

## **To Shoot or not to Shoot: How to Navigate Buy-Sell Deadlock Resolution Mechanisms for Joint-Ventures**

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### ***Disclaimer***

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### **Introduction**

Joint Venture (JV) governance can sometimes become a “sea of troubles” and raise the question for the partners whether or not to “take arms against”<sup>1</sup> it.

When the JV agreement (particularly for 50:50 or closely held JV) or applicable laws reserve a number of matters to the unanimous decision of the partners, a deadlock situation arises if the partners cannot reach a common ground.

A classic dispute resolution clause which defers the matter to an independent authority (court, arbitration, independent expert) usually proves costly if not ineffective when time is of the essence and persistent disagreements between the parties critically jeopardize the JV operation.

Amongst the most popular mechanisms specifically designed to quickly break the deadlock on a low cost basis and avoid the company winding-up or dissolution, the so-called “Shotgun” or “Buy- sell” provisions, drastically lead to the exclusion of one/several partners from the JV and ownership concentration by the remaining partner(s).

Although Shotgun provisions seem appealing notably due to the reasonably fair pricing and expedient procedure, they should be cautiously drafted and parsimoniously used considering the partners profile, JV post-exit operation issues and possible legal/regulatory hurdles related to their trigger.

This paper will explore the Buy-sell mechanisms, while pointing out a few key aspects for counsels to consider in order to ensure that their implementation is legally and operationally viable, particularly from French law perspective.

Finally, it will give some thoughts about alternative paths to creatively address a JV deadlock and, whenever possible, circumvent or mitigate the dramatic effects of Shotgun provisions.

### **I. Definition and Purpose of Buy-Sell Deadlock Resolution Mechanisms**

The JV agreement drafters can choose from an array of buy-out mechanisms that could be triggered, should prior escalation attempts to the parties’ highest decision makers not be conclusive in a given timeframe.

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<sup>1</sup>William Shakespeare – “Hamlet”

Despite the differences, notably in terms of price determination methods, all such mechanisms have the same objective: to allow one of the partners to take full control over the JV and ultimately decide the matter on his own terms.

Shotgun provisions are based on a cake-cutting or Solomonic bargaining model (one partner cuts/shoots, the other chooses) and offer in substance the possibility for a shareholder X to propose a purchase price for the stake of the shareholder Y who has to either accept or buy himself the interest of the shareholder X for the same price.

Depending on the parties' specific agreement, there are several variations of the same core mechanism consisting of crossed call options<sup>2</sup> or put options<sup>3</sup>:

1. **“Russian roulette”**: The initial shooter –shareholder X- can only name a purchase price or has the right to choose between an offer to sell his own interest or to buy shareholder Y's interest. Shareholder Y is entitled to either accept shareholder X's offer to sell/purchase or reverse such offer. Therefore, shareholder X does not know whether he will be a seller or a buyer at the time the offer is made.<sup>4</sup>
2. **Texas shoot-out**: The process starts as a classic Russian roulette, but shareholder Y is granted with the right to either accept shareholder X's offer or to follow through with the terms of a counter offer. Shareholder X has the same right with regard to the shareholder's Y counter offer, so that multiple rounds of Russian roulette are going to be successively played (as many times as agreed by the parties and with each bid varying from the previous ones by a certain defined threshold). The main drawback of this clause allowing successive overbids is that the offeror is not encouraged to propose a fair price from the outset, thus delaying the exit process. In order to avoid this side effect similar to the so called **“Dutch auction”**<sup>5</sup>, it is recommended to provide, depending on the stakes involved, for a minimum overbid threshold in case of a purchase offer or a maximum overbid threshold in case of a sale offer.
3. **Mexican shoot-out**: The partners can simultaneously submit sealed bids either to each other or to an independent third party and the higher price offeror can force the other to sell at the lower price or purchase at the highest price.

