



## UIA 10<sup>th</sup> Winter Seminar

# Cross-Border Business Partnering 2015

## Corporate Joint Ventures: Structuring Aspects in Cross-Border Settings with a Swiss JV Company

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# Introduction (1/2)

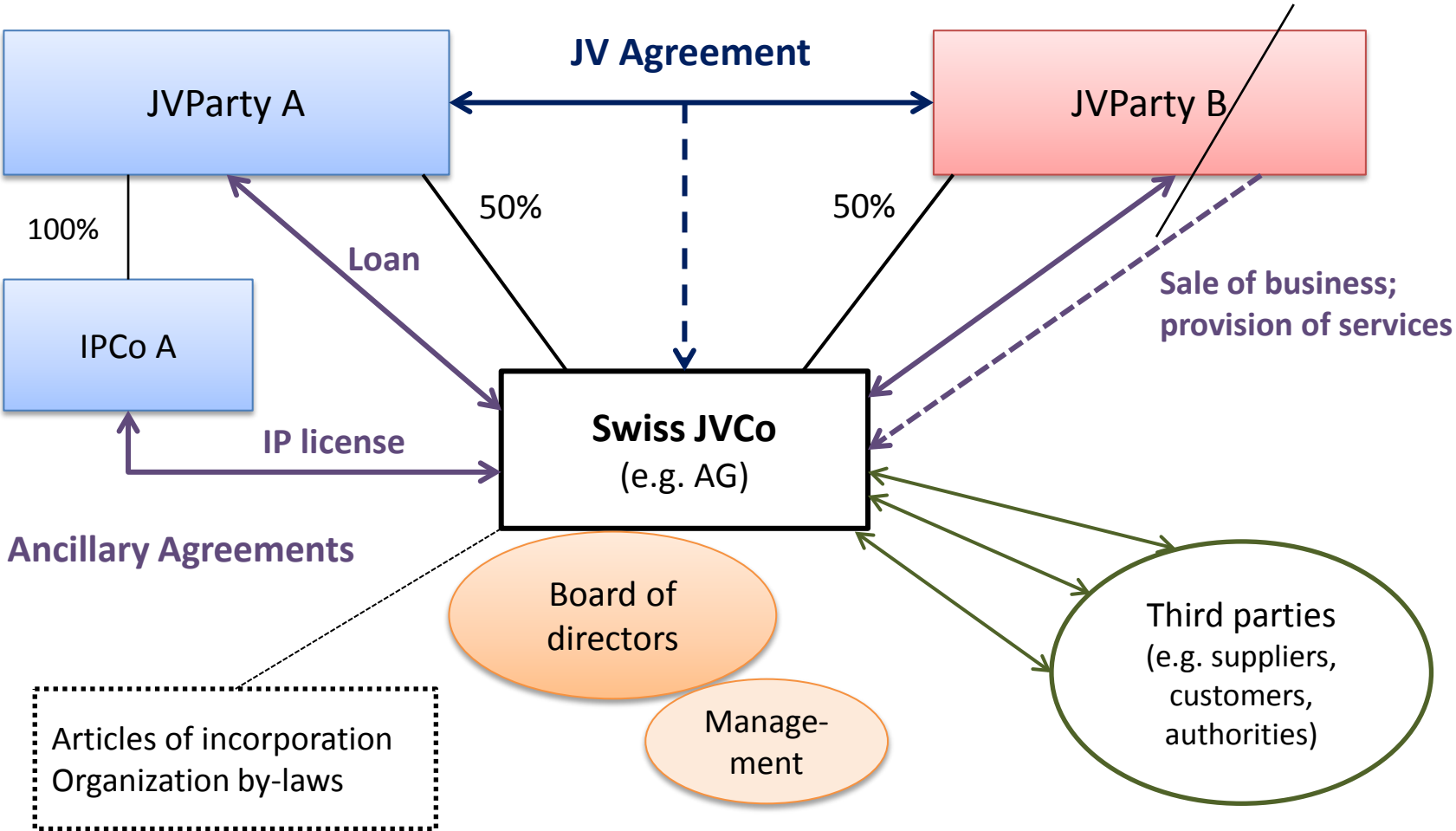
- The term Joint Venture (JV)
  - Form of cooperation or combination
  - No legal term under Swiss law
  - No contract or type of company regulated by statute
- Use of JV in practice
- Purposes of a JV
  - Bundling of complementary activities / expertise / resources
  - Cooperation among partners (alternative to M&A deal)
  - Exploring / entry into new business fields and/or markets
  - Joint production and/or distribution
  - Joint development of new product(s), R&D
  - ...many more



