

DEUTSCH-CHINESISCHER JOINT VENTURE-VERTRAG MUSTERKLAUSELN

Recht



GERMANY
TRADE & INVEST

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Vorwort



Die mit dieser Publikation veröffentlichten „Sample Clauses for Sino-German Joint Venture Contract“ wurden von der „Gemischten Arbeitsgruppe für rechtliche Fragen der wirtschaftlichen Zusammenarbeit“ unter dem gemischten deutsch-chinesischen Regierungsausschuss in mehrjähriger Arbeit entwickelt und durch die ebenfalls in diese Publikation aufgenommene Gemeinsame Erklärung von Herrn Bundeswirtschaftsminister Dr. Philipp Rösler sowie dem Minister für Handel der VR China, Herr Chen Deming, am 28. Juni 2011 ratifiziert und den beteiligten Wirtschaftskreisen damit offiziell zur Verwendung empfohlen.

Die „Sample Clauses“ stellen alternativ gestaltete Klausulempfehlungen für Joint Venture-Verträge dar und zwar für jene Bereiche, für die die gesetzlichen Regelungen noch lückenhaft sind oder die sich in der Praxis als schwierig bei Entwurfsfassung und Verhandlung erwiesen haben. Die gemischte Arbeitsgruppe, die bereits vorher den „Standardvertrag für die Lieferung beweglicher Wirtschaftsgüter“ und den „Standardvertrag Know How- und Patentlizenzen“ (beide erhältlich über Germany Trade & Invest) erarbeitet hatte, besteht auf chinesischer Seite unter Leitung des Ministry of Commerce aus Vertretern namhafter Handelsfirmen, Anwaltskanzleien, der Bank of China und der chinesischen Schiedskommission CIETAC. Die deutsche Delegation setzt sich aus Vertretern deutscher Großfirmen und Verbände, insbesondere des VDMA, zusammen.

Der Schaffung der vorliegenden Musterklauseln lag die gemeinsame Absicht zugrunde, die Gestaltung von Verträgen für Joint Ventures, die nach wie vor einen wesentlichen Teil der Investitionstätigkeit deutscher Firmen in China ausmachen, zu vereinfachen, zu erleichtern und in gewissem Umfang auch zu standardisieren. Insbesondere soll es mittelständischen Firmen erleichtert werden, umfassende, interessengerechte Regelungen zu verwenden und im konkreten Fall auch durchzusetzen.

Es ist mit den Musterklauseln gelungen - dies erklärt auch in erster Linie die lange Dauer der Verhandlungen - von beiden Seiten akzeptierte und durch die Gemeinsame Erklärung der Minister auch ratifizierte Formulierungen für Fallkonstellationen wie Kündigung/Beendigung des Joint Venture und deren Folgen zu entwickeln. Von mittelständischen Firmen können im Einzelfall bei Verhandlungen Regelungen, die bei Scheitern eines Joint Ventures die Fortführung der Gesellschaft zum Beispiel durch einen Gesellschafter erlauben, meist nicht durchgesetzt werden. Die bislang vorliegenden gesetzlichen Regelungen sehen für den Fall des Scheiterns eines Joint Ventures die Liquidation und damit das Risiko des Totalverlustes des Investments vor. Demgegenüber ermöglichen die Musterklauseln nunmehr einen Anteilerwerb (Buy-out oder Sale-out) als Alternative zur Liquidation.

Die deutsche Delegation glaubt, mit diesen Klauseln einen Beitrag zur Vereinfachung und Erleichterung der mit der Gestaltung eines Joint Venture-Vertrags verbundenen Fragen geleistet zu haben.

Magdalena Harnischfeger-Ksoll

- Delegationsleiterin -

für die deutsche Delegation

Gemeinsame Erklärung des Bundesministeriums für Wirtschaft und Technologie der Bundesrepublik Deutschland

und des

Ministeriums für Handel der Volksrepublik China

über die gegenseitige Erleichterung von Investitionen

Das Bundesministerium für Wirtschaft und Technologie der Bundesrepublik Deutschland und das Handelsministerium der Volksrepublik China (im Folgenden: beide Seiten) geben ihrer Überzeugung Ausdruck, dass beide Seiten auch künftig eine nachhaltige wirtschaftliche Entwicklung in Deutschland und China gemeinsam aktiv unterstützen. Sie streben an, die Wirtschaftsbeziehungen zwischen beiden Ländern im Sinne des Grundsatzes der Gleichbehandlung und des gegenseitigen Nutzens weiter zu vertiefen und zu intensivieren. Aus diesem Grund erklären beide Seiten einvernehmlich Folgendes:

1. Das Bundesministerium für Wirtschaft und Technologie begrüßt das wachsende Interesse chinesischer Unternehmen, in Deutschland zu investieren und dadurch Arbeitsplätze in Deutschland zu schaffen und den deutschen und europäischen Markt zu erschließen. Seit Jahrzehnten haben viele deutsche Unternehmen durch Wertschöpfung und Schaffung von Arbeitsplätzen zum wirtschaftlichen Aufbau in der Volksrepublik China beigetragen. Das Handelsministerium der Volksrepublik China begrüßt auch künftig Investitionen von deutschen Unternehmen in China.

2. Beide Seiten fassen die Einrichtung einer Anlaufstelle zur Erleichterung von Investitionen ins Auge.

Im Bundesministerium für Wirtschaft und Technologie wird als Ansprechpartner das Chinareferat der Abteilung für Außenwirtschaftspolitik zur Verfügung stehen. Auf deutscher Seite wird das Bundesministerium für Wirtschaft und Technologie hier durch die deutsche Handelskammer in China und die Germany Trade and Invest (GTAI) unterstützt. Die konkreten Ansprechpartner mit Kontaktdaten sollen in deutscher und chinesischer Sprache auf der Website des Bundesministeriums für Wirtschaft und Technologie veröffentlicht werden.

Im Handelsministerium wird als Ansprechpartner das Referat für Investitionsförderung der Abteilung für Verwaltung ausländischer Investitionen zur Verfügung stehen. Die Investment Promotion Agency des Handelsministeriums wird das Handelsministerium dabei unterstützen. Die konkreten Ansprechpartner mit Kontaktdaten sollen in chinesischer und deutscher Sprache auf der Website des Handelsministeriums veröffentlicht werden.

Die Behandlung von Visafragen bleibt in der Zuständigkeit der Außenministerien.

3. Nach mehrjährigen Anstrengungen hat die dem Deutsch-Chinesischen Gemischten Wirtschaftsausschuss untergeordnete Arbeitsgruppe für rechtliche Fragen des Handels und der wirtschaftlichen Entwicklung Empfehlungen für Musterklauseln zu Joint Venture-Verträgen ausgearbeitet. Diese Empfehlungen sollen dazu beitragen, unter Aufrechterhaltung des Grundsatzes der Vertragsfreiheit Verhandlungen über Joint Venture-Verträge zwischen deutschen und chinesischen Unternehmen, insbesondere auch kleinen und mittleren Unternehmen, zu erleichtern und zu beschleunigen.

Das Bundesministerium für Wirtschaft und Technologie wird die Empfehlungen durch die Germany Trade and Invest im englischen Original mit erklärenden Hinweisen veröffentlichen lassen und der chinesischen Seite Exemplare zur Verfügung stellen.

Das Ministerium für Handel wird die Empfehlungen durch die Investment Promotion Agency im englischen Original und in chinesischer Übersetzung mit erklärenden Hinweisen veröffentlichen lassen und der deutschen Seite Exemplare zur Verfügung stellen.

4. Darüber hinaus stimmen beide Seiten überein, die Zusammenarbeit zwischen den Investitionsfördergesellschaften beider Länder zu verstärken und Informationen über Gesetze, Rechts- und Verwaltungsvorschriften und -bestimmungen etc. in Bezug auf gegenseitige Investitionen auszutauschen.

Unterzeichnet in Berlin am 28. Juni 2011 in deutscher und chinesischer Sprache, wobei beide Sprachfassungen gleichermaßen gültig sind.



(Philipp Rösler)
Für das Bundesministerium für
Wirtschaft und Technologie
der Bundesrepublik Deutschland



(Chen Deming)
Für das Ministerium für Handel
der Volksrepublik China

Sample Clauses

for

Sino-German

JOINT VENTURE CONTRACT

Elaborated by:

Sino-German Legal Working Group

under the Bilateral Sino-German Government Commission

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Chapter Heading

Joint Venture Contract *

* Anmerkung des Herausgebers:
Seite freibleibend, von den Parteien auszufüllen

Chapter 1 Definitions and Interpretation *

* Anmerkung des Herausgebers:
Seite freibleibend, von den Parteien auszufüllen

Chapter 2 Parties to the Contract *

* Anmerkung des Herausgebers:
Seite freibleibend, von den Parteien auszufüllen

Chapter 3 Registered Capital and Capital Contributions

Article 1 Total Investment and Registered Capital

- 1.1 The Parties agree that the amount of total investment of the Company shall be [...] Renminbi/United States Dollar/Euro (RMB/USD/EUR [...]).
- 1.2 The amount of the Company's registered capital shall be [...] Renminbi/United States Dollar/Euro (RMB/USD/EUR [...]) *[Optional; equaling [...] percent ([...])% of the total amount of investment.]*.
- 1.3 The capital contribution to the registered capital subscribed by each Party shall be as follows:
 - 1.3.1 Party A shall contribute [...] Renminbi/United States Dollar/Euro (RMB/USD/EUR [...]), equivalent to [...] % of the registered capital.
 - 1.3.2 Party B shall contribute [...] Renminbi/United States Dollar/Euro (RMB/USD/EUR [...]), equivalent to [...] % of the registered capital.
- 1.4 Unless the Parties agree otherwise, once a Party has paid-in its contribution to the registered capital in full, it shall not be required to provide any further funds to or on behalf of the Company by way of capital contribution, guarantees, loan or otherwise. Other than as mentioned in Article [...] [Article on Breach of contract], pursuant to this Joint Venture Contract, no Party shall have any liability towards the other Party, the Company or any third party for any losses by or any claims against the Company.

Article 2 Capital Contributions

[OPTION 1: Capital Contributions in Cash]

- 2.1 The Parties shall contribute the registered capital in cash.
- 2.2 Party A's contribution shall be made in Renminbi.
- 2.3 Party B's contribution shall be made in United States Dollar or Euro except as provided in Article 2.3.2.
 - 2.3.1 The exchange rate which shall be used for determining the amount of the capital contributions in Renminbi shall be the mid point price of United States Dollar or Euro published by the People's Bank of China on the date when the capital contributions are made.

- 2.3.2 Notwithstanding Article 2.3 Party B may also use Renminbi profits from its own investments in China to make its contributions to its share of the registered capital, subject to relevant governmental approvals, if required by applicable PRC laws and regulations.
- 2.4 The Parties shall contribute the registered capital according to their equity ratio by paying in simultaneously the installments in accordance with Article [...] to Article [...].
- 2.4.1 [...] percent ([...]%) of each Party's contribution to the registered capital, being [...] Renminbi [...] (RMB...) by Party A and United States Dollar/Euro [...] (USD/EUR [...]) by Party B shall be paid in within [three (3) months] of the date of issuance of the Company's business license. **[NOTE: Statutorily at the moment 15% within 3 months of the date of issuance of the business licence]]**

[OPTION 2: Contributions in Kind and in Cash

- 2.5.1 Party A shall contribute the following to the registered capital:
- a. Machinery and equipment with a value of [...] Renminbi (RMB [...]).
 - b. Technology, patents and know-how and related documentation with a value of [...] Renminbi (RMB [...]).
 - c. Cash in Renminbi equivalent to the amount of [...] Renminbi (RMB [...]).

The assets to be contributed in kind as stated in a) and b) above are listed in Annex [...].

- 2.5.2 Party B shall contribute the following to the registered capital:
- a. Machinery and equipment with a value of [...] Renminbi (RMB [...]).
 - b. Technology, patents and know-how and related documentation with a value of [...] Renminbi (RMB [...]).
 - c. Cash in United States Dollar/Euro [...] (USD/EUR [...]) equivalent to the amount of [...] Renminbi (RMB [...]).

The assets to be contributed in kind as stated in a) and b) above are listed in Annex [...].

- 2.5.3 Each Party represents and warrants that all assets contributed by it to the registered capital of the Company shall be free of claims, liens, mortgages and debts. Party A (remark: being the Chinese partner) represents and warrants that it has complied with all relevant laws and regulations regarding the evaluation and transfer of State-owned assets.

[OPTION 2a:

- 2.5.4 In the event the value of the contributions in kind as determined in the verification report according to Article 2.5.2, has changed by the time the aforementioned contributions in kind are made, the Party whose contribution does not correspond to the value determined in this Article 2.1 shall pay the remaining amount required to the Company [check with accounting advisor: or shall receive the exceeding amount respectively from the Company] to ensure the

registered capital as per Article 1.2 and the Parties' equity ratio as set out in Article 1.2 are attained.

[OPTION 2b:

If any assessed value exceeds the value set forth in Article 2.5 for each group of assets, any surpassing amount shall be treated as reserve of the Company. Any assessed value less than the value set forth in Article 2.5 for each group of asset shall be covered by the respective Party in cash in the currency of its cash contribution within [...] days after receipt of the Capital Contribution Certificate.]

- 2.6 Party A's cash contribution shall be made in Renminbi.
- 2.7 Party B's cash contribution shall be made in United States Dollar or Euro except as provided in Article 2.3.
- 2.7.1 The exchange rate which shall be used for determining the amount of the capital contributions in Renminbi shall be the mid point price of United States Dollar or Euro published by the People's Bank of China on the date when the capital contributions are made.
- 2.7.2 Notwithstanding Article 2.3 Party B may also use Renminbi profits from its own investments in China to make its cash contributions to its share of the registered capital, subject to relevant governmental approvals, if required by applicable PRC laws and regulations.
- 2.8 The Parties shall contribute the registered capital according to their equity ratio by contributing simultaneously the installments in accordance with Article [...] to Article [...].
- 2.8.1 [...] percent ([...]%) of each Party's contribution to the registered capital, being [...] Renminbi [...] (RMB...) by Party A and United States Dollar/Euro [...] (USD/EUR [...]) by Party B shall be contributed within three (3) months of the date of issuance of the Company's business license.
[NOTE: Statutorily at the moment 15% within 3 months of the date of issuance of the business license]

Contribution Schedule

[OPTION 1:

- 2.8.2 The Parties shall contribute the further portions of the registered capital of the Company in accordance with the schedule set forth in Annex [...] to this Joint Venture Contract or as otherwise determined by the Board of Directors. The Board of Directors shall be entitled to call for the contributions in one or more installments from both Parties in proportion to their participation in the registered capital and shall exercise its calls so timely that all the contributions are to be made within two years of the date of issuance of the Company's business license or within any other period determined by the Board of Directors subject to mandatory requirements of Law.][Note: Law shall mean any published and publicly available PRC laws, regulations and rules.]

[OPTION 2:

- 2.8.3 Subject to Article 2.5 and Article 2.10 the Parties shall pay in the rest of their capital contributions according to the actual project progress. The Board of Directors will prepare the contribution schedule upon receipt of a proposal by the General Manager.
The dates of payment of capital contributions shall be decided by the Board of Directors based on the budgets prepared according to the progress of the project construction and any deadlines provided for under mandatory requirements of Law.]

[OPTION 3:

- 2.8.4 The Parties shall contribute subject to Article 2.10 the following percentage of the registered capital starting from the date of issuance of the Company's business license:
- a. On the [...] ([...])th Business Day following the date of the issuance of the Company's business license: [...] percent ([...])% of the total Registered Capital,
 - b. On the [...] ([...])th Business Day of the [...] ([...])rd month following the date of the issuance of the Company's business license: [...] percent ([...])% of the total Registered Capital.

The Board of Directors may, by [majority/two third/unanimous/...] vote of the Directors of the Board, postpone the contribution schedule provided that all contributions shall be paid in within [...] ([...]) months from the date of issuance of the business license. In the event that the actual progress of the construction of the Plants is accelerated the Board of Directors may, by [majority/two third/unanimous/...] vote of the Directors of the Board, accelerate the contribution schedule based on the financial needs of the Company. In any such event the Board of Directors shall determine the exact amounts and dates of the revised capital contribution schedule.]

