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INTERNATIONAL CONTRACTS WORKSHOP
SELECTED INTERNATIONAL CONTRACTS
JOINT VENTURES IN ITALY

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I. INTRODUCTION

The term joint venture is probably one of the most used and misused legal terms of this century and, as often happens in the business world, it has successfully crossed all linguistic barriers, and is being used around the world, in English, with a variety of meanings.

First of all, a linguistic and legal notation. In Italy, there is no legal definition of the term joint venture and there is no such thing as a "joint venture law". There are important rules on joint ventures, but it is generally correct to say that the legal implications of a joint venture will depend on the legal norms which regulate the legal structure selected by the parties to carry out the common and joint venture.¹

Furthermore, as the "importation" of the English term is relatively recent, the legislation of most countries will already contain rules and definitions for certain structures aimed at reaching a common goal. In this case, local legal experience would seldom refer to those structures as joint venture structures, thereby creating some sort of communication problem when discussing the issue of joint ventures. Just to make an example, in Italy the term joint venture is usually used only with reference to corporate joint ventures which require the creation of a joint venture company owned by the participants in the venture. Therefore, if a businessman coming from an Anglo-Saxon country meets an Italian businessman and starts discussing the possibility of setting up a joint venture, he should be advised that the Italian counterpart is probably thinking that the proposal is to create a jointly owned company.

II. Contractual Joint Ventures in Construction Contracts

As already mentioned above, in some countries the term joint venture has been imported with a more limited meaning than its original one. In all countries, however, there are contractual structures which would fall within what an Anglo-Saxon lawyer would define a joint venture. In Italy, the most important example,

¹ Another important exception is that of international cooperation, as the term joint venture is often used in international treaties with either developing countries or with countries which need economic support. In these cases, the term may have a specific legal meaning as the creation of a joint venture with certain characteristics is a prerequisite to obtaining financial and other benefits.

which is not unique to the Italian experience and is widespread throughout the European Union is that of a temporary association for participation in a construction project.² This scheme was prompted by the need to allow various companies to join forces and, all together, meet the minimum quantitative and qualitative standards to submit bids for a public contract project without forming a consortium. At the same time, at least in Italy, it was aimed at avoiding the usual scheme of a general contractor which then subcontracts part of the work, as for a variety of reasons the public authorities wanted to limit the recourse to subcontractors.

The temporary association is a purely contractual scheme whereby the participants, without forming any type of common structure, prepare and submit a bid together.³ The parties must appoint, with an irrevocable notarial proxy, an association leader who will be responsible for the representation of all participants in the negotiations with the public body which issued the call for tender.⁴ The relationship between the parties was initially from the point of view of the public body and the leader was simply obliged to replace any participant who did not fulfil as promised or went bankrupt. The most recent rules have increased the power of the public authorities to control the Temporary Association and now

² The basic legal discipline was provided for by art. 20ff of Law no 584 of August 8, 1977, which was substantially reproduced in Art. 22ff of Legislative Decree no. 406 of December 19, 1991. A revised and more stringent regulation was recently issued and is embodied in Article 37 of Legislative Decree 12 April 2006 n. 163

³ Cfr. Cass. January 4, 2001 n. 77, in *Società* 2001, 12, 1465 according to which a temporary association cannot be regarded as a form of consortium. Also, according to App. Genoa February 11, 1991, in *Foro it., Rep. 1991, Impresa*, n. 24, a temporary association does not imply the creation of an association between the participants. The persisting individuality of each participant is now explicitly stated by Article 37(17) of Legislative Decree 163/2006 with respect to tax and social security obligations.

⁴ The leader is, in all respects, a representative of all companies forming the temporary association and may act accordingly. It may, for example, challenge in court the exclusion of the temporary association from the bid procedure (T.a.r. Abruzzo, October 27, 1989 no. 458, in *Foro it., Rep. 1991, Giustizia amministrativa*, n. 452).

provide, for example, strict limits to the substitution of the participants in case of non fulfilment of duties. It is also required that the contribution of each participant to the project be explicitly indicated and the public body has cause of action against both against the leader and against the individual participant.

The scheme is very flexible, and the parties may structure the relationship among them as they wish, provided that there is only one representative and the work is carried out as promised. This leaves the participants ample freedom to agree among themselves the rules that the leader has to follow in accepting or not accepting the contract, the allocation of the work to be performed, the allocation of the financial guarantees to be provided, and so on. From a legal and commercial point of view it is important to note, however, that this type of joint venture does not constitute a new entity, either for tax or other any other purposes. Therefore, unlike the joint ventures where the participants have decided to incorporate a jointly owned company, the contract is awarded to each participant in the temporary association, and it is not possible to exit the contract without the consent of the principal, the consent of the other participants and their willingness to replace the exiting partner being legally irrelevant.

