

Joint Ventures 2020

Contributing editors
Gavin Williams and James Farrell
Herbert Smith Freehills





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Joint Ventures 2020

Contributing editors**Gavin Williams and James Farrell**

Herbert Smith Freehills

Lexology Getting The Deal Through is delighted to publish the third edition of *Joint Ventures*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, the Netherlands, Saudi Arabia and Thailand.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gavin Williams and James Farrell of Herbert Smith Freehills, for their continued assistance with this volume.



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FORM

Types of joint venture

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

In Germany, the term 'joint venture' comprises a variety of cooperation models. The key types of joint venture are equity joint ventures and contractual joint ventures. Equity joint ventures are formed by setting up an autonomous joint venture entity, and its main characteristics include full participation in risks and joint responsibilities for the management of the joint venture entity by the joint venture partners. In contrast, contractual joint ventures are formed by entering into an agreement setting out the key terms of cooperation, in particular, risk allocation, participation in profits and liability of the joint venture partners.

Joint ventures are a standard concept for cooperation in Germany. There are no specific rules in German law that only apply to joint ventures.

The following questions are answered with a strong focus on incorporated joint ventures and on German limited liability companies (GmbHs), by far the most common form of German joint venture entity.

Common sectors

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

The main objective of joint ventures in Germany is to pool knowledge and know-how, and to share costs and risks for the respective business undertaking. Joint ventures are, therefore, often established in industry sectors that require the development of new technologies and offer new business opportunities. In recent years, for example, the automotive sector, which is Germany's biggest industry sector, has seen a number of new joint ventures established to tackle the challenges of electrification and autonomous driving. However, joint ventures are also commonly used across all other German industrial sectors.

As is the case in other jurisdictions, joint venture-type structures are used by financial institutions to structure their financial investments, allowing them to make diversified investments that still meet their investment criteria.

PARTIES

Rules for foreign parties

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

There are no rules that specifically relate to foreign joint venture parties. However, general rules on foreign investments apply, such as:

- foreign investment rules, which stipulate governmental review procedures for foreign investment in connection with critical

infrastructures, such as defence, healthcare or telecommunications (see question 31);

- the German Foreign Tax Act, which determines the taxation of income in connection with other countries (see question 23); and
- the German Foreign Trade Law, which regulates the trading of goods with other countries.

Recently, efforts have been made by the EU and nationally to implement certain rules for foreign investment that provide for review rights of the respective governments. In practice, though, even after the most recent changes to foreign investment laws, Germany remains very open to foreign investors. The respective efforts made by the EU and at a national level emphasise the principle of reciprocity. This means that restrictions on foreign direct investment shall only apply to investors based in countries that do not apply liberal standards to investment from Germany or, as the case may be, the EU. While the changes to foreign direct investment laws did not, in practice, lead to restrictions until the end of 2017, 2018 has seen some state intervention with respect to investments from China into Germany, as well as into other EU jurisdictions (see question 31 for more detail).

Ultimate beneficial ownership

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

In Germany, no specific rules apply for disclosing the ultimate beneficial ownership of a joint venture entity. However, ultimate beneficial owners must be disclosed (eg, in connection with certain standard procedures, such as anti-money laundering procedures for, inter alia, banks, auditors or legal advisers). In connection with such procedures, any individuals holding more than 25 per cent of the capital or voting rights in a company, or that are able to exercise control in a similar manner, must be identified.

SETTING UP AND OPERATING A JOINT VENTURE

Structure

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

The joint venture parties' objectives are the main drivers when structuring a joint venture in Germany. The key drivers may include the parties aiming for a strong or a rather loose form of their cooperation and whether the cooperation is disclosed to third parties. Often, tax considerations have a major impact on the structure of the joint venture. Further aspects include the desired liability regime, corporate governance structure, the financial and regional scope of the cooperation as well as the envisaged duration of the joint venture.

Most common legal forms of an equity joint venture are GmbHs or limited partnerships with a GmbH as their sole general partner. The

respectively applicable rules of German corporate law are flexible and allow a variety of cooperation models. Irrespective of the specific cooperation model, joint ventures may themselves qualify as a private company under German law. This has the effect that certain rules of the German Civil Code may apply, which can only be modified to a limited extent.