- 2.9 Each Party shall pay its respective taxes and charges incurred due to its capital contribution, including but not limited to, stamp duties etc..
- 2.10 No Party shall have any obligation to make any contribution to the Company's registered capital until each of the following conditions precedent has been fulfilled or waived by the Parties in writing:
- a. The competent authority has approved the Project Report, this Joint Venture Contract and the Articles of Association of the Company without varying their terms or conditions or imposing any additional terms or conditions unless consented by the Parties in writing;
 - b. The competent State Administration of Industry and Commerce has issued the Company's business license reflecting the agreed content, but not necessarily the same wording, of the business scope under this Joint Venture Contract;

[OPTIONS: other conditions precedent to be added according to the specific case including e.g.

[The [technology license agreement/trademark license agreement] between the Company and [...] attached hereto as Annex [...] were signed and became registered by the competent authorities;]

[Evidence to the satisfaction of Party [...] that the certificate on granting of the land use rights for the project as defined in Article [...] will be issued in accordance with Annex [...];]

[The Company's Board of Directors was established in accordance with this Joint Venture Contract and the Articles of Association;]

[The certified public accountant, who shall verify the Parties' contributions to the Company, was determined by the Board of Directors and entrusted by the Company;]

[The Annexes (including the Related Agreements) were ratified by the Company's Board of Directors at its first meeting and became binding upon the Company and, to the extent required by mandatory law, were registered with the competent authorities and became legally effective as set out therein;]

[The Parties received evidence satisfactory to them that the competent Chinese authorities will grant in due course the relevant approvals, licenses, permits and registrations required for the operation of the Company;]

[Receipt by the Company of a Confirmation Letter issued by the appropriate Chinese authority confirming that the machinery, equipment and parts imported by the Company and financed out of its total amount of investment are exempted from customs duties and import value added tax;]

[Availability of evidence satisfactory to the Parties that the Company will be granted [Encouraged Status] and all preferential tax treatments thereunder available at the time of scheduled contributions under this JV-Contract;]

[Legally valid conclusion and to the extent required by law, registration of the Contract on Rental of Land and Buildings as set out in Annex X hereof [and verification of the warranties given by Party [] in Article... to the satisfaction of Party [];]

[Availability of evidence in respect of environmental compliance for the Factory Building and Land in accordance with relevant environmental law of the People's Republic of China;]

[No breach of any warranty, representation or covenant or other underaking by the other Party has occurred;]

[The Company organized a financing plan for the initial phase of the Company which is approved by the Parties / the Company received evidence on provision of financing as determined in Annex [...].]

If any of the conditions precedent as of Subparagraph (c) to ([...]) is not fulfilled in 90 (ninety) days after the fulfilment of the conditions precedent as of Subparagraph (a) and (b) above, and the Parties do not agree in writing to waive such conditions precedent or to extend the time for its fulfilment, then each Party shall have the right to terminate in writing this Joint Venture Contract, in which case no Party and no third party or authority shall have any right whatsoever to require the other or either of the Parties to make any contribution to the registered capital or to claim any damages from the other or either of the Parties. In such case the Company shall be dissolved and liquidated as set out in Article [...] unless one Party acquires from the other Party its equity stake in the Company as provided for in Article [...] of this Joint Venture Contract.

If the conditions precedent according to Subparagraph (a) and (b) are not fulfilled within the time-limit stated in Article [...] or such other date as agreed by the Parties, this Joint

Venture Contract and the Articles of Association shall automatically become null and void as set out in Article [...].

- 2.11 In the event that a Party fails to make its contribution, in whole or in part, in accordance with the provisions of this Article [...], such Party shall be liable to pay liquidated damages to the other Party amounting to [0.05% (point zero five percent) per day] of the unpaid amount commencing from the date the amount is due until date of payment. If the failure of a Party to make its contribution, in whole or in part, is not remedied within thirty (30) days of notice from the other Party, the notifying Party shall have the right to terminate in writing this Joint Venture-Contract pursuant to Article [...].
- 2.12 In addition to such termination rights and without prejudice to any rights the Company or the other Party may have against the defaulting Party due to its breach of Joint Venture Contract, the non-defaulting Party shall have the right to contribute the unpaid portion of the registered capital and to acquire the respective equity ratio in the Company's registered capital from the defaulting Party. In such case, the defaulting Party shall agree and consent to all measures required to realize such acquisition by the other Party.
- 2.13 If a Party to the Company fails to pay any installment of the registered capital, the other Party shall be under no obligation to pay any future installments.
- 2.14 Within one (1) month after each contribution by the Parties to the registered capital the Company shall cause the Company's certified accounting company to verify the contribution and issue a contribution verification report to the Company and to each Party. The Company shall issue to each Party an Investment Certificate based upon the verification report provided by the auditing company. The Investment Certificates shall include the following items:
 - a. The name of the Company;
 - b. The amount of the registered capital;
 - c. The day, month and year of establishment of the Company;
 - d. The date and amount of the contribution paid in or made by the Party concerned;
 - e. The date, month and year of issuance of the Investment Certificate itself;
 - f. The seal of the Company;
 - g. The signatures of the Chairman and of the Vice Chairman of the Board of Directors of the Company.

The Investment Certificates shall constitute conclusive evidence of the contributions of the Parties.

Article 3 Increase and Decrease of Registered Capital

- 3.1 The Parties may agree, subject to approval of the Examination and Approval Authority if such approval is required by mandatory law, to increase or to reduce the registered capital. In the event of a capital increase or decrease the Parties' share ratio in accordance with Article 1.3 may be changed and be determined based on the total investment subsequent to the increase or decrease respectively. Contributions to increased registered capital may be made by reinvesting profits.

[OPTION 1:

- 3.2.1 To the extent that the Parties agree to provide further funds to the Company in addition to the registered capital they shall provide such additional amount by means of subordinated loans or securities from the Parties according to their equity ratio. Subject to respective agreements between the Parties, resolutions of the Board of Directors and approval by competent government authorities, such subordinated loans may be converted into registered capital.]

[OPTION 2:

- 3.2.2 In the event that one Party considers it necessary for the development and business operations of the Company to increase the registered capital of the Company and proposes to increase the registered capital, the non-proposing Party shall give its fullest consideration to such proposal.

The non-proposing Party must consent to such increase of the registered capital and must cause its representatives on the Board of Directors to consent to the increase if the Company has reached its objectives as set out in the Project Report in the year prior to the proposal to increase the registered capital.

If the non-proposing Party does not agree to participate in such increase within nine (9) months from the date of the proposal, and the proposing Party proposes further, at the end of such period, to contribute the increase in the registered capital on its own, the non-proposing Party shall cause its representatives on the Board of Directors to consent to the increase and the resultant adjustment to the equity ratio held by the Parties in the Company.]

[OPTION 3:

- 3.2.3 If in any Party's opinion the Company's operations should be expanded and such expansion requires an increase in registered capital, then such Party shall be entitled to require a related increase of the Company's total investment and registered capital on basis of sufficient reasons and a related Project Report drawn up by such Party. Such request shall be made in the form of a notice to the other Party in writing (the „Increase Request“). In such case the Parties within [...] ([...]) days following the receipt of the Increase Request shall agree on a related increase of the Company's total investment and registered capital, subscribe for such increase of the registered capital of the Company in accordance with the equity ratio between the Parties and cause their directors of the Board of Directors to approve such increase and to take all measures required for its implementation. In case the other Party fails to agree on such increase in time and/or to agree on the required changes to implement such increase in the Company's registered capital within [...] ([...]) days of its receipt of the Increase Request,

then the requesting Party shall have the right to require an unilateral increase of the Company's total investment and registered capital and to subscribe for such increase of the Company's registered capital in whole. The other Party shall agree to such unilateral increase and the related amendment of the Joint Venture Contract and the Articles of Association and cause its directors to the board to take all measures required for its implementation. In case the other Party fails to comply with its obligations to take all necessary measures it shall be deemed in gross breach of contract and notwithstanding any other rights the requesting Party may have shall be liable to pay a penalty of [...].]

3.3 Encumbrances to Equity

Neither Party shall mortgage, pledge, charge or otherwise encumber all or any part of its contribution to the Company's registered capital without the prior written consent of the other Party.

[3.4 NOTE: Optional Clause of Cost-Overrun

[OPTION 1:

- 3.4.1 The Parties have determined the investment for construction (assets other than working capital and the loan interest accrued during the construction period) in the Project Report to be [...] Renminbi (RMB [...]). If this investment for construction at the beginning of commercial production of the Company exceeds the amount determined in the Project Report, the Parties shall adjust the registered capital so that the ratio between the adjusted registered capital and the total investment shall comply with the regulations of the relevant government authorities.]

[OPTION 2:

- 3.4.2 If during or at the end of the construction of the Plants the amount of the actual construction investment of the Company, as determined at that point of time exceeds the amount of the construction investment as forecasted in the total investment in the Project Report („Cost Overrun“), the Board of Directors will review the options for the funding of the Cost Overrun. If the Cost Overrun is less than or the equal of twenty percent (20%) of the total investment, then the Company shall undertake best efforts to obtain additional loans to finance such Cost Overrun. If the Company has not obtained the required loans within three (3) months, the Parties shall cause the Directors appointed by them to adopt a resolution to increase the registered capital and the Parties shall contribute the necessary additional registered capital according to their equity ratio so that [...] ([...]) or such ratio as shall be required by law of the increased total investment shall be financed by capital contributions of the Parties. If the Cost Overrun is greater than twenty percent (20%) of the total investment any increase of the registered capital shall require the unanimous approval of the Board of Directors according to Article [...].
- In the event one or more of the Parties do not wish to contribute, in whole or in part, its share of any increase in the registered capital according to this Article [...], the other Parties shall be entitled to increase the registered capital without a contribution from such refraining Party. In such event the other Parties shall contribute their share of the additional registered capital, and in addition contribute pro rata the portion of the refraining Party's share.]]

[3.5 NOTE: Optional Clause on Further Loan Financing

3.5 The Company shall finance up to [...] Renminbi (RMB [...]) through loans provided by banks or other sources to the Company.

A security to be provided for such loans shall be solely provided by the Company. Neither Party shall be obliged to provide any security.]

Chapter 4 Transfer of Shares

- 1.1 During a period of [...] ([...]) years from the issuance of the Business License to the Company, no Party shall sell, transfer, assign or otherwise dispose of all or part of its shares to any third party including any affiliate without the written consent of the other Party and no Party shall be required to consent to such assignment.
- 1.2 Neither Party shall mortgage, pledge, charge or otherwise encumber all or any part of its share in the Company's registered capital without the prior written consent of the other Party.
- 1.3 After the expiration of the period set out in Article 1.1, neither Party shall sell, transfer, assign or otherwise dispose of any portion of its share unless the following conditions are duly fulfilled:
 - a) No Party („Offeror“) shall sell or assign its share in the Company unless it first offers to sell, in writing („the Offer“), its share to the other Party („the Offeree“).
 - b) If after two (2) months from receipt of the Offer, the Offeree have not replied to the Offer, or have indicated in writing that they are not interested in purchasing the share, the Offeror shall have the right to offer its share for sale to a third party in accordance with the stipulations set forth in this Joint Venture Contract.
 - c) If within two (2) months from receipt of the Offer, at least the Offeree indicates in writing that it is interested in purchasing the shares, the Parties shall seek to agree on a reasonable purchase price.
 - d) If the Parties fail to agree on a reasonable purchase price within four (4) months from receipt of the Offer by the Offeree,

[Option 1:

the Parties shall seek an opinion from an external auditor as to the reasonable purchase price for the offered share based on internationally accepted evaluation methods permitted by PRC law. [Note: The Parties should agree on the specific method on how to determine the purchase price.]. If the Parties fail to agree on the external auditor within further [two weeks], each Party shall be entitled to request the [note: a third party] to nominate an auditor to render the opinion. The costs of the opinion of the external auditor shall be shared by all of the Parties in proportion to their respective participations in the registered capital of the Company.]

[Option 2:

then the Parties shall jointly conduct a valuation to determine the value of the Company.]

- e) The Offeror shall inform the Offeree, within one (1) month from receiving the auditor's opinion on the price, as to whether it prepares to sell its share at the price resulting from the opinion. If the Offeror refuses to sell its share at the price stated in the opinion, or if it does not inform the Offeree within the aforementioned one (1) month period, it shall not be entitled to sell its share to a third party.
- f) The Offeree shall inform the Offeror within one and a half (1 1/2) months after the Offeror has indicated its willingness to sell, pursuant to Subchapter 4/1.3. e) above, as to whether the Offeree is prepared to purchase the share at the price stated in the opinion. If the Offe-

ree refuses to purchase the share at the price stated in the opinion, or if within the period of one (1) month the Offeree fails to inform the Offeror of their intent to purchase the share, the Offeror shall have the right to offer for sale to a third party its share. The conditions of this offer to sell to the third party shall not be more favorable than those at which the share was offered for sale to the Offeree.

- g) Before the respective share is sold to a third party, the Offeree shall have the right to require the Offeror to reveal all information on this transfer as well as the third party as may be reasonably required by the Offeree. The Offeree shall have the right to require the offered share to be sold to them on the same terms and conditions as offered to the third party. Such right of first refusal shall be exercised in writing within a period of three (3) months after the Offeror has informed the Offeree in writing of the name and the address of the third party and of the terms of the sale agreement.

- 1.4 If a Party transfers its share to a third party, the transferring Party shall enter into a transfer contract under which the third party agrees to assume in relation to the other Party the same rights and obligations as exist for the transferring Party at the signing of the share transfer contract under (i) this Joint Venture Contract and under (ii) other legally valid agreements and contracts between the Parties in their capacity as the shareholders to the Joint Venture. The transferring Party shall provide evidence of said undertaking to the other Party.

Alternatively:

- 1.4.1 It shall be a condition precedent to the right of any Party to transfer its share that (i) the transferring party executes in such form as may be reasonably required by the other Party a deed of ratification and accession under which the purchaser agrees to be bound by and entitled to the obligations and benefits of this Joint Venture Contract as if an original party hereto and (ii) neither the business of the Company nor the performance of this Joint Venture Contract shall be interrupted, nor shall its organizational structure be affected by any such sale, alienation or other disposal of such share.
- 1.5 Any transfer to a third party of any portion whatsoever of any Party's share must be approved in advance by the Board of Directors and shall be valid only with the written consent of the Board of Directors.

Alternatively:

- 1.5.1 Subject to the terms and conditions set forth in this chapter the Parties shall consent and cause their directors appointed to the Board of Directors to approve any sale, transfer, assignment or other disposal of the shares hereunder provided that (i) the provisions under this Article have been complied with and (ii) the third party (Transferee) presents evidence satisfactory to the other Party that it is fully capable to fulfill all its obligations resulting from such contracts in all respects and (iii) has legally valid executed the documents and contracts referred to in Article 4/1.4 hereof. Unless it has other reasonable cause to reject its consent to such assignment, the other Party shall consent and take all measures required for its implementation.

[1.6 **Optional: Control by Third Party**

In the event that:

- a) [...] % ([...] percent) or more of the shares in a Party („Offeror“) are acquired by a third party by law, contract or otherwise; or
- b) [...] % ([...] percent) or more of the shares in a Party („Offeror“) are acquired, owned or voting control is exercised by a competitor of the other Party („Offeree“) or of the Company; or
- c) a Party („Offeror“) merges with or into another entity in a transaction in which it is not the surviving corporation, or
- d) A Party („Offeror“) merges with or into another entity in which it is the surviving corporation, however (ii) apply,

then the Offeree shall have the right to purchase all of the shares held by the Offeror in the Company and the Offeror shall consent to such purchase and cause its directors appointed to the Board of Directors to approve such sale or assignment accordingly and to take all measures required for the implementation of such transaction. As regards the purchase price, the related regulation of Subchapter 4/1.3 (d) shall apply accordingly, i.e. in case the Parties cannot agree on a purchase price within 60 (sixty) days after Offeree´s purchase request, it shall be determined by an auditor to be appointed by the Board of Directors as set out in said Subchapter 4/1.3 (d) above.]

- 1.7. Any sale, alienation or other disposal of the share, if and to the extent required by law, be submitted to the Examination and Approval Authority for approval. The Company shall register the change in ownership in accordance with the law.
- 1.8 For purposes of this chapter, Affiliates (to be defined) of the Parties shall not be deemed to be third parties.