Temporary Associations, once limited to construction projects, are now used in almost every type of public contracts, in all types of business area, including service contracts. The key business factor to consider, which is of extreme importance to foreign companies, is that the compliance requirements for the admission to the bidding procedure are verified, in case of a temporary association, with reference to the cumulative experience of the participants rather than with reference to the individual partners.⁵ On the other hand, if the joint venture partners create a joint venture company, which bids on the various projects, the verification of the compliance will be made with respect to the joint venture

⁵ Cons. Stato, sez V, 5 July 2007, n. 3814.

company, which might well have no experience, as it is a newly created vehicle. Therefore, even if the participants are interested in a long term relationship between themselves, the creation of a joint venture company may not be appropriate if such a company does not immediately develop the strength and market share which is required in order to bid for almost every public contract, whereby the use of a temporary association scheme will allow the public tender office to consider the joint experience and market strength of the partners.

III. CORPORATE JOINT VENTURES - SHAREHOLDERS AGREEMENTS

As mentioned above, most joint ventures are referred to as such if the scheme provides for the creation of a jointly owned corporate vehicle.⁶ Traditionally Italian corporate rules were quite rigid and this often created a discrepancy between the clauses which could be included in the company by-laws and the clauses agreed in the Joint venture Agreement, the latter being subject to the more flexible contractual rules,

As a consequence, there may be a situation whereby a contractual arrangement, perfectly valid and enforceable as long as it is included in the shareholders' agreement, could be legally included in the by-laws of the joint venture company, with the consequence that an act in violation of the joint venture agreement could well be in compliance with corporate rules and consequently insulated against any legal action at corporate level and therefore difficult to enforce. Under Italian law,

⁶ Italian civil law regulates seven different types of companies. Some corporate schemes are very similar to partnership arrangements, and do not offer any limitation of liabilities to the participants. Some other schemes exclude the personal assets of the participants from the liabilities incurred by the company and, finally, there are corporate forms where certain participants limit their liability and others, who are entrusted with the management of the company, do not. In the vast majority of cases, however, corporate joint ventures are either incorporated as s.p.a.s or s.r.l.s. Both types of company are subject to the same tax regime, ie. they are taxed on their worldwide income.

this distinction prevented the avoidance of corporate decisions that are made in accordance with corporate procedure, but violates a contractual arrangement, although such violation may give rise to a claim for damages between the contracting parties.⁷

The situation has somewhat changed with the latest corporate law reform, which accepted and regulated some of the most widely used provision in joint venture situations, which can now be included in the by-laws, and also dictated some specific rules for shareholders agreements.

It must be noted that shareholders agreements regarding voting rights and transfer restriction cannot last for as long as the joint venture is in place. In fact Article 2341bis of the Italian civil code⁸ dictates that agreements which include clauses aimed at regulating voting rights, limiting transfer of holding, or that have the effect of allowing the parties to exercise a dominant influence on the company, cannot have a term of more than 5 years and, if a longer term is provided, the term is automatically reduced to five years. This means that, every 5 years, the rules may be renegotiated between the parties and a party has no obligation to enter into another agreement covering those facets of the joint venture.⁹ This provision also

⁷ The possibility of requesting damages is more theoretical than real for two distinct reasons. The first one is that the length of legal proceedings for award of damages prevents this remedy from being effective in a joint venture situation, where all disputes must be resolved quickly. In fact, all litigation involving joint ventures are usually resolved, in practice, through interlocutory remedies. The second impediment is that it is very difficult to prove the damages suffered. One of the basic principles of Italian law is that damage awards are intended to restore the damaged party to the same economic position which that party would have been in, had the breach not occurred, and that punitive damages are not admitted. In such a legal environment, it is often very difficult to even prove the existence of damages, which often relate to market strategies rather than actual quantifiable losses. Also, although the parties may agree on the liquidated damages clause, a court always has the power to review such a clause and reduce the amount of liquidated damages if there has been part performance or if the amount is deemed excessive.

⁸ The Article is included only in the section of the code dealing with s.p.a. companies and it is not clear whether it should apply to other corporate structure, considering its overall rationale.

⁹ If no term is provided, each party may withdraw from the agreement with 180 days prior notice.

applies to agreement entered into before the new legislation came into effect, and the fine year term starts running as of January 1, 2004.¹⁰

IV. RESTRICTIONS TO TRANSFER OF SHARES

A Prohibition to transfer and prior approval clauses

The new rules on corporations, effective as of 2004, have substantially modified the legal scenario affecting restrictions to transfer of shares and have codified some of the results of the jurisprudence over the previous years..