Tax considerations

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

Tax-structuring considerations when setting up joint ventures are limited by the overarching principle that taxes generally have to be paid in the jurisdiction where the joint venture conducts its respective business. In the event that the relevant business is conducted in a high-tax jurisdiction, structuring considerations regarding legal form and the main seat of the joint venture entity will only have limited tax effects on the joint venture parties and the joint venture entity. Irrespective of whether the joint venture has its main seat or only a branch in Germany, German-related business activities will be subject to German taxes.

When transferring assets to a German joint venture, certain transfer taxes may apply, such as real-estate transfer tax. In addition, asset transfers to a joint venture entity can potentially lead to taxable gains. In certain cases, assets may be contributed to a joint venture on a tax-neutral basis, in particular, pursuant to the German Transformation Tax Act. In the event that the joint venture entity is a German corporation, the sale of an interest in the corporation is potentially subject to only limited taxes in Germany.

For certain legal forms such as GmbHs, withholding taxes may be potentially reduced to zero if the dividends are distributed to a shareholder in a member state of the EU and such shareholder owns at least 10 per cent of the share capital in the joint venture entity.

In addition, Germany is party to a large number of double-taxation agreements with other nations, which include potentially beneficial regulations for foreign joint venture parties (eg, on collection at source).

Asset contribution restriction

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

In Germany, there are no restrictions on the contribution of assets to a joint venture entity. However, depending on the type of joint venture entity and if assets are contributed in connection with the process of raising or increasing the share capital, strict rules apply with respect to accurate valuation of the contributed assets. In the event that inaccurate valuations are used to the detriment of the joint venture entity, the respective contributing shareholder may be held liable. Apart from these rules on the injection and maintenance of the share capital, no other restrictions on the contribution of assets to a joint venture entity apply.

Interaction between constitution and agreement

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

As the articles of association of corporations are publicly available, it is common to only include the mandatory formal provision in these constitutional documents. In contrast, the joint venture agreement will usually include the detailed framework for cooperation between the parties. The key points in the joint venture agreement often include rules on contributions, corporate governance, shares in profits and liability of the joint venture partners as well as duration of the cooperation. The scope and focus of the key terms differ from joint venture to joint venture.

With respect to the interaction of the agreements, it is key to understand that the rules of the joint venture agreement are only binding in the internal relationship of the joint venture parties. Hence, certain provisions must be included in the articles of association to be valid with in rem effect regarding third parties (eg, rights of first refusal for shares in a GmbH).

In the event of inconsistency between the provisions of the constitution and the joint venture agreement, the parties' agreement determines, for their internal relationship, which rules prevail. In most cases, the parties are bound by the joint venture agreement to give effect to its rules, including potentially required amendments of the joint venture entity's articles of association in the case of inconsistency. However, in the case of inconsistent provisions, which must be included in the articles of association to be effective, the respective rules in the articles of association will prevail in relation to third parties.

Party interaction

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

The interaction of the joint venture parties with the joint venture entity is subject to the contractual agreement. German law provides for a wide range of possible arrangements. However, applicable laws may limit the scope of information to be legitimately shared owing to restrictions under competition law (eg, production cost, prices or market strategies) or owing to rules relating to the protection of personal data.

Regarding a GmbH, German law provides a level of protection for joint venture partners by providing rights to a minimum level of information in respect of the joint venture entity. This includes, in particular, the right to review the books and records of the joint venture entity.

Exercising control

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

The main instruments of control over the joint venture entity's decision-making are shareholders' information rights (see question 9), mandatory notices to the joint venture parties for shareholders' meetings, the rights of each joint venture partner to participate in shareholders' meetings, and the rights to take part in the voting and decision-making process in shareholders' meetings. Finally, each shareholder of the joint venture entity has the right to challenge shareholders' resolutions. In the event that the joint venture entity is a GmbH, minority shareholders with at least 10 per cent of the voting rights can convene shareholders' meetings and force decisions on certain items. This alone can be a powerful instrument for minority investors if respective majority requirements for decision-making were implemented.

The main forum where the joint venture parties may exercise control over the joint venture entity's decision-making is the entity's general meeting. Agreements on applicable majorities may ensure that certain decisions are not taken without minority investors' votes. In a GmbH, the shareholders have extensive rights to instruct the company's management by way of shareholders' resolutions to take or to refrain from taking certain actions.

