

## Legal Framework for Consortium and Association Agreements in Participation

Approved by Decree-Law no.º 231/81, of July 28.

This law came into force after the *vacatio legis*.

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## Legal Framework for Consortium and Joint Venture Agreements

### DL 231/81

With this law, the government is once again showing its commitment to making current or updated, simple and secure legal instruments available to economic agents, so that they can accommodate types of enterprise that practice has created or at least has been sketching out.

This law regulates two agreements that can be used in cooperation between companies: an old one, which is intended to be revived - the participation association agreement; and a new one, which is intended to be established - the consortium agreement.

With regard to the former, the aim of the law is merely to update and clarify. Under the name of "association in participation account", the agreement was regulated in the Commercial Code of 1833, and articles 224.º to 227.º of the current Commercial Code are dedicated to the "participation account". However, litigation concerning participation accounts has been frequent in our courts, due to the lack of regulation in the Code. The aim now is to update and extend these regulations, without, however, stifling negotiating autonomy, which in these sectors contributes more than the legislators to the progress of legal institutes.

As for the second - the consortium agreement - although it is known in Portuguese practice, the law has forgotten about it. The creation of the consortium agreement provides a legal framework for a form of cooperation between companies, which can be aimed at various objectives, but always requires simplicity and flexibility.

The practical purposes of the interested parties and the very nature of the relationships they establish with each other for certain purposes often lead their businesses away from the traditional types, where only an aberrant legal conservatism can stubbornly close them down. For example, when several companies come together to carry out an important public or private project, it is just as absurd to force them to form a company among themselves, in one of the types of commercial companies, as it is for them, having voluntarily distanced themselves from this type of framework, to claim that it was in fact a company - and an irregular one at that - that they actually formed.

The examples can be multiplied if we think of the meeting of companies only for the preparatory study of a project for which they will then compete; associations for the research and exploitation of natural resources, in which the members, public or private, want to share the extracted products and not the profits from the exploitation, etc.

The term joint venture is in vogue internationally to designate temporary or long-term associations that do not meet the requirements of commercial companies (and sometimes even when they do) and, although the expression is, at least in our system, devoid of strict legal content, the reality exists and must be recognized.

The agreement now expressly regulated in our law is called a "consortium", as this is the name that our practice has adopted and covers a large part of the so-called unincorporated joint ventures. It is not to be confused with commercial companies or complementary groupings of companies, as their elements are different. As far as companies are concerned, it is enough to note that the members of the consortium do not carry out a common activity, as each one continues to carry out its own activity, albeit in concert with the activities of the other members. As for the complementary grouping of companies, it is also aimed at cooperation between companies, but in fields and with structures very different from those of the consortium.

In the consortium agreement regulations contained in this statute, the following predominate

supplementary concepts. As stated above, it is not the government's intention to stifle the imagination of those interested, but rather, on the one hand, to create the broad defining lines of the institute and, on the other, to provide a standard set of regulations from which those interested can depart when they see fit and to which they can make the additions they deem advisable.

Like this:

The Government decrees, under the terms of paragraph a) of no.º 1 of article 201.º of the Constitution, the following:

## **CHAPTER I**

### **The consortium agreement**

#### **Article 1º**

##### **Concept**

A consortium is an agreement whereby two or more natural or legal persons engaged in an economic activity undertake, in concert, to carry out a certain activity or make a certain contribution in order to pursue any of the objectives referred to in the following article.

#### **Article 2º**

##### **Purpose**

The consortium will have one of the following objects:

- a) Carrying out acts, material or legal, preparatory to either a specific undertaking or an ongoing activity.
- b) Execution of a given project.
- c) Supply to third parties of the same or complementary goods produced by each member of the consortium.
- d) Research or exploitation of natural resources.
- e) Production of goods that can be shared in kind among the members of the consortium.

#### **Article 3º**

##### **Form**

1 - The agreement is only subject to written form, unless the members of the consortium transfer real estate, in which case it is only valid if it is concluded by public deed.

2 - The lack of a public deed only produces total nullity of the deal when the final part of article 292.º of the Civil Code applies and if it is not possible to apply article 293.º of the same Code, so that the contribution becomes the simple use of the assets whose transfer requires that form.

#### **Article 4.º**

##### **Content**

- 1 - The terms and conditions of the agreement will be freely established by the parties, without prejudice to the mandatory rules contained in this law.
- 2 - When the achievement of the agreement's object involves the provision of some contribution - this shall consist of a tangible thing or the use of a tangible thing; contributions in cash are only permitted if the contributions of all the members are of this kind.