Chapter 5 Minority Shareholders Protection Clauses [Optional Clause]

Article 1 Tag-along Right

- 1.1 If the controlling Party intends to sell all or part of its shares to a transferee, then the controlling Party shall deliver a transfer notice („Transfer Notice“) to the other minority Parties, stating the transfer it wishes to carry out, the number of shares it wishes to transfer, the price of the shares and the status of the proposed transferee. If the minority Parties elect not to exercise their rights of first refusal under this Joint Venture Contract within [] days after the receipt of the Transfer Notice, such minority Parties shall have the right (but not the obligation) to incorporate the shares not more than [] shares into such transfer, provided such exercise of tag-along right is permitted under applicable PRC laws and regulations and the Parties have obtained all necessary and required approvals, consents, permits, authorizations regarding their exercise of such tag-along right.
- 1.2 Within [] days after receiving the Transfer Notice, the minority Parties may exercise its tag-along rights by delivering a written notice (the „Tag-along Notice“) to the controlling Party, stating (i) the minority Parties' decision to exercise their rights under such Tag-along Notice, and (ii) the number of shares to be purchased by the transferee from Parties other than the controlling Party as stated under (Article 1.1).
- 1.3 Within [] days after the minority Parties in a bona fide manner send the Tag-along Notice, if the transferee is not willing to accept the additional shares of the Company, the Parties will only transfer the shares to the transferee on a pro rata basis.

Article 2 Put Option

- 2.1 The controlling Party hereby agrees to grant an [irrevocable] option (the „Put Option“) to the minority Parties. Under such Put Option, the minority Parties shall have the right (but not the obligation) to sell all of their shares (but not part of its shares) to the controlling Party, and the controlling Party shall purchase directly or cause other Persons to purchase from the minority Parties of its shares. The minority Parties shall be entitled to exercise its Put Options if any of the following circumstances occurs:
 - i. Upon the occurrence of any events of early termination (except for any early termination caused by the breach of the minority Parties);
 - ii. [Other circumstances to be decided by the Parties through negotiation.]
- 2.2 Unless the Parties agree otherwise, if minority Parties elect to exercise the aforesaid Put Options, they shall send an appraisal notice (the „Appraisal Notice“) to the controlling Party. The fair market value of the shares of the Company shall be decided under appraisal procedures.

- 2.3 Upon the determination of the fair market value of the shares of the Company by the agreement among the Parties and/or based on the appraisal value, the minority Parties shall have the right to send a notice (the „Exercise Notice“) to the controlling Party [] days thereafter, stating that their wishes to exercise the rights to sell all the shares to the controlling Party at the price of the fair market value agreed by the Parties multiplied by the then percentage of shares held by the minority Parties in the Company (the „Exercise Price“). The controlling Party shall have the right to designate a third party (the „Third Party Purchaser“) to purchase from the minority Parties the shares, and the controlling Party shall notify the minority Parties of the status of such Third Party Purchaser within [] days after his/her receipt of the Exercise Notice.
- 2.4 Within [] days after the delivery of the Exercise Notice, the controlling Party or the Third Party Purchaser designated by the controlling Party (as applicable) and the minority Parties shall enter into a share transfer agreement with respect to the transfer by the minority Parties of all its shares to the controlling Party or the Third Party Purchaser designated by the controlling Party (as applicable) at the Exercise Price. The controlling Party agrees and warrants that if she/he designates the Third Party Purchaser to purchase the shares from the minority Parties, she/he shall ensure that such Third Party Purchaser will fully perform the obligations relating to the share transfer by the minority Parties.

Chapter 6 Board of Directors and Management

Article 1 Composition of the Board of Directors

- 1.1 The Company shall have a Board of Directors consisting of [...] members, [...] of which shall be appointed by Party A and [...] by Party B. In case the Parties' equity shares in the registered capital of the Company change, the number of directors appointed by each Party shall be adjusted in accordance with the new equity share ratio. Each change of [X%] in the registered capital allows for adjustment of the number of directors. The Board of Directors shall be established on and shall meet within one month from the issuance date of the Business License.
- 1.2 The term of office for the directors shall be [four/three] years. Any director may be re-appointed or at any time be replaced by the Party which originally appointed him, and any such removal or appointment shall become effective upon receipt of a respective notice by the other Party. Members of the [Management Board/Management Office] [may/may not] be members of the Board of Directors.
- 1.3 Party [...] shall appoint from among the directors the Chairman, while Party [...] shall appoint the Vice Chairman.

The Chairman of the Board of Directors is the legal representative of the Company.

[Option 1:

Subject to prior consent of the members of the Board of Directors the Chairman may issue a power of attorney to the [President of the Management Board/General Manager] to represent the Company externally and internally as legal representative of the Company.

Option 2:

Subject to prior consent of the members of the Board of Directors the Chairman shall issue a power of attorney to the [President of the Management Board/General Manager] to represent the Company externally and internally as legal representative of the Company.

Option 3:

Unless revoked by the Board of Directors, the [President of the Management Board / General Manager] shall hereby have the power of attorney to represent the Company externally and internally as legal representative of the Company.]

The Chairman may contractually or otherwise bind the Company only after prior explicit and specific authorization by (i) this Joint Venture Contract, (ii) the Articles of Association of the Company, (iii) or a resolution of the Board of Directors. The Chairman and the Vice Chairman shall carry out all functions and tasks as authorized specifically by the Board of Directors. Should the Chairman be unable to exercise his responsibilities, he shall authorize the Vice Chairman to act temporarily on his behalf. In the event the Chairman acts on the Company's behalf or interferes in the management of the Company without prior approval by the Board of Directors then either Party shall have the right to demand the Chairman in writing to cease his unauthorised actions. If despite such demand the Chairman continues to act in an unauthorised manner then any director may request the Vice-Chairman to convene and hold

a meeting. At such meeting to be presided over by the Vice-Chairman the directors will decide whether to revoke the Chairman. The Chairman shall have no voting right in such meeting. In the event a majority of the directors decides to remove the Chairman, rights of the Chairman shall be considered as suspended including voting rights and the Vice-Chairman shall act as caretaker Chairman if the Party having appointed the Chairman fails to appoint a successor within maximum seven days following the aforementioned resolution

The same as provided above applies to the Vice Chairman.

- 1.4 Directors who harm the Company's interest shall be replaced by the nominating Party within 30 (thirty) days upon request by the other Party, such request to specify the reasons for replacement. If the failure has not been rectified or replacement not been implemented within the time period stated above, such director may be removed by a simple majority resolution of the Board of Directors notwithstanding his personal liability towards the Company for damages incurred by the Company due to his failure. The director concerned shall have no voting right in such meeting. The voting rights of the respective director shall be suspended until a new director has been nominated by the Party entitled thereto.
- 1.5 Each Party shall cause the directors nominated by it to faithfully follow and implement the terms of this Chapter of this Joint Venture Contract. Any failure by a director to follow and implement the terms of this Chapter of this Joint Venture Contract shall constitute and be deemed to constitute a breach of this Joint Venture Contract by the Party that nominated that director.

Article 2 Responsibilities of the Board of Directors

- 2.1 The Board of Directors shall be the highest authority of the Company and shall decide the strategic policy issues of the Company. The Board of Directors shall supervise the affairs of the Company and shall arrange for the proper organization of its activities. The tasks of the Board of Directors are non-executive, i. e. no individual member of the Board of Directors shall interfere in the day-to-day business operations of the JV-Company. The Board of Directors shall empower the Management Board / General Manager to manage the daily business of the Company in accordance with the Management By-Laws or other regulations issued by the Board of Directors.
 - 2.2.1 The Board of Directors shall decide
 - a) the annual financial statements of the Company, including balance sheet, profit and loss statement, report on the Company's activities during the financial year, as well as allocation to statutory funds etc.
 - b) the following strategic issues of the Company: business policy, planning and budget, i.e.
 - overall business policy
 - strategic and operative planning including
 - business plan/budget
 - investment plan
 - product and production plan
 - research programme
 - finance planning; as well as

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- c) any substantial deviations from the respective budgets and planning listed in a) and b) above during the operations of the Company.

2.2.2 To the extent not already approved by the Board of Directors under Article 2.2.1 above (or specified in a plan or budget approved by the Board of Directors), the Board of Directors shall furthermore decide the following matters **[NOTE: to be determined according to the requirements of the individual project.]**:

- a) Amendment of the Articles of Association of the Company.
- b) Allocation and distribution of profits of the Company.
- c) Increase, decrease, other modifications or assignment of registered capital of the Company.
- d) Merger, termination or dissolution of the Company other than provided in Article [unilateral termination] of this Joint Venture Contract.
- e) Capital expenditures (investments) and sale of assets of the Company [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]].
- f) Acquisition and sale of interests in other companies (including setting-up of new companies); appointment and dismissal of the governing bodies of such companies.
- g) Setting-up, acquisition and closing of branches, offices and other facilities of the Company [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]].
- h) Projects exceeding a value as decided by the Board of Directors from time to time or of fundamental importance for the Company including any joint venture projects of the Company.
- i) Conclusion, termination or substantial modification of contracts of importance for the Company relating to the following transactions:
- granting credits [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]];
 - obtaining credits [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]];
 - issuing securities/guarantees or accepting similar liabilities for debts of third parties;
 - acquisition or sale/assignment of real property including land use rights or granting encumbrances on real property;
 - lease contracts exceeding a term of [...] or with an annual rent [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]];
 - contracts involving the licensing or transfer/assignments of technical or commercial know-how, patents, trademarks or other intellectual property rights or regarding technical cooperation;
 - sale and distribution contracts [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]] or having a term of one year or more and granting exclusive distribution rights;
 - any agreement between the Company and any of the Parties or their Affiliated Companies [exceeding a value as decided by the Board of Directors from time to time/exceeding a value of [...]]; and
 - all other agreements outside the scope of the normal business of the Company.

- Control agreements and profit and loss transfer agreements of the Company with any other person.
- j) Human resources:
 - important personnel matters which affect the Company as a whole and questions of principle (e.g. remuneration principles and social policy, personnel planning including annual expatriate planning, allocations to the Company's pension and other personnel-related funds); and
 - appointment (including employment terms) and dismissal of
 - members of the Management Board (including designation of the president/chief executive officer and executive vice president) /General Manager and Deputy General Manager
 - members of the board of directors and the management board of important subsidiary companies, if any.
- k) establishment and important alterations of the structural organization affecting the Company as a whole (e.g. setting-up of permanent positions at first level below the Management Board).
- l) Other important principles and guidelines which affect the Company as a whole (e.g. applicable financial and accounting principles, public relations policy, environmental guidelines, IT-structure and standards, insurance policy).
- m) Adoption and amendment of the Management by-Laws and/or other internal rules for the [Management Board/Management Office] including rules concerning the authority to sign on behalf of the Company.
- n) Appointment and dismissal of the statutory auditor of the Company.
- o) Any other matter assigned by the Chinese Laws, the Articles of Association or this Joint Venture Contract to the Board of Directors.
- p) Substantial changes in the scope or character of the Company's business including start-up of new or discontinuation of product and/or service lines.
- q) Product and marketing strategy, including pricing policy.
- r) Decisions (including but not limited to legal actions, settlements, waivers etc.) in relation to disputes of the Company with an amount involved of more than [...], but with the exception of collection proceedings.
- s) delegation of competences of the Board of Directors to the Management Board/Management Office including granting power of attorney.
- t) Any other matter considered by the majority of the statutory number of directors of the Board of Directors as of substantial importance for the Company.]

[With the exception of Article 2.2.2 e) above, the term „exceeding a value“ shall include matters the aggregate amount of which exceeds the respective value.]

- 2.3 The Board of Directors may, at any time and to the extent legally permissible, assign tasks to the [Management Board/Management Office] for fulfilment.

Article 3 Meetings and Resolutions of the Board of Directors

3.1 Meetings of the Board of Directors are validly held and a quorum is present as long as [...] directors **[NOTE: statutorily at the moment 2/3]** are present or represented in the meeting. If a director is unable to attend a meeting, such director may designate by written proxy another director or a third person to attend the meeting in his place and to vote on his behalf. If at any properly convened meeting, no quorum is constituted, the Chairman or the Vice Chairman may call another meeting with 7 (seven) days' notice with the same agenda, such meeting being entitled to adopt decisions on matters set out in such agenda regardless of the number of directors present or the Parties represented in such meeting.

3.2 The Board of Directors shall meet at least once annually **[Note: statutorily at the moment at least once per year and subject to specific requirements of individual project]**. Upon written request by [...] of the directors **[NOTE: statutorily at the moment at least 1/3]** of the total number of directors, interim meetings shall be convened within 21 (twenty-one) days upon receipt of such written request by the Chairman or, if the Chairman does not comply with such request, by the Vice Chairman. The meetings shall be held either at the place of the legal address of the Company or other places agreed upon by the Chairman and the Vice Chairman.

The meetings shall be convoked and presided over by the Chairman or in his absence by the Vice Chairman with one-month prior written notice. The notice shall contain the agenda and be accompanied by supporting documents. A Board of Directors meeting held without proper notice having been given to any director shall be invalid unless the directors concerned deliver a written waiver of notice to the Chairman and Vice Chairman.

Working language of the Board of Directors shall be English. The Company shall provide Chinese - English translator(s), if necessary. Resolutions shall be passed and minutes of all meetings shall be set up in the English and Chinese language and signed by all of the directors and their proxies who attended the meeting. Both language versions are equally effective.

Upon agreement of all directors in office, meetings may be held in the form of written or email correspondence or telephone or video conference and in these cases resolutions may be taken in writing signed by all directors in office (circular resolutions).

3.3 The directors shall exercise at all times their best efforts to reach a common understanding in all matters to be decided by the Board of Directors.

a) Any matters which require unanimous consent of all directors according to this Joint Venture Contract or mandatory statutory law applicable at the time of the resolution shall require the unanimous consent of all directors present. At the signing of this Joint Venture Contract, the following matters statutorily require unanimous consent:

- amendment of the Articles of Association of the Company;
- termination and dissolution of the Company, other than set out in Article [...];
- increase or reduction of the registered capital of the Company; and
- merger or division of the Company.

- b) In such cases where a common understanding cannot be reached during the respective meeting, decisions of the Board of Directors shall require the affirmative vote of the majority of the total number of directors present or represented in the respective meeting, unless higher percentage or unanimous decisions of directors are required by Chinese Law.

3.4 Deadlock-Provisions:

Option 1:

If a vote on any resolution results in a tie, the directors shall promptly endeavour to resolve the matter through further consultations. Any director shall have the right to request a meeting for a second vote on the matter after seven days have elapsed from the first vote. If the second vote also results in a tie, the Chairman or the Vice Chairman may refer the matter to the highest executive officer or organ of both Parties within fifteen days from the second vote, which shall endeavour to agree on a resolution of the matter, which resolution shall be resubmitted to and adopted by the Board of Directors.

Option 2:

Option 2a): Deadlock in respect of all Board of Directors Matters

[If, with respect to a specific voting item, the required majority is not achieved by the Board of Directors in a Board of Directors Meeting in accordance with above Article 3.3, then each director has the right to request a new voting on the same item. Such new voting shall occur within one month commencing from the date of the last voting.]

Option 2b): Deadlock in Specific and Selected Cases

[If, with respect to a specific voting item set out in [___] of Article 2.2.2 above, the required majority is not achieved by the Board of Directors in a Board of Directors Meeting in accordance with above Article 3.3, then each director has the right to request a new voting on the same item. Such new voting shall occur within one month commencing from the date of the last voting.]

Option 2a) and 2b):

If in the second voting the required majority is not achieved the respective upper management of each Party shall be asked for a final decision according to which the Board of Directors members appointed by the Parties shall exercise their voting right.

If the upper management of the Parties cannot reach a final decision within 30 (thirty) days after the second voting, the Parties shall within 10 (ten) days consult each other and express their opinion as to if one of them wishes to purchase the shares of the other Party. If none of the Parties is willing to purchase, then each Party shall have the right to demand the dissolution of the Company according to **Chapter XXX** hereof. If one of the Parties is willing to purchase, the other Party shall be obligated to sell, and the purchase price shall be determined in accordance with **Article XXX** hereof. If both Parties wish to purchase, then each Party shall make to the other Party an irrevocable offer by submitting a sealed envelope containing the price at which it is pre-pared to purchase. The Party whose purchase price offer is higher shall automatically be entitled to purchase and the other Party shall be obligated to sell at such price. The transaction to sell and purchase according to this Article shall be completed latest within [___] months upon submission of the offer and both Parties undertake to contribute any required action.

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- 3.5 The members of the Board of Directors shall not be entitled to any remuneration. Travel and accommodation expenses incurred by the directors for attending board meetings as well as attending allowances shall be borne by the Company.

The Company shall, in accordance with the relevant Chinese Laws, indemnify each director against all claims and liabilities incurred by reason of his being a director of the Company and in the course of performing his official duties as a director of the Company, provided that the claim or liability does not result from intentional misconduct or gross negligence or a violation of criminal laws by the director.

