Cross-Border Joint Venture and Strategic Alliance Guide (South Africa)

A Practical Guidance® Practice Note by Deepa Vallabh, Maud Hill, Bernice Abrahams, Dumisani Lucas and Aphelele Binta, CMS RM Partners

Deepa Vallabh
CMS RM Partners

This Cross-Border Joint Venture and Strategic Alliance Guide (South Africa) discusses relevant law and practice related to the formation and operation of cross-border joint ventures, including corporate and contractual joint ventures, in South Africa. For other jurisdictions see the Cross-Border Joint Venture and Strategic Alliance Resource Kit.

Structures

What are the standard forms of joint ventures / strategic alliances and common features of each?

Joint ventures are business enterprises or arrangements where two or more parties (juristic or natural persons) come together with a common business purpose or to undertake a specific economic activity, in order to share resources, knowledge, and expertise. Joint ventures come in various forms in South Africa, and are not specifically regulated. Joint venture arrangements are implemented under the following structures:

- Contractual or unincorporated joint venture arrangements (Contractual Joint Ventures)
- Incorporated joint venture companies –and–
- Partnerships

Contractual Joint Ventures

Contractual Joint Venture arrangements are informal structures where two or more parties wishing to conduct a specific common activity enter into a joint venture agreement in order to regulate their relationship.

The joint venture agreement must be comprehensive and detailed in order to efficiently regulate the arrangement between the parties. The joint venture agreement sets out, amongst other things, (1) the intention of the parties, (2) the specific role of each of the members, and (3) the specifics regarding the business arrangement between the parties.

Unlike the incorporated joint venture arrangement, a separate company is not created with this form of joint venture. The businesses of the members remain separate and they remain separate legal entities. The members act together to share resources, expertise, and knowledge in order to maximize their ability to compete in the marketplace. The joint venture parties are taxed separately and have separate accrued liabilities and profits (unless otherwise agreed upon by the parties).

The Contractual Joint Venture arrangement can be accompanied by multiple ancillary agreements that regulate its processes, such as agency agreements and management agreements. Agency agreements appoint an agent for the purposes of performing specified functions on behalf of the joint venture parties, such as the marketing of products. Management agreements specify the management structure of the arrangement and the specific duties and rights that management may have.

The Contractual Joint Venture arrangement is a flexible arrangement. Obligations and duties are typically tailored within the joint venture agreement to reflect the arrangements between the parties and to suit the needs of the joint venture. However, with flexibility, often comes uncertainty, and therefore as stated above, the joint venture agreement must clearly set out the roles, responsibilities, duties, rights, and recourse that the parties have under the arrangement. This arrangement is a much smaller financial commitment than the incorporated joint venture. Contractual Joint Venture arrangements do not protect the members from personal liability, as there is no creation of a separate legal entity.

Incorporated Joint Ventures

Incorporated joint venture arrangements are created by forming and registering a new company (or the use of a shelf company that is already incorporated). The members of the joint venture then become the shareholders of the joint venture company. Incorporated joint venture companies are therefore separate legal entities. Due to incorporated joint venture companies being incorporated as a company, as defined in the Companies Act No. 71 of 2008 (**Companies Act**), they are taxed separately based on its profits and losses and therefore the tax implications which apply to registered companies will apply to incorporated joint ventures. Joint venture companies are liable for income tax at a rate of 28%. In circumstances where dividends are paid to shareholders of incorporated joint venture companies, shareholders will, subject to exceptions, be liable for dividends tax at a rate of 20%.

South African companies are governed by the Companies Act and the joint venture company must comply with the provisions of the Companies Act. One of the main obligations imposed on companies, in terms of the Companies Act, is that companies are required to have a memorandum of incorporation (**MOI**) in place. A MOI, in terms of the Companies Act, is similar to the Articles of Incorporation in the United States of America or the Articles of Association in the United Kingdom.

Shareholders of the joint venture company may set out the terms and conditions of the arrangement between them in a joint venture agreement. The joint venture agreement most commonly takes the form of a shareholders' agreement. The shareholders' agreement, as well as the MOI, cannot be in contravention with the provisions of the Companies Act. Therefore, the incorporated joint venture arrangement is less flexible than the unincorporated joint venture arrangement, because it is regulated by legislation and only certain Companies Act provisions may be altered by a company's MOI.

The shareholders' agreement will normally set out, among other provisions, the role of shareholders, the shareholdings of each shareholder, the scope of the business, and the management principles of the arrangement.

In the case of inconsistencies between a company's MOI and the shareholders' agreement, the MOI will prevail. Therefore, rights and obligations contained in the shareholder's agreement will be invalid if they are in contravention with the Companies Act and the company's MOI. It is advisable, therefore, that the MOI and shareholders' agreement be drafted at the same time in order to avoid any inconsistencies between the two documents.

As with the Contractual Joint Venture, there may be a number of ancillary agreements that are entered into between the parties, such as shareholder loan agreements and service agreements. Shareholder loan agreements provide funding and working capital to the company. Service agreements appoint particular service providers to perform services for the company, such as management services.