#### **Article 5º** **Consortium arrangements**

- 1 - The consortium is said to be internal when:
  - a) The activities or goods are supplied to one of the members of the consortium and only it establishes relations with third parties.
  - b) The activities or goods are supplied directly to third parties by each of the members of the consortium, without expressly invoking that capacity.
- 2 - The consortium is said to be external when the activities or goods are supplied directly to third parties by each of the members of the consortium, expressly invoking that capacity.

#### **Article 6.º** **Agreement modifications**

- 1 - Modifications to the consortium agreement require the agreement of all the agreement parties, except if the agreement itself does not require it. 2 - Modifications must take the form used for the agreement.
- 3 - Unless otherwise agreed, the agreement shall not be affected by changes in the management or partners of the members when they are legal persons.

#### **Article 7º** **Guidance and supervisory board**

- 1 - The external consortium agreement may provide for the creation of a steering and supervisory board to which all members belong.
- 2 - In the silence of the agreement:
  - a) Board decisions must be taken unanimously.
  - b) The Board's decisions, taken unanimously or by the majority provided for in the agreement, shall be binding on the head of the consortium as instructions from all its principals, provided that they fall within the scope of the powers conferred or granted to it under Articles 13º and 14; o
  - c) The Board does not have the power to decide on the modification or termination of agreements entered into within the framework of the consortium agreement, nor on transactions aimed at either preventing or terminating disputes.

### **Article 8° Duties of consortium members**

In addition to the general duties arising from the law and the duties stipulated in the agreement, each member of the consortium must:

- a) Refrain from establishing competition with the consortium, except in the terms expressly permitted.
- b) Provide the other members of the consortium, and in particular the head of the consortium, with all the information they consider relevant.
- c) To allow examinations of the activities or goods that, under the agreement, it is obliged to provide to third parties.

### **Article 9° Removal of members**

1 - A consortium member may withdraw from the consortium if:

- a) You are unable, through no fault of your own, to meet your obligations to carry out a certain activity or make a certain contribution.
- b) The events provided for in Article 10°, paragraph (2), subparagraphs b) or c), have occurred in relation to another member and, if there is a significant loss, not all the members agree to terminate the agreement in relation to the defaulter.

2) In the case of point b) of the previous paragraph, the member who resigns from the consortium shall be entitled to compensation, under the general terms, for the damage resulting from that fact.

### **Article 10° Termination of agreement**

1- The consortium agreement may be terminated, as regards some of the agreement parties, by written declarations issued by all the others, in the event of just cause.

2- Just cause for termination of the consortium agreement is deemed to exist with regard to one of the consortium members:

- a) The declaration of bankruptcy or the approval of an arrangement with creditors.
- b) Serious misconduct, in itself or through repetition, whether culpable or not, in the duties of a member of the consortium.
- c) The impossibility, whether culpable or not, of fulfilling the obligation to perform a certain act or make a certain contribution.

3- In the event of paragraph b) of the preceding paragraph, termination of the agreement shall not affect the right to any compensation due.

**Article 11°**  
**Termination of the consortium**

1 - The Consortium is extinguished:

- a) By unanimous agreement of its members.
- b) By the fulfillment of its object or by it becoming impossible.
- c) On expiry of the term set out in the agreement, in the absence of an extension.
- d) Because the plurality of its members is extinguished.
- e) For any other cause provided for in the agreement.

2 - In the absence of any of the cases provided for in the preceding paragraph, the consortium shall be extinguished after ten years from the date of its conclusion, without prejudice to any express extensions.

**Article 12°**  
**Head of consortium**

In the external consortium agreement, one of the members will be designated as the head of the consortium and, in this capacity, will be responsible for carrying out the internal and external functions assigned to him due to the agreement.

**Article 13°**  
**Internal functions of the head of the consortium**

In the absence of an agreement' stipulation defining them, the internal functions of the head of the consortium consist in the duty to organize cooperation between the parties in the realization of the consortium object and to promote the measures necessary for the execution of the agreement, employing the diligence of a judicious and orderly manager.

**Article 14°**  
**External functions of the head of the consortium**

1- The members of the consortium may grant their respective leader the following powers of representation, by means of a power of attorney, among others:

- a) The power to negotiate any agreements to be concluded with third parties within the scope of the consortium agreement, or its modifications.
- b) The power, during the performance of the same agreements, to receive any declarations from third parties, except those for the termination of such agreements.
- c) The power to make declarations to third parties regarding acts provided for in the respective agreements, except when they involve modifications or termination of the same agreements.