# Introduction (2/2)

- Typical legal structures
  - (1) Contractual JV (contractual basis; e.g. cooperation agreement, consortium, partnership, profit participating loan)
  - (2) Corporate / equity JV (basis: e.g. JV agreement; a legal entity serves as JV company (JVCo); JVPartners are shareholders; JVCo operates a business)
- Number of JV parties
  - 50/50-JV
  - Other two-party JV (e.g. 70/30-JV)
  - Multiparty JV
- Focus of presentation
  - Corporate JV with two partners (50/50-JV)
  - Cross-border setting; JV among equals
  - Structuring aspects for JV/JVCo (contract and corporate law)

# Case Study – Setting the Scene





# Case Study – Facts

- Characteristics of JV
  - JVParty A and JVParty B establish JV
  - JVCo is a Swiss company (e.g. AG)
  - JVCo shall operate an own business / enterprise
  - JV Parties/founders continue with own businesses
- Contributions of JVParties
  - Initial equity funding / cash contributions
  - Debt financing; grant of license (JVParty A, IPCo A)
  - Transfer of business; provision of services (JVParty B)
- Some key issues
  - Board of directors of JVCo
  - Joint control over JVCo
  - Restrict share transfers
  - Duration: initial term of 10 years

# Structure of Corporate JV

- Documentation
  - JV agreement among JV Parties (JVA)
  - (Ancillary) agreements of JVCo with JV Parties and/or affiliates
  - Corporate documents of JVCo:
    - a) Articles of incorporation
    - b) Organization by-laws
- Legal characteristics of Swiss corporate JV
  - Interplay of contracts and corporate law
  - Complexity and interests of parties involved
  - Dependency of JV relations vs. independency of JVCo
  - Separation of JVCo from its shareholders

# The Swiss JVCo

- Legal form of Swiss JVCo
  - Swiss share corporation (AG); or
  - Limited liability company (GmbH)
- Swiss particularities of formation
  - Public notarization of founder's meeting
  - Registration in public commercial register
  - Contributions by founders
  - (Anticipated) acquisition of assets from affiliated persons
- Publicity of commercial register
  - Corporate data (AG and GmbH)
  - Ownership / shareholder base (only GmbH)
  - Filed documents are public (e.g. articles of incorporation)
- Shareholder rights and obligations (e.g. in AG)



# The JV Agreement (1/4)

- Scope of JV; function of JVA
- Parties to JVA (JVParties; future JVCo?)
- Principal content of JVA
  - Establishment of JV / formation of JVCo
  - Operation / running of JV
  - Termination / exit from JV
  - Schedules (e.g. form of articles, by-laws, business plan)
- Choice of law, dispute resolution for JV/JVA
  - Agreements (JVA, ancillary agreements)
  - Local corporate law for Swiss JVCo
- Legal qualification of JVA
  - Controversial: innominate/mixed contract vs. partnership
  - Relevance of legal qualification; potential pitfalls

# The JV Agreement (2/4)

- **General provisions**
  - General undertakings of shareholders
  - Exercise of voting and other rights in line with JVA, e.g.,
    - in shareholders meeting(s)
    - through representative(s) on board of directors
- **Establishment of JV**
  - Undertakings re formation of JVCo
  - Contributions (valuation of assets, reps/warranties)
  - Conclusion of ancillary agreements
  - Timing, one or multiple «closings»
- **Financing of JVCo**
  - Further funding obligations of JVParties (if any)
  - Equity financings; rules on subscription rights
  - Shareholder loans; external debt financing
- **Distributions; dividend policy**

# The JV Agreement (3/4)

- Governance; shareholder control
  - Division of powers (shareholders meeting vs. board of directors)
  - Shareholders' meetings
    - Quorum provisions (attendance, resolutions)
    - Chairperson (casting vote?)
    - Alignment with articles of incorporation
  - Board of directors
    - Composition; nomination rights of JV Parties
    - Appointment/role of chair-/vice chairperson
    - Quorum provisions (attendance, resolutions, veto rights?)
    - Chairperson (by default: casting vote!)
    - Alignment with organization by-laws
  - Executive management (composition, powers)
- Reporting; information rights

# The JV Agreement (4/4)

- Mechanisms to address deadlock
  - Dilemma in 50/50-JV
  - Casting vote of chairperson of board of directors
  - Uneven number of directors; independent chairperson
  - Appointment of expert
  - Escalation procedure (e.g. refer matter to CEOs, committees)
  - Put / call option right mechanism
- Share transfers; exit
  - Registered shares (with statutory transfer restriction)
  - Share transfer restrictions in JVA; security mechanism
  - Pre-emptive rights/right of first refusal; drag/tag along rights
  - Conditional call options
  - Exit provisions
- Non-competition; confidentiality
- Term; termination

# Discussion / Q&A

## Corporate / equity JV in cross-border settings

- Special rules on JV in different jurisdictions
- Legal forms typically used for JVCo
- Differences between common law and civil law systems
- Common topics and challenges for cross-border JV

# Contact

Thank you for your attention

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