- 3.6 Members of the Board of Directors shall keep secret all Confidential Information, including information concerning negotiations and decisions of the Board of Directors. All Members of the Board of Directors will have to sign a Confidentiality Agreement in line with the sample attached as **Annex [...]**. Only the Chairman, the Vice Chairman and the [President of the Management Board/General Manager], or any other member of the Board of Directors specifically authorized by the Board of Directors may disclose Confidential Information to third parties, (e.g. subcontractors) provided that such disclosure is approved in advance by the Board of Directors.

[Management Option 1: Management Board

Article 4a Management Board

- 4.1 The Company shall establish a Management Board comprising [...] members including a president/chief executive officer/General Manager, and [...] vice-presidents. [...] shall nominate the president/chief executive officer and [...] vice-presidents, whereas [...] shall be entitled to designate the other [...] vice-presidents.

- 4.2 The functions of the members of the Management Board shall be allocated in accordance with the following structure under the overall responsibility of the Company's president:

[...]

The allocation of functions to the members of the Management Board may be changed by the Board of Directors at any time.

- 4.3 The president/General Manager shall, upon request of the Board of Directors, attend the meetings of the Board of Directors, but shall have no voting right **[(unless the president is at the same time a member of the Board of Directors) - NOTE: See Article 1.2 last sentence]**. In case the president is unable to perform his duties, he shall, with a written notice, authorize the vice-president to exercise his responsibilities in accordance with the directives given by the president.
- 4.4 All members of the Management Board shall be appointed in principle for a term of office of three years and such term may be renewed on request of the nominating Party. The Board of Directors shall also decide about their terms of employment. The members of the Manage-

ment Board shall be replaced at any time upon proposal of the Party which originally selected them. However, before proposing a person a Party shall consult with the other Party on the qualification of such person. Members of the Management Board who seriously violate their official duties shall be dismissed by the Board of Directors at any time.

Article 5 Responsibilities of the Management Board and its Members

- 5.1 The president/General Manager shall be responsible for the implementation of the business policy as decided by the Board of Directors. For this purpose the president shall organize and conduct the daily management of the Company in accordance with the applicable Chinese Laws, this Joint Venture Contract, the Articles of Association, the internal rules for the Management Board and the decisions of the Board of Directors. In handling major issues the president shall consult with the executive vice-president.

The Management Board shall support the president and shall under the leadership of the president proceed within the annual budget approved by the Board of Directors, shall ensure that the books of account and the corporate seal of the Company are kept properly and that the administration of the assets of the Company is carried out in a satisfactory manner, and shall provide monthly reports on production, sales, inventory and profit and loss of the Company to the Parties. Any activities and operations of the Management Board shall be conducted within the limits of the budgets and plans approved by the Board of Directors.

- 5.2 Each member of the Management Board shall be responsible to the president for the performance of his duties.
- 5.3 The president shall report directly to the Board of Directors and present the decisions of the Management Board to it. Furthermore, the president shall within the scope of the comprehensive power of attorney granted to him by the Board or Directors and in accordance with internal rules for the Management Board concerning the authority to sign on behalf of the Company represent the Company in dealing with third parties.
- 5.4 Unless otherwise approved by the Board of Directors in writing, the members of the Management Board shall not hold posts in other companies, businesses or state organizations concurrently with the performance of their duties to the Company.
- 5.5 If a member of the Management Board in performing his duties to the Company incurs liability towards a third party, he shall be indemnified by the Company except for gross negligence or wilful misconduct or violation of criminal law.
- 5.6 The Management Board shall from time to time provide the Parties with the relevant information regarding the management and operation of the Company upon the request of the Parties.

Article 6 Meetings and Resolutions of the Management Board

- 6.1 As a general rule, the Management Board shall meet once every week [English/Chinese] shall be the working language of the Management Board, unless otherwise decided unanimously by the Management Board. Minutes of meetings shall be written in the English and Chinese language and signed by the president and the executive vice-president (both versions being equally effective). The Company shall provide Chinese - English translator(s), if necessary.
- 6.2 The Management Board shall decide in particular on the following important matters, which decisions shall not be inconsistent with any decisions of the Board of Directors [**NOTE: to be determined according to the requirements of the individual project**]:
- (a) giving general directives for the daily management of the Company;
 - b) establishment and alteration of the detailed organization of the Company within the framework set by the Board of Directors;
 - c) allocation of functions to and appointment, dismissal and terms of employment of the personnel at first and second level positions below the Management Board as well as issuance of general or special powers of representation;
 - d) adoption of marketing and sales strategy including retail network concept, export strategy etc. as well as appointment including terms of appointment and termination of dealers and service outlets;
 - e) setting of sales prices including margins, sales conditions and delivery quotas for the Products;
 - f) determination of the production concept and the quality management; determination of the monthly production program of the Company;
 - g) determination of the procurement policy;
 - h) conclusion, modification and termination of contracts that entail obligations binding on the Company in excess of a value equivalent to the individual or aggregate amount of xxx Euro;
 - i) allocation of housing facilities;
 - j) all matters to be submitted to the Board of Directors (in particular preparation of the annual financial statements as well as adoption of the quarterly financial statements of the Company);
 - k) all matters put on the agenda by any member of the Management Board.]
- 6.3 Meetings of the Management Board are validly held and a quorum is present as long as at least half of the total statutory number of the voting members is present or represented in the meeting. If a member of the Management Board is unable to attend a meeting, he may designate by written proxy any other person to attend the meeting in his place and to exercise his voting rights.

The members of the Management Board shall use their best efforts at all times to reach a common understanding in all matters to be decided by the Management Board. Only in such cases where a common understanding cannot be reached, decisions of the Management Board

shall require the affirmative vote of the majority of the voting members present or represented at the meeting.

6.4 Matters specified in Article 2.2.2 require prior approval by the Board of Directors.]

[Management Option 2: General Manager and Deputy General Manager:

Article 4b General Manager

4.1 The General Manager shall be responsible for the day-to-day management of the Company. The General Manager shall report directly to the Board of Directors. The other department managers (including the Deputy General Manager(s)) shall report to the General Manager.

4.2 [...] shall be entitled to nominate the General Manager **[and the head of the [...] department]**. [...] shall be entitled to nominate the Deputy General Manager who shall also be responsible for [...] **[and the head of the [...] department]**. The Deputy General Manager shall represent the General Manager in his absence. Responsibilities, function and other details including direction rights are outlined in the management organizations chart which forms **Annex [...]** hereto and which shall be implemented into the management guidelines of the Company. The Board of Directors shall appoint the persons nominated as prescribed above and if required by the Board of Directors the department managers. All such managers appointed by the Board of Directors shall form the Management Office.

The Board of Directors shall also decide on the terms of employment and dismissal of the members of the Management Office.

4.3 The term of office for members of the Management Office shall be three (3) years and may be renewed by the Board of Directors.

Should any member of the Management Office wish to resign, he must promptly submit a written request to the Board of Directors for acceptance.

Members of the Management Office who seriously violate their official duties may be dismissed by the Board of Directors at any time.

In the event that a vacancy in the Management Office arises, replacement members shall be appointed by the Board of Directors, whereby replacement appointees shall be nominated as described above in **[Article 4.b/4.2]**. The Party entitled to nominate the replacement appointee pursuant to **[Article 4.b/4.2]** shall advise the Board of Directors of the replacement member it has chosen within 30 (thirty) days of the vacancy.

4.4 Unless expressly approved by the Board of Directors, members of the Management Office shall not hold concurrently any posts in other companies, enterprises, businesses, state-owned companies or governmental organizations.

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- 4.5 The Management Office shall conduct its business in accordance with the Rules of Procedure for the General Manager and the Management Office of the Company according to **Annex [...]**. The General Manager shall within his scope of the comprehensive power of attorney granted to him by the Board of Directors and in accordance with the internal rules for the Management Board concerning the authority to sign on behalf of the Company represent the Company in dealing with third parties.
- 4.6 Matters specified in Article 2.2.2 require prior approval by the Board of Directors.]

Chapter 7 Technology Transfer

Article 1 Provision of Technology

1.1 Option 1:

Party [...] shall

[Option 1a: license]

[Option 1b: cause that [affiliate / third party] licenses],

to the Company technology and know-how relating to the JV Products. Details shall be set forth in the Technology License Agreement [attached to this Contract as Annex [...]/ which forms a Related Contract.]

Representatives of the Parties on behalf of the Company and the Licensor shall sign the Technology License Agreement at the same time when the Parties shall sign this Contract. The Technology License Agreement shall become binding by ratification in the Company's first BoD meeting.

1.2 Option 2:

Party [...] shall contribute to the Company as part of its capital contribution as set forth in Article [...] technology and know-how relating to the JV Products. Details shall be set forth in the Technology Contribution Agreement attached to this Contract as Annex [...].

Article 2 Trademarks

- 2.1 Subject to the terms and conditions of the Trademark License Agreement attached to this Contract as **Annex [...]** or forming a Related Contract hereto [upon registration for such trademark(s) for Party [...] in China], Party [...] shall grant to the Company the right to use certain trademark(s) for its products in accordance with such Trademark License Agreement.

Under such Trademark License Agreement the Company shall have the right to use the trademark(s) after the date of effectiveness of the Trademark License Agreement until expiration or termination of such Agreement or the expiration of the registration of the trademark(s) in China, whatever is earlier.

The Company shall not / **or**: may also develop or use its own trademarks.

[Optional: Notwithstanding any other rights to terminate the Trademark License Agreement, if, at any time Party [...] ceases to be a party to the Company or if Party [...] share in the registered capital of the Company falls below [...] percent the Company shall no longer be entitled to use the trademark(s) licensed by Party [...].

Article 3 JV Products (optional)

- 3.1 All JV-Products shall be distributed under the [...] brand.

Chapter 8 Confidentiality

Article 1 Confidentiality Information

- 1.1 The Parties acknowledge that, prior to and during the term of this Joint Venture Contract, each Party or its Affiliates has disclosed and will disclose to the other Party or its Affiliates confidential and proprietary information concerning their respective businesses, financial condition, proprietary technology, research and development and other confidential matters [Note: The specification of those information which are deemed to be Confidential Information will be subject to negotiation among Parties on a case by case basis.]. Except as may be provided in other relevant confidentiality agreements, each of the Parties receiving all such information as aforesaid (written, including e-mail and unwritten information) (hereinafter referred to as „**Confidential Information**“) shall, during the term of this Joint Venture Contract and for __ years thereafter:
- a) maintain the confidentiality of such Confidential Information; and
 - b) not disclose it to any person or entity, except to their respective employees who need to know such Confidential Information to perform their work responsibilities; and
 - c) not use the Confidential Information for any purpose other than the performance of this JV-Contract.

Article 2 Exceptions

- 2.1 The provisions of Article 1.1 shall not apply to Confidential Information that can be proven by the receiving Party to the other Party:
- a) to be known by the receiving Party prior to disclosure by the disclosing Party;
 - b) is or becomes public knowledge otherwise than through the receiving Party's breach of this Joint Venture Contract;
 - c) was obtained by the receiving Party from a third party having no obligation of confidentiality with respect to such Confidential Information; or
 - d) is developed by the receiving Party independently of information received from the other Party; or
 - c) is required by order of any competent court or Governmental Authority to be disclosed;
 - f) [is disclosed to a potential third party purchaser of the receiving Party's shares in accordance with the terms of this Joint Venture Contract, provided, the other Party has first been informed in writing of the intention to sell the shares and to disclose Confidential Information, and such third party purchaser has agreed in writing with all Parties to keep any information disclosed to it confidential and not to make use of such information other than for the purpose of evaluating a possible acquisition by it of the Disclosing Party's shares.]

2.2 [Optional:

Each Party shall inform the disclosing Party in writing (by stating the relevant circumstances) of its prior knowledge of the Confidential Information or of the rightful obtaining of the Confidential Information from a third party within a period of __ days after the particular Confidential Information was disclosed by the disclosing Party in case of prior knowledge. Such notification shall be deemed as prima facie evidence of its compliance with this Article. In the case of the receiving Party's failure to notify as required above, the receiving Party shall have the burden to prove that it had the prior knowledge or had rightfully obtained such information.]

- 2.3 For the purpose of the provisions of Article 2.1 disclosures made to a Party, which are specific, shall not be deemed to be within the foregoing exceptions, merely because they are embraced by general disclosures which are in the public domain. In addition, any combination of features shall not be deemed to be within the foregoing exceptions merely, because individual features are in the public domain, but shall be deemed to be within the foregoing exceptions only if the combination itself is in the public domain.

Article 3 Safeguarding of Confidential Information

- 3.1 During the term of this Joint Venture Contract the receiving Party may disclose the Confidential Information to its directors, managers, senior or other relevant staff and other employees, advisors and those of their Affiliates to the extent that they have a need to know such Confidential Information for the purposes of this Joint Venture Contract. Each Party shall advise its directors, managers, senior or other relevant staff and other employees, advisors and those of their Affiliates, who receive any Confidential Information of the other Party or its Affiliates of the existence of and the importance of complying with the obligations set forth in Article 1.1.

The Parties shall ensure that the Company formulates rules and regulations to cause the members of the Board of Directors, Management Personnel, senior or other relevant staff, advisors of the Company to also comply with the confidentiality obligations set forth in this Article 1.1. All members of the Board of Directors, Management Personnel, senior staff and other employees and advisors of the Company having access to Confidential Information shall be required to sign a confidentiality undertaking including the acceptance of an obligation of secrecy no less stringent than set forth in this Joint Venture Contract. In the case of employees, such obligation of secrecy shall be effective, so far as legally possible, both during and after the period of their employment. Prior to any disclosure to an Affiliate or to an advisor, the receiving Party shall have in place a written agreement with such Affiliate or such advisor imposing on such Affiliate or on such advisor confidentiality obligations in respect of the Confidential Information not less stringent than the obligations imposed on the receiving Party under this Joint Venture Contract.

[Each of the Parties shall be entitled, at any time and from time to time, to withhold disclosure of any further Confidential Information until further undertakings of confidentiality have been entered into. The Parties anticipate that further restrictions may be imposed in relation to certain technical Information which is of particularly high value including further restrictions on dissemination and copying.]

Article 4 Breach of Confidentiality Obligations

- 4.1 If any Party or the Company breaches the provisions of this Article 1.1, it shall be liable for damages accrued to the other Party/Parties or the Company as a result of such breach, which damages shall be determined in accordance with the applicable laws of the PRC. The payment of damages shall be without prejudice to any other rights or remedies accrued as of the date of such breach.

Article 5 Confidentiality Obligation upon Termination

- 5.1 On termination of the Contract, each of the Parties shall and shall procure that its directors, managers, senior or other relevant staff and other employees, and those of their Affiliates, who receive any Confidential Information of the other Party or its Affiliates shall:
- a) immediately return to the disclosing Party or destroy any and all materials, including any notes, analysis or memoranda prepared by it, containing Confidential Information relating to any of the other Parties or their Affiliates and all copies thereof; and
 - b) immediately delete all such Confidential Information, including any back-up copies, from any computer, word processor or other electronic device containing Confidential Information;
- 5.2 The provisions of this Article 1.1 shall remain binding upon any natural or legal person who has been a party to this Joint Venture Contract after such natural or legal person, through a transfer of equity interest and corresponding contractual rights and obligations, ceases to be a party to this Joint Venture Contract. In addition, the rights and obligations under this Article 1.1 shall survive the expiration or earlier termination of this Joint Venture Contract, and shall remain in effect for the periods stated herein, notwithstanding the dissolution of the Company.

Chapter 9 Non-Competition

- 1.1 [Party A/Party B/each Party] undertakes for the duration of this Contract that it will not develop, manufacture, sell or distribute any products [in the Territory] as manufactured or sold by the Company or products similar thereto, neither directly nor indirectly nor via any subsidiaries or Affiliates nor via any of its employees, its representatives [and/or their relatives or spouses].
- 1.2 [Party A/Party B/each Party] further undertakes, for the duration of this Contract, not to enter into any undertaking, be it joint venture or of any other contractual nature, on the development, manufacture, sale or distribution of products [in the Territory] as manufactured or sold by the Company or products similar thereto with any other party, neither directly nor indirectly, nor via any subsidiaries or Affiliates nor via any of its employees, its representatives [and/or their relatives or spouses].

[Note: The Parties may agree on an extension of the non-competition undertaking by the selling Party for [years/period] in case of a share transfer resulting in the exit of the selling Party.]