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<sup>2</sup>Purchase option

<sup>3</sup>Sale option

<sup>4</sup>Although a Russian roulette clause can be drafted in many ways depending on the specific JV agreement, here is an example:

*“In the event of a disagreement on [specific matters] that could not be solved according to the previous escalation set forth herein, but not later than [a deadline to be defined by the parties], [party X OR either party](the “Offeror”) can provide a written express notice to [party Y OR the other party] stating his offer to sell his stake in the shared capital of the company or his offer to buy the [party Y OR the other party](the “Recipient”) stake for the price and at the terms and conditions specified in such offer. The Recipient shall, within [a deadline to be defined by the parties] from the receipt of such offer (the “Offer”), exercise one of the following options:*

- a. *Accept the Offer and therefore decide to: i) in case of a sale Offer, to acquire the Offeror's stake in the company. ii) in case of a purchase Offer, to sell its stake in the company to the Offeror;*
- b. *Reject the Offer and thereby commit to: i) in case of a sale Offer, to sell its stake in the company to the Offeror' ii) in case of a purchase Offer, to buy the Offeror's stake in the company ;*

*all for the same price and at the same conditions as stated in the Offer.*

*Where the Recipient has not notified the chosen option to the Offeror within the given deadline, the Offer is deemed to have been [accepted OR rejected].”*

<sup>5</sup>An auction starting with an initial high price which is successively reduced up to a price acceptable by one participant or to a pre-determined bottom price.

4. **Alternative offer clause:** A variant of the Mexican shoot-out clause, where the party who first offers the highest price has the possibility to subsequently make an alternative bid, i.e. either to buy the other's shares or sell its own shares.

Most jurisdictions recognize in principle the validity of the Shotgun clauses, but sometimes under certain conditions.

In France, the following points require particular attention:

- i) **The price determinability** - For a sale contract to be valid, the price has to be either pre-determined or able to be later determined according to a method which does not depend on a single party's discretionary judgement.

For a Texas or Mexican shoot out, the sale price, being ultimately the higher price of the 2 offers, was not considered to be an unilaterally determined price. However, for a classic Russian roulette clause where the other party cannot make a counter-offer, the French doctrine is not unanimous regarding the price determinability. Nonetheless, French courts recognized their validity based on the fact that even though the price is set by the first party, the second party chooses whether it applies for a sale or for a purchase of its shares.<sup>6</sup> In case of disagreement between the parties with regard to the shares pricing, valuation by an independent third party is required.

- ii) **A definite duration**— the perpetual agreements are not enforceable and either partner can notify their termination at any time. The JV agreement should therefore define the duration of such clauses.

- iii) **“Unconscionable” one-sided provisions** are not legally permitted. Such provisions, which directly or indirectly reserve all the losses or profits to a shareholder, are deemed unconscionable in any JV agreements<sup>7</sup>.

French Courts have held valid JV agreement provisions which stipulate a share sale commitment at a minimum price as long as it only targets, except fraud, the transfer of shares and does not aim at exonerating one of the shareholders from his duty to contribute to the corporate losses.<sup>8</sup>

## II. SHOTGUN KEY CAVEATS

Even if a Shotgun provision is perfectly drafted and valid according to the applicable law, the effective consequences of its trigger have to be carefully weighed based on the actual circumstances pertaining on a case-by- case basis.

A few key points to be appraised:

### 1. *Balanced financial strength and shareholding stake*

*“When the man with a 45 meets the man with a rifle, the man with a pistol is a dead man”<sup>9</sup>*: Shotgun works well only if all partners are placed on equal footing.

Moreover, if the JV is held by more than 2 partners, the efficiency of the Shotgun is reduced and its implementation more complex if no share distribution rules between remaining partners are defined in the JV agreement.

<sup>6</sup>« Validité du mécanisme d'enchère dans une clause de *buy or sell* » - Benoit Marpeau : François Dietrich – RLDC N° 135- March 2016

<sup>7</sup>Article 1844-1, al. 2 –French Civil Code

<sup>8</sup>Cass. Com., 20 May 1986 (“Arrêt Bowater”) and Cass. Com., 19 May 1998 (“Arrêt Lyonnaise de Banque”)

<sup>9</sup>The Man with no name other than Joe –main character of the movie **“A Fistful of Dollars”** (“**Per un pugno di dollari**”). **A Fistful of Dollars** is a 1964 Italian movie about a wandering gunfighter (Joe) playing two rival families against each other, the Rojos and Baxters.