The rules vary depending on the legal structure being used for the joint venture. We will examine the two most important cases, regarding s.p.a. companies and s.r.l. companies.

With reference to s.p.a. companies Article 2355bis provides that the by-laws of the company may prohibit the transfer of the shares for a period not exceeding 5 years from the date of incorporation of the company or from the date on which the by-laws of the company were amended to include the prohibition.

The same statutory provision indicates that when the transfer is subject to the unconditional approval of the board or of the shareholders assembly, the clause must provide that the company or the other shareholders have the duty to take over the holdings of the shareholders whose sale was not approved. If such a provision is not included, the clause is null and void.¹¹

The above requirement does not apply when the approval is subject to specific conditions. For example, it is possible to provide that the buyer must have sufficient financial resources to continue to fund the project, or that it will be

¹⁰ Shareholders' agreement regarding quoted companies, must be communicated to the stock and exchange commission (CONSOB)

¹¹ Previous legislation plainly prohibited unconditional approval clauses

required to execute the joint venture agreement and be bound to the same obligations the selling partner was committed to. The criteria must be precise and objective and the use of vague terms, such as verification that prospective buyer is in line with the objectives of the company, or similar, will cause the voidance of the clause by the courts.¹²

With reference to s.r.l. companies 2469 of the Civil Code provides that the participation is freely: transferable inter vivos or mortis causa, unless otherwise indicated in the by-laws, and this is usually interpreted to permit the by-laws of an S.r.l. to prohibit any sale of quotas by the holders for an unlimited period of time¹³ or to prohibit such sale without the consent of the other quotaholders.¹⁴

B. Right of first refusal

The civil code does not contain any mandatory provision relating to right of first refusal ("prelazione"), call or put options and the parties are therefore free to shape the arrangement as it best suits their needs. Furthermore, if included in the by-laws of the company, rights of first refusal, call and put options shall be binding for the shareholders as well as for the third parties.¹⁵

¹² Trib. Napoli, February 9, 1993, in Foro it., Rep. 1993, Società, n. 756.

¹³ If, however, the by-laws did not originally provide for such a prohibition to sell, the amendment to the by-laws which introduces the restriction must be approved with the consent of all quotaholders (Trib. Latina July 9, 1988, in Foro it., Rep. 1989, Società, n. 720). Similarly, the consent of all quotaholders is required to remove the provision of the by-laws which provided for the transfer to be subject to the consent of all other shareholders (App. Milano, 09-06-1992, in Foro it., Rep. 1994, Società, n. 846).

¹⁴ Cfr. Trib. Roma March 23, 1988, in Foro it., Rep. 1988, Società, n. 721. In one case, however, it was decided that the refusal to consent to the transfer must be motivated (App. Roma, March 19, 1990, in Foro it., Rep. 1991, Società, n. 713).

¹⁵ Trib. Como, February 23, 1994, in Foro it., Rep. 1994, Società, n. 741; Trib. Bassano del Grappa, September 15, 1993, in Foro it., Rep. 1994, Società, n. 740.

It must be considered, however, that the by-laws of an S.p.A. may be amended to repeal (or to introduce) a clause containing a right of first refusal by the majority resolution of the shareholders' meeting without the consent of all shareholders¹⁶ and it is therefore appropriate to provide that the by-laws cannot be amended without a supermajority vote, in order to avoid the disappearance of the clauses which are not in the interest of the majority shareholders.

If the right of first refusal clause is included in the by-laws the sale made in violation of the right of first refusal is invalid,¹⁷ however the shareholders holding the right of first refusal cannot call back the shares from the third party.¹⁸ On the other hand, should the clause be included only in the joint venture agreement or other agreement which governs the relationship between the parties, the right of first refusal shall be valid, but its violation will give rise only to an action for damages, while the company will be obliged to recognize the transfer and list the new owner in the shareholders book.¹⁹

The main problem posed by right of first refusal clauses is a problem of precision, as the parties will have to exactly determine their extent and, more importantly, the procedure to use. As to the extent, the right of first refusal relates to all shares being put on the market, unless otherwise stated. In general, the shareholder in favour of which the right of first refusal exists, shall decide whether he wants the shares being put out for sale under the same terms and conditions offered by the third party. It is possible, however, to structure the scheme as an option, and provide that the prospective seller shall sell the shares to the other

¹⁶ Cass. July 15, 1993, no. 7859, in *Foro it.*, Rep. 1993, *Società*, n. 672; App. Torino 1 June 2006, in *Giur. It.* 2007.3,659

¹⁷ Trib. Catania 28 February 1991, in *Società* 1991, 1104; Trib. Napoli, June 4, 1993, in *Foro it.*, Rep. 1994, *Società*, n. 742.

