

CHAPTER 6 JOINT VENTURES

Definition In this Chapter, the expression *joint venture* is used to refer to a limited company owned principally by two or more corporate shareholders. It differs from the expression *joint venture* when used Chapter 4 *Business Organizations*, where it is used to refer to a form of unregistered partnership, not a limited company, having at least one juristic person as a partner.

Many foreign companies seek to enter into joint ventures with Thai companies as a means of facilitating their starting a business in a new country and also, in some cases, to comply with the Thai ownership provisions of the Foreign Business Act or a promotional certificate issued by the Board of Investment. On the other hand, there are Thai businesses that wish to create new or expand existing business projects but do not have the requisite technology or experience. Hence the need to involve a foreign partner in their business expansion.

Accordingly, both Thai and foreign businesses often seek to enter into joint ventures as a means of accomplishing their respective goals.

Points to negotiate In negotiating a joint venture agreement each side has its own objectives. The foreign side is interested in protecting its technology and name and in obtaining as much profit as possible, whilst the Thai side also wants high profits and to protect its investment.

The result is that the parties must negotiate as to who will own and control the joint venture company, and how profits will be shared. The resulting joint venture agreement is considered a private matter and it is usually not necessary for it to be filed with any governmental authority.

Associated agreements The joint venture agreement may often contains provisions for other associated agreements to be entered into. These may include agreements for technical assistance, intellectual property licensing, shareholders' loans to the company, etc. Copies of these agreements may have to be lodged with a commercial bank when an application to remit funds abroad is made, pursuant to them. The Revenue Department may also wish to see them. These agreements usually allow the foreign side to remit profits abroad at low total tax rates. Agreements for the supplying of raw and other materials to the joint venture are another source of profit to a parent company.

BOI requirements Where companies are promoted by the Board of Investment, it may be necessary to show to the BOI agreements providing for the transfer of know-how and technology to the promoted company.

Management agreements To offset some of the advantages that the foreign side may gain from the use of the above agreements, the Thai side may require that the joint venture agreement include a provision for a management agreement in their favour, whereby they can receive management fees that would to some degree offset the advantages the foreign side receives from the payments made pursuant to related agreements referred to above.

Alternatives to a joint venture In some cases, the foreign side may prefer to forego any direct involvement in a Thai joint venture company and may choose to rely solely on agreements for the provision of technical assistance, supply of materials, intellectual property licensing and other similar arrangements.

Memorandum of association In addition to the agreements referred to above, the joint venture agreement usually provides for the agreed form of the constitutional documents of the joint venture company. The first of these is the Memorandum of Association, which describes the objects of the company.

If the company is foreign majority owned, the Ministry of Commerce may require the company to delete business objects that are prohibited to foreigners under the Foreign Business Act or other relevant law. The Ministry of Commerce has a standard form of memorandum of association with 40 objects that a Thai majority owned company may use, or the company may draft its own memorandum. Usually, the memorandum is not a controversial matter between the parties to a joint venture.

Articles of association The second important document filed with the Ministry of Commerce is the articles of association, which describes how the company will be managed and the relationship between the shareholders and the directors. In order for there to be effective control by a particular group of shareholders, the articles of association must be in good order (see the sample articles of association at the end of this Chapter).

Control Because of legal restrictions contained in the Foreign Business Act or conditions attached to a promotional certificate issued by the Board of Investment, foreign partners may be required to limit their equity interest in the joint venture to 49% or less.

Few foreigners would be willing to invest in a company in which they do not have at least an equal say in the management. Such equality may be brought about in several ways.

Super majority The articles of association may provide that all matters to be voted upon by the shareholders require the approval of a super majority, that is by shareholders holding more than 51% of the shares. If all matters require a vote of at least 60% of the shares then, as far as control is concerned, owning 51% is no better than owning 49%. The 49% shareholder cannot cause anything

to be done, but neither can the 51% shareholder. Accordingly, the articles of association of many joint ventures companies provide for a super majority vote.

While the super majority rule is often used, it is a negative power. One party can stop the other carrying out a particular act, but it cannot force either party to do any act. Since the shareholders do not control the day-to-day operations of the business, it is not enough to have rules governing shareholder voting. Effective control can only be exercised through the board of directors.

In theory, a super majority requirement can be used to force a compromise, whereby each party must agree to elect acceptable directors. In practice, there are more practical ways to achieve a board of directors that fits the requirements of the parties.

Separate classes of shares The shares of a company may be divided into one or more classes with each class having specified rights. For example, there can be two classes of shares designated as Class A shares and Class B shares. Let us assume that the 51% Thai majority owns all the Class A shares and the 49% foreign interests own all the Class B shares.