In terms of price determination, the Shotgun mechanisms are generally considered balanced because either partner, fearing the “boomerang “ or “back fire” effect, would be incentivized to act in good faith and set a fair price<sup>10</sup>.

However, although *bona fide* principle should govern the Shotgun exercise, a partner who is financially stronger might be tempted to skew the price in order to force departure of the other partner who cannot meet an offer to buy and thus be compelled to sell his interest in the company.

**“I get the wrong idea only when it suits me”<sup>11</sup>:** The most influent partner could in this case distort the price in order to make it unacceptable for the other partner. On the other hand, a smaller shareholder could be constrained to propose a lower sale price in order to avoid the risk of having to buy at the same price the whole JV stock, thereby increasing the odds that the other side will buy.

**“You shoot to kill, you better hit the heart”<sup>12</sup>:** Sometimes, even the presumably stronger partner might fall into his own trap!

A real life example of the biter bit: the majority shareholders of a French JV (Business Value Challenge) received an offer to buy from a third party (Sodexo) all its shares in the company. In parallel, he concluded a buy-sell agreement with a minority shareholder and decided to act on it by offering the minority shareholder to purchase its shares at a price 40% lower than the one offered to him by Sodexo.

In case of resale to Sodexo, the majority shareholder was expecting substantial capital gains. But, instead of selling, the minority shareholders surprisingly decided to buy at this price, after which he sold the full JV share to another purchaser (Accentiv'house). Subsequently, the majority shareholders who had promised to sell the JV shares to Sodexo faced a claim from the latter. The French supreme court of appeal (*Cour de Cassation*) dismissed the claim and enforced the buy-sell agreement validity.<sup>13</sup>

This case perfectly illustrates the uncertainty of a Shotgun mechanism which should prompt the partners to exercise proper due diligence of their exit risks.

### 2. Knowledge of the JV business and of the other partner(s)

**“A man's life in these parts often depends on a mere scrap of information”<sup>14</sup>:** A non-operating shareholder less knowledgeable of the business condition might not strike the right price if he shoots first. This could be the case of minority shareholders or financial investors who are less involved in the JV management.

The arbitrary determination of the cutoff point<sup>15</sup> by one party without due consideration of the JV's situation and the other partner's investment/risk profile might turn against such party if the other party decides to purchase as well at the same price.

### 3. JV's post-exit operation issues

- The JV's reliance on its mother companies should be fully evaluated before a Shotgun is activated in order to avoid the JV being unable to operate the business after the exit of one or several owner(s).

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<sup>10</sup>“Shotguns and Deadlocks”-Claudia M. Landeo and Kathryn E. Spier, Yale Journal on Regulation vol.31(2014)

<sup>11</sup>Idem

<sup>12</sup>Idem

<sup>13</sup>Cass.Com., 20 September 2011, 10-27.186

<sup>14</sup>The Man with no name other than Joe – “**A Fistful of Dollars**”

<sup>15</sup>See Investopedia (<https://www.investopedia.com/terms/c/cutoffpoint.asp>): “The cutoff point is the point at which an investor decides whether or not a particular security is worth purchasing. The cutoff point is very subjective and will be based on the personal characteristics of the individual investor. Some examples of personal characteristics that may determine the cutoff point include the investor's required rate of return and his or her risk aversion level.”

Here the parties should recall the foundation of their partnership and the synergies presiding over the JV creation: risk sharing, costs savings, pooling complementary skills, strengthen the market presence, etc.

- In case one of the owners is also a JV key customer, the use of the Shotgun mechanism impacts the business plan of the JV, unless the situation is anticipated and addressed by the partners in the JV agreement or in the specific commercial contracts entered into by the JV with its parent.
- Additional aspects have to be kept in mind:
  - The impact of a change of control on the JV material commercial contracts has to be carefully evaluated.
  - Know-how and IP licenses granted by a partner might not survive his JV exit, in the absence of JV agreement express provisions.
  - Building co-rental/lease or logistic support provided to the JV by a partner in the form of service level agreements (SLA) will generally cease in case of exit.
  - Certain shared assets and human resources seconded by the leaving partner to the JV might not be easily replaceable or not fungible at all.
  - Termination of shareholder's loans or similar payment facilities arrangements result in immediate payment obligations by the JV to the exiting partner.
  - The leaving partner who issued financial bonds or parent company guarantees for securing certain JV commitments might not be always released without the third party beneficiary's agreement which is often conditioned on the remaining partner providing equivalent protection.