¹⁸ Trib. Napoli, June 4, 1993, in *Foro it.*, Rep. 1994, *Società*, n. 847

¹⁹ (Cass. November 15, 1993, no. 11278 in *Foro it.*, Rep. 1994, *Società*, n. 736).

shareholders at a price determined in accordance with predetermined criteria or by an arbitrator.²⁰

With respect to the procedure, the parties are also free to determine the procedure and the timing which they deem most appropriate. When the company has more than two shareholders, this procedure can be quite complex. For example, under a standard right of first refusal, the shares must be offered pro rata to all shareholders. When one shareholder does not intend to buy, the offered quota must be extended to the other shareholders on a pro rata basis as well. The exercise could easily result in an enormous waste of time. To avoid the hazards of this approach, one could draft the clause to require the remaining shareholders to buy jointly all shares put up for sale, if they decide to exercise the right of first refusal. In this manner, the portion of the shares offered to the shareholder who does not exercise the right of first refusal would be allocated automatically to the other shareholders.

V. APPOINTMENT OF DIRECTORS

Because of their nature, joint venture agreements would usually allocate a certain number of directors to each participant. The starting point is, usually, a clause whereby each party endeavours to use its voting power to elect a specified number of directors.

The enforceability of such a clause has been debated for many year, however irrespective of the final outcome of this legal dispute, it is practically difficult to enforce it, unless an appropriate voting structure is implemented in the by laws. In

²⁰ Cfr., however, Trib. Trieste December 19, 1993, in Foro it, Rep. 1994, Societa n. 735, according to which it is not possible to oblige the seller to transfer his interest at a price which is lower than the price resulting from arms length negotiations.

fact, the contractual arrangement is binding only upon the parties, and not upon the company, and may also be subscribed to only by some of the shareholders. This means that a violation of the voting arrangement may constitute a violation of a contractual obligation, however it will seldom cause the company resolution to be invalid.

The problem must be dealt with by providing schemes which, in addition to being contractually binding, are also enforceable at corporate level. There are, traditionally, two schemes aimed at resolving the issue of enforcing a contractual obligation relating to the appointment of directors.

The first method was that of having the shareholders confer the shares in trust to a fiduciary, who would vote the shares in accordance with a trust agreement. The scheme would be applicable to every type of voting arrangement and, applied to the instant case, would require the trustee to vote the shares in a manner that assures each shareholder a number of seats equal to the one indicated in the Joint Venture Agreement. The courts have substantially limited the use of this device on the grounds that it constitutes a violation of the principle that corporate decisions must be taken within the company.²¹

The safest solution relies on the possibility, indicated in Article 2368 of the Civil Code, that the by-laws of a company may require special voting procedures for the elections of the Directors. This special procedure should always comply with the

²¹ The best known example is given by the various decisions issued in the Mondadori dispute. According to Trib. Milano March 28, 1990, in *Foro it.*, Rep. 1990, *Provvedimenti di urgenza*, n. 238, the voting trust agreement which provides for the transfer of the shares to a fiduciary company with instructions to vote the shares as agreed by the parties holding the beneficial ownership of the majority of the shares conferred in trust is void and the shares must be therefore returned by the fiduciary company to the shareholders who have so requested. Along the same line is *App. Roma*, January 24, 1991, *Foro it.*, Rep. 1991, *Società*, n. 434, published in almost every Italian legal journal, on the ground that such an arrangement substantially prevents the shareholders from participating in the shareholders' meetings and moves the decision-making powers outside the shareholders' meeting. This interpretative approach, although much debated and discussed also outside the legal profession for its economic and political implications, was in line with legal tradition, as shown by many previous decisions. *Cfr.*, among others, *Trib. Milano* April 14, 1989, in *Foro it.*, Rep. 1989, *Società*, n. 432.

principle that one share is entitled to one vote, and provide that a shareholder is not entitled to vote his stock in more than one way. It is possible, for example, to provide that each shareholder will indicate a number of directors which is smaller than the total number to be elected. In the event of a limited number of shareholders (two or three), this clause will provide the minority shareholder with a presence on the board. Similarly, if the participation in the board should be substantially in proportion to the shareholding, it is possible to rely on a voting procedure known as "voto di lista". A classical example of voto di lista is as follows:

Unless a different, unanimous decision is taken at the Shareholders' Meeting, the shareholders shall select the members of the Board of Directors by presenting lists of candidates, in which the candidates are presented in the shareholder's order of preference. The list shall contain as many candidates as the Board positions available; the votes obtained by each list shall be divided by one, two, three, etc. up to the number of directors to be elected. A quorum shall be assigned to the listed candidates according to their order on the list. The positions available will be assigned to the candidates which have obtained the highest quorum. In the event of a tie in the voting for the last available Board spot, the list that obtained the majority of the votes will be preferred, and in the case of equal votes, the more senior candidate shall prevail.