- 1.3 The restraint of Competition as per Article 1.1 or 1.2 shall not apply to:
- a) Any acquisition or ownership of direct or indirect shareholdings in other companies for financial purposes if such shareholding represents less than [____]% of such company's total voting capital and if the acquiring Party does not participate in any management function of such company;
 - b) **Optional:**
Any acquisition of a business which is engaged in Competition (the „**Competing Business**“) if (i) the Competing Business or interest therein is acquired as part of a larger acquisition, and, (ii) if the Competing Business does not account for more than [____]% of the total annual net sales of such larger business acquired taken as a whole as reported for the last fiscal year prior to the closing date of such acquisition.]
- 1.4 For each individual violation of Article 1.1 or 1.2 and in addition to any other remedy available under this Joint Venture Contract or applicable law the violating Party shall pay to the other Party a contractual penalty of EUR [____] (in words: Euro [____]). If a violation of Article 1.1 or 1.2 continues for more than [____ days], each such continued violation for [] days shall subject the violating Party to a penalty of REM/EUR [] under the Section 1.4. By accepting a penalty payment as per this Section 1.4 or by seeking any other remedy available under this Joint Venture Contract or applicable law the other Party shall not be deemed to have waived the violating Party's obligation under Article 1.1 and 1.2.

Chapter 10 Liability for Breach

1.1 Option I:

In the event of a breach of contract committed by a Party to this Contract or Annexes hereto [optional: or Related Contracts], the liabilities arising from the breach of Contract towards the Company and the other Party shall be borne by the breaching Party. In the event that a breach of Contract is committed by more than one Party, each Party shall bear its individual share of the liabilities towards the Company and the other Parties arising from the breach of Contract. [Optional: Any liability shall only exist with respect to direct losses, not for any indirect or consequential losses or damages or loss of profit of the Company or the Non-breaching Party, unless provided otherwise in this Contract.]

1.2 Option II:

- 1.2.1 If a Party fails to perform any of its obligations under this Contract or Annexes hereto [optional: or Related Contracts] or if a Party's representation or warranty under this Contract or Annexes hereto [optional: or Related Contracts] is untrue, materially inaccurate or has any material omission, such Party („Breaching Party“) shall be deemed to have breached this Contract.
- 1.2.2 The Breaching Party shall correct such breach not later than one (1) month from receipt of written notice from another Party specifying the breach and requesting the Breaching Party to correct such breach. If, after such one (1) month period, the breach is not corrected, then the Breaching Party shall be liable to the other Parties [optional: for all foreseeable direct, not consequential, damages and loss of profit of the Company and the Non-breaching Party caused by the breach]. At all times, the Breaching Party shall mitigate the loss arising out of such breach.

Chapter 11 Duration/Termination

Article 1 Term

- 1.1 This JV-Contract shall become effective as of the Effective Date, shall continue in force and effect **[OPTION 1: for an indefinite term / OPTION 2: for [____] ([____]) years]**, and may be terminated only according to the provisions of this Contract.

[In case of Option 2] The Parties shall start to negotiate in good faith to extend the term of this Joint Venture Contract [one (1) year] prior to the expiration of this Joint Venture Contract. Upon the agreement of the Parties, an application to extend the term of this Joint Venture Contract may be made to the Examination and Approval Authority no less than six (6) months prior to the expiration of the term of this Joint Venture Contract. The term of this Joint Venture Contract may be extended only upon approval of the Examination and Approval Authority as long as such approval is required by law.

[In case of Option 2] In case the Parties do not agree on an extension of the term of this Joint Venture Contract Article 2 shall be applied.

Article 2 Termination

- 2.1 Upon the occurrence of any of the following events, either Party shall have the right to, by delivering a written notice to the other Party, take actions as specified under Article 2.2:
- a) The Parties do not agree on an extension of the term of this Joint Venture Contract at latest six (6) months prior to the expiration of the term of this Joint Venture Contract;
 - b) If the Parties jointly agree in writing to terminate the Joint Venture Contract prior to the expiration of the Joint Venture Term;
 - c) If the conditions or consequences of Force Majeure (as hereinafter defined) significantly interfere with the normal functioning of the Company for a period in excess of six (6) months and the Parties have been unable to find an equitable solution pursuant to Article [...] hereof;
 - d) If the Company is constantly unable to repay its debts for the period of [____] days;
 - e) **[OPTIONAL: If any Party's economic benefits are adversely and materially affected due to any reason not attributable to any Party and the Parties fail to agree on any adjustments necessary to prevent such affected Party from material adverse effect within ... days since the affected Party informs the other Party in writing (only the affected Party shall be entitled to deliver the written notice to the other Party and take actions under Article 2.2);]**
 - f) **[OPTIONAL: If the Company has losses in the audited financial statements for [...] consecutive years exceeding the amount of [...] in accumulation;]**

g) [OPTIONAL: Other events as agreed upon by the Parties]

2.2

2.2.1 Upon the occurrence of any event set out in Article 2.1 and upon written notification of either Party, the Parties shall have the right to initiate any of the following actions

- a) to agree to transfer the equity interest held by them in the Company to the other Party(ies) (or to such selected third party(ies) as agreed upon by the Parties). The price for such equity interest transfer shall be determined pursuant to Article 3.
- b) to dissolve and liquidate the Company as set out in Art. 2.2.3.

2.2.2 In case the Parties to the Joint Venture Company agree to transfer the equity interest held by any Party to such selected third party(ies) as set out above, provided all conditions are equal, the Party which does not transfer its equity interest shall have the priority purchase right for the equity interests the transfer of which has been consented by the Parties.

2.2.3 If no agreement on equity transfer can be reached between the Parties within [_____] days, the Parties instead shall dissolve and liquidate the Company. In such case the Parties shall cause the Directors appointed by them to approve the dissolution and liquidation of the Company. The dissolution shall be submitted to the Examination and Approval Authority for approval if so required by Chinese law.

[Optional: In case of indefinite term as set out in Article 2.1, after the expiry of [...] ([...]) years after the Effective Date, any Party may terminate this Contract with [...] ([...]) months prior written notice.]

2.3 Upon the occurrence of any of the following events and provided the non-defaulting Party has complied with its obligations under this Contract and the Articles of Association, as well as all Related Contracts and contracts and agreements attached hereto as Annexes, such Party (the „non-defaulting Party“) subject to Article 2.4 hereof shall have the right to, by delivering a written notice („Breach Notice“) to the other Party (the „defaulting Party“),

- a) acquire the defaulting Party’s equity interest by itself or a third party nominated by it pursuant to Article 3 hereof („Buy-out“),
- b) have its equity interest sold to the defaulting Party pursuant to Article 3 hereof („Sale-out“), or
- c) unilaterally apply to the relevant Examination and Approval authority - if such approval is required by mandatory law - for termination of the Joint Venture Contract and liquidate the Company,
 - unless i) Parties agree otherwise in writing and, if so required by mandatory law, obtain corresponding approval by the Examination and Approval Authority for what they so agreed or
 - ii) the non-terminating Party has obtained a final arbitral award according to which the non-defaulting Party due to lack of the existence of a cause shall have no rights under this Article 2.3:

Termination Events as set out here under are:

- 1) the defaulting Party materially breaches this Contract or violates the Articles of Association [Option: as well as all Related Contracts and contracts and agreements attached hereto as Annexes], and such breach or violation has significantly affected the ordinary and continuous business operation of the Company and is not cured within [3] ([three]) month(s) of a written reminder by the non-defaulting Party to the defaulting Party for correction and rectification of such breach; or
 - 2) the defaulting Party undergoes bankruptcy, liquidation or reorganization proceedings or any other insolvency proceedings including appointment of a trustee, filed or commenced against it in a court of law or by a public authority, or has voluntarily filed for bankruptcy or has had involuntarily been filed against it a bankruptcy petition, which is not dismissed within [___] ([___]) days; or
 - 3) the defaulting Party has its shares in the Company seized by a creditor; or
 - 4) the defaulting Party has its shares in the Company pledged or encumbered for the benefit of its creditors in violation of this Joint Venture Contract and the Company Law of PRC; or
 - 5) the defaulting Party is dissolved; or
 - 6) **[Optional:** within six (6) months after the non-defaulting Party becomes aware of the occurrence of a change of control of the defaulting Party as defined in Article 1.6 [Chapter 4 Share Transfer] of this Joint Venture Contract while the defaulting Party failed to notify the non-defaulting Party and/or the non-defaulting Party does not exercise its right to purchase the shares of the defaulting Party as described in Article 1.6 [Chapter 4 Share Transfer]; to be further amended to incorporate time limit for notification of the occurrence of the change of control and for exercising its right to purchase the shares thereof.] or
 - 7) If the defaulting Party has failed to provide its contribution to the Registered Capital of the Company subscribed by it before the expiration of the time period stipulated in Article [...] or Article [...], as the case may be, the Party having provided its contributions to the Registered Capital of the Company subscribed by it in time may exercise the rights of the non-defaulting Party prescribed under this Article 2.3, or
 - 8) **[Optional:** any of the Related Contracts or any contracts or agreements attached hereto as an Annex is terminated or expired, Party [...] („non-defaulting Party“) may exercise the rights under this Article 2.3.]
- 2.4 Within [____] weeks as of the date of the Breach Notice, the Parties in case of Art. 2.3 shall endeavor to agree on amicable solutions to have the Termination Event cured by the defaulting Party with a view to ensure the continuation of their cooperation under this Contract. Such negotiations shall be without prejudice to any rights the non-defaulting Party may have.
- 2.5 If within the above mentioned period no amicable settlement in writing has been achieved, the non-defaulting Party shall be entitled to exercise its rights as set out under Article 2.3 a) - c).
- 2.6 If within [____] weeks after delivery of the breach notice the Parties have not reached the agreement on the sale and purchase of the equity interest according to 2.3 (a) and (b), the non-defaulting Party is entitled to unilaterally apply to the Examination and Approval Authority for dissolution and liquidation of the Company unless arbitration proceeding has been initiated by one Party.

Article 3 Determination of Purchase Price

3.1 The price for the equity interest transfer as set forth above shall be determined between relevant parties taking into account of the following factors:

3.1.1 In case the Parties are required under applicable PRC law to determine the equity interest transfer price based on a valuation, or they agree to have a valuation for the pricing purpose, then the Parties shall jointly appoint a qualified appraisal firm licensed in China to conduct such valuation which shall be done in accordance with PRC laws and internationally accepted valuation standards and the appraisal result shall be binding upon the Parties. [Optional: In case the Parties fail to agree on an appraisal firm within [___] weeks upon commencement of such negotiations on identification of an appraisal firm either Party may apply to [...] for nomination of an appraisal firm. The appraisal firm so decided shall carry out such valuation.

[Optional: in accordance with the principles and rules set forth hereunder:

- a) The parties agree that within [...(...)] days following consensus reached by the Parties on the transfer of equity interest rather than a liquidation or dissolution of the Company, the Parties shall jointly appoint one competent appraiser to conduct a valuation of the Company in accordance with applicable Chinese laws and generally accepted principles for valuation adopted in PRC;
- b) the costs for the appraisal shall be born by the Company;
- c) the appraiser shall conduct the valuation of the Company and furnish a final valuation report to the Company and the Parties within [...(...)] days from its appointment.]

3.1.2 In case the Parties are not statutorily required to conduct a valuation, the price may be decided, as agreed upon by the Parties, either by appraisal result [according to the procedures and principles set forth in the Article 3.1.1 above] or based on the net worth of the Company, which may be determined by an audited balance sheet effective, multiplied by the percentage of the Company's registered capital contributed by the selling Party.

3.1.3 The Parties may also negotiate in good faith an additional amount based on the value determined under above (3.1.1) or (3.1.2), if any, to reflect the fair market value of the Company as a going concern in light of the actual circumstances of the Company, the market value of similarly-sized companies in the same industry, recent or existing bona fide offers from third parties and internationally accepted principles relevant to the determination of going concern value.

Article 4 Liquidation

4.1 In the case of dissolution of the Company pursuant to the Article 2.2, the Board of Directors shall appoint a liquidation committee consisting of three (3) members, of whom [] ([]) are to be appointed by Party [] and [] ([]) by Party []. One of the members appointed by Party [] shall preside over the liquidation committee. The members of the liquidation committee shall be from the Directors of the Board of Directors, or otherwise appointed by the Parties.

- 4.2 During the liquidation process, the liquidation committee shall represent the Company and may sue and be sued in the name of the Company.
- 4.3 The tasks of the liquidation committee shall be as set out in the relevant laws and regulations. The liquidation plan shall be carried out following approval of the Board of Directors, and the liquidation shall be performed in accordance with the Laws and Regulations, as well as in accordance with the Articles of Association.
- 4.4 In preparing the financial statements for liquidation, the liquidation committee shall apply, on a consistent basis, the principles used in the establishment of annual audited balance sheets for the Company.
- 4.5 The financial statements for liquidation and the evaluation of the Company shall be audited by the external registered auditor of the Company, as appointed pursuant to Subchapter [...], and submitted to the Parties within thirty (30) days after submission of the statements for auditing. Should the auditor not approve the financial statements and evaluation within the above-mentioned thirty (30) day period, or should the Parties not agree with the audited financial statements and evaluation within thirty (30) days following submission of the audited financial statements and evaluation, each Party shall be entitled to request a supplementary audit, to be performed by an auditor chosen by that Party. The Parties and the Company shall cooperate fully in this supplementary audit. The Party requesting such supplementary audit shall bear all expenses incurred in performing the supplementary audit.
- 4.6 The liquidation proceeds of the Company, after payment of outstanding obligations to the Parties and third parties, shall be distributed to the Parties in proportion to their respective, then-existing participation in the paid-in registered capital of the Company. In accordance with the applicable Laws and Regulations, Party B shall be entitled to receive the EUR/USD-equivalent of its entire share of liquidation proceeds, if Party B so chooses.
- 4.7 The liquidation expenses and the remuneration of the members of the liquidation committee and working team (if any) shall be paid from the existing assets of the Company. These payments shall be given priority over all other disbursements as allowed under the Laws and Regulations.
- 4.8 Upon conclusion of liquidation, the liquidation committee shall cancel the Company's registration with the competent authorities.
- 4.9 The Parties shall execute all agreements and additional documents necessary to comply with this Article and shall cause the Directors of the Board appointed by them to agree to the termination of the Company under this Article.

Article 5 Actions to be taken in Equity Interest Transfer

- 5.1 If the Parties agree on the equity transfer under Article 2, the Parties shall execute all necessary equity interest transfer agreements and other documents necessary to facilitate such equity interest transfer and shall cause their appointees on the Board to pass resolutions in favour of and facilitating any and all the matters regarding the related transfer of equity interest and corresponding adjustment of the Contract and Articles of Association, as well as use

their best efforts to cooperate, coordinate and assist the Company in all aspects with regard to the transfer of the shares and corresponding adjustment of the Contract and Articles of Association, including but not limited to submitting all relevant signed documents to the Examination and Approval Authority according to law and registration with competent SAIC without any delay.

- 5.2 Until such time as the sale and transfer of the equity interest in the Company of either Party to the other Party or any selected third parties as set forth above are perfected, the Parties shall cause and ensure the Company, to the fullest extent possible, to maintain the conduct of its business in the ordinary course and no Party shall hinder the Company from the conduct of its business.
- 5.3 The Parties agree that if the mandatory Laws and Regulations require any particular procedures and approvals regarding the equity interest transfer under Articles 2.2 and 2.3 hereof, such Laws and Regulations must be complied with.

Article 6 Other Rights

- 6.1 The termination rights under this Contract shall be in addition to and not in substitution of any claims or remedies that may be available to the non-breaching Party and any termination shall neither relieve the breaching Party from liabilities accrued to the date of termination nor relieve the breaching Party from liabilities against the non-breaching Party or the Company.

Article 7 Continuing Obligations

- 7.1 The obligations and benefits stipulated in the confidentiality provisions of Article [...], in the provisions on settlement of disputes of Article [...] and in the provisions on buy-out, sale-out and liquidation of this Article [...] shall survive the termination of this Contract, the Articles of Association and the termination, dissolution or liquidation of the Company.

Chapter 12 Dispute Resolution

Article 1 Amicable Settlement

1.1 If any dispute arises in connection with this Contract, the responsible representatives of the parties shall attempt, in good faith, to settle such dispute. If a party provides written notification to the other party that no final settlement has been reached at such stage, then each party shall appoint a more senior representative duly authorized to resolve such dispute and promptly notify in writing the other Party hereof. Such senior representatives shall try to reach an amicable settlement. If such senior representatives have not been appointed or are not able to reach an amicable settlement within a time period of [thirty (30)] days after the appointment of the first senior representative or such other time period as the parties may agree in writing, then:

- a) either party may, by written notification to the other party, submit the dispute for arbitration pursuant to Section 2.1.