The incorporated joint venture company is a greater financial commitment and is therefore recommended for joint ventures that do business for a longer period of time. The arrangement, although less flexible, provides increased certainty due to legislative regulation. Importantly, these arrangements limit personal liability through the creation of a separate legal entity and personal liability does not attach to the shareholders except in limited instances, such as fraud, or willful, or intentional misconduct.

Partnerships

Joint venture partnerships are implemented when the joint venture arrangement is to exist for an indefinite period. This is in contrast to the contractual and unincorporated joint venture arrangements, each having a specific purpose or project in mind. Partnerships are formed through partnership agreements that regulate the duties and obligations of the partners.

Partners share in the losses and profits of the venture and are taxed at the partner or individual level, as a partnership is not considered a separate legal entity for tax purposes.

Partnerships offer very little protection in terms of personal liability. Given the risks of personal liability, joint venture partnerships are not common. These arrangements, along with contractual joint ventures, do not have perpetual succession. Therefore, where a partner is a natural person, the partnership will terminate upon the death of a partner.

Advantages and Disadvantages of Joint Venture Arrangements

Advantages of joint venture arrangements consist of the following:

- Access to new markets, opportunities, and distribution networks
- Increased input and output capacities (facilitating entrance into new markets otherwise difficult to enter)
- Sharing of risks and costs with other parties
- Access to greater resources, expertise, and knowledge –and–
- The possibility of being able to access a higher broad-based black economic empowerment (**BEE**) score resulting in a greater opportunity to procure public tenders (as further described below)

Disadvantages of joint venture arrangements consist of the following:

- Complex agreements are required to regulate the technical aspects of the arrangements
- Effort is required to build relationships with the other members
- The arrangements require extensive and clear rights, obligations, and objectives for the members –and–
- Requires efficient management in order to ensure cooperation and integration

The Impact and Effect of BEE on Joint Ventures

BEE is a strategy that aims to realize South Africa's full economic potential, while helping to bring the black majority into the economic mainstream. In 2004, the South African government passed the Broad-Based Black Economic Empowerment Act (B-BBEEA), to facilitate the implementation of BEE. The Department of Trade and Industry (DTI) introduced B-BBEEA scorecards and B-BBEEA Codes of Good Practice (BEE Codes) that aim to promote the meaningful participation of black people in the South African economy. Depending on the total score, companies are awarded procurement recognition levels ranging from level one to level eight. The higher the B-BBEEA compliance level, the stronger a company is in relation to its competitors and thus more likely to procure more public tenders. A level one contributor is the highest achievable status and level eight is the lowest level of compliance. However, the sole purpose of the venture cannot be to circumvent the provisions of the B-BBEEA and one should consider the factors carefully in this regard.

A B-BBEEA certificate:

- Is a document that indicates a business' level of compliance with the B-BBEEA in the particular industry that the company is classified
- Is an indication of a business' turnover, the overall B-BBEEA status, and the level of black ownership –and–
- Is only valid for a period of one year and has to be renewed annually, based on new evidence supporting the level of compliance by a particular company

A B-BBEEA certificate is not a statutory requirement for all businesses in South Africa. Accordingly, a company can make the decision not to obtain a B-BBEEA certificate. However, South African public offices, such as municipalities and any state owned entities, require all their suppliers to have valid B-BBEEA certificates before any contracts are awarded. Failure to submit a valid B-BBEEA rating will lead to disqualification of the company from any public tender and procurement process. Therefore, a B-BBEEA certificate becomes a legal requirement for any company that wishes to do business with the South African government, any state owned entity, government department, or municipality.

However, there are certain industry specific rules in which, amongst others, a certain percentage of black ownership or BEE level is required.

Moreover, larger companies (including private companies that are B-BBEEA compliant) prefer to have B-BBEEA certified companies in their supply chain, as this boosts their own B-BBEEA score and puts them in a good position to access government contracts. The presence of B-BBEEA certified companies in their supply chain also allows larger companies to remain competitive by aiming to reach a level one status or to remain at level one status and in doing so, procure more business in the process.

Although there are no direct financial penalties applied to non-B-BBEEA compliant companies, the B-BBEEA system ensures that procurement managers and buyers will favour companies that are compliant since that enhances their own B-BBEEA scorecard.

The Minister of Trade and Industry of South Africa issued amendments to the generic BEE Codes which were published on 31 May 2019. The purpose of these BEE Codes is to set out a framework of how companies are to be assessed in relation to their B-BBEEA levels. There are also sector specific BEE Codes which are applicable to companies that undertake business in the Agricultural sector, the Financial sector, the Information, Communication and Technology sector, the Property sector, the Chartered Accountancy sector, the Transport sector, the Forestry sector, the Marketing, Advertising and Communication sector and the Tourism sector. Each of these sectors have their own specific BEE Codes and guidelines on how they are scored from a B-BBEEA compliance perspective.