Furthermore, if the joint venture vehicle is an s.r.l., the new corporate legislation provides with an higher degree of flexibility and it is possible, for example, to reserve some board position to the minority shareholder.

VI. MINORITY RIGHTS AND BOARD OF DIRECTORS'S DECISIONS

Under Italian law, the management of the company is entrusted to the Board of Directors.²² In the event of an s.p.a., or for s.r.l. companies exceeding certain thresholds, the Civil Code also requires that a board of statutory auditors ("sindaci") be elected by the shareholders to supervise the management of the company by the directors. The auditor must supervise the actions of the Directors and insure compliance with legal rules. Compliance with accounting rules may be entrusted with the same board of auditors or with a separate auditing firm.²³

The Board may delegate most powers to one or more executive directors, or to an executive committee, except for the power to prepare the balance sheet and increase or decrease the share capital of the company.²⁴ In any event, each director has the duty to supervise the management of the company, and will be held liable for damages caused by lack of appropriate supervision.

In a joint venture, certain key decisions always require the consent of all participants to the venture, especially when there are only two shareholders and the relevant provisions are usually included in the joint venture agreement. Those provisions, however, cannot be limited to the joint venture agreement and must be implemented, as far as possible, in the by-laws. In general, the by-laws will provide that most matters will be delegated to the managing director and that certain sensitive matters will be excluded from the delegation, and require a supermajority resolution by the board. It must be considered, however, that under Italian law the board may always refer a decision to the shareholders meeting²⁵ and that the

²² The management can be also entrusted to a sole director but this is very unusual in a joint venture situation.

²³ The new corporate legislation also provides for alternatives of the above management structure, however they are seldom used.

²⁴ Cfr. Section 2381 of the Italian civil code.

²⁵ Cfr. Section 2364 of the Italian civil code relating to s.p.a.s which, according to Cass. February 25, 1992, no. 2330, in Foro it., Rep. 1992, Società, n. 679, is also applicable to s.r.l. companies. The resolution of the shareholders' meeting may be challenged in court by each shareholder if against the law

relevant resolution is within the scope of the ordinary meeting, for which a supermajority requirement cannot be provided.²⁶ It is therefore advisable to provide that the decision to refer the matter to the shareholders meeting be subject to a board supermajority and that, in any event, the Board be not obliged to follow the determination of the shareholders meeting if, in its opinion, it is against the interest of the company.

In some cases, the solution of a supermajority requirement at board level is not practical, because the parties may not want to disclose to third parties that a joint decision of the shareholders is required. Also, in many cases, it may be difficult to limit decision-taking to the Board when most of its members are not practically involved in the management of the company and reside in many different countries.²⁷ This is especially the case with respect to restrictions on exceeding expenditure ceilings or similar matters. Furthermore, unlike other countries, in Italian practice the managing director and the general managers usually have very ample powers and it might be a question of embarrassment for them if they were required to regularly go back to the Board to seek approval.²⁸

In these cases, it is very common to provide the managing director with ample powers; at the same time, the Board instructs the managing director, privately but in writing, not to exercise such powers without Board approval in certain cases.

or the provisions of the by-laws (Cass. January 27, 1989, no. 493, in *Foro it.*, Rep. 1989, *Cooperativa*, n. 58)

²⁶ Trib. Brescia, March 12, 1994, in *Foro it.*, Rep. 1994, *Società*, n. 520; Trib. Rieti, November 25, 1991, in *Foro it.*, Rep. 1992, *Provvedimenti di urgenza*, n. 173.

²⁷ In Italy, it is not possible to participate in a board meeting by proxy. The law has now been amended to allow participation via video or telecom conference.

²⁸ Also, according to Section 2384 of the Italian civil code any limitation to the powers of the directors, even if included in the by-laws and published with the chamber of commerce, is not relevant for a third party, unless such third party has intentionally acted to damage the company.

VII. MINORITY RIGHTS AND SHAREHOLDERS MEETING'S DECISIONS

The management of the company is entrusted to the Board of Directors, but certain decisions are delegated to the shareholders' meeting. This is the case, for example, of decisions regarding the approval of the balance sheet, the amendment of the by-laws, an increase in the company's capital²⁹, the issue of bonds, the appointment and removal of the directors, or the dissolution of the company, and the distribution of profits.