Each class of shares is then given the right to nominate the same number of directors. Thus if the Class A shareholders have the right to nominate two directors designated as Class A directors, the Class B shareholders will have the right to nominate the same number of directors designated as Class B directors.

The articles of association may provide that at least one director from each class must be present at each meeting of the board of directors and that at least one director of each class concurs in passing any resolution. Furthermore, they may provide that all documents signed on behalf of the company must be signed by at least one director of each class.

It is recognized that this equalization of control may sometimes lead to a deadlock or even a dissolution of the company, but this is rare in practice, as the parties will normally agree to compromise if difficulties arise.

Special voting rights The Ministry of Commerce may permit the articles to contain provisions whereby a class of shares has special voting rights, for example, by requiring ten shares of one class to combine to cast one vote. This is a controversial matter where foreign shareholders are concerned and in the view of some persons, the giving of more votes to foreign shareholders than to Thai shareholders may violate the Thai majority ownership provisions of the Foreign Business Act.

Sample articles of association The following is a sample articles of association suitable for a joint venture company, where the foreign shareholder owns 49% of

the shares but wishes to have an equal voice in the management of the company:

**ARTICLES OF ASSOCIATION
OF
_____ LIMITED**

1. The shares of the capital of the Company shall be divided into two (2) classes, so that at all times the ordinary share capital of the Company shall be divided into *Class A shares* which shall constitute 51% of all shares and *Class B shares* which shall constitute 49% of all the shares.
2. Shares of both classes shall rank equally with each other in all respects except that in the election of directors each class of shares shall nominate its own directors, as set forth in these articles.
3. The share certificates of the Company shall be issued with the Company's seal and shall bear the signature of at least two directors, one of whom shall be a *Class A director* and one of whom shall be a *Class B director*.
4. Class A shares can be registered only in the names of Thai natural or juristic persons as proved to the satisfaction of the Board of Directors. There is no such restriction with respect to Class B shares.
5. A share may be transferred to another shareholder but no transfer may be made to any person who is not a shareholder, except with the approval of the Board of Directors.
6. The Board of Directors, in their sole discretion, may refuse to register the transfer of any shares to a person not already a shareholder whom they shall not approve as being a shareholder.
7. If a share certificate is defaced, lost or destroyed, it may be replaced on such terms as the directors may deem fit.
8. The shareholders only at a general meeting shall elect directors so that at all times the number of Class A directors and Class B directors shall be equal.
9. The total number of directors shall be as determined by the shareholders.
10. All directors shall retire annually but all retired directors shall be eligible for re-election.
11. A director need not be a shareholder.

12. The Board of Directors may hold their meetings at such places and at such times as they deem fit.
13. Meetings of the Board of Directors shall be held upon such notice, if any, as the Board of Directors shall determine at a meeting.
14. A majority of the directors (including at least one Class A director and at least one Class B director) must be present to constitute a quorum at a meeting of the Board of Directors.
15. Decisions of the Board of Directors shall require the affirmative votes of a majority of the directors present, including the affirmative vote of at least one Class A director and one Class B director.
16. The Chairman of the Board of Directors shall be chosen by the shareholders. In case of a tied vote, he shall not have a casting vote.
17. The Company shall to the maximum extent permitted by law, have the power to indemnify each director against expenses, fees, judgments, fines, penalties, settlements and other amounts actually and reasonably incurred in connection with any civil, criminal or administrative proceeding arising by reason of the fact that such person is or was a director. The Company shall further have the power to advance to each director, expenses and fees incurred in prosecuting or defending any such proceeding to the maximum extent permitted by law.
18. The signatures of any two directors one of whom shall be a Class A director and one of whom shall be a Class B director shall be binding on the Company when combined with the Company seal.
19. The Board of Directors shall manage the business of the Company in accordance with the objects enumerated in the Company's memorandum.
20. At any general meeting of the shareholders no business may be transacted unless shareholders owning at least sixty (60) per cent of the shares of the Company are present either in person or by proxy in order to constitute a quorum. If there is a failure to obtain a quorum at any meeting then at a subsequent general meeting the same sixty (60) per cent quorum shall be necessary. At any general meeting, unless the law requires a greater majority, no action may be taken unless at least sixty (60) per cent of all shares in the Company are voted in favour of such action.

21. In addition to the above regulations, the provisions of the Civil and Commercial Code as now enacted or as may be amended hereafter, except as they may be inconsistent hereto, are hereby adopted as the Articles of Association of the Company.

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