Notwithstanding the above, any party may initiate arbitration proceedings by notification to the other party pursuant to Section 2.1 at any time irrespective of the prerequisites of this Section 1.1.

- b) the Parties may also reach agreement on termination of the Joint Venture Contract and liquidate the Company pursuant to Chapter 11 Article 4, or shall conduct an equity interest transfer as specified under Chapter 11 Articles 2 and 3.

Article 2 Arbitration

2.1 All disputes arising out of or in connection with this Contract including any question regarding its existence, validity or termination, shall be finally settled by arbitration to the exclusion of the regular courts being competent for a decision in respect of the dispute.

2.2 The case shall be submitted for arbitration to [XXX] (an international arbitration institute agreed by the parties, such as:

- a) China International Economic and Trade Arbitration Commission, arbitration proceedings shall be held in [...], P.R. China
- b) The German Institution for Arbitration, arbitration proceedings shall be held in [...], Germany.
- c) [...] (other international arbitration institute agreed by both parties such as the ICC - International Court of Arbitration Paris or the Arbitration Institute of the Zurich Chamber of Commerce or Hong Kong International Arbitration Center.)

The Arbitration shall be conducted in accordance with the procedural rules of [such institute or other rules agreed by the Parties and accepted by the arbitration institute].

[2.3 The arbitration procedures shall be conducted in [Chinese or English or English and Chinese or German or any other language agreed by the Parties and accepted by the arbitration institute].]

2.4 The arbitration award shall be final and binding upon both Parties

Kommentierung

Einleitung

Magdalena Harnischfeger-Ksoll, Rechtsanwältin, Taylor Wessing, München

Joint Ventures (JV) sind im deutsch-chinesischen Investitionsverkehr unverändert von erheblicher Bedeutung. Zwar optieren ausländische Unternehmen seit Chinas Beitritt zur World Trade Organization (WTO) zunehmend für eine Investition in Form einer 100% ausländischen Beteiligung (Wholly Foreign Owned Enterprise (WFOE)). Dennoch ist das Joint Venture in weiten Bereichen nach wie vor die erforderliche oder bevorzugte Investitionsform.

Ein Joint Venture ist zum einen als Investitionsvehikel in vielen Fällen gesetzlich vorgeschrieben. Der zum 30. Januar 2012 aktualisierte „Foreign Investment Guidance Catalogue“, das Investitionslenkungsinstrument der chinesischen Zentralregierung, sieht zwar eine weitere Liberalisierung im Sinne der Öffnung zusätzlicher Industriebereiche für WFOE-Gründungen vor. Jedoch bleiben auch weiterhin wesentliche Sektoren ausländischer Investitionstätigkeit in China Joint Ventures vorbehalten. Dies betrifft u. a. folgende Branchen: die Automobilproduktion einschließlich Herstellung vieler Komponenten im Automobilbereich, den Kraftwerksektor, Telekommunikation, Schienenverkehr und verwandte Industriebereiche sowie wesentliche Teile des Transportsektors, des Weiteren den Pharmasektor, Finanzierungstransaktionen und kommerzielle Grundstücksgeschäfte.

Auch gibt es bei den von der chinesischen Wirtschaftspolitik zunehmend favorisierten Cross-Border-Kooperationen - beispielsweise im Umweltbereich - eine starke Tendenz zu Joint Ventures. Die zunehmende Investitionstätigkeit ausländischer Firmen in Form von Merger & Aquisition-Transaktionen (Erwerb von Beteiligungen an chinesischen Unternehmen) führt ebenfalls zur Errichtung eines Joint Ventures.

Die Gründungsdokumente eines Joint Ventures bestehen aus dem Joint Venture Vertrag („Joint Venture Contract“) und der Satzung des zu gründenden Gemeinschaftsunternehmens („Articles of Association“).

Die auf chinesischer Seite in der Regel verwendeten Muster von JV-Contract und Articles of Association stammen aus den 80-er Jahren und entsprechen in weiten Teilen nicht mehr der wirtschaftlichen Realität. Sie werden durch die vorliegenden Musterklauseln aktualisiert. Diese vereinen vertragstechnische und praktische Erfahrungen, die deutsche und chinesische Partner in den mehr als 25 Jahren der wirtschaftlichen Öffnung Chinas sammeln konnten.

Grundlagen der Errichtung eines Joint Ventures

Joint Ventures können in der Form eines Equity Joint Ventures sowie eines Contractual Joint Ventures errichtet werden. Diese beiden Joint Venture-Modelle unterscheiden sich in wesentlichen Gesichtspunkten und bieten jeweils spezifische Vor- und Nachteile.

Beiden Joint Venture-Konstruktionen ist grundsätzlich gemeinsam, dass die chinesische Beteiligung an Joint Venture-Unternehmungen durch Artikel 1 Equity Joint Venture Law sowie Artikel 1 Cooperative Joint Venture Law auf chinesische Unternehmen („companies, enterprises or other economic enterprises“) beschränkt ist. Dieses Prinzip scheint seit 2008 aber sowohl in Beijing als auch Shanghai aufzubrechen. Ausländer können hingegen auch als natürliche Personen Anteilseigner eines Joint Ventures werden.

Die den Musterklauseln zugrundeliegende Konstruktion ist das Equity Joint Venture, welches in der Regel als Kooperationsmodell gewählt wird, während Contractual Joint Ventures nach wie vor Ausnahmen darstellen beziehungsweise auf bestimmte Sektoren wie zum Beispiel Infrastrukturprojekte beschränkt sind.

Equity Joint Venture

Rechtsgrundlage für die Errichtung eines Equity Joint Ventures (EJV) ist das Equity Joint Venture Law in der Fassung vom 15.3.01 in Verbindung mit den Implementing Regulations for the Sino-Foreign Equity Joint Venture Enterprise Law of the PRC vom 22.7.01, ergänzt durch Vorschriften u.a. zur Genehmigung, Kapitalaufbringung, etc.

Das Equity Joint Venture ist regelmäßig in der Form der GmbH („Ltd.“) zu errichten und unterliegt in den Bereichen, die nicht durch das Equity Joint Venture Law geregelt sind, dem Gesellschaftsgesetz (Company Law) der VR China. Der ausländische Anteil am Haftkapital („Registered Capital“) kann 25% unterschreiten. Vergünstigungen zum Beispiel bei Einfuhr von Maschinen können jedoch nur bei einer Beteiligung von mehr als 25% in Anspruch genommen werden. Die Beteiligung kann in Geld- und Sacheinlagen, aber auch durch Technologie- und Know-how-Transfer erbracht werden.

Die Gewinnbeteiligung hat zwingend der Kapitalbeteiligung zu entsprechen. Die Einlagen sind innerhalb eines in Abhängigkeit von der Höhe der Investition festgelegten Zeitraumes zu erbringen. Hierzu finden sich ausführliche Regelungen in Kapitel 3 der Musterklauseln. Die Nichteinhaltung der Einzahlungsfrist kann das Erlöschen der Geschäftslizenz („Business Licence“) zur Folge haben.

Der Joint Venture-Vertrag und die Satzung eines Joint Ventures in der VR China unterliegen zwingend chinesischem Recht. Sie müssen durch die auf lokaler oder Provinzebene zuständige Abteilung des Ministry of Commerce (COFCOM) genehmigt werden, und erst mit der anschließenden Registrierung bei der lokal zuständigen Administration of Industry and Commerce (AIC) ist die Joint Venture-Gesellschaft zur Aufnahme ihrer Geschäftstätigkeit berechtigt.

Allerdings sieht das chinesische Recht für viele Einzelfragen keine oder unzureichende Regelungen vor (so beispielsweise im Bereich der Veräußerung von Anteilen an einem Joint Venture, dem

Schutz des Minderheitsgesellschafters, vor allem aber der Beendigung von Joint Ventures). Hierfür bieten die vorliegenden Klauseln ausführliche Regelungen an, welche aufgrund der ministeriellen Ratifizierung durch die chinesischen Geschäftspartner und Gerichte mitgetragen werden können.

Sonstige mit der Joint Venture-Gründung zusammenhängende Verträge wie Technologietransferverträge, Lieferungen und Verkauf sowie Managementverträge können auch ausländischem, das heißt nicht-chinesischem Recht unterstellt werden.

Die Musterklauseln enthalten umfassende Regelungen für die wesentlichen Fragen von Errichtung, Betrieb und Auflösung eines Joint Ventures und sind in weiten Bereichen selbsterklärend. Ziel dieser Kommentierung ist daher vor allem, für deutsche Unternehmen in der Praxis wichtige und teils weniger geläufige Aspekte wie die Übertragung von Anteilen, wettbewerbsrechtliche Problematiken oder die Beendigung eines Joint Ventures zu erläutern.

Chapter 4 - Transfer of Shares

Magdalena Harnischfeger-Ksoll, Rechtsanwältin, Taylor Wessing, München

1. Generelle Anmerkungen

Die ganze oder teilweise Veräußerung eines Anteils in einem chinesisch-ausländischen Joint Venture ist nach chinesischem Recht grundsätzlich erlaubt.

Die Grenzen für die Zulässigkeit, das heißt den möglichen Umfang der Anteilsübertragung, ergeben sich lediglich aus dem „Foreign Investment Guidance Catalogue“ von 2007 (aktualisiert mit Wirkung zum 30.01.12), der ein Regelungsinstrumentarium für die Zulässigkeit ausländischer Investitionen in bestimmten definierten Industriebereichen darstellt.

Neben der Einteilung von Branchen und Produktionsbereichen in die Kategorien „encouraged“, „restricted“, „prohibited“ und „permitted“ für ausländische Investitionen definiert der Catalogue Investitionsprojekte, in denen (nach wie vor) ein Equity Joint Venture als Organisationsform oder chinesische Anteilsmehrheit mandatorisch ist.

Dazu gehören unter anderem Projekte im Bausektor, Erschließung von Rohstoffen, Automobilproduktion, teilweise Komponentenproduktion, Verkehr, Telekommunikation, Stromerzeugung, Real Estate und Finance. Wo chinesische Kapitalmehrheit und damit auch chinesische Mehrheit im Board of Directors vorgeschrieben ist, kann diese nicht durch spätere Anteilsübertragung nach Gründung des Joint Ventures beispielsweise durch Übernahme eines chinesischen Teilanteils durch den ausländischen Gesellschafter unterlaufen werden.

Eine unterschiedliche Behandlung des Share Transfers nach den gesetzlichen Bestimmungen ergibt sich darüber hinaus aus der Organisationsform des Anteilsübertragenden beziehungsweise Anteilsempfängers. Im Falle der Übertragung durch beziehungsweise an ein chinesisches Staatsunternehmen (State Owned Enterprise (SOE)) gelten besondere Regelungen (wie unten darge-

stellt). Ankauf von einem oder Übertragung an ein SOE stellen in der Praxis häufig auftretende Fälle dar, zum Beispiel bei Merger & Acquisition - Transaktionen (Investition durch Erwerb einer chinesischen Unternehmens-Beteiligung) oder bei „Auskauf“ eines Partners im Rahmen von Exit-Transaktionen bei Joint Ventures.

2. Einzelfragen

2.1 Grundsätzliches

Für alle Fälle der Verfügung über Anteile gilt unabhängig von der Rechtsnatur oder Eigentümerstruktur des Übertragenden oder Anteilsempfängers:

Die ganze oder teilweise Übertragung oder Belastung (Verpfändung) von Anteilen bedarf der Zustimmung des/der Mitgesellschafter und der Genehmigung durch die staatliche Genehmigungsbehörde¹. Im Zuge der Dezentralisierung der Genehmigungsbefugnisse ist dies nicht mehr zwingend die für die ursprüngliche Errichtung der Gesellschaft, sondern meist die auf lokaler oder Provinzebene entsprechend der Gesamtinvestitionssumme des Projekts oder lokalen Bestimmungen (zum Beispiel Shanghai) zuständige Behörde, in der Regel die Commission of Commerce (COF-COM).

Im Falle einer beabsichtigten Veräußerung hat jeder Mitgesellschafter ein gesetzliches Vorkaufsrecht. Dieses Vorkaufsrecht wird in Chapter 4 der Sample Clauses differenziert behandelt, da die gesetzlichen Bestimmungen zu Equity Joint Ventures keine ausführlichen Regelungen zu der Ausübung des Vorkaufsrechts enthalten, sondern dieses nur grundsätzlich festlegen.

2.2 Besonderheiten bei Übertragung von oder an SOEs

Entsprechend den wesentlichen gesetzlichen Bestimmungen² gelten für die Übertragung von sogenannten „state assets“ (unbewegliche, bewegliche sowie immaterielle Wirtschaftsgüter in Staatsbesitz einschließlich Beteiligungen) Besonderheiten, die folgende Regelungsbereiche betreffen:

- erweiterte Genehmigungsverfahren;
- mandatorische Bewertung durch ein seitens der State Assets Supervision and Administration Commission (SASAC) bestimmtes Bewertungsinstitut;
- Durchführung des Equity Transfers über eine örtliche Stelle, das United Assets and Equity Exchange Centre (EXI) was zumindest in Shanghai auch für Veräußerung durch Non-SOE, das heißt also beispielsweise durch einen ausländischen Shareholder an ein SOE vorgeschrieben ist.

¹ Sino-Foreign Equity Joint Venture Enterprise Law i.d. Fassung 15.3.01; Implementing Regulations for the Sino-Foreign Equity Joint Venture Enterprise Law of the PRC i.d.F. vom 22.7.01; PRC Company Law (3rd Revision) vom 1.1.06.

² Certain Provisions on Change of the Equity Interests of the Investors of a Foreign-Invested Enterprise vom 28.5.97; Interim Measures for the Administration of the Transfer of State-Owned Property Rights of Enterprises, erlassen durch den State Council und das Ministry of Finance am 12.12.03; Circular on Issues Relevant to Further Regulating the Transactions of State-Owned Assets and Property of Sino-Foreign Equity or Cooperation Joint Ventures in Shanghai vom 28.1.05.

Eindeutig ist die Anwendung der nachstehend behandelten Bestimmungen bei Transfer durch ein SOE, das heißt Abtretung des von einem SOE innegehabten Anteils. Mangels ausdrücklicher Regelung wird jedoch von den Genehmigungsbehörden vielfach die Auffassung vertreten, dass die Vorschriften auch auf den Erwerb seitens eines SOE anzuwenden sind.

Im Einzelnen:

2.2.1 Erweiterte Genehmigungsverfahren

Folgender Ablauf ist nach der internen Einigung der Parteien über den Verkauf vorgeschrieben:

- Transfer-Genehmigung durch die lokale State Assets Supervision and Administration Commission (SASAC) oder bei Gruppenfirmen durch die Dachgesellschaft des chinesischen JV-Partners (auf Grund Ermächtigung durch SASAC);
- Bewertung (zum Verfahren siehe unter 2.2.2) und Genehmigung des Bewertungsergebnisses durch die lokale SASAC oder die Dachgesellschaft der chinesischen Partei;
- Genehmigung des Transfer-Verfahrens durch die SASAC (Bidding oder Contract);
- Genehmigung des Transfers nach Vertragsunterzeichnung durch lokales oder Provinz-COFCOM und Registrierung bei der zuständigen Administration of Industry and Commerce.

2.2.2 Bewertung

Entsprechend den dafür geltenden SASAC-Bestimmungen³ ist eine Bewertung durch ein von SASAC akkreditiertes oder bestimmtes Bewertungsinstitut mandatorisch. Üblicherweise bestimmt SASAC das Bewertungsinstitut, das in der Regel der SASAC-Administration zumindest nahesteht. Akzeptiert wird von SASAC jedoch auch, wenn die Parteien eine gemeinsame Beauftragung im Joint Venture-Vertrag vereinbart haben.

In diesem Zusammenhang gewinnen die Verfahrensregelungen in Kapitel 4 der Musterklauseln, das heißt die gemeinsame Bestimmung des Valuators einschließlich anzuwendender Verfahrensregeln, an Bedeutung, da in der Praxis diese Regelungen seitens SASAC auch für den Fall der Bewertung im Rahmen einer SOE-Übertragung akzeptiert werden. Allerdings muss in der Praxis das von einem gemeinsam beauftragten Schätzer ermittelte Ergebnis von einem SASAC-Institut nochmals bestätigt werden. Dies gilt vor allem für die verwendete Bewertungsmethode.

³ Enterprise State-Owned Assets Evaluation Administration Tentative Measures vom 25.8.05; State-Owned Assets Evaluation Project Administration Tentative Measures vom 15.7.04, Shanghai.