#### **4. Regulatory/ legal matters**

As for most exit scenarios through a share transfer, various legal or regulatory constraints could render the Shotgun implementation burdensome or impossible.

##### **A. Competition law impacts**

###### *i) Merger notification requirements*

Shotgun exercise might lead to a change of control situation which falls into the "concentration" clearance scope<sup>16</sup>.

A change of control<sup>17</sup> can occur:

- In 2 partner JVs, when the exiting partner was exclusively controlling the JV. In this case, the corporations concerned are the acquiring partner and the JV itself.
- In case of a transformation from joint control to exclusive control, the corporations concerned are the partner acquiring control and the JV itself, while the selling partner(s) are not considered to be concerned. For example, the exclusive takeover of Keolis by SNCF Participations who was previously exercising only a joint control was considered a concentration and authorized subject to the renewed commitments previously taken by SNCF Participations as co-controlling shareholder.<sup>18</sup>

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<sup>16</sup>See «Lignes directrices de l'Autorité de la Concurrence relatives au contrôle des concentrations». The *Autorité de la Concurrence* is the authority responsible for merger control in France since 2 March 2009.

<sup>17</sup>The meaning of "control" from competition law standpoint is not identical to that of "control" when it comes to company law. A firm can hold decisive control over another firm when it alone has the power to take strategic decisions for the firm in question or when it is the only shareholder able to block the other firm's strategic decisions, though without the ability to impose these decisions on its own (this is referred to as "negative" exclusive control).

<sup>18</sup>Commission Decision COMP/M.5557 SNCF/CDPQ/KEOLIS/EFFIA and Décision - *Autorité de la Concurrence*. N° 12-DCC-129 of 5 September 2012

- In JVs with more than 2 partners, where before the Shotgun exercise no shareholder was exercising decisive influence on the JV<sup>19</sup>.

The key parameter checked by competition authorities for the concentration purpose is the “full function” character of the JV, in other words the JV’s ability to operate as an autonomous economic player on the market based on dedicated human resources, budget and commercial responsibility. Even when the parent companies represent a significant share of a JV’s sales, a concentration is not excluded if on a commercial level, the joint venture deals with its parent companies in the same manner as with third parties.

#### ii) *Non-compete undertakings*

In case of earlier exit of a JV’s partner, possible business exclusivities or preferred supplier rights granted by such a partner to the JV or conversely by the JV to a former partner, might not survive.

On the other hand, indefinite exclusivities or non-compete clauses are likely unenforceable. Regular checks of the JV agreements are recommended to ensure they remain legally compliant throughout the JV life, considering that exclusivity durations reasonably set at the JV agreement date might not be justified in the same way later (e.g. once the investments costs have been amortized).

### **B. Surviving liabilities**

The mere resignation might not automatically release the former partner’s directors from their fiduciary duties. A JV agreement should contain specific undertakings for the remaining partner to promptly perform all legal formalities for updating the trade public registers in this regard.

### **C. Company legal form**

Depending on the JV legal form, the consolidation of the full share capital in one single partner might become incompatible with legal provisions which require that certain companies have a minimum number of shareholders.

For illustration purpose, a French *Société Anonyme* (SA) should be held at minimum by 2 shareholders. In such case, the remaining partner should either consider an acquisition structure through two entities or change the JV legal form within 12 months in order to avoid the risk of the JV dissolution.

### **D. Foreign investment control rules**

These rules have to be observed if the foreign partner of the JV is to take over and the JV operates in a business domain which is subject to foreign investment control in its country of incorporation.

A JV between a national company and a foreign partner could be vetoed in sensitive sectors likely to impact public policy, national security or defense interests (supply of energy sources or water, transport and electronic communications services, etc.).

The exit mechanisms originally negotiated at the JV creation might face foreign investment constraints particularly in case of the JV business extensions or successive law revisions between the JV agreement and the Shotgun trigger date.