The shareholders' consent to each of the above decisions cannot be granted simply by asking each of them. Rather, the consent must be expressed during a formally convened shareholders' meeting.³⁰ There are two types of meeting: Ordinary and Extraordinary. Ordinary Meetings decide, for example, on the approval of the balance sheet and the distribution of profits, as well as on the appointment of the directors, and any other matter submitted to the meeting by the Board.³¹ The remaining matters listed above are decided at an Extraordinary Meeting.³² The main difference between the two types of meeting is in the required voting quorum, which is lower in the Ordinary Meeting. Furthermore,

²⁹ However, according to Section 2443 of the civil code, it is possible for the shareholders' meeting to authorize the board to increase the capital up to a certain amount, in one or more instalments, as deemed appropriate by the board.

³⁰ However, the attendance of all shareholders, directors and auditors will validate a meeting otherwise irregularly convened.

³¹ Cfr. Section 2364 of the civil code

³² Cfr. Section 2365 of the civil code

super-majority quorums are not allowed in the Ordinary Meetings,³³ but are permitted in Extraordinary Meetings.³⁴

With respect to Ordinary Meetings, we have already examined the appointment of directors and decisions on matters submitted by the Board. This leaves us with the issue of distribution of profits and approval of balance sheets.

As to the issue of profit distribution, the only way of addressing it is that of including special provision in the joint venture agreement. This could provide, for example, that at least a certain percentage of profit always be distributed, rather than allocated to some special company reserve. A similar provision, however, cannot be included in the by-laws, as the shareholders must be always free, year after year, to determine if and to what extent the profits must be distributed.³⁵ The breach of a contractual arrangement relating to the distribution of profits shall be subject to an action for damages.

The approval of the balance sheet is another crucial matter, which is often cause of friction between shareholders. The balance sheet must be prepared and approved by the Board first,³⁶ and then submitted to the shareholders' meeting. Failure to approve the balance sheet within the required deadline (usually the end of April) will cause a number of tax, criminal and corporate law problems.

With respect to Extraordinary Meetings, it is clear that a super-majority provision will have to be included in both the Shareholder Agreement and in the By-Laws, to avoid unilateral modification of the By-Laws, issuance of new stock, etc. A super-majority provision for Extraordinary Meetings will usually be upheld by a

³³ Trib. Brescia, March 12, 1994, in *Foro it.*, Rep. 1994, Società, n. 520; Trib. Rieti, November 25, 1991, in *Foro it.*, Rep. 1992, Provvedimenti di urgenza, n. 173.

³⁴ Unanimity is never consented, as it is deemed that corporate law is based on the principle of majority vote.

³⁵ Cfr. Trib. Cassino, March 20, 1992, in *Foro it.*, Rep. 1992, Società, n. 418.

³⁶ The board cannot delegate the preparation and approval of the balance sheet to the managing director.

court, except when an increase in capital must be made to overcome a depletion of the Company's paid-in capital. The use of supermajority provisions is, however, a double-edged approach to the issue of minority protection. The longer the list, the more likely it is that a deadlock may arise. The main legal problem is that any shareholder may petition the court to liquidate the company if the company is no longer in condition to operate regularly. This may be the case, for example, for failure to agree on the appointment of directors, the recapitalization of the company if the paid-up capital has been absorbed by incurred losses, or failure to approve the balance sheet.

VIII. JOINT VENTURES IN ITALY AND LABOUR LAW ISSUES

Labour law issues are not necessarily specific to joint venture situation but there are certain issues which more frequently arise in connection with joint ventures, and those issues will be analyzed below.

Very often the participants to a joint venture transfer some personnel to the joint venture company, for a limited period of time or for as long as the joint venture will remain in existence. Usually, this personnel expects, or is assured, a return transfer after a certain period of time, or at the termination of the joint venture. Italian law, however, by default does not treat an intercompany transfers as a transfer; the employee may be deemed terminated and then re-hired.³⁷ The legal implications of this approach are quite substantial because Italian law recognizes very high termination rights and, if the employee is a top level manager, and he has been working in Italy for a reasonably long period of time, he may well decide to

³⁷ Cass. October 26, 1982, no. 5597, in *Foro it.*, Rep. 1982, *Lavoro* (rapporto), n. 1568. In some cases, it is however possible to second an employee to another company, for a limited period of time, with appropriate paper work

ask for the payment of those termination indemnities,³⁸ without taking into account the disruption that this will create in his relationship with his original employer.³⁹

A second issue relates to the identification of the employment relationship. Unlike other jurisdiction, board members are not treated, per se, as employees of the corporation, rather they are considered independent professionals, subject to a different tax, social security and labour law regime. It is possible, however, and not uncommon, that a board member be deemed to be a "dirigente" (ie. a top level employee) if, in fact, he is subordinated and has to report to another individual or even to the board.⁴⁰ Should he be deemed an employee of the company, the protections in case of dismissal shall apply and, even more important, the company will probably be deemed in violation of social security and labour laws, with the consequent heavy sanctions.