Gemäß der „Guideline on Assets Evaluation“, erlassen von der China Asset Evaluation Association und dem Ministry of Finance am 5.2.04, werden drei Bewertungsmethoden akzeptiert:

- sogenannte Earning Method;
- sogenannte Market Comparison Method;
- sogenannte Cost Method.

Die Earning Method, die von ihrer Definition her der Discounted Cash Flow-Methode entspricht, ist in der Praxis die am häufigsten angewendete.

Nach Vorliegen des Bewertungsergebnisses ist dieses durch die zuständige lokale SASAC zu genehmigen und bildet dann die Basis für den Verkaufspreis mit einer zulässigen 10%igen Abweichung nach oben oder unten.

Sofern eine Einigung über den Transaktionspreis, das heißt das Bewertungsergebnis, nicht möglich ist, ist ein Rückzug vom Verfahren für die Parteien zu jeder Zeit zulässig.

In der Praxis wird häufig so vorgegangen, dass die Parteien, gestützt auf ihre eigenen Bewertungen, schon vor der Beauftragung des Bewertungsinstituts versuchen eine Annäherung zu erreichen, die dann für die Bewertung als Richtschnur gelten soll.

2.2.3 Verfahren

Gemäß den nationalen Vorschriften ist die Übertragung von state-owned assets, das heißt im konkreten Fall eines im Eigentum eines SOE befindlichen Anteils, über die sogenannten Equity Exchange Center (EXI) abzuwickeln. Während dieses Verfahren nach den nationalen Regelungen lediglich für den Verkauf durch ein SOE vorgeschrieben ist, ist gemäß den Shanghai-Regulations vom 28.1.05⁴ auch die Übertragung von Assets durch ein Non-SOE, also den ausländischen Investor, an ein SOE über die Shanghai United Assets & Equity Exchange (SUAE) abzuwickeln.

Die Verfahren vor dem EXI stellen Bidding Verfahren dar mit der Möglichkeit, dass dritte Bieter sich an dem Verfahren beteiligen. Die vorstehend zitierte Shanghai-Regulation sieht ebenfalls Public Bidding (im Rahmen einer Auktion), sogenanntes Competitive Bidding, sowie als dritte Möglichkeit Abtretung durch Vertrag auf Grund vorab erteilter Genehmigung durch die SASAC vor.

Damit bietet sich zumindest theoretisch als zulässige Alternative der Übertragung mit Genehmigung der SASAC die Veräußerung im Vertragsweg zwischen den beiden interessierten Parteien. Im konkreten Fall sollte allerdings frühzeitig, das heißt vor Einleitung der Genehmigungs- und Bewertungsverfahren, die Frage der Übertragungsform mit den Behörden geklärt werden.

⁴ Shanghai Municipality, Issues Relevant to Further Regulating the Transactions of State-owned Assets and Equity of Sino-foreign Equity and Cooperative Joint Ventures in the Municipality Circular v. 28.1.05

2.3 Hinweise zu den Klauseln

Ausführlich gestaltet sind Alternativvorschläge zu den Verfahren und Modalitäten bei Ausübung des gesetzlichen und auch im Vertrag verankerten Vorkaufsrechts. In Anbetracht der geringen Regelungsdichte in den gesetzlichen Bestimmungen⁵ sollte die für den Einzelfall geeignete Alternative beibehalten werden.

Dies gilt in gleicher Weise für die alternativ gestalteten Regelungen zum Verfahrensablauf nach erfolgter Übertragung (Board of Directors-Genehmigung etc.), sowie eine spezielle Übernahmebeurteilung für den Fall einer Change of Control-Situation (Kapitel 4 Artikel 1.6).

Chapter 5 - Minority Shareholders Protection Clauses

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In China ist der Schutz von Minderheitsgesellschaftern für ausländische Investoren von erheblicher Bedeutung. Dies liegt zum einen daran, dass Investitionen von ausländischen Investoren noch stark von Vorschriften der „Industriepolitik“ bestimmt werden und zum anderen, dass das chinesische Gesellschaftsgesetz bezüglich des Schutzes von Minderheitsgesellschaftern noch einige Schwachpunkte aufweist.

Ausländische Investitionen werden durch den „Foreign Investment Industrial Guidance Catalogue“ (Investitionslenkungskatalog) kanalisiert und geregelt. Der Katalog gibt vor, welche ausländischen Investitionen gefördert und welche nur eingeschränkt zugelassen oder verboten sind. Der Katalog bestimmt zudem, in welchen Industriebereichen die Mehrheitsbeteiligung der chinesischen Seite zwingend ist. So dürfen ausländische Investoren Waren in Bereichen wie Arzneimittel, Getreide oder Öl nur als Minderheitsgesellschafter vertreiben. Die zum 30.1.12 in Kraft getretene reformierte Fassung sieht eine Anteilsmehrheit der chinesischen Seite neben den oben benannten Industriezweigen vor allem auch in Bereichen wie Verkehr und Medien vor.

Das chinesische Gesellschaftsgesetz aus dem Jahr 2005 hat einige Neuerungen zur Stärkung der Rechte von Minderheitsgesellschaftern mit sich gebracht. Jedoch ist eine Vielzahl von üblichen Instrumenten für den Schutz von Minderheitsgesellschaftern nicht im chinesischen Gesellschaftsgesetz vorgegeben.

⁵ Siehe Fußnoten 1 und 2.

Durch die in Kapitel 5 aufgeführten Rechte können die Minderheitsgesellschafter ihre Interessen besser schützen. Hierbei handelt es sich in Artikel 1 um die Regelung des „Tag-along“-Rechts (Mitveräußerungsrecht) und in Artikel 2 um die sogenannte „Put-Option“ (Verkaufsoption). Beide Rechte geben den Minderheitsgesellschaftern die Möglichkeit, ihre Geschäftsanteile unter bestimmten Voraussetzungen zu veräußern und stellen damit eine Exit-Möglichkeit dar. Sofern die Anteile des ausländischen Minderheitsgesellschafters nur teilweise übertragen werden, muss beachtet werden, dass die ausländische Beteiligung an einem Joint Venture nach der Anteilsübertragung grundsätzlich nicht weniger als 25% betragen darf.

1. Artikel 1: Tag-along-Recht

Verkauft der Mehrheitsgesellschafter seinen Anteil an dem Joint Venture, so kann der Minderheitsgesellschafter durch Ausübung des Tag-along-Rechts zu gleichen Konditionen mitveräußern. Die Geltendmachung dieses Rechts kann insbesondere dann sinnvoll sein, wenn der Minderheitsgesellschafter vermeiden will, zukünftig gemeinsam mit einem (ihm unter Umständen unliebsamen) Dritten Gesellschafter des Joint Ventures zu sein, er zugleich aber nicht über die erforderlichen finanziellen Mittel verfügt, um von seinem Vorkaufsrecht Gebrauch zu machen. Bei der Erstellung des Joint Venture-Vertrages sollte hier insbesondere auch an den Fall gedacht werden, dass der erwerbwillige Dritte nicht willens oder in der Lage ist, auch die Geschäftsanteile des von seinem Tag-along-Recht Gebrauch machenden Minderheitsgesellschafters zu erwerben. In der Musterklausel wird den Parteien für diesen Fall das Recht eingeräumt beziehungsweise die Pflicht auferlegt, im Wege einer pro-rata Regelung dem Dritten eine anteilige Veräußerung von Geschäftsanteilen beider veräußerungswilliger Joint Venture-Partner anzubieten.

Artikel 1.1 bis 1.3 regeln den genauen Ablauf, der zur Geltendmachung des Tag-along-Rechts notwendig ist. Hierbei muss der Mehrheitsgesellschafter durch eine schriftliche „Transfer Notice“ den Minderheitsgesellschafter innerhalb einer von den Parteien zu bestimmenden Frist (üblicherweise 30 Tage) über die geplante Veräußerung informieren. Der Minderheitsgesellschafter hat dann einerseits die Möglichkeit, sein Vorkaufsrecht auszuüben. Bevorzugt der Minderheitsgesellschafter hingegen die Geltendmachung des Tag-along-Rechts, muss er gemäß Artikel 1.2 den Mehrheitsgesellschafter durch eine „Tag-along Notice“ über die Geltendmachung des Tag-along-Rechts informieren. Im Falle, dass der Erwerber an der aufgrund der Geltendmachung des Tag-along-Rechts nun erhöhten Anzahl an Geschäftsanteilen nicht interessiert ist, sieht Artikel 1.3 eine anteilige Übertragung der jeweiligen Geschäftsanteile vor.

2. Artikel 2: Put-Option

Bei einer Put-Option hat der Minderheitsgesellschafter das Recht, seinen Geschäftsanteil an den Mehrheitsgesellschafter zu verkaufen, wenn seine Interessen bei seiner weiteren Beteiligung an dem Joint Venture gefährdet sind. Der Mehrheitsgesellschafter wiederum kann die Anteile entweder selbst kaufen oder einen Dritten (Third Party Purchaser) für den Anteilskauf bestimmen. Dies ist unter anderem in den Fällen vorstellbar, in denen der Mehrheitsgesellschafter selbst nicht genügend Kapital für den Kauf aufbringen kann oder bereits einen bestimmten Investor für das Joint Venture vorgesehen hat. Die Put-Option ist sehr verkäuferfreundlich ausgestaltet und gibt dem Minderheitsgesellschafter eine Möglichkeit, aus dem Joint Venture auszusteigen.

Die Voraussetzungen, unter denen der Minderheitsgesellschafter die Put-Option geltend machen kann, ist von den Parteien im Joint Venture-Vertrag festzulegen. Zu den Voraussetzungen für die Ausübung der Put-Option können zum Beispiel gehören:

- Beendigung des Joint Venture-Vertrages vor Ablauf der Vertragslaufzeit; es sei denn, der Minderheitsgesellschafter hat den Umstand, der zur Beendigung des Vertrages führte, selbst verursacht.
- Vertragsverletzungen auf Seiten des Mehrheitsgesellschafters, wodurch die Interessen des Minderheitsgesellschafters wesentlich geschädigt werden oder geschädigt zu werden drohen.
- Beschlussfassungen, gegen die der Minderheitsgesellschafter oder die von ihm berufenen Vorstandsmitglieder gestimmt haben und die bei dem Minderheitsgesellschafter materiellen Schaden verursachen können.

Artikel 2.2 bis 2.4 geben das Verfahren zur Ausübung der Put-Option vor. Beabsichtigt der Minderheitsgesellschafter das Put-Option-Recht auszuüben, muss er das Verfahren durch eine „Bewertungsmitteilung“ (Appraisal Notice) einleiten. Demnach ist zunächst der Wert der Geschäftsanteile nach dem Marktwert (Fair Market Value) zu berechnen. Nach der Wertbestimmung kann der Minderheitsgesellschafter seine Put-Option mit einer „Ausübungsmitteilung“ (Exercise Notice) geltend machen. Nach Eingang der Bewertungsmitteilung schließen der Veräußerer (Minderheitsgesellschafter) und der Erwerber (Mehrheitsgesellschafter oder ein Dritter) eine Vereinbarung über die Anteilsübertragung (Share Transfer Agreement) ab. Um im Falle eines Anteilsverkaufs an einen Dritten den Interessen des Minderheitsgesellschafters Rechnung zu tragen, soll der Mehrheitsgesellschafter dem Minderheitsgesellschafter versichern, dass der Dritte seinen Verpflichtungen aus dem Anteilsabtretungsvertrag nachkommen wird (Artikel 2.4).

Chapter 9 - Non-Competition

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China verfügt seit dem 1. August 2008 über ein eigenständiges Wettbewerbsgesetz, welches den Vorgaben des europäischen Kartellrechts nahekommt. Allerdings ist das chinesische Wettbewerbsrecht noch nicht ausgereift, wesentliche wettbewerbliche Fragen sind noch ungeklärt. Dennoch findet eine stetige Fortentwicklung des chinesischen Wettbewerbsrechts statt. Welche genaue Ausgestaltung dieses finden wird, ist unklar. Angesichts der Tendenz des chinesischen Gesetzgebers, europäische Vorgaben zumindest einzubeziehen, dürfte es im Rahmen von Vertragsgestaltungen nicht unangemessen sein, die Maßgaben des strengen europäischen Kartellrechts auf das chinesische Recht zu übertragen, um auch in Zukunft chinesischen wettbewerblichen Vorgaben zu genügen.

1. Grundsätzliche wettbewerbsrechtliche Fragen - Kartellrechtliche Zulässigkeit des Zusammenschlusses

Vor Abschluss des Joint Venture-Vertrages sollte überprüft werden, ob der Zusammenschluss des deutschen mit dem chinesischen Unternehmen einer kartellrechtlichen Genehmigung innerhalb oder außerhalb der VR China bedarf.

Gemäß den Vorgaben des chinesischen Antimonopolgesetzes vom 1.8.08 muss eine fusionskontrollrechtliche Anmeldung beim MOFCOM eingereicht werden, wenn der Umsatz der Joint_Venture-Partner einen der folgenden Schwellenwerte überschreitet:

- der weltweite gesamte Umsatz aller Vertragsparteien im vorhergehenden Finanzjahr betrug mehr als 10 Mrd. RMB und der Umsatz in der VR China jeder der wenigstens zwei Vertragsparteien überstieg in diesem Zeitraum 400 Mio. RMB ;

oder

- der Umsatz aller Vertragsparteien zusammengenommen überschritt im vorhergehenden Finanzjahr in der VR China zwei Mrd. RMB und der Umsatz in der VR China jeder oder wenigstens zweier der beteiligten Parteien betrug in diesem Zeitraum mehr als 400 Mio. RMB.

Darüber hinaus kann das MOFCOM auch unterhalb der Schwellenwerte eine kartellrechtliche Untersuchung des geplanten Zusammenschlusses anordnen, wenn Hinweise vorliegen, dass dieser geeignet ist, den Wettbewerb in der VR China zu beeinträchtigen oder zu unterbinden.

2. Regelungsbereich Chapter 9

Kapitel 9 regelt wettbewerbsrechtliche Fragen in Bezug auf Aktivitäten der Joint Venture-Partner. Artikel 1.1 verbietet dem jeweiligen Joint Venture-Partner, selbst oder durch Tochtergesellschaften, Angestellte oder Geschäftsführer beziehungsweise deren Familienangehörige, Waren, wie sie durch das Joint Venture produziert und veräußert werden, selbst herzustellen, zu entwickeln oder zu verkaufen. Artikel 1.2 erweitert dieses Wettbewerbsverbot auf vertragliche Vereinbarungen mit Dritten bezüglich Produktion und Vertrieb von Waren, wie sie die durch das Joint Venture hergestellt werden.

Ziel von Kapitel 9 ist es, zu verhindern, dass der Joint Venture-Partner unter Zuhilfenahme des im Rahmen der Zusammenarbeit erworbenen Know hows dieses zu eigenen Zwecken zum Schaden des Gemeinschaftsunternehmens verwertet.

Die Genehmigung dieser Wettbewerbsbeschränkung durch das MOFCOM im Rahmen der Verhandlungen zur Erstellung der Joint Venture-Musterklauseln sichert die Durchsetzbarkeit der Vereinbarung. Nichts desto trotz sollten folgende Besonderheiten beachtet werden:

Das chinesische Wettbewerbsrecht befindet sich in einer fortlaufenden Entwicklung, in der wesentliche Problembereiche, wie beispielsweise Wettbewerbsverbote zu Lasten der Gesellschafter eines Joint Ventures oder eines sonstigen Zusammenschlusses noch keine Regelung gefunden ha-

ben. Es ist jedoch davon auszugehen, dass der chinesische Gesetzgeber sowie die beteiligten Behörden und Ministerien die entsprechenden Lücken in den nächsten Jahren füllen werden. Daher sollte bereits zum jetzigen Zeitpunkt darauf geachtet werden, Wettbewerbsbeeinträchtigungen durch vertragliche Vereinbarungen nur zu angemessenen Zwecken und nur mit der notwendigen Eingriffsintensität zu vereinbaren.

Besondere Vorsicht ist hinsichtlich der territorialen Reichweite des Wettbewerbsverbotes erforderlich (Beschränkung auf VR China, Asien oder möglicherweise weltweit). Wie nach europäischem Recht sollte der räumliche Geltungsbereich lediglich das Territorium erfassen, in welchem die Gründer des Gemeinschaftsunternehmens bereits tätig sind / waren. Gegebenenfalls kann dieser Bereich auf die Gebiete erweitert werden, in welchem das Gemeinschaftsunternehmen in Zukunft tätig sein soll.

