across all sectors and industries in South Africa. Joint ventures are particularly prevalent in industries and sectors involving long-term projects requiring large capital expenditure. Participants seeking to limit their exposure and costs associated with capital-intensive projects regularly use joint ventures to pool resources and access the margins available at scale.

Venture parties

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

There are no specific rules that relate to foreign joint venture partners, other than the South African exchange control regulations. Joint ventures are not specifically regulated in South Africa. If the joint venture vehicle is a company, company-law rules (mainly the South African Companies Act) would apply. If the joint venture is structured by way of an unincorporated partnership, the South African common-law rules applicable to partnerships would apply. There are no company-law or partnership-law rules that relate specifically to foreign joint venture parties.

South Africa has strict exchange control regulations and the participation by foreign joint venture parties would be subject to these. Generally, the exchange control regulations would require approval from the South African exchange control authorities to bring money or property into South Africa (whether by way of loans or share issues or partner contributions) and taking money out of South Africa (whether by way of dividend, distribution or upon a sale of the joint venture interest). Foreign joint venture parties may be taxed in South Africa differently from their South African counterparts.

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

This depends on the type of joint venture vehicle. If the joint venture vehicle is a company, the South African Companies Act requires disclosure of certain share transactions. These disclosure requirements apply only in respect of companies that qualify as 'regulated companies' in terms of the Companies Act. Public companies are regulated companies, but private companies may also be regulated companies if more than 10 per cent of the company's issued shares have been transferred within 24 months preceding a transaction.

The Companies Act imposes an obligation on a person who acquires a beneficial interest in the securities or class of securities issued by a company that, as a result of the acquisition, holds a beneficial interest in securities amounting to whole multiples of 5 per cent of the issued securities of that class. There is a similar obligation on a person who disposes of a beneficial interest in sufficient securities of a class issued by a company; as a result of this disposition, the person no longer holds a beneficial interest in securities amounting to a particular multiple of 5 per cent of the issued securities of that class. The obligation is to notify the company of such a change. The regulated company, in turn, must file a copy of the notice with the Takeover Regulation Panel and report the information to the holders of the relevant class of securities, unless the notice concerned a disposition of less than 1 per cent of the class of securities. There are generally no requirements for disclosure of the ultimate beneficial interest in a partnership.

Setting up and operating a joint venture

5 Are there any particular drivers in your jurisdiction that will determine how a joint venture is structured?

The most common factors driving the structure of a joint venture will be the parties' preferred tax treatment of the joint venture (see question 19), competition-law concerns (see question 13) and accounting (eg, whether the parties want to consolidate the joint venture in their accounts).

Apart from the above reasons, limited liability is generally the driver determining the type of joint venture. It is not possible under South African law to have an incorporated or limited liability partnership, and common-law partnerships expose partners to joint and several liability for the partnership debts. For this reason, incorporated joint ventures are more common. There are also other legal issues with partnerships that parties will have to consider in determining the structuring of a joint venture. For example, partnerships, not being separate legal entities, generally come to an end if one of the partners leave. This is not the case with companies that have perpetual succession, and changes in membership do not affect the existence of the company.

There are also practical considerations that may play a role in determining the structure of a joint venture – partnerships are established and operated by contract, and are, therefore, easier to establish and operate than companies.

An additional important consideration in South Africa in structuring joint ventures is black economic empowerment. There may be certain instances where a joint venture would need to be structured with a particular shareholding that qualifies as a 'black shareholding' in terms of the broad-based black economic empowerment measures applicable in South Africa. In addition, there may be certain requirements

for directors on the board or management of the company that qualify under the black economic empowerment measures (see question 31).

6 When establishing a joint venture, what tax considerations arise for the joint venture parties and the joint venture entity? How can tax charges be lawfully mitigated?