Governance issues

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

The most common governance issues that arise in connection with joint ventures concern the balance of power between joint venture partners, especially in joint ventures between equal partners and the agreement on and nomination of the members of the executive management.

Deadlock provisions are also very common corporate governance issues (see question 21).

The powers of joint venture partners are typically balanced by implementing joint decision-making procedures. Such rules can include the implementation of financial limits for transactions for certain or all members of the executive management and require joint decisions of the management board for these items. Another option is to establish an approval process so that certain decisions or actions may not be taken without shareholders' approval or to transfer the authority for the decision to another management body (eg, an advisory board). Further common measures include the allocation of responsibilities for specific areas to certain members of the executive management so that each manager has broader discretion for decisions within his or her responsibilities. Commonly, a combination of these measures is implemented.

Nominee directors

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

The means and possibilities of management control largely depend on the form of the joint venture company. In a GmbH, as the most common joint venture entity, the shareholders have extensive instruments at hand to control and instruct the executive management, including nominee directors or by way of shareholders' resolutions with a simple majority of the votes cast. The shareholders may pass shareholders' resolutions with specific instructions that must be observed by all members of the executive management. In contrast to these far-reaching capabilities of GmbH shareholders, the stockholders of a German stock corporation have only very limited means to control the executive management. In particular, the executive management of stock corporations is not bound by stockholders' instructions.

Nominee directors must act in the interest of the joint venture entity and not for the benefit of the nominating shareholders. Otherwise, managing directors, including nominee directors, may be held liable.

Competition law

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

The formation or acquisition of an existing joint venture is, irrespective of it being fully functional, subject to German merger control where one or more parent entities acquire either at least 25 per cent of the shares or voting rights, or control over a joint venture (provided that the applicable turnover thresholds are met).

Even if a filing requirement is formally triggered, the German Federal Cartel Office has no capacity to review transactions that have no 'appreciable effect' on German territory.

The authority may review potential coordinative effects between the joint venture and its parent entities and, in the case of non-compliance, prohibit joint ventures pursuant to the cartel prohibition. Such proceedings are not tied to a statutory deadline and are conducted independent of merger-control proceedings.

Provision of services

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

The key objective in structuring the provision of services to the joint venture entity by joint venture parties is to provide any services at arm's length (ie, market terms). In the event of a discrepancy between the value of the services that are provided to the joint venture company and the value of the respective consideration to the benefit of the shareholder, the provision of services could qualify as hidden profit distribution. Such hidden profit distribution has negative tax implications on shareholders and on the level of the joint venture entity. In addition, such mismatch of service value and respective consideration may affect the agreed commercial balance between the joint venture partners. Other major structuring considerations include agreeing regulations to ensure a certain quality of the services and rules on liability and liability limits in connection with such services.

Employment rights

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

German employment law can have a significant impact on joint ventures depending on the joint venture structure adopted.

For example, if a joint venture party contributes significant tangible or intangible assets (including employees) to the joint venture entity, it may lead to a transfer of business. As a result, the employees of that respective business at the time of transfer are automatically transferred to the joint venture entity by operation of law, including the rights and obligations of the employment relationships (including all individual contracts, collective agreements, pensions, etc) of the transferring employees.

If only employees of a joint venture party are intended to be transferred to the joint venture, the parties can, for example, agree to second employees for a limited period of time to the joint venture. Such secondment has to comply with the German Act on Temporary Work (eg, permission to lease employees for a maximum lease period of 18 months). Another option would be to transfer the employment relationships to the joint venture under tripartite agreements between the employees, the employing entity and the joint venture entity.

In certain scenarios, co-determination rights of works councils may apply, pursuant to the German Works Constitution Act. This is the case, for instance, if the establishment of the joint venture leads to a change of the operation of a joint ventures party. Such change of operation can be triggered if a part of the business has to be carved out before transferring this part to the joint venture entity. A change to the operation triggers co-determination rights of the works council; namely, it will be required to negotiate a reconciliation of interest (setting out what, how and when the changes are to be implemented) and a social plan (concerning compensation for the employees affected by the proposals, namely, termination payments, relocation benefits, etc).

Intellectual property rights

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

No specific rules apply to the treatment of intellectual property (IP) for joint ventures. Generally, the joint venture parties are free to agree on how IP rights shall be handled. On the creation of joint ventures, it is common to agree on transfers of IP rights from joint venture partners to the joint venture entity or to conclude respective licensing agreements at arm's length.

IP rights are often created during joint venture business operations. During ongoing operations of the joint venture entity, it is common to exclude the use of the joint venture's IP rights outside the joint venture. However, of course, the joint venture's IP may be licensed to the joint venture partners on arm's-length terms.

In the event of the joint venture's termination, contractual provisions often provide for a split of the intangible assets among the joint venture parties, including allocation and future use of IP rights. IP rights are often allocated to the joint venture parties according to their respective business focus. To ensure future use of joint venture IP rights, joint venture partners may grant licences at arm's-length terms to other joint venture partners.

FUNDING THE JOINT VENTURE

Typical funding

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

When setting up joint venture entities in the form of GmbHs or stock corporations, strict funding rules apply to ensure that the share capital of the respective entity is properly raised. After formation of the joint venture entity, similarly strict capital-maintenance rules apply to preserve the share capital and prohibit distributions to the shareholders to the detriment of the share capital. In addition to the rules on the initial contribution and maintenance of the share capital, in particular, tax considerations may influence the funding structure of the respective joint venture.

Typical funding instruments include equity financing or non-equity financing (eg, by way of shareholder loans or third-party financing). Less common is financing of mid-cap joint ventures by way of bonds. Statutory rules ensure that shareholdings may not be diluted in connection with future funding without agreement of the shareholders.

Capital injection restrictions

- 18 | Are there any legal or regulatory restrictions on the injection of capital into, or the distribution of profits or the extraction of cash by other means from, the joint venture entity?

There are different restrictions on the injection of capital, the distribution of profits and the extraction of cash by other means from the joint venture entity. Primarily, the rules on the injection and maintenance of the share capital apply (see question 17) that set certain limits to shareholder distributions. This applies for cash distributions as well as for distributions in kind or other means of extracting cash from the joint venture entity. Capital maintenance rules also apply to upstream loans, which are only permissible if made from excess cash or if the repayment claim of the joint venture entity is fully recoverable. Any violation of these rules may lead to corresponding liability of the joint venture partners.

Tax considerations

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

There is no specific tax regime for joint venture entities in Germany. In general, tax characteristics of a joint venture partner do not affect tax consequences for the other joint venture partners. Sensible tax-structuring considerations for the operation of joint ventures are only possible after thorough assessment of the joint venture partners' aim and after considering a variety of local tax implications.

As a general rule, with a GmbH as joint venture entity, income tax at around 30 per cent applies. In the past, joint ventures were sometimes

extensively funded by shareholder loans. Interests on these shareholder loans would decrease the joint venture's profits and reduce profit taxes in Germany. However, the Corporation Tax Act has been amended to limit such tax planning.

Services between the joint venture entity and its shareholders should also be assessed from a tax perspective; in particular, such services should be provided at arm's length.

Corporation tax group relief rules only apply in the event that certain prerequisites are met with respect to financial, economic and organisational integration of the relevant joint venture entity into the respective group. In order to be recognised from a profit-tax perspective, the group company must be financially integrated and must be party to a profit and loss transfer agreement with the parent company. However, pursuant to a decision of the Court of Justice of the European Union, cross-border offsetting of losses is permissible, provided certain prerequisites are met.

Accounting and reporting issues

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

Regarding accounting, participation in joint ventures may be accounted for pursuant to the equity method or the acquisition-cost principle.

Different standards apply under the International Financial Reporting Standards (IFRS) and German Generally Accepted Accounting Principles (German GAAP) on whether the shares and business relationships with the joint venture entity may be accounted for, pursuant to the equity method. While the IFRS applies the equity method if a controlling influence of the joint venture partner is possible, German GAAP requires that the respective joint venture partner actually exercises its controlling influence.

DEADLOCK, EXIT AND TERMINATION

Deadlock provisions

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

Standard provisions to resolve deadlock situations include casting votes for specific management members. Casting votes can either be given to, for example, the chairman of the executive management for all matters or to different management members, depending on the subject matter of the decision.

Further standard provisions include the implementation of escalation mechanisms, which refer the respective matter to another (higher) decision-making body (eg, the joint venture partners' or the parent companies' management). Other options include establishing an advisory committee or a shareholders' committee to resolve deadlocks. Further, dispute resolution mechanisms may be implemented that require mediation procedures in the event of disagreement. The competent mediating authority could be, for example, the executive boards of the joint venture partners or parent companies, an advisory committee, an independent third-party expert or even a court of arbitration.

Escalation mechanisms are regularly structured in staged models so that the dispute settlement is initially transferred to higher internal authorities (eg, management bodies of joint venture parties or parent companies); if a dispute cannot be resolved on that level within a certain time period, the dispute will be transferred to external decision-making bodies.

Exit provisions

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

Common exit provisions include Texas shoot-out and Russian roulette clauses. Shoot-out clauses entitle joint venture parties to transfer their shares to another joint venture party and exit the joint venture; they also entitle a joint venture partner to submit an offer to purchase the other partner's shares. This other partner may either accept the offer or buy the shares of the initial offeror for a higher price. If both joint venture partners intend to keep their shares in the joint venture, such shoot-out rules will trigger a bidding process. The joint venture partner with higher financial means will most likely prevail. Russian roulette clauses entitle each joint venture partner to offer its shares for sale and transfer to the other joint venture party. If the other joint venture party declines to buy the offered shares, it has to sell its shares to the offering joint venture partner for the same price.

Further exit provisions include drag-along and tag-along rights. Under a drag-along right, a joint venture partner that intends to sell its shares to a third party may force the other shareholders to sell their shares as well. In the event that one joint venture partner sells its shares to a third party, a tag-along right entitles the other joint venture partners to sell their shares under the same terms and conditions to the respective buyer.

Rules on mandatory share transfers in a GmbH in the event of a joint venture partner's insolvency must be included in the articles of association. Such mandatory share transfer is effected by way of a corresponding shareholders' resolution. There are certain requirements with respect to the basis of calculation for the consideration of mandatory share transfers. In particular, such consideration must not be grossly disproportionate to the fair market value of the respective shares. Otherwise, the calculation model is deemed void. In addition, calculation models should be assessed from a tax perspective.

Tax considerations following termination

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

In the event that a joint venture partner disposes of its shares in a GmbH, such disposal is potentially subject to tax on chargeable gains. However, tax relief for German-based joint venture partners may apply. For foreign joint venture partners, applicable double-tax agreements often include rules that such gains are not subject to taxes in Germany (eg, under certain conditions, the current double-tax treaty with France). Transfers of assets from the joint venture entity to the joint venture partners may also be subject to tax on chargeable gains for the respective joint venture partner.

DISPUTES

Choice of law and resolution methods

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

There are no direct constraints on the choice of law; the parties are free to reach an agreement on the applicable law. Without agreement of the parties, the European Community Laws, Brussels I Regulation and Treaties of Rome apply for European member states. Usually, article 4 of the Rome I Regulation applies, according to which, the contract shall be governed by the laws of the country with which it is most closely connected. In most cases, this should be the country in which the joint venture company has its registered office.

In joint ventures with individuals as joint venture partners, strict requirements apply to a valid agreement on arbitration clauses.

Mandatorily applicable local law

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

There are different mandatory provisions of local law that will apply, irrespective of the choice of governing law. If the joint venture is a German entity, German corporate law applies. In the case of employees in Germany, German employment law is relevant. Further, within their respective regional scope of application, German competition law and German tax law apply, irrespective of the parties' agreement.

Remedy restrictions

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

Under German arbitration law, a tribunal is generally empowered to grant the same remedies as courts. Tribunals may, therefore, grant declaratory relief, order payments, order a party to refrain from taking certain actions or order specific performance. In the context of joint venture disputes, there are no specific restrictions. In particular, a tribunal may order a defaulting party to comply with its capital increase obligations, order a party to express a specific declaration (eg, specific casting of votes) or find that, upon application, the joint venture was dissolved. Tribunals may also decide upon deficiencies of shareholder resolutions. The latter, however, requires that:

- all shareholders have agreed to the arbitration agreement;
- all shareholders are informed about the arbitration, and are given the right to participate in the proceedings; and
- all shareholders have equal rights as to the nomination of the arbitrators.