The amendments to the generic BEE Codes mentioned above include, amongst other things, that certain entities require a consolidated B-BBEEA verification certificate. In this regard, unincorporated joint ventures are required to compile a consolidated B-BBEEA verification certificate. This exercise is required to consolidate the verified compliance data of joint venture partners or members as though the measured entities were a single entity. Each entity or partner in the joint venture's respective score in terms of the relevant BEE Codes is weighed according to their proportionate shareholding or membership in the joint venture and added together for a combined score out of 100. Such consolidated B-BBEEA verification certificate is valid for a period of 12 months and applicable to a specific project. Consequently, whenever two entities or partners form a Contractual Joint Venture or a partnership for tender purposes, a new consolidated verification certificate must be obtained for that specific tender.

Can a joint venture be formed for any purpose?

Joint ventures can be formed for any purpose, provided that the joint venture complies with the laws of South Africa.

In the same manner, joint ventures can be utilized in any market, sector, or industry, provided that the arrangement complies with the requirements that apply to the company in the specific sector, if such sector is regulated, in this regard see the note on the BEE Codes specific to each sector above.

How is a joint venture structured to minimize potential liability? Are there instances where parties to a venture may knowingly choose a vehicle without limited liability and, if so, why would such party make that choice?

It is important to have an understanding of the potential liability that joint venture parties may be subject to, particularly with respect to their personal assets. Below is a discussion of matters of potential liability with respect to each of the joint venture structures: Contractual Joint Ventures, incorporated joint ventures, and partnerships.

Contractual Joint Ventures

Contractual Joint Venture arrangements have high liability risks for members. The formation of this type of joint venture does not result in a separate entity and therefore the members have joint and several personal liability (unless otherwise agreed within the joint venture agreement). Furthermore, members are liable for their own income tax. A method of mitigating possible liability is to enter into indemnity agreements with the other members to ensure that liability remains limited. The joint venture agreement can also be used to allocate liability by incorporating indemnity provisions and guarantees. A party typically will enter into this type of joint venture because it has cost savings advantages and wide flexibility.

Incorporated Joint Ventures

As provided above, incorporated joint ventures are separate legal entities and therefore liability is limited to the company itself. Each member of an incorporated joint venture shares the expenses specific to the objectives of the company, as defined in the shareholder's agreement and the company MOI. The company is liable for its own income tax and shareholders of the incorporated joint venture company may be liable for dividends tax when dividends are paid. A bank account specific to the joint venture company should be opened to ensure that private funds are not intermingled with the company's funds.

Partnerships

Joint venture partnership arrangements have the highest potential for personal liability. Each partner is jointly and severally liable with respect to the liabilities of the partnership. However, in the case of tax liability, each all "limited partners" as defined in the Income Tax Act are only liable on a pro rata basis on their agreed capital contribution.

Statutory Framework

What is the applicable statutory framework for each structure discussed above?

As provided above, the only structure governed by a statutory framework is the incorporated joint venture. The incorporated joint venture is governed by the Companies Act. However, depending on the nature of the activities of a company or joint venture, there may be additional laws and/or regulations applicable to the activities of the company or joint venture.

Are there statutory or other limits on the duration of a joint venture?

There are no statutory limits on a joint venture's duration. The only minimum or maximum periods for a joint venture are those set out and agreed upon in the joint venture agreement or the shareholder's agreement. Partnerships and contractual joint ventures terminate upon the death of a member, where the member is a natural person, as there is no perpetual succession in these arrangements.

Do joint ventures have to be registered with any federal or local body other than the CIPC (as described below) in order to effect the entity's formation?

In order to effect the entity's formation, an incorporated joint venture must be registered with the Companies and Intellectual Property Commission (CIPC). CIPC is the statutory body that incorporates and regulates South African companies. An incorporated joint venture will be required to submit its MOI and other specified documents on an ongoing basis to CIPC.

In addition, filing or approvals with the other agencies, as specified below, may be required:

- The formation of a joint venture can trigger South African competition and antitrust legislation under the Competition Act No. 89 of 1998 (**Competition Act**) and filing of documentation may be required by the Competition Commission of South Africa (**Competition Commission**). This is more fully set out in the answer to the question below: *Are there any antitrust matters to be considered when forming a joint venture*?
- In terms of the Competition Amendment Act No. 18 of 2018 (**Competition Amendment Act**), the Competition Act has or will be amended. In this regard, section 18A will, once a commencement date has been proclaimed, be inserted into the Competition Act. This section will provide that the President must constitute a committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa. Once established a foreign acquiring firm must file a notice with the committee for any merger that relates to the list of national security interests of South Africa.
- Joint ventures can be subject to regulations promulgated by specific industry regulatory bodies, for example, the Financial Services Board, as well as the Department of Mineral Resources in the mining sector.
- Joint ventures will be subject to the South African Revenue Service (**SARS**) regarding matters of taxation.

Regulatory Environment

Are joint ventures specifically regulated?