There is a recent trend particularly for the EU and the European governments to reinforce the foreign investment control rules through: i) enlarging the field of industries deemed critical to national security ii) lowering the investment thresholds for such control iii)

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<sup>19</sup>This case can arise when the capital and voting rights are divided between several minority shareholders, with no legal or factual element requiring a stable majority as part of the decision-making procedure, and when a majority can arise on a case-by-case basis according to the possible combinations of the votes of the minority shareholders (fluctuating majorities).

introducing new prerogatives and sanctions for the authorities empowered to perform such control.<sup>20</sup>

In France for instance, the legal framework for national security review has been expanded end of 2018 to include new sectors such as semiconductors, space technology and drones, and to the extent that national security is concerned, artificial intelligence, cybersecurity, robotics and big-data storage.<sup>21</sup>

#### ***E. Prior information/consultation of the employees' representatives***

In many jurisdictions, the transfer of shares particularly when leading to a change of control requires the prior information and/or consultation of the employee's representatives or Workers Council. This procedure even though generally not blocking for the transaction can be more or less lengthy (around 2 months in France) and can be required for both the exiting and remaining partners<sup>22</sup>.

#### ***F. Incompatibility with listed companies rules***

If the shares of a company become traded on a regulated market, the shareholder agreement provisions particularly the Shotgun might become ineffective due to the disclosure obligations and legal constraints applicable to listed companies.<sup>23</sup>

In France, shareholders agreements of publicly listed JVs are to be disclosed to the Financial Markets Authority (*Autorité des Marchés Financiers*) within five days following their execution as soon as they concern at least 0.5% of the securities or voting rights.<sup>24</sup>

### **III. Shotgun Efficiency for Breaking a Deadlock; Tips and Alternative Deadlock Resolution Techniques**

As long as the Shotgun leaves a partner with the option to shoot first and thus activate or not the compulsory buy-out mechanism, they cannot systematically guarantee the resolution of a deadlock if both partners are gun shy. Therefore the parties should carefully define clear deadlines for such option exercise and complement their JV agreement with automatic compulsory deadlock resolution provisions.

Here are some suggestions for consideration whilst drafting a JV agreement:

1. Carefully define what is a "deadlock" based on objective criteria or triggering events which are disconnected from "breach" or "default" considerations. If the shareholders disagree on the deadlock existence itself, the JV Agreement should provide for a backstop date beyond which unsolved matters are deemed to be deadlock events. By way of example, a deadlock could be defined as any impossibility for the governing bodies to decide within their respective perimeter for a minimum set time period.

<sup>20</sup>"Foreign Investment Control Reforms in Europe" –January 17, 2019 - Skadden's 2019 Insights -John Adebiji, Pascal Bine, Matthias Horbach, Dmitri V. Kovalenko, Jason Hewitt, Mikhail Koulikov.

<sup>21</sup>Decree no. 2018-1057 of 29 November 2018 on foreign investment. It should also be noted that a new draft legislation in France called "Pacte Bill" (Action Plan for Growth and Transformation) expected to be adopted in 2019 will increase the sanctions and control prerogatives of the French authorities on foreign investments.

<sup>22</sup>In France, as per the Law n°2015 990 of 6 August 2015 for growth, activity and equality of economic opportunities (known as Macron Law), such information is compulsory in case of the sale of a business as a going concern or 50% or more of the share capital of a company, unless the information has already been provided to the employees within the last 12 months.

<sup>23</sup>In line with the European Directive 2004/25/EC on takeover bids ("Takeover Directive") the key principles governing public offers are: i) A level playing field between alternative bids ii) Equal treatment of, and access to, information by holders of securities concerned by the offer. iii) Market transparency and integrity iv) Fairness in transactions and in competition among bidders.

<sup>24</sup>Article L. 233-11 of the French Commercial Code

2. The application of the Shotgun can be allowed only after the expiry of a certain development phase of the JV when the partners' investments are less critical and the business is stable.
3. The trigger of a Shotgun can be limited to certain specific deadlocks which materially impact the JV operations - to be clearly identified by the partners in the JV agreement.

Ideally, the JV agreement should include provisions related to a default business plan and budget that, at a minimum, will ensure the JV can operate in the ordinary course while the partners work through the deadlock period and exit mechanics.