³⁸ Corporate executives fall under the employment category of "Dirigenti". The applicable collective bargaining agreements contain very protective rules for the dismissal of an executive, which may often result in a very expensive exercise. For example, most collective bargaining agreements prohibit the dismissal of corporate executives without a justified motive and the violation of this rule is sanctioned with the payment of an indemnity, in favour of the executive, of an amount which may go up to two years of salary, depending on the collective agreement applicable and on the "global" seniority of the executive with that employer (ie. also considering the time when he was working with the same employer without having executive status). In general, the dismissal of an executive is very expensive, due to the existence of a substantial notice period (usually up to one year), the payment of the termination indemnity (approximately one month for each year of work) and the difficulty of showing a justified motive for the termination. Furthermore, very often multinational companies have hiring and termination procedures which are decided at international level and do not comply with Italian rules. For example, if an executive is terminated without a written notice, or the written notice does not indicate the reasons for the termination, the termination would be always deemed to be unjustified, with the subsequent payment of the indemnity for unjustified termination, regardless of the fact that a justified motive actually exists and the employer may be able to prove it in court.

³⁹ Those rights cannot be waived in advance and the statute of limitation is very generous, ranging from 2 to 10 years depending on the specific claim.

⁴⁰ Cfr. Cass. November 11, 1993, no. 11119, in Foro it., Rep. 1994, Lavoro (rapporto), n. 592, which specifies that, in order to ascertain whether a director is to be treated as an employee of the company, relevance must be given not only to the contents of the by-laws and to the various resolutions of the company, but also and predominantly to the actual circumstances which characterize the performance of his working duties. Obviously, no employment relationship may exist if the director is a sole director, as there is no other individual or body corporate to whom he may be required to report (Cass. November 13, 2006, n. 24188 in Notariato, 2007,1,11).

Finally, joint venture companies often use employees while they continue to work for the shareholding companies. This is not illegal but it is certainly appropriate to determine the portion of the relationship which is with the shareholder and the portion of the relationship with the joint venture company, because the two relationships may well be governed by different statutory rules, especially if the shareholding company is located outside of Italy.

IX. BREACHING A JOINT VENTURE AGREEMENT

As repeatedly mentioned throughout this paper, the most watertight method of insuring compliance with the obligations undertaken by the parties is that of including the relevant provisions in the corporate documents. This is not, however, always possible, either because of legal prohibitions or due to the nature of the provision which does not relate to the life of the company and cannot therefore be included in the by-laws. A list of those provisions could be almost unlimited, as it would include, for example, non competition clauses, confidentiality undertakings, supply agreements, funding obligations, and so on. In general the joint venture agreement will consist, in reality, of a bundle of agreements regulating the various segments of the relationship between the parties and each agreement may be subject to a breach. From a legal point of view the breach will, of course, be treated as any other contractual breach and give rise to a claim for damages or specific performance,⁴¹ but the interactions among all various agreements requires some coordination to prevent a party who is in breach from continuing to benefit from the joint venture for a number of years.

⁴¹ The recourse to specific performance is however quite unusual in Italy, because the code of civil procedure does not offer effective remedies to "enforce" specific performance awards and the concept of contempt of court is substantially foreign to Italian legal experience.

The first notation to make is that, unlike other jurisdictions, it is not possible or, at least, very difficult, to dissolve the joint venture or to take over the interest of the breaching party if the joint venture is implemented through a corporate vehicle. The dissolution of a company is governed by rules of law which are for the benefit of both the shareholders and third parties, and cannot be therefore delegated by the shareholders. More specifically, the dissolution of a company must be mandatorily approved by the shareholders' meeting with the consent of shareholders holding at least the absolute majority of the outstanding shares,⁴² and this statutory requirement is usually amended to require a higher supermajority in the event of a joint venture. Therefore, although it is often provided that the joint venture company shall be dissolved in the event of a material breach of the joint venture agreement, or in the event of a deadlock on a material issues, this clause is impossible to enforce.