There are generally no tax costs in setting up a joint venture as a company or a partnership. If the joint venture is set up as a company, the company is generally the tax-paying entity and there will only be tax on distributions to shareholders. In the case of a partnership, and because a partnership is not defined as a person for normal tax purposes, it is not a taxable entity. For certain other purposes (for example, VAT), however, the partnership is regarded as a body of persons, but only for those purposes. Since a partnership is not a taxable entity, and its individual partners are liable for normal tax on their portion of the partnership's profits, the income that has been received by a partnership is deemed to have been received by the partners individually on the same date as the receipt of the book by the partnership, in accordance with their profit-sharing proportions as set out in the partnership agreement.

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

There are no general restrictions on the ability of joint venture participants to contribute assets to the joint venture. If the joint venture is an incorporated joint venture, the contributions would take the form of subscriptions for shares. The consideration for the shares can be money, property, labour, or any other thing undertaking promise or agreement.

If the joint venture is a partnership, contributions take the form of money, knowledge, experience, expertise, labour or its equivalent. Because the partnership does not have separate legal existence (distinct from the partners composing it), its property is owned in common by the partners in undivided shares.

8 What is the interaction between the constitution of the joint venture entity and the agreement between the joint venture parties?

This depends on the type of joint venture. The position under the current South African Companies Act differs from the position that has always prevailed in South Africa. Previously, it was possible for the shareholders in a joint venture company to enter into a shareholders' agreement and provide that the shareholders' agreement prevails in the event of a conflict between the shareholders' agreement and the company's articles of association. Under the current South African Companies Act, this is no longer possible. The South African Companies Act provides that a shareholders' agreement must be consistent with the Companies Act and the company's memorandum of incorporation (its constitution), and any provision of such shareholders' agreement that is inconsistent with the Companies Act or the company's memorandum of incorporation is void to the extent of the inconsistency. This has resulted in joint venture parties including more provisions in the memorandum of incorporation to remove any inconsistency and the risk of such provision being void.

The memorandum of incorporation has to be filed (registered) with the Companies and Intellectual Property Commission. There is no requirement for the shareholders' agreement to be registered, but, sometimes, parties file the shareholders' agreement together with the memorandum of incorporation, and incorporate its terms by reference, so as to avoid any inconsistency between them that may result in the shareholders' agreement being void.

Partnerships are not regulated by statute and are governed by contract. The partnership agreement serves as both the 'constitution' of the partnership and the agreement regulating the partners' relationship. A partnership agreement does not have to be registered.

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

The rules differ depending on the type of joint venture.

In the case of companies, interaction between the joint venture parties (shareholders) and the company is regulated by the Companies Act and the company's memorandum of incorporation. Generally, such interaction takes place at shareholders' meetings. Matters such as information sharing are regulated by the South African Companies Act and

the company's memorandum of incorporation (and, to a lesser extent, the shareholders' agreement). Information given to directors nominated by a specific shareholder can generally not be shared with the shareholder nominating the director. Sometimes the memorandum of incorporation will include a specific provision allowing such sharing of information but it will be subject to the directors' fiduciary duties, and this will generally allow the sharing of the information by the director.

Partnerships in South Africa are not legal entities. In other words, partnerships are not recognised under South African law as a 'legal person'. The interaction between the partners is purely contractual. Partnerships are largely unregulated and information-sharing between partners is unrestricted. Partners have a duty to observe good faith, which includes a duty to guard against a conflict of interest. The duty to guard against a conflict of interest means that a partner may not place itself in a position where such partner's private interests may conflict with the partner's duty towards the partnership. It also means that a partner may not use information that it obtained for its own benefit if such action would conflict with the partnership's interest. The general principle underlying the fiduciary duty of a partner is that it may not acquire, or retain for itself, any benefit or advantage that falls within the scope of the partnership's business, and which it is the partner's duty to acquire for the partnership.

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

South African incorporated entities transact the majority of their business by simple majority decision of the board of directors or by majority votes of the shareholders. Therefore, in the absence of any agreement to the contrary, minority investors have relatively few rights by operation of law to exercise control over a joint venture entity's decision-making – this is particularly the case in an incorporated joint venture where a majority shareholder with an interest of more than 50 per cent will be able to effectively control the joint venture, including through the power to appoint and remove directors. As such, it is customary that minority investors seek additional ability to block controls by a majority shareholder in these circumstances, and this additional protection should be included in the memorandum of incorporation.