Sometimes, for vital matters, the partners can contemplate a so-called "**sole risk**" provision whereby a shareholder can act alone at its own risks for example to increase the JV capital. This is usually coupled with appropriate adjustments of the risk/reward ratio including a share dilution mechanism.

4. The ability of the partners to finance the share purchase can be a legal enforceability argument of the Shotgun in some jurisdictions (like Germany). For this reason, the JV agreement should define a reasonable timeframe for the acquiring partner to secure a financing arrangement.
5. When the JV has more than 2 partners, a proportional mechanism for distributing the shares of an exiting partner should be contemplated as well.
6. Although usually the Shotgun applies to the sale/purchase of all the other partner's shares, a partial acquisition limited to an amount of shares might be sufficient for a party to take control for the purpose of that specific disputed decision.
7. Shotgun clauses can be also combined with other dispute resolution techniques that avoid a partner exit from the JV:
  - i) Certain partners, depending on the matter at stake can benefit from one or several **casting votes** or even a **rotating casting vote** according to a frequency/procedure agreed by the partners in the JV agreement.
  - ii) Close to the casting vote, are **Swingman clauses**<sup>25</sup>: whereby the owners rely on a trustworthy third party who holds a minor percentage of the company shareholding and is generally sitting in the board of directors. This is also known as the "outsider" technique and can be applied specifically in the context of a particular deadlock or generally contemplated in the JV agreement.
8. Instead of, or in addition to the Shotgun provisions if not triggered, the parties can agree on some other compulsory exit mechanisms such as:
  - i) **Simple Put options or Call options** whereby all or certain partners are offered the option to buy (generally for the majority shareholder) /sell (generally for the minority shareholders) or can be compelled to buy/sell at a price which is:
    - Defined in the JV operating agreement and eventually annually adjusted according to a predetermined escalation formula. Despite the advantage of offering certainty and avoiding future valuation costs, if the exit horizon is remote from the JV agreement date, the

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<sup>25</sup>Comparative Law Yearbook of International Business, vol. 28- Deadlocks in Resources Joint Ventures – (Philip Christensen – 1992 AMPLA Year Book)



market realities would have evolved and the company value might have significantly changed.

- Determined at the exit date based on the fair market price (FMP) or on the acquisition costs increased by a fixed interest rate set by the parties in the JV agreement (egg. EURIBOR/LIBOR+ x points).
- Determined by a third independent expert (usually appointed among independent accounting firms of international standing and reputation) according to an expedient valuation procedure contractually agreed upon by the parties.
- Adjusted by a “share the wealth” provision. This type of provision requires the remaining partner to provide the exiting partner with a pro rata share of any positive differential in value that the remaining partner achieves in the subsequent sale of its interest in the JV. Note that share the wealth provisions tend to be applicable only for a very short period of time after the exit or require a resale value significantly higher than the price paid to the departed partner, to avoid sharing an increase that merely reflects ordinary course improvements of the JV.

ii) **The joint sale of 100% of JV shares to a third party.** In such a case, the JV partners have to choose an investment bank tasked to sell their JV interest at the best price available and transfer accordingly their shares to the selected purchaser upon receipt of such price reduced by the transaction costs.<sup>26</sup>

9. Shotgun regulatory issues or liquidity constraints for the acquiring partner can be mitigated through **temporary stock holding arrangements** (called “*portage d’actions*” in France). The exiting partner’s shares would be in this case temporarily transferred to a third party (“*porteur*”) who promises to sell it back to the remaining shareholder (“*donneur d’ordre*”) who commits to buy it back at a fixed price and date.

Such cross buy-sell commitments (classically used for pledging or mortgaging the shares to the benefit of credit institutions that finance an acquisition) have been recognized as being valid by French courts to the extent that the hazard of a price fluctuation is equally borne by both parties to such arrangements.<sup>27</sup> Unilateral commitments by a shareholder to repurchase a financial investor’s stake at a set floor price (equal to the subscription price plus annual interests) and by a set deadline have been also legally enforced.<sup>28</sup>

10. Finally, one should also consider when **the silence** would be an option as well? In other words, understand what happens according to the applicable law in the absence of contractual deadlock provisions or compulsory buy-out mechanisms.