As mentioned above, joint ventures are not expressly regulated other than within a joint venture agreement.

Contractual Joint Ventures are regulated by the contract laws of South Africa.

Incorporated joint venture companies are regulated by the Companies Act, as well as by the contract law of South Africa.

However, as a whole, joint venture arrangements will be subject to industry specific laws and regulations, such as the following:

- Banks Act, No. 94 of 1990
- The B-BBEEA or Broad Based Black Economic Empowerment Act, No. 53 of 2003
- Financial Advisory and Intermediary Services Act, No. 37 of 2002
- Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA)
- Applicable tax laws, such as the Income Tax Act No. 58 of 1962 –and–
- Exchange control regulations, as further described in below

Are there any antitrust matters to be considered when forming a joint venture?

The formation of a joint venture may trigger the provisions of the Competition Act and the Competition Amendment Act. The advantages gained by entering into joint venture arrangements and the extra capacity and resources garnered from the arrangement may give entities an unfair advantage in market-related activity.

The Competition Commission therefore scrutinizes and evaluates joint ventures under the Competition Act with the same degree of scepticism as any other agreement or conduct between competitors.

In particular, the Competition Act sets out multiple restricted and expressly prohibited practices, such as the following:

- Direct or indirect price fixing
- Allocation of markets between competitors
- Collusive tendering –and–
- Setting and maintaining minimum resale prices

As an example, if two or more competitors enter into an agreement to conduct business together, and the effect of the agreement is that competition is prevented or decreased, this could be viewed as a restricted practice and will be scrutinized by the Competition Commission. The term "agreement" is broadly defined within the Competition Act. It is therefore important to seek the advice of counsel on the applicability of the Competition Act before entering into a joint venture arrangement.

In other instances, and depending on the structure of the arrangement, a joint venture, whether incorporated or contractual, may result in a merger. In such instances, approval may be required under the Competition Act. A joint venture may constitute a merger in the following examples:

Acquisition of assets. The first instance is where two competing companies to a joint venture arrangement decide to transfer assets, interests, or business into a newly created entity. The transfer of the assets, interests, or business by the competing companies may constitute an acquisition by the joint venture (a separate entity), of control over the business, or a part of the competing companies. If control is established, then the transaction constitutes a merger under Section 12 of the Competition Act. The joint venture is considered as the acquiring firm, while the assets, interest, or business acquired are regarded as the target firms under the Competition Act.

Acquisition of control. The second instance is where two or more companies acquire joint control over (1) an existing entity (being an incorporated joint venture), (2) any part of an existing entity, or (3) any part of the business that none of the companies had control prior to the transaction. The acquisition of the entity or part of the business may occur through the issuance of shares by the acquiring companies in consideration for the acquisition. Depending on the amount of shares issued, the share issue may result in a further notifiable merger. Through the acquisition, the parties who created the joint venture arrangement will control the business. This constitutes a merger, as defined under the Companies Act, because control of the acquired entity changes as a result of the transaction.

An example of an acquisition of control exists where Company A and Company B jointly acquire control of Company C through a sale agreement. In consideration for the acquisition, the two companies (being Company A and Company B) each issue 50% of the shares in their respective businesses to Company C. This transaction will result in a change of control of Company C and therefore possibly constitute a merger. Furthermore, it is important to note that the shares issued by Company A and Company B may result in Company C acquiring control over the businesses of Company A and B, respectively. This subsequent issue of shares by Company A and Company B may also therefore constitute notifiable mergers, if the threshold is met. Therefore, one transaction can result in multiple mergers that may require notification. In this case, there is a change of control in Company C, as well as the change of control in Company A and Company B.

When two or more firms acquire control over a third firm (as described above), the acquisition by each firm may constitute an independent and separate notifiable transaction. The Commission may, after analysing the transaction, prohibit one and approve the other. The fact that the transactions occur simultaneously and are contained in one agreement is not sufficient motivation for the transactions to be considered one transaction for notification purposes. The purpose of merger regulation is to ensure that each transaction is analysed and evaluated for competition effects and its impact on the public interest.

Formation

What are the procedures, documents, and agreements required to form a joint venture?

Contractual Joint Ventures

A joint venture agreement sets out the terms and conditions of the joint venture, including many of the following elements:

- The objectives of the joint venture
- The contributions (financial and asset) made by the joint venture partners
- Intellectual property rights
- The management functions
- Liabilities, profits, and losses
- Dispute resolution –and–
- An exit strategy

Ancillary agreements may regulate separate functions of the arrangement, for example, a management agreement, confidentiality agreements, guarantees, and indemnities.

Incorporated Joint Ventures

The creation of an incorporated joint venture company involves the following:

Registration of a new company with the CIPC, including the provision of the following information:

- The name of the company
- The company address
- The shareholder and director information –and–
- Drafting and filing of an MOI

In addition, the parties typically enter into a shareholder's agreement to govern the relationship between the shareholders.

Partnerships
The partnership agreement regulates the relationship between the parties. The partnership agreement is required to delineate a system of profit sharing.