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d) The power to receive from said third parties any sums owed by them to the members of the consortium, as well as to claim from them the fulfillment of their obligations.

obligations to any of the members of the consortium.

e) Power to ship goods.

f) The power, in specific cases, to hire economic, legal, accounting or other consultants appropriate to the needs and to pay for these services.

2- Only by special power of attorney may powers be granted to enter into, modify or terminate agreements with third parties within the scope of the consortium agreement, as well as powers of representation in court, including the receipt of the first summons, and to transaction aimed at either preventing or terminating disputes.

3- The powers of representation referred to in the preceding paragraphs, when they cannot be specifically related to one or more of the members of the consortium, shall be deemed to be exercised in the interest and on behalf of all.

#### **Article 15°**

##### **Name of the external consortium**

1- The members of the external consortium may designate themselves collectively, adding all their names, company names or corporate names, with the addition "*Consortium of . . .*" or "*. . . in consortium*", but only the member of the consortium who has signed the document in which the name is used or the person for whom the head of the consortium has signed, in the use of the powers conferred, is liable to third parties.

2- All members of the consortium shall be jointly and severally liable to third parties for damages resulting from the adoption or use of names of the consortium which may create confusion with other existing names.

#### **Article 16°**

##### **Breakdown of amounts received for external consortia activity**

1- In external consortia whose purpose is as provided for in Article 2(b) and (c), each member of the consortium shall directly receive the amounts owed to it by the third party, except as provided for in the following paragraphs and without prejudice either to the solidarity between the members of the consortium that may have been stipulated with the third party, or to the powers conferred on any of those members by the others.

2- The members of the consortium may establish in the respective agreement a distribution of the amounts to be received from third parties different from that resulting from the direct relations of each one with the third party.

3- In the case of the previous paragraph and with regard to relations between the members of the consortium, the difference to be provided by one of them to another shall be deemed to have been received and held on behalf of the one entitled to it under the terms of the consortium agreement.

4- The rules in the previous paragraph also apply if the service provided by one of the members of the consortium is not materially independent from the third party and the remuneration is therefore included in the sums received from the third party by one or more other members of the consortium.



#### **Article 17º**

##### **Distribution of the proceeds from the activities of external consortia**

- 1- In external consortia whose object is as provided for in Article 2(d) and (e), each member of the consortium must purchase part of the products directly, without prejudice to the provisions of paragraph 3.
- 2- The agreement shall specify the moment at which ownership of the products is deemed to have been acquired by each member of the consortium; in the absence of any stipulation, account shall be taken of usage or, failing that and depending on the case, the moment at which the product enters the warehouse or passes through the premises where the economic operation took place.
- 3- It may be stipulated in the consortium agreement that the products acquired by a member of the consortium under the terms of paragraph 1 are sold on its behalf by another member, in which case the rules of the mandate shall also apply.

#### **Article 18º**

##### **Profit and loss sharing in internal consortia**

In internal consortia, when the agreement parties agree to participate in profits, losses or both, the provisions of article 25 of this law shall apply.

#### **Article 19º**

##### **Relations with third parties**

- 1- Active or passive solidarity between the members of the external consortium and third parties is not presumed.
- 2- The stipulation in agreements with third parties of fines or other penal clauses to be borne by all the members of the consortium does not give rise to a presumption of solidarity as regards other active or passive obligations.
- 3- The obligation to compensate third parties for an event constituting civil liability is restricted to those members of the external consortium to whom such liability is attributable by law, without prejudice to internal stipulations regarding the distribution of this burden.

#### **Article 20º**

##### **Prohibition of common funds**

- 1 - Joint funds are not allowed in any consortium.
- 2 - In external consortia, the sums delivered to the respective head or retained by him with the authorization of the interested party are deemed to have been provided to him under the terms and for the purposes of article 1167º, paragraph a), of the Portuguese Civil Code.
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## **CHAPTER II**

### **The association agreement**

#### **Article 21°**

##### **Concept and regulation**

- 1 - The association of one person with an economic activity carried out by another, with the former participating in the profits or profits and losses resulting from such exercise for the latter, shall be governed by the provisions of the following Articles.
- 2 - Profit-sharing is an essential element of the agreement; loss-sharing can be waived.
- 3 - Matters not regulated in the following articles shall be governed by the agreements of the parties and by the regulatory provisions of other agreements, according to the analogy of the situations.

#### **Article 22°**

##### **Multiple membership**

- 1 - