

Cyprus Joint Ventures: Flexibility for Russia, CIS and India



Cyprus plays an important role in the structuring of overseas investments, most significantly to Russia, the CIS and India, and therefore corporate joint ventures have an important role to play for investors who wish to participate or co-operate in such investments. In this article Demetris Loizides of Harneys' Alyco in Cyprus discusses essential legal and practical matters underlying the concept of joint ventures in Cyprus.

Advantages of Cyprus

The use of a Cypriot company particularly in the capacity of holding company in a JV provides benefits relating to certainty, limited liability, separate legal personality, versatility, financing and tax flexibility.

The Companies Law of the statute laws of Cyprus (the 'Cap 113') contains a mature body of statutory principles, supported by an established commercial (both local and international) practice. Consequently the legal regime is defined by certainty regarding the JV Parties' legal position between themselves and in relation to the company or third parties.

The Cypriot company has separate legal personality whose members' liability is limited to the amount of capital they respectively contributed to the company and into the Business. It has the capacity to sue and be sued and has the power to own property and contract in its own right. The separate legal personality makes a JV particularly appropriate to a business where continuity is essential to JV Parties.

A JV in Cyprus can be versatile and able to cope with complex arrangements in terms of funding the business (in relation to both equity and loan) and in terms of returns and earnings on such funding. The loan financing can be secured in various ways including the granting of fixed and floating charges over some or all of the JVC assets.

Finally, the separate taxation of the JV allows the JV Parties a high degree of latitude in planning their own and their venture's tax position.

The Cypriot company is a creature of statute, a fictitious entity without physical, tangible, existence or presence and for this reason Cap 113 focuses primarily on the relationship of those which "constitute" the company, in particular, its members and directors. Cap 113 is founded on the ancient principle "the majority rules".

The Constitution of the Cypriot company

The Cypriot company has two sets of documents which define its constitution, namely the memorandum of association (the 'MA') and the articles of association (the 'AA'). Both the MA and the AA are filed with the Registrar of Companies (the official company registration office of Cyprus, a department of the Ministry of Commerce and Industry) and are available to the public.

The MA and the AA by virtue of Cap 113 form together a contract, known as the "statutory contract", between the Cypriot company and the members as well as the members inter se.

The MA contains five clauses setting out the company name, its domicile, the company objects (and powers), the limitation of its members (shareholders), and its authorised share capital. The MA has more to do with the company's external relations.

The AA contains regulations concerning the internal management of the company broadly relating to the following main matters: the issue of shares; the rights and restrictions of members; the transfer of shares; the composition, powers and duties of directors; the conduct of meeting and voting both at the level of directors (board meetings) and at the level of members (general meetings); and the right to and the distribution of dividends.

The AA is therefore an essential document in a JV which should be tailored to accord with the particular circumstances and requirements of the venture and to reflect the bargaining power of the JV Parties.

The Shareholders' Agreement

JVs almost invariably, except in simple arrangements, require some form of a shareholders' agreement (the SHA), also referred to as joint venture agreement. Although most of the provisions likely to be included in a SHA can, in principle and in substance, be included in the AA the object and the role of the SHA differ from those of the AA.

Although the actual rights and obligations of the JV Parties under a SHA are capable of wide variation depending on their commercial objectives and bargaining power, matters ordinarily addressed in a SHA include the following: the on-going relationship of the JV Parties; the funding of the Business; the management of the Business and the division of matters reserved to the decision of the board of directors and of the JV Parties; the control of the board of directors; the resolution of deadlocks; and the eventualities relating to the withdrawal of the JV Parties and the termination of the JV.

Remedies and forum

The remedies available to the innocent JV Party in an event of a breach of the SHA include damages, specific performance and injunction. Damages in principle aim to put, in so far as money can do so, the innocent JV Party in the position he would have been had the SHA been performed without breach in accordance with its provisions.

Specific performance requires the JV Party in breach to perform the SHA in accordance with its provisions. Unlike damages a remedy available as of right, specific performance is subject to the discretion of the court. A SHA can in appropriate circumstances be specifically enforceable. The remedy will be awarded if it is fair, practical and if it sought promptly after the occurrence of the breach. Despite these conditions it will not be awarded if, inter-alia, damages is an adequate remedy.

Injunction is in nature a prohibitive remedy and requires the JV Party in breach to halt his course of action. Like the remedy of specific performance, the remedy of injunction is discretionary and it is subject to the same conditions referred to above relating to specific performance.

Generally the JV Parties may choose any law (forum) to govern the SHA. Nevertheless whatever law is chosen the Cypriot law and regulations will always be relevant to a JV for it applies to the MA and AA regardless of the chosen law. Ideally the SHA should be governed by Cypriot law.

Conclusion

The legal and tax regimes in Cyprus are able to cope with a wide variety of commercial arrangements and corporate structures. Cypriot law is flexible to allow those participating to plan their tax position while accommodating their commercial wishes under an established legal environment.

The participants are largely free to formulate any rules they wish to regulate and govern their joint venture relationship. These rules can be divided between the constitution of the joint venture company and the joint venture agreement without compromising their effect,

validity or enforceability. The rules contained in the joint venture agreement may be kept in confidence from the public.

Although the joint venture company may be a party to the joint venture agreement the participants can instead direct the company to conduct its affairs in accordance with the agreement without the company itself needing to be involved or be a party to it.

Cypriot law has sufficient remedies available to the participants to ensure the performance of the rules which formulate the joint venture and to secure their respective rights under or in connection with it. ■

Demetris Loizides (demetris.loizides@harneys.com) is a founding partner of Harneys' Cyprus office and a member of the firm's Corporate and Commercial Department.