Becoming a Member or Partner

What are the different levels of equity and voting participation in the various forms of joint ventures? How flexible is each of the structures?

Contractual Joint Venture Arrangements
Participation is regulated by the contract entered into between the parties. Accordingly, there is great flexibility in the terms governing the joint venture.

Incorporated Joint Venture Companies
Members of a company participate as shareholders. The voting and equity will be defined in the MOI or shareholder's agreement. It is not as flexible as the contractual arrangement, as it must conform with the Companies Act.

Partnerships
In a partnership, voting and equity is normally dependent on the contribution of the specific partner. This can be modified within the partnership agreement and is very flexible. There must be a profit sharing structure set forth in the partnership agreement.

What forms of contributions (e.g., cash versus in-kind) may be made by members or partners?

Contractual Joint Ventures
Members can contribute in any form agreed to within the joint venture agreement. Contributions can be in the form of cash, services, expertise, skills, and assets.

Incorporated Joint Ventures
Members participate as shareholders and can provide money, assets, or services in return for shares within the company. If a company requires further capital, it may list as a public company on the Johannesburg Stock Exchange or acquire shareholder loans.

It is important to note that any transfers of funds to and from South Africa by members outside of South Africa are subject to South Africa's exchange control regulations, as more fully described below.

Partnerships
Partners can provide contributions through a number of means, such as assets, cash, or services, as agreed upon by the partners within the partnership agreement.

Should contributions to the joint venture be documented? If so, what is the typical form of documentation?

It is prudent to document every contribution made to a joint venture. This can be done within the shareholder's agreement, partnership agreement, or joint venture agreement. Subsequently, the parties should keep comprehensive statements, books of account and share registers (if applicable) for the joint venture arrangement.

Are there any statutory or other requirements regarding the number or type of members (as in age requirements or legal status; individual or juridical person) in the joint venture?

There are no statutory limits on the number of members that can participate in joint ventures.

Both natural persons and juristic persons can enter into joint venture arrangements.

In terms of age, minors (that is children under the age of 18) cannot enter into joint venture arrangements, as they do not have legal capacity to do so (unless they are emancipated minors). A minor under 18 years of age may enter into certain contracts with the assistance of a legal guardian.

Can a public sector body be a member or partner in the joint venture?

A public sector body can be a member, partner, or shareholder in a joint venture. Public sector bodies are required however, to comply with the Public Finance Management Act, No. 1 of 1999 (and its regulations), and any applicable enabling legislation.

Furthermore, public-private partnerships are also required to comply with:

- The Preferential Procurement Policy Framework Act, No 5. of 2000 –and–
- The Municipal Finance Management Act, No. 56 of 2003

Restrictive Covenants

What restrictive covenants can apply to members or partners relating to corporate opportunity, non-competition, and non-solicitation?

Contractual Joint Ventures

A standard practice within South African contract law is to include non-compete provisions within agreements. Non-compete provisions prohibit the parties from competing with the joint venture during the term of the agreement or for a prescribed period after the agreement has been terminated. The prohibition can be in the form of geography restrictions and/or duration restrictions.

Non-competition and non-solicitation clauses can be included in the contractual joint venture agreement on the basis that these clauses comply with the Competition Act, applicable law in South Africa and are reasonable in the circumstances.

Incorporated Joint Ventures

Corporate opportunity can be regulated contractually as described above, however in general, members are not restricted in terms of corporate opportunity.

Partnerships

Partnerships mirror contractual arrangements, as non-compete provisions may be included within the partnership agreement. There is general freedom and flexibility in drafting these clauses.

Management

How is the joint venture managed in the different structures? Are there statutorily mandated supermajority provisions?

Contractual Joint Ventures

Contractual Joint Ventures are managed solely in accordance with the provisions of the joint venture agreement.

Ancillary agreements may regulate the management of the joint venture arrangement, including whether a supermajority is required to make certain decisions. However, these terms are generally included within the joint venture agreement itself and are not statutorily mandated.

Incorporated Joint Ventures

Companies are managed by the board of directors. The board of directors has the power to appoint management to oversee the day-to-day operations of the company.

Depending on the MOI and the shareholder's agreement, actions of the company often require shareholder and board approval. This approval is obtained through board and shareholder resolutions.

The Companies Act sets out the following actions that require a special resolution (being 75% of the voting rights) to be approved or implemented (note that this percentage can be altered in the MOI, subject to the Companies):

- Amending the company's MOI Ratifying a consolidated revision of a company's MOI
- Ratifying actions by the company or its directors in excess of their authority
- Approving the issue of shares or the grant of rights to directors and related persons
- Approving the issuance of shares and securities where the voting power of the shares or securities issued will equal or exceed 30% of the voting power of shares and securities held immediately prior to the transaction
- Authorizing the board to grant financial assistance as contemplated in the Companies Act
- Approving a reacquisition of shares
- Authorizing the basis for director's compensation (the underlying reasoning and justification behind a director's compensation)
- Approving the voluntary winding-up of a solvent company
- Approving the transfer of the registration of the company to a foreign jurisdiction
- Approving any proposed fundamental transaction, such as (1) the disposal of the whole or greater part of the assets or undertaking of the company, (2) mergers, (3) acquisitions, and (4) schemes of arrangement (a scheme of arrangement is a binding agreement entered into between a company and its shareholders to effect a company's structural change or to achieve a change of corporate control of a target company.) –and–
- Revoking a resolution that gave rise to shareholders' appraisal rights

Shareholders agreements or MOIs can require that actions not listed above require a special resolution to be approved or implemented. These additional restrictions can be agreed upon between the parties.