In the case of a company, the joint venture parties, as shareholders, generally exercise control of the joint venture through reserved matters, which are matters that cannot be undertaken by the company without a specified majority of shareholders approving such matter. Shareholders have the ability to nominate directors to the board, but directors owe fiduciary duties to the company when they make decisions and cannot generally act on the instructions of the shareholder who nominated such director. Having said this, it is also possible to provide that certain board decisions can only be taken with the consent of all of the directors.

In a partnership, 'control' of the partnership by the partners is exercised by including reserved matters that cannot be undertaken by the partnerships or the partners without consent of a specific majority vote.

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

The most common governance issues that arise in connection with joint ventures relate to the split between the daily operations of the business and overall supervision of the daily operations. Generally, whether the joint venture is operated through a company or a partnership, there would be an operating or management committee that would be responsible for the daily operations of the partnership or the company. This body would have some sort of delegated authority to take certain decisions on behalf of the company or the partners. There would generally be oversight of such operating or management committee either by the board or by the partners themselves. In the case of a company, certain decisions may also be reserved for the decision-making by the shareholders of the company. See also the discussion in question 31 about black economic empowerment.

12 With an incorporated joint venture, what controls exist in your jurisdiction in relation to nominee directors? How should a nominee director balance the potentially conflicting interests of the joint venture company and the appointing shareholder?

Generally, directors, whoever nominates them, owe fiduciary duties to the company and have to act in the best interests of the company. This means that directors are not allowed to act in the best interests, or on

the instructions, of the shareholder who nominates them. The director should always act in accordance with this fiduciary duty and cannot balance the conflicting interests of the joint venture company and the appointing shareholder. This generally means that the director considers only the best interests of the company, and only where those interests coincide with the interests of the nominating shareholder can the director take into account the interests of the nominating shareholder. The fiduciary duties owed to the company are paramount.

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

The formation of a joint venture may require merger approval from the competition authorities if it results in a direct or indirect acquisition or establishment of direct or indirect control over the whole or part of a business of another firm and if it meets the financial thresholds for a notifiable merger. There is no exclusion in South Africa in respect of non-full function joint ventures. Instances in which there may be an acquisition or establishment of control include the following:

- a transaction where two or more firms acquire joint control over an existing entity or the whole or part of a business in circumstances where at least one of the firms did not previously have control; and
- a transfer of interests, assets or the whole or part of a business to a joint venture entity resulting in an acquisition of control by the joint venture entity over those interests, assets or business.

A transaction where two or more firms create a new entity, over which they exercise joint control and contribute, for example, funds and know-how, is unlikely to require merger approval, provided there is no transfer of interests, assets or the whole or part of a business to the joint venture entity.

Joint ventures are often pro-competitive and efficiency-enhancing; for example, a joint venture may facilitate entry into a market that may not have been possible to enter independently. However, joint ventures between competitors may present competition-law risks. It is imperative that any joint venture between competitors has a legitimate purpose and only places restrictions on the joint venture parties that are commercially necessary for the operation of the joint venture. In addition, agreement between competitors on issues such as price, quantity and quality should only be reached if it is ancillary to the legitimate purpose of the joint venture. Information-sharing protocols should be put in place to prevent the sharing of competitively sensitive information that goes beyond that which is required for the operation of the joint venture.

14 What are the key considerations in your jurisdiction in structuring the provision of services to the joint venture entity by joint venture parties?

It is common for the joint venture parties to provide services to the joint venture entity. The key considerations in structuring these provisions are tax issues and the rules relating to conflicts of interest under the South African Companies Act.

Commercially, joint venture parties will want to assess whether the provision of services will be at arms' length and whether they will need to negotiate the provisions of any services with the joint venture parties.

It is also important to consider the nature of the services being provided or whether the joint venture is carrying out regulated activities, as this may lead to additional regulatory scrutiny over the contractual arrangements and may also require specific mandatory terms to be included in any contract.