Very often, it is crucial that the breaching party be immediately substituted because of the financial commitments of each participant to the joint venture or due to the nature of the project. Assuming the creation of a joint venture company between a manufacturer, a financier, a marketer to build and sell a certain product, if one party defaults, the other parties have a strong interest in a quick replacement to continue to carry out the project. Unfortunately, a clause which provides for the breaching party to transfer its shares to the other parties would be regarded as in violation of various mandatory rules of Italian law and therefore unenforceable.

In order to deal with the above problems, a number of contractual devices will need to be put in place to protect, sometime in an indirect way, the non breaching party. Let us assume that one party is interested in preventing the joint venture from continuing to operate in the event of breach, and the joint venture company

⁴² Cfr. Section 2369 of the civil code

is, as it usually is, manufacturing, or selling products based on a supply agreement, or a license agreement. Based on a cross-collateralization clause those agreements may be terminated because of a breach in one of the various agreements which regulate the joint venture, thereby making it legally impossible for the company to continue to work on the project. Therefore, if the by-laws of the company have been drafted to restrict the legal purpose of the company to the carrying out of the joint venture project,⁴³ the company shall be put in liquidation and a court order may be obtained to enforce this requirement, should the other shareholders oppose the liquidation.⁴⁴ This procedure is not very fast but it will prevent the joint venture company from being taken over by one party, or by a competitor which has acquired the interest of one of the original participants.⁴⁵

The substitution of a shareholder is a much more complicated issue. Unless the shareholder fails to pay in full the price of the shares into the account of the company, it is not possible for the company to call back the shares. Depending on the specific circumstances of the transaction, a lien could be put on the shares of each participant, or a call option may be provided in the shareholders agreement, paying attention to the drafting of the clause, which cannot be intended as a penalty. In general, although some legal structures are available, they usually imply such lack of trust to be inappropriate at the outset of a joint venture, when each party supposedly trusts and likes the others. The solution is that of limiting the impact of the breach and allowing the other parties to call in new shareholders, with the warning that they may have to continue to sit side by side with the breaching party.

⁴³ Unlike other jurisdictions, the commercial purpose of the corporation must be specified within the incorporation deed, and it is not possible to incorporate a company "to pursue any legitimate activity".

⁴⁴ Cfr. Section 2484 of the civil code

⁴⁵ This may happen because of the expiry of the 5-year non-transferability period, or because one of the partners has been taken over by a competitor.

The above appraisal clearly demonstrates the leit-motif of this entire analysis. Most clauses normally included in joint venture agreements are in practice difficult to enforce, if not actually void, because of the limits posed by mandatory provisions of law. The joint venture company, once incorporated, is something different from the parties which participated in its setting up and have an interest in it, and the various contractual documents must be drafted bearing this element in mind. For example, if the joint venture company is given the name of one of the parties, an appropriate license agreement shall be drafted with the joint venture company in addition to the agreement among the various shareholder, or the holder of the licensed name may find itself in a very difficult position when trying to force the joint venture company to discontinue the use of the name.⁴⁶

X. DEADLOCK

By nature, the more rigid quorum or super-majority rules are, the higher the risk of creating deadlock situations. First of all, not all disagreements are likely to create deadlock. This could be the case, for example, when the parties cannot reach an agreement on the financing pattern of the venture, or a prolonged disagreement over the terms of the license agreement.

There are several possible solutions to a deadlock situation.

The most common one is that of including either a call or put option, in favour of one party. In this way, the disagreement is overcome by eliminating the dissident party. This type of solution creates a number of additional problems,

⁴⁶ Note, also, that Italian law does not contain rules aimed at preventing two or more companies from using the same name or similar names. Some protection is offered indirectly by the rules on unfair competition in the event the use of a similar name may create confusion among consumers: it is therefore recommended that the trade name be always registered as a trademark to enjoy a better protection.

many of which are related to the determination of the purchase/sale price, which are outside the scope of this paper. Sometimes the determination of the price is deferred to an arbitrator, pursuant to predetermine criteria.

One way of eliminating pricing issues is that of providing a reciprocal put/call option. In those clauses, each party has a call option (usually at a price to be determined freely by the interested party) and the party against which the call is used, has the option to sell at the offered price or to buy out the investment of the offeror at the same price. In practice, one party makes the price and the other decides whether to sell or buy.

Options, whether call or put, can be included in the by-laws of the company, thereby becoming relevant and binding also for third parties. A sale of stock in violation of the option process will be therefore ineffective if the option is openly provided in the by-laws. To the contrary, a mere contractual undertaking in the shareholders agreement will be a mere private agreement, whose violation may normally only give rise to damages.