Partnerships

The partners generally share the management of the partnership.

The partnership agreement can set out the specific duties of each partner within the arrangement and the voting percentages required to make decisions regarding the management of the partnership. In practice, a majority voting percentage is required, however, these are not statutorily mandated.

What mechanisms are there for resolving deadlocks on major decisions?

It is a standard practice within South African contract law to include dispute resolution clauses in an agreement. The clauses can be applicable for joint venture agreements, shareholder's agreements, and partnership agreements.

Generally, a dispute resolution clause states that the dispute will be addressed by the chief executive officers of the respective parties. If the dispute is still deadlocked, it typically is then referred to an independent arbitrator for arbitration. The arbitration is governed by the rules of the Arbitration Foundation of Southern Africa or other rules as selected by the parties. Should the determination of the arbitrator be disputed, it is generally sent on appeal to a panel of three arbitrators for final decision (unless this ability has been excluded in the agreement itself).

Certain joint venture arrangements allow parties to exit the arrangement if there is no resolution to the dispute. This exit mechanism is drafted into the contract and is implemented by (1) dissolving the whole entity, or (2) the disposal of a party's participation interest in the joint venture. These clauses are called "forced exit clauses."

Other deadlock mechanisms are also possible, such as providing deciding votes on the board to a particular person or requiring a matter to be referred to shareholders.

What procedures apply for electing and removing managers in joint ventures?

Contractual Joint Ventures

The procedures for election and removal of management is set forth in the joint venture agreement. There are no specific regulations for this procedure.

Incorporated Joint Ventures

Directors on a company can either be elected by the shareholders, be appointed by the remaining board members or be appointed to the board as a result of a position held in the company (known as an ex officio director).

Pursuant to the Companies Act, at least 50% of the company's directors must be elected by the shareholders.

Further, pursuant to the Companies Act, ineligible or disqualified persons are forbidden from being elected as directors. A person is deemed to be ineligible or disqualified, if:

- Prohibited from serving as a director of a company pursuant to a public regulation. Public regulations include any legislation that governs public matters, such as public financing, that is governed by the Public Finance Management Act, No. 1 of 1999. The prohibitions in the public regulations are similar to the prohibitions currently contained in the Companies Act. For example, the commission of fraud constitutes disqualification. Another example is found in the Public Services Regulations, 2016, that prohibits employees of the Department of Public Service and Administration from serving as a director of a public or private company conducting business with the government
- Removed from an office of trust, on the grounds of misconduct involving dishonesty
- Convicted and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury, or an offense involving fraud, misrepresentation, or dishonesty –and–
- Has been disqualified in the last five years

In addition, the MOI of the company can set out further criteria for the disqualification of directors.

Partnerships

Partnership agreements generally set out the procedures for the removal of partners. However, once a partner leaves, the partnership dissolves and must be reformed. In order to reform the partnership, the partners must enter into a new partnership agreement.

Allocating Profits, Losses, and Distributions

How are profits, losses, and distributions allocated among partners or members? Are there legal or regulatory restrictions that may limit the ability of the partners or members to make such allocations on their own?

Contractual Joint Ventures

Profits, losses, and distributions within contractual arrangements are allocated based on the joint venture agreement itself.

There are no restrictions governing the distribution of profits, losses, and distributions. Under South African law, there is a freedom to contract.

Incorporated Joint Ventures

To the extent declared by the board, shareholders are entitled to receive a dividend in an amount corresponding with their respective shareholding in the company.

Partnerships

In partnerships, the profits, losses, and distributions are allocated based on the contribution of each partner to the partnership. This can be modified by the partnership agreement.

Indemnification

What indemnification provisions would apply in a joint venture?

Indemnification provisions typically are more common in Contractual Joint Venture arrangements, as a means to provide extra protection due to the potential personal liability of members.

Generally, indemnification clauses should be included within the joint venture agreement. They can vary due to the flexibility offered in a Contractual Joint Venture arrangement. Indemnities, for example, can be offered (1) for any claims arising against a party before the joint venture arrangement was concluded, (2) for parties not performing in accordance with the terms of the joint venture agreement, and (3) for parties acting without authority, or in excess of their authority.

Exit or Termination

How does a partner or member exit a joint venture?

Contractual Joint Ventures

Contractual arrangements usually have an exit mechanism built into the agreement. These exit mechanisms allow for the exit of a member voluntarily, by giving a predetermined number of prior days' notice.