Des Weiteren ist Kapitel 9 insoweit ergänzungsfähig, als dass keine umfassende Definition der Begrifflichkeit „Affiliates“ (Artikel 1.1 und 1.2) vorgenommen wurde. Diese muss gegebenenfalls zusätzlich eingefügt werden. Abhängig von der Reichweite der Definition umfasst „Affiliate“ die Muttergesellschaft und andere Beteiligungen des Joint Ventures oder aber nicht. Eine Definition, welche sowohl Mutter-, Schwester- und Tochterunternehmen mit einer Mindestinhaberschaft von 50% seitens der Konzernmutter erfasst, könnte beispielsweise folgendermaßen formuliert werden:

„Affiliate“ shall mean any business entity which controls, is controlled by or is under common control with either Party; for the purpose of this definition, a business entity shall be deemed to „control“ another business entity if it owns, directly or indirectly, in excess of 50% of the outstanding voting securities or capital stock of such business entity.“

Auch hinsichtlich der zeitlichen Reichweite des Wettbewerbsverbotes ist Vorsicht geboten. Während die Vereinbarung von Non-Compete-Regelungen für die Dauer des Joint Ventures regelmäßig zulässig ist, ist die wettbewerbsrechtliche Situation bei der Vereinbarung von das Joint Venture überdauernden Wettbewerbsverboten noch nicht geklärt.

Ob der chinesische Gesetzgeber sich dieses Problems zeitnah annehmen wird, ist nicht absehbar. Selbst aber, wenn dieser Bereich zur Zeit der Errichtung des Joint Ventures durch chinesische Regelungen noch nicht abgedeckt ist, heißt dies nicht notwendigerweise, dass nicht in Zukunft restriktive Bestimmungen ergehen, welche die Unwirksamkeit des Wettbewerbsverbotes für die Zukunft zur Folge haben könnten.

Grundsätzlich scheint es daher empfehlenswert, die zeitliche Dauer des Wettbewerbsverbots mit der Lebensdauer des Joint Ventures zu koppeln.

Artikel 1.3 sieht eine Carve Out-Möglichkeit vor, welche insbesondere innerhalb größerer Unternehmensgruppen relativ üblich ist. Ziel ist, ein nicht beabsichtigtes Überlappen beispielsweise in Folge finanzieller Beteiligungen (wie im Zusammenhang mit Pensionsbeteiligungen) zu vermeiden oder aufzulösen. Die Klausel kann, falls dies gewünscht ist, erweitert werden, so dass sie die Verpflichtung zum Verkauf konkurrierender Unternehmen innerhalb der Gruppe an das Joint Venture mit erfasst.

Zur Durchsetzung des wettbewerbsrechtlichen Konkurrenzverbots kann neben oder anstelle des Verbots eine Vertragsstrafe vereinbart werden (Artikel 1.4). Diese Art von Strafzahlung ist im Zweifelsfalle eher durchsetzbar als eine tatsächliche Einhaltung des Wettbewerbsverbotes.

Chapter 11 - Duration/Termination

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1. Generelle Anmerkungen

Chinesisch-ausländische Joint Venture sind nicht immer erfolgreich. Wirtschaftliche Rahmenbedingungen, Interessenlagen der Joint Venture-Partner oder deren Situation selbst können sich ändern und erheblichen Einfluss auf den Betrieb und Erfolg des Joint Venture nehmen. Mithin ist bereits bei Errichtung des Joint Venture auch dessen Beendigung und deren Folgen eingehend zu bedenken und zu regeln.

Die bislang hierzu vorliegenden gesetzlichen Regelungen sind allerdings lückenhaft, sowohl hinsichtlich der Gründe für eine Beendigung als auch hinsichtlich deren Folgen. Sie stellen auf einen Konsens der Joint Venture-Partner ab und sehen als Möglichkeit der Beendigung allein die Liquidation des Joint Venture vor. Belässt man es bei dieser Regelung, stärkt dies im Regelfall gerade denjenigen Joint Venture-Partner, der sich entgegen den Interessen des Joint Venture oder gar vertragswidrig verhält: Der vertragstreue und im Interesse des Joint Venture agierende Partner könnte sich allein unter Totalverlust des Aufgebauten vom anderen Joint Venture-Partner trennen.

Anders die Musterklauseln: Sie bieten einzelfallorientierte und vor allem die einseitige Beendigung (Kündigung) vorsehende Regelungen an, in deren Folge die Liquidation des Joint Venture nur eine von mehreren Möglichkeiten ist. Typische Fallgestaltungen aus der Praxis, auch vor dem Hintergrund der allgemeinen rechtlichen Rahmenbedingungen in China waren bei ihrer Ausarbeitung Orientierung, jedoch ohne den Anspruch, alle denkbaren Situationen und Interessenlagen antizipieren zu können. Es darf und soll also ergänzt werden.

Im Einzelnen:

2. Laufzeit

Die Bestimmung der Laufzeit eines Joint Venture unterliegt gewissen Grenzen und - wie die Gründungsdokumentation selbst - der Genehmigung durch die zuständige chinesische Genehmigungsbehörde. Abhängig vom Geschäftsgegenstand des Joint Venture, dessen Kategorisierung als „erlaubt“, „eingeschränkt zulässig“ oder „gefördert“ sowie abhängig von dem betroffenen Industriezweig können bestimmte Maximallaufzeiten gelten. So ist zum Beispiel die Laufzeit bei einem Joint Venture für die Errichtung und die Vermietung von Bürogebäuden regelmäßig auf die Dauer der betreffenden Landnutzungsrechte beschränkt.

Eine Mindestlaufzeit ist gesetzlich nicht fest vorgeschrieben, jedoch ist zu bedenken, dass die Gewährung von etwaigen Begünstigungen (zum Beispiel Steuernachlässe) häufig an eine Laufzeit nicht unter zehn Jahren geknüpft ist. In der Praxis sind daher Laufzeiten unter zehn Jahren nur in wenigen Ausnahmefällen anzutreffen.

Im Einzelfall muss also geprüft werden, ob und welche Laufzeiten gesetzlich vorgegeben sind.

Natürlich kann die ursprünglich genehmigte Laufzeit mit Genehmigung der Behörde im Grundsatz auch verlängert werden. Dies muss allerdings rechtzeitig und im Einvernehmen aller Joint Venture-Partner passieren (vgl. Artikel 1.1 Abs. 2). Fehlt es an der notwendigen Einigung, sehen die Musterklauseln vor, dass auf Initiative eines Partners über eine Veräußerung der Anteile verhandelt wird (vgl. Artikel 2.2.1 a)). Dabei kann der Verweis auf die Preisbestimmungsregelungen den Erfolg solcher Verhandlungen entsprechend befördern (vgl. Artikel 2.2.1 a) S. 2 in Verbindung mit Artikel 3).

3. Beendigung

Neben der einvernehmlichen (vorzeitigen) Beendigung (vgl. Artikel 2.1 b)) bietet Artikel 2 vor allem Regelungen zur einseitigen Beendigung des Joint Venture an. Dabei wird unterschieden zwischen Beendigungsgründen, die offensichtlich von keinem der Joint Venture-Partner zu vertreten sind (vgl. Artikel 2.1), und solchen, die klar einem Partner zuzuschreiben sind (vgl. Artikel 2.3). Folgerichtig besteht in ersterem Fall für jeden Joint Venture-Partner das Recht, eine Beendigung des Joint Ventures zu veranlassen, während dies in letztgenanntem Fall naturgemäß nur der vertragstreuen Partei zustehen soll.

Von den von keinem Joint Venture-Partner zu vertretenden Gründen für eine Beendigung des Joint Venture sind vor allem Artikel 2.1 d) und f) hervorzuheben. Beide sind darauf gerichtet, jedem Joint Venture-Partner die Möglichkeit des Ausstiegs zu verschaffen, wenn das Joint Venture in näher zu definierenden wirtschaftlichen Schwierigkeiten ist, ohne dass dies von einem Partner zu vertreten ist. Den bislang geltenden gesetzlichen Insolvenzbestimmungen ist kein klarer Zwang zu entnehmen, in Fällen einer Zahlungsunfähigkeit oder Überschuldung sofort selbst ein Insolvenzverfahren einzuleiten. Mithin wäre ein Ausstieg in Abwesenheit vorgenannter einseitiger Beendigungsregelungen der Zustimmung des anderen Joint Venture-Partners anheim gestellt. Dies kann insbesondere in denjenigen Fällen fatale Auswirkungen haben, in denen eine exklusive Bindung eingegangen wurde (zum Beispiel Nutzung einer bestimmten Technologie ausschließlich im Rahmen des betroffenen Joint Venture).

Auch die von einem Joint Venture-Partner zu vertretenden Beendigungsgründe sind nicht abschließend gemeint und können weiter konkretisiert werden. Natürlich setzt ihre Inanspruchnahme regelmäßig voraus, dass der sie in Anspruch nehmende Partner selbst vertragstreu handelt (vgl. Artikel 2.3 Abs. 1). In Fällen, in denen mit dem Joint Venture-Vertrag gleichzeitig wesentliche andere Leistungsbeziehungen etabliert werden (zum Beispiel Einräumung einer Technologielizenz, Vermietung eines Betriebsgeländes, etc. durch einen Partner an das Joint Venture), bietet es sich an, in diesem Verhältnis stattfindende (dauerhafte) Leistungsstörungen auch für eine Beendigung des Joint Venture heranzuziehen (vgl. Artikel 2.3 Abs. 2 Ziffer 8). Dabei ist dann allerdings genau zu bestimmen, welcher Partner kündigungsberechtigt sein soll.

Abhängig davon, ob ein Beendigungsgrund von einem Partner zu vertreten ist oder nicht, sehen die Musterklauseln unterschiedliche Folgen vor:

Ist der Beendigungsgrund von keinem Joint Venture-Partner zu vertreten, kann jeder Partner veranlassen, dass eine Anteilsveräußerung betrieben wird (vgl. Artikel 2.2.1 a)). Einigt man sich darauf, dass ein Partner seine Anteile an einen Dritten veräußert, bleibt das Vorkaufsrecht des nicht veräußernden Joint Venture-Partners erhalten (vgl. Artikel 2.2.2). Dies ist vor allem dann von hervorragender Bedeutung, wenn es sich bei dem veräußernden Joint Venture-Partner um ein Staatsunternehmen handelt, das seine Anteile über ein spezielles, öffentliches Verfahren zu veräußern hat (vgl. Kommentierung zu Kapitel 4, Ziffer 2.2). Je nach Einzelfall ist im Übrigen zu bedenken, ob der Ausübung des betreffenden Vorkaufsrechtes zum Beispiel dadurch Grenzen gesetzt sind, dass es dem ausländischen Joint Venture-Partner infolge der chinesischen Investitionslenkungs politik untersagt ist, über einen bestimmten Prozentsatz hinaus Anteile am Joint Venture zu haben (vgl. in diesem Zusammenhang auch die Kommentierung zu Kapitel 5). In solchen Fällen kann daran gedacht werden, dem ausländischen Gesellschafter das Recht einzuräumen, den Dritten (Erwerber) zu bestimmen oder den Verkauf der Anteile davon abhängig zu machen, dass auch die vom ausländischen Partner gehaltenen Anteile übernommen werden („Tag-along-Recht“, vgl. Kommentierung zu Kapitel 5). Findet eine Einigung über den Verkauf von Anteilen nicht innerhalb zu bestimmender Frist statt, sind die Parteien nach den Musterklauseln verpflichtet, das Joint Venture zu liquidieren (vgl. Artikel 2.2.3).

Ist der Beendigungsgrund einem Joint Venture-Partner zuzuschreiben, hat der vertragstreue Partner nach Scheitern eines Friedensversuches (vgl. Artikel 2.4) die Wahl, ob er den den Kündigungsgrund setzenden Partner auskaufen („Buy-out“), seine Anteile an ihn verkaufen („Sale-out“) oder unmittelbar die Liquidation des Joint Venture betreiben will (vgl. Artikel 2.3 a) - c)). Im Zusammenhang mit den beiden ersten Alternativen wird vor allem die Frage des Preises eine herausragende Rolle spielen. Hierzu bietet Artikel 3 Preisfindungsregelungen an, die auf die in der Praxis häufigsten Fälle ausgerichtet sind (vgl. zum Beispiel Artikel 3.1.1 Variante 1, zwingende Bewertung, sowie auch Kommentierung zu Kapitel 4, Ziffer 2.2.2). Dem Weg der Erstellung der Musterklauseln geschuldet, handelt es sich hierbei naturgemäß um Kompromissklauseln, die im Einzelfall dadurch verbessert werden können, dass die angesprochenen Alternativen schon bei Abschluss des Joint Venture-Vertrages genau bestimmt werden, so dass es auf eine spätere Einigung der Parteien hinsichtlich der Wahl einer der gebotenen Alternativen (vgl. Artikel 3.1.2; Bewertung oder Buchwert) gerade nicht mehr ankommt (zum Beispiel von vornherein Bestimmung des Wertes durch einen zugelassenen chinesischen Wirtschaftsprüfer nach vorher festgelegter, zulässiger Bewertungsmethode). Im Fall der Musterklauseln wird die gebotene Einigung der Parteien natürlich dadurch befördert, dass mangels Einigung in zu definierender Frist die kündigende Partei die Liquidation der Gesellschaft einseitig beantragen kann (vgl. Artikel 2.5).

Auch in diesen Fällen der von einer Partei zu vertretenden Beendigung sind der Gestaltungsfreiheit der Parteien hinsichtlich der Folgen jedoch Grenzen gesetzt, sei es infolge der Investitionslenkungs politik (vgl. oben), sei es infolge der Besonderheiten, die gelten, wenn es sich bei dem chinesischen Joint Venture-Partner um eine staatliche Gesellschaft handelt (vgl. hierzu Kommentierung zu Kapitel 4, Ziffer 2.2).

Hinzu tritt, dass die Umsetzung der jeweils gewählten oder einschlägigen Folge nach derzeitigem Gesetzesstand der Genehmigung durch die betreffenden chinesischen Behörden bedarf; ohne die-

se werden die Vereinbarungen der Joint Venture-Partner, sei es zum Beispiel der Buy-out oder der Sale-out, nicht wirksam.

4. Weitergehende Ansprüche

Gemäß Artikel 6.1 werden Schadensersatzansprüche durch eine Kündigung des Joint Venture gerade nicht ausgeschlossen. Dies hat Bedeutung einerseits für den Fall, dass die Beendigung von einem Joint Venture-Partner zu vertreten ist, andererseits für den Fall, dass die vertragsbrüchige Partei sich auch im Weiteren nicht an ihre vertraglichen Verpflichtungen hält. So sieht zum Beispiel Artikel 5.1 ausdrücklich vor, dass im Fall der Vereinbarung eines Anteilsverkaufes (zum Beispiel Buy-out) jede Partei, also auch die bisher vertragsbrüchige all diejenigen Schritte vorzunehmen hat, die erforderlich sind, vorgenannte Vereinbarung wirksam zu implementieren. Das in der Praxis so häufig anzutreffende „Ausbremsen“ nach einer Einigung auf eine der Kündigungsfolgen ist daher nach den Musterklauseln nicht mehr gefahrlos für den absichtlich Untätigen. Gleiches gilt im Übrigen auch für den Fall, dass dieser den Wert der Gesellschaft dadurch verringern möchte, dass er deren normalen Betrieb in der Phase der Beendigung stört (vgl. Artikel 5.2, demzufolge die Parteien ausdrücklich verpflichtet sind, ungeachtet der Beendigung bis zu deren Umsetzung den Fortbetrieb des Joint Ventures nach Kräften zu unterstützen).

Abkürzungsverzeichnis

AIC	Administration of Industry and Commerce
BoD	Board of Directors
CIETAC	China International Economic and Trade Arbitration Commission
COFCOM	Commission of Commerce
EJV	Equity Joint Venture
EUR	Euro
EXI	United Assets and Equity Exchange Centre
GTAI	Germany Trade & Invest
ICC	International Chamber of Commerce
JV	Joint Venture
Ltd.	Limited
MOFCOM	Ministry of Commerce
PRC	People's Republic of China
RMB	Renminbi
SASAC	State Assets Supervision and Administration Commission
SOE	State Owned Enterprise
SUAEE	Shanghai United Assets & Equity Exchange
USD	United States Dollar
VDMA	Verband Deutscher Maschinen- und Anlagenbau e.V.
VR China	Volksrepublik China
WFOE	Wholly Foreign Owned Enterprise
WTO	World Trade Organization

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