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

South African employment law is generally favourable to the employees with specific statutory rights given to employees in various labour laws. For example, employees have statutory entitlement to paid leave, the right to strike and statutory protection against retrenchments. Generally, these would apply to a joint venture in South Africa and employees who are employed in the joint venture would enjoy these statutory protections. If there is a transfer of the employees from the joint venture parties to the joint venture, in certain circumstances the joint venture entity would be responsible for recognising certain employment protections prior to the transfer of the employees to

the joint venture (mainly, if there is a transfer of the business of the joint venture parties to the joint venture entity as a going concern). Secondments from the joint venture parties to the joint venture entity itself should be considered carefully, as some of the statutory rights may attach to the joint venture entity.

16 How are intellectual property rights generally dealt with on the creation, operation and termination of a joint venture in your jurisdiction?

This depends on the circumstances. Very often, intellectual property (IP) rights are held by the joint venture parties and licensed to the joint venture. Sometimes, a separate IP entity is created that holds the IP, and this entity licenses the IP to the joint venture. IP rights of the joint venture itself is normally vested in the joint venture entity, and would be dealt with in the same way as other assets upon termination.

Funding the joint venture

17 How are joint ventures generally funded in your jurisdiction? Are there any particular requirements relating to funding and security packages?

Incorporated joint ventures are funded by the shareholders by way of shareholder loans or through the subscription for shares. In addition outside bank or financial institution funding is generally provided. Any financial assistance to the company would have to comply with the provisions of the Companies Act. Share subscriptions are also subject to rules set out in the Companies Act.

In the case of partnerships, funding is generally provided by way of contributions and capital accounts. In addition, outside bank or financial institution funding is generally provided. Partner contributions are generally regulated by the partnership agreement.

All funding to the joint venture by foreign joint venture parties will be subject to the South African exchange control regulations, which, if obtained, would generally mean that funds can be remitted to the foreign joint venture parties (see question 18).

18 Are any restrictions on the injection of capital into, or the distribution of profits or the extraction of cash by other means from, the joint venture entity imposed by law or regulation?

There is a general restriction on the distribution of profits or the extraction of cash from a South African joint venture to a non-resident joint venture party in terms of the South African exchange control regulations. The restriction generally means that, when the joint venture is established, approval is obtained for funding provided to the joint venture, and there are certain restrictions on the terms of such funding. If the funding is provided within those restrictions and upfront approval is obtained, the distribution of profits and the extraction of cash is generally allowed, provided the exchange control authorities are informed of the distribution or extraction. For example, in the case of a company, a subscription for shares requires approval from the exchange control authorities, and such approval takes the form of a non-resident endorsement on the share certificate. Provided that the non-resident endorsement is obtained, dividends or other distributions to a non-resident are allowed.

If the joint venture is a company, the injection of capital into the joint venture will be by way of a subscription for shares. The South African Companies Act requires the subscription to be approved by the board, but only for adequate consideration to the company, as determined by the board. The board's determination of the adequacy of the consideration for any shares may not be challenged unless there is a breach by the directors of their fiduciary duties.

There are restrictions on the distribution of profits by a company to its shareholders – generally, any distribution requires to be authorised by the board and can only occur if it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

Contributions by and distributions to partners in a partnership arrangement are generally regulated by the partnership agreement.

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

Tax considerations play an important role in the structuring and operation of the joint venture, and in relation to the contributions and

Update and trends

There are no noteworthy current trends affecting joint ventures specifically, but there has been a definite rise in shareholder activism and ADR as a method of resolving disputes in South African commerce generally, which may also flow through to joint ventures.