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<sup>26</sup>Getting The Deal Through- Joint Ventures- France - December 2018 (Frederic Jungels and Anne-Caroline Payelle- Allen & Overy LLP)

<sup>27</sup>Cass. Com., 24 May 1994 (“Arrêt Tuileries de Saint-Rémy”)

<sup>28</sup>Cass. Com., 16 November 2004 (“Arrêt Laboratoire Actimed”); Cass. Com., 22 February 2005 (“Arrêt Textilinter”); Cass. Com., 27 September 2005 (“Arrêt BSA Bourgoin”)

Squeeze-out mechanisms that would allow a shareholder of a non-listed company<sup>29</sup> to force another shareholder to sell his shares are not commonly available in the absence of specific JV agreement provisions.<sup>30</sup>

On the other hand, the shareholders, unlike the directors, are generally not bound by a fiduciary duty towards the company when exercising their voting power.

However, for certain deadlocks, the applicable law might allow a majority partner to claim for minority “abuse”. In France, an undue use of minority powers can be qualified only if the behavior (either by vote or abstention) of the minority shareholder:

- harms the company’s interest; and
- blocks a measure that is critical for the company survival (e.g. a capital increase) and
- favours his own interests to the detriment of the majority shareholders.

In such cases, minority shareholders are liable for damages and the Court will appoint a proxy or *ad-hoc* agent for the purpose of representing the defaulting minority shareholder at a new general meeting and voting for decisions that are in accordance with the company’s interest but that do not affect the minority shareholders’ interests.

In reverse, most jurisdictions grant to minority shareholders of unlisted private companies certain basic rights.

In France, the partners holding more than 1/3 of the company capital can block an amendment to the Articles of Association. For the holders of one single share, the ambit of minimum legal prerogatives mainly covers the possibility to participate and vote at shareholder’s general meetings, to approve or block any increase of the face value of existing shares and to pre-empt new shares, in proportion to the existing shareholdings in the company.<sup>31</sup>

The minority shareholders can challenge a decision of a general shareholder meeting before the Courts if they consider that such decision is the result of abuse of majority position (“*abus de majorité*”). The Courts may cancel that decision, appoint an expert and/or award damages to the minority shareholders.<sup>32</sup>

## Conclusion

The Shotgun deadlock resolution mechanisms can be time and cost effective ways for untying a governance knot in a 2 partner or closely held JV, provided that the JV partners are not too disparate in terms of participations, finance or business capabilities.

When included in the JV agreement, they should be carefully drafted and consider, depending on the partners’ specific reasons to venture, the possible exit risks and how they can be mitigated through contractual key protections ensuring that the JV’s operations are not prevented or substantially disrupted after a partner’s exit.

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<sup>29</sup>For traded companies, under EU Takeover Directive, the majority shareholders could have the right, under certain conditions, to force the minority shareholders to sell their shares (Article 15). The right of squeeze-out is combined with a sell-out right enabling minority shareholders to require the majority shareholder to buy their securities following a takeover offer at a fair consideration if the bidder meets the requirements for the takeover-related squeeze-out (Article 16).

<sup>30</sup>In France, the Macron Law of 6 August 2015 provides for the forced eviction of the shareholders of a company under judicial administration (“*redressement judiciaire*”), either through a forced sale or by a dilution of their shareholding.

<sup>31</sup> France Minority Shareholder Rights -IBA Corporate and M&A Law Committee (2016) by Bertrand Cardi (Darrois Villey Maillot Brochier)

<sup>32</sup> OECD (2012) – Related Party transaction and minority shareholder rights

Still before loading the gun, the partners shall think twice and remember that “***He will win who knows when to fight and when not to fight***”.<sup>33</sup>

Even though generally Shotgun clauses are valid as such, a number of legal or regulatory hurdles can possibly delay or even frustrate their implementation.

Last but not least, Shotgun mechanisms generally rely on a party’s choice to exercise it and as long as no partner is bound to trigger it, alone they might not ensure systematic resolution of a deadlock. Therefore, a well designed JV agreement should also include complementary conflict resolution strategies and mandatory exit obligations.

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- Helicopters: the world’s leading helicopter manufacturer offering the most comprehensive range of civil and military helicopters in the world.

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<sup>33</sup>Sun Zhu – “The Art of War”