There are also mechanisms for mandatory withdrawal, such as when a party commits a material breach of its obligations under the agreement.

Incorporated Joint Ventures

Shareholders are permitted to sell their shares in the company. The sale of shares is usually subject to preemptive rights or rights of first refusal in terms of which, the selling shareholder is to first offer their shares to the remaining shareholders in the company. Clauses can also be included in the shareholders agreement and MOI regarding forced sales and other exit provisions.

Partnerships

Partnership agreements typically have an exit mechanism for partners, requiring prior notice.

There are also mandatory withdrawals that can be built into the partnership agreement, such as when the partner reaches retirement age, commits an act of insolvency, or becomes unable to fulfill his/her duties for a certain period of time.

Importantly, when a partner leaves a partnership, the partnership dissolves.

How is a joint venture terminated?

Contractual Joint Ventures

The joint venture agreement governs the termination of a joint venture. It is common practice for the joint venture to terminate:

- Upon the completion of the project and when final invoices have been paid
- After a specified duration
- When a force majeure event persists for a certain period of time
- When a breach of contract occurs and remains unresolved –or–
- Upon one month's written notice from any of the parties

Incorporated Joint Ventures

Incorporated companies can be terminated through a voluntary winding up of the company (either in insolvent or solvent circumstances).

Furthermore, as stated above, shareholders may exit the company through a sale of shares. Generally, any such shares will be subject to pre-emptive rights or rights of first refusal as stated above.

Partnerships

Partnerships automatically dissolve when a partner leaves the partnership by any means, including by:

- Death
- Insolvency
- Retirement –or–
- Incapacity

Is the termination of a joint venture subject to the approval of any governmental body?

The termination of a joint venture agreement is not subject to any governmental body's approval, unless the joint venture operates in a sector governed by regulatory requirements.

Foreign Members or Partners

What statutes, provisions, or rules govern joint ventures with foreign parties?

Joint venture arrangements with foreign members are allowed within South Africa. There is no discrimination against foreign membership within joint ventures. However, South African exchange control regulations are applicable.

South Africa's exchange control is regulated by applicable government regulations (specifically Government Notice R.1111 of 1 December 1961 and amended up to Government Notice No. R.9 in Government Gazette No. 33926 of 14 January 2011) (Exchange Control Regulations).

The Exchange Control Regulations stipulate that the payment of discretionary funds (such as royalties and fees) are subject to South African Reserve Bank (SARB) approval and must be made through an authorized dealer (being a bank in South Africa). Therefore, any payments of dividends, salaries, royalties and fees that exit South Africa to a foreign company are subject to SARB approval.

It is important to note that a South African registered company is regarded as a resident, irrespective of the fact that it may be fully owned by a nonresident shareholder.

All capital introduced from abroad must be placed on record with the SARB. This is reported through local banks acting as authorized dealers.

In order to issue shares to a nonresident, an endorsement of the share certificates is required from an authorized dealer. The following is generally required in this respect (however, each authorized dealer may have specific requirements):

- Documentation supporting that funds came into South Africa and originated from a nonresident account and the reason for the flow
- Documentation supporting that the acquirer of the shares is regarded as a nonresident (as defined below) for Exchange Control purposes
- Documentation that the shares were acquired at fair and market related prices
- Documentation that there is no South African interest in the nonresident –and–
- The latest audited financials of the nonresident company

Joint venture companies wishing to register as importers, must apply to SARS. SARS will grant the registration, subject to (1) the applicant (or at least one of the applicant's employees) being permanently employed at the premises where the business will be conducted; and (2) that person must have sufficient knowledge of customs laws and procedures to ensure that the activities that the application relates to are conducted efficiently and in compliance with applicable laws and procedures. Given the technical requirements, it is important to approach local counsel in order to navigate the specific registration requirements.

If the joint venture company (where one party is a foreign company) is interested in entering into an agreement where the foreign company manufactures a product in South Africa, the South African party must submit an application to the DTI. The DTI will subsequently make a recommendation to the SARB.

Following the 2020 Budget Speech by the Minister of Finance of South Africa, the SARB published a circular (circular no. 2/2020) outlining a new proposed capital flow management framework. The proposed framework aims to align the current exchange control system with more modern best practice standards used in other developing economies. The fundamental change to the current system would be shifting from a negative bias framework to a positive one by allowing all cross-border transactions with the exception of transactions that are subject to the capital flow management measures and/or pose a high risk in relation to cross-border financial flows. Consequently, this would decrease onerous measures and encourage trade and cross-border flow. According to the circular, the proposed capital flow management framework and regulations will be issued and implemented within a period of 12 months to allow for drafting, finalization, and engagement with the relevant stakeholders.

What constitutes a "foreign" member or partner of a joint venture?