The South African Companies Act is fairly new and came into effect in 2011. Because the new Act introduced a number of concepts into South African law, the case law is still developing, especially in relation to things like derivative actions and minority protections. Currently, partnerships are not regulated by statute and there are a number of voices discussing the introduction of incorporated partnerships and limited liability partnerships, and for the overhaul of regulations in relation to partnerships.

distributions of funds to the joint venture, whether as a loan or as share subscriptions. Specific tax advice should be obtained in relation to all of these tax issues. Generally, apart from normal income and capital gains tax, tax is payable in respect of distributions to shareholders in the form of dividend withholding tax. Particular emphasis should be placed on tax considerations relating to transactions between connected persons; the South African tax laws include specific provisions relating to transfer pricing and specialist advice should be sought in relation to those. The transfer pricing provisions in the South African Income Tax Act were amended in 2012 in order to modernise the South African transfer pricing rules in line with those of the Organisation for Economic Co-operation and Development (OECD). The wording of the current transfer pricing rules is aligned with the wording of the OECD and United Nations Model Tax Conventions. Section 31 provides special anti-avoidance rules (or so-called transfer pricing provisions) with regard to certain international transactions involving transfer pricing and thin capitalisation to ensure that international transactions are based on arms' length principles in order to avoid artificial profit shifting by transacting at terms that are different from those that would have applied had the transaction been concluded on normal commercial grounds between unrelated parties.

20 Are there any noteworthy accounting or reporting issues for the joint venture partners regarding their investment in the joint venture?

In relation to joint ventures operated through companies, the normal accounting and reporting rules applicable to companies would apply to such joint venture entities. In relation to joint ventures through partnerships, these are less regulated by a particular statute, but the general accounting rules applicable to partnerships would apply.

In certain circumstances, companies are required to keep accounts for each financial year. Parties to a joint venture arrangement through a corporate entity may want to consider how their participation will impact their existing group structure, accounts and tax. In particular, whether their holding in the joint venture would be considered an investment or a subsidiary. If the latter, the entity may need to be consolidated into the joint venture parties' financial accounts.

Deadlock, exit and termination

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

There are a number of mechanisms available to resolve deadlock situations in South African joint ventures. The options range from internal dispute resolution mechanisms, such as the escalation of the deadlocked matter to senior representatives of the joint venture parties, to third-party solutions, such as mediation or expert determination (where appropriate).

The deadlock provisions depend on the extent of the interests of the joint venture partners. If their participation interests are equal, it is common for a deadlock to result in the liquidation of the company. This is sometimes preceded by some form of mediation, generally a referral to more senior members of the board of the joint venture parties (such as the chairperson).

Where the interests of the shareholders are not equal, there are a number of deadlock-breaking mechanisms, ranging from put and call options to forced sales. The most common deadlock-breaking mechanism is to refer the deadlock to the shareholders or to particular senior

individuals in the shareholders, and if no decision can be reached, the decision is not taken.

22 What exit provisions are commonly included? Does the law restrict any forms of mandatory transfer provision or any basis of calculation?

Exit provisions include put and call options, tag- and drag-along provisions and forced sales in the event of a breach. Russian roulette or Texas shoot-out provisions are also common in South African joint ventures. In the case of Russian roulette and Texas shoot-out provisions, the mechanisms are only workable where there are a small number of parties (preferably two). In practice, while the mechanisms are often included in joint venture agreements, they are rarely used.

South African law does not generally restrict any forms of mandatory transfer provision or the basis of calculation, but these provisions may be subject to the provisions of the Conventional Penalties Act. The Conventional Penalties Act provides that a stipulation in a contract whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, shall be capable of being enforced in any competent court. However, the Conventional Penalties Act contains a prohibition on accumulation of remedies and contains certain limits on the recovery of penalties. Generally, a person shall not be entitled to recover, in respect of any act or omission that is the subject of a penalty stipulation, the penalty and damages or (except where the relevant contract expressly so provides) damages in lieu of the penalty. The Conventional Penalties Act also makes provision for the reduction of an excessive penalty. The court, upon hearing of a claim for a penalty, if the penalty is out of proportion to the prejudice suffered by the person by reason of the act or omission, may reduce the penalty to the extent it considers equitable in the circumstances.

There are also restrictions that may apply in circumstances of insolvency. Generally, these consist of circumstances where the liquidator may choose not to give effect to the contractual provisions of a contract to the extent that it is to the prejudice of creditors generally.