Minority investor protection

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

General statutory rules on the protection of minority investors apply to joint ventures. The specific scope of statutory protection depends on the legal form of the joint venture entity. For example, German law provides for information rights of GmbH shareholders, which include, in particular, the right to review the books and records of the joint venture entity, as well as for participation and decision-making rights with respect to the shareholders' meeting (see question 10). Minority shareholders whose interests amount to a certain percentage of the share capital also have the right to summon shareholders' meetings and to force decisions on certain items. Further, irrespective of their shareholding quota, minority shareholders have a right to challenge shareholders' resolutions.

Liabilities

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

In addition to the agreement concerning the allocation of liability in the joint venture agreement, statutory provisions apply. Irrespective of the form of the joint venture entity, the joint venture itself may qualify as a German partnership so that the respective rules of the German Civil Code and of the German Commercial Code will apply. This may lead to

joint and several liability of the joint venture partners, which may have the effect that, even concerning third-party claims, the joint venture entity may be claimed from each joint venture partner. If held liable, the responsible joint venture partner has a claim for compensation against the other joint venture partners.

Further, joint venture partners may claim recourse from the joint venture company when having incurred reasonable expenses for the benefit of the joint venture.

Disclosure of evidence

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

Under German procedural law, discovery practice is virtually non-existent. The law, however, allows for limited power of the courts to order the production of specific documents by the parties and even third parties. A fishing expedition is not possible. It is within the courts' discretion to order such production of documents. When exercising its discretion, the court will, inter alia, take elements of legal privilege into consideration. In an arbitration seated in Germany, a tribunal will most likely follow the standards as set out by the International Bar Association's rules on the taking of evidence. The tribunal would then also need to exercise its discretion, and thereby take issues of legal privilege into account.

MARKET OVERVIEW

Jurisdictional advantages

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

Key advantages when setting up and operating joint ventures in Germany include the efficient and reliable legal system and its fundamental principle of freedom of contract. In particular, the applicable GmbH laws may be modified to a great extent and allow for flexible agreements of the joint venture parties. In addition, joint venture parties benefit from the limited amount of required transparency of the joint venture and its business operations.

Further, in Germany, only very limited restrictions apply with respect to foreign investors and managing directors' nationalities.

Another advantage is that the robust and global German economy is in the heart of the European Union, the world's largest trading bloc. Germany provides a strong and reliable infrastructure as well as a highly skilled workforce.

Requirements and restrictions

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

Again, there are no particular requirements or restrictions that specifically apply to joint ventures. However, general requirements and restrictions include, in particular, review competencies of the German state in connection with foreign investment (see question 32), and a comparatively high standard of employment protection laws.

As a further requirement, German employment protection laws apply rather high standards on pension requirements, workers' health and safety, and data protection.



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UPDATE AND TRENDS

Key developments of the past year

32 | What are the current trends affecting joint ventures in your jurisdiction? What recent developments in legislation and case law have had an impact on joint ventures?

With Germany being the home to a large number of key industrial players, foreign investment in connection with joint ventures remains of particular importance. In this respect, the framework in connection with review competencies of the Federal Ministry of Economic Affairs and Energy in connection with foreign investment in critical German infrastructure (such as defence, healthcare and telecommunications) was adjusted at the end of 2018. The goal of the amendments was to allow the German government a more efficient review of foreign investment in sensitive industry areas. Correspondingly, the reporting obligations for foreign investors wishing to invest in Germany towards the German government, ie, the Federal Ministry of Economic Affairs and Energy, have been extended. This could potentially lead to additional efforts for foreign investors when preparing investment in critical infrastructure in Germany.

While the relevant threshold regarding foreign investment in critical infrastructure of 25 per cent generally continues to apply, security- and defence-related industries are now being particularly protected. Here, the German foreign direct investment rules already apply for investments of 10 per cent. Because of the particular importance of the media for a well-functioning democracy, the media industry has been added to the industries for which the German foreign direct investment rules apply. In general, the amended rules will allow the German government to review at an earlier stage whether foreign investments are in line with Germany's security interests.



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