As stated above, a company incorporated in South Africa, is a South African resident regardless of the company being fully owned by a nonresident shareholder. It is noted that the Currency and Exchanges Manual for Authorised Dealers, 2020 (**AD Manual**) provides that an affected person is, amongst others, a company or partnership operating in South Africa in respect of which 75% or more of, amongst others, (a) the capital, assets or earnings are utilized for the benefit of any non-resident of South Africa or (b) the voting rights are controlled by or on behalf of any non-resident of South Africa. Being an "affected person" will have certain consequences under the AD Manual.

In terms of the Companies Act, a "foreign company" means an entity incorporated outside South Africa, irrespective of whether it is a profit or nonprofit company, or whether it carries on business within the country or not. Foreign companies in this regard, include branches of a foreign entity, where the branch is not formally incorporated in South Africa (foreign company registration is further discussed below).

In terms of the Exchange Control Regulations, a nonresident means a person (i.e., a natural person or legal entity) whose normal place of residence, domicile, or registration is outside the country. The AD Manual states that a non-resident means a person whose normal place of residence, domicile or registration is outside the Common Monetary Area which includes Lesotho, Namibia and Swaziland.

Do such statutes or rules have any limitations regarding foreign members or partners in a joint venture (for instance, levels of participation, investments, management, etc.)?

There are no restrictions on foreign company participation, management, or investments within South Africa, other than the Exchange Control Regulations.

Are there any economic incentives for foreign direct investments in a joint venture?

Generally, there are no maximum or minimum equity investments or contributions for foreign joint venture members or partners. However, it depends on the specific regulations applicable to the sector in within the joint venture is operating. A number of sectors require a percentage of local ownership, such as the mining sector, in accordance with the Mining Charter of 2018.

There are further equity equivalent programs that receive improved BEE scores. These equity equivalent programs are approved by the Minister of Trade and Industry of South Africa and allow for multiple economic incentives.

In addition, the DTI provides financial assistance to qualifying companies in various sectors, including foreign direct investment.

Are there mandatory minimums or maximum equity investments or contributions for a foreign joint venture member or partner?

Generally, there are no maximum or minimum equity investments or contributions for foreign joint venture members or partners. However, it depends on the specific regulations applicable to the sector in within the joint venture is operating. A number of sectors require a percentage of local ownership, such as the mining sector (where the proposed new Mining Charter of 2018 (which is expected to come into force by the end of the year) will require a minimum of 30% black ownership in order to hold a mining right (it currently requires 26%). The proposed new Mining Charter requires said ownership to be allocated in shareholding blocks of not less than 8% to host communities and qualifying employees as well as a minimum of 14% ownership to BEE entrepreneurs).

Investments into and out of South Africa require a knowledge of the Exchange Control Regulations. It is prudent to approach local counsel in this regard.

Are there any differences in the answers above in the case of joint ventures or strategic alliances with foreign members?

The answers provided above will remain the same whether the members are South African or foreign entities subject to the discussion below.

Foreign companies (also referred to as an external company) must comply with the legislation specific to their jurisdiction.

Foreign companies have the ability to register a company in South Africa, where that company was originally formed outside of South Africa. This registration must comply with the requirements of the Companies Act, and is required by a foreign company wishing to conduct business in South Africa. Under the Companies Act, the following activities constitute 'doing business' in South Africa:

- Being a party to one or more employment contracts –or–
- Engaging in conduct, or having engaged in a course or pattern of activities, within South Africa over a period of at least six months, that would lead one to reasonably conclude that the company intended to continually engage in business within South Africa

This registration allows a foreign company to do business in South Africa in the same manner as if it was a domestic company. However, the burden is less than registering a domestic company.

A foreign company is not required to register as an external company solely as a result of, amongst others, (1) holding board meetings, (2) establishing a bank account, or (3) acquiring any interest in any property in South Africa.

Foreign companies registered as external companies are required to comply with the following:

- An external company must continuously maintain at least one office in South Africa and register the address of its office or principle office.
- An external company must file an annual return in the prescribed form and with the prescribed fee.
- An external company must provide its full registered name or registration number to any person on demand.

Deepa Vallabh, Director, CMS RM Partners

Deepa Vallabh has 20 years' experience in corporate and commercial practice and is Head of Africa: M&A and Co-Head, Corporate & Commercial.

She specialises in a number of legal areas, including mergers and acquisitions (both domestic and cross-border), corporate reorganisations and restructurings with a particular focus on cross-border M&A into Africa.

Deepa began her career at Werksmans Attorneys. In 2003, she was appointed by Clover Industries Ltd as the head of legal. In 2005 Deepa joined Webber Wentzel where she practised as a partner until 2015. During that time, she was a member of the firm's management board and other management committees. She joined Cliffe Dekker Hofmeyr as a director in 2015 and held the position of Head: Cross Border M&A - Africa and Asia. Deepa joined CMS RM Partners Inc in 2019.

Deepa has experience in a variety of sectors including telecommunications, media and communications, regulatory/compliance, agriculture, manufacturing, consumer products, mining and resources, investments, private equity, insurance, exchange control and pharmaceuticals