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

Again there are general tax considerations that differ depending on the type of joint venture. Generally, distributions are subject to tax upon termination of the joint venture unless the distributions can be structured so that they fall within the group tax relief provisions set out in the Income Tax Act, such as the relief relating to distributions in anticipation of the winding up of a company.

Disputes

24 In your jurisdiction, are there constraints on the choice of law or the method of dispute resolution provided for in joint venture agreements?

A joint venture business operating in South Africa is not constrained as to the governing law provided for in its joint venture agreement. Similarly, there are no constraints on the method of dispute resolution chosen by a party. The party should ensure they choose dispute resolution mechanisms appropriate to the various types of dispute that may arise. For example, a deadlock dispute may be better resolved by expert determination (if such mechanism is recognised under its chosen governing law) than by litigation.

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

The choice of law of the parties will generally apply, other than in matters of procedure or instances where the choice of law would result in something that is against public policy in South Africa. There may also be instances where specific statutory requirements would override the choice of law. For example, the South African courts will not enforce the revenue laws or penal laws of foreign states.

26 Are there any restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes? Are there any restrictions on the arbitration of shareholder claims?

There are no general restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes.

In certain circumstances, the South African Companies Act makes a provision for alternative dispute resolution (ADR) as an alternative to applying for relief to a court or filing a complaint with the Companies and Intellectual Property Commission.

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

In the case of incorporated joint ventures (companies), the Companies Act contains statutory protections for minority shareholders. Broadly, these minority protections will protect minority shareholders if the company's business is being carried out recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. If a company's business is conducted in such a manner, the Companies and Intellectual Property Commission may issue a compliance notice to the company requiring it to cease its operations.

Shareholders may also apply to court for relief in the event that any act or omission of the company has had an oppressive or unfairly prejudicial result on, or that unfairly disregards the interests of, the shareholder. Shareholders can also apply for relief if the business of the company has been carried out or conducted in an oppressive or unfairly prejudicial manner, or that unfairly disregards the interests of, the shareholder.

Minority shareholders who dissent in decisions of the company relating to takeover transactions have an appraisal right, which entitles them to require the company to buy their shares at fair value. There are certain requirements that must be met for shareholders to exercise their appraisal rights (for example, they must vote against the resolution). Shareholders also have a derivative action to protect the legal interests of the company.

There are also a number of additional minority protections set out in the Act, for example remedies to promote certain purposes of the Act. These are obviously not restrictions and are intended to assist mainly minority shareholders in their ability to enforce their rights under the Companies Act.

Partnerships are generally unregulated and effect would be given to the agreement between the parties.

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

If the joint venture is a company, the partners do not generally have liability to each other beyond what is expressly agreed in the shareholders agreement or the memorandum of incorporation.

If the joint venture is a partnership, the partners are jointly and severally liable for the partnership debts. If one partner pays more than its interest in the partnership, it may have a claim against the other partner for the balance of the claim at common law.

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

Apart from practical considerations and the rules relating to information sharing, there are no general issues particular to joint venture disputes concerning disclosure of evidence.

Market overview

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

Joint ventures are widely used in South African commerce across sectors. This means that there is a developed body of law and commercial practice in regard to joint ventures.

Generally, subject to South African exchange control, funds coming into and out of South Africa are freely transferable, provided the rules regarding the introduction of the funds and the repatriation of the funds are followed. The exchange control rules to bring the money in and to take it out are generally administrative in nature, although some restrictions apply to the commercial terms.

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

There are no particular legal requirements or restrictions that should deter international investors, but they should be aware of the exchange control restrictions.

The one additional matter that should be considered in South Africa, however, relates to black economic empowerment. Generally, there is no black letter law requiring companies to have a shareholding by black shareholders, as that term is defined in the legislation and the codes of good practice on black economic empowerment. However, it is generally commercially beneficial for companies to have a black shareholding and to have representation on the board by black people. In some industries (for example, the mining industry) a black shareholding is a requirement. Investors in South Africa have to consider the fact that a shareholding by black people of between 26 per cent and 30 per cent may be required or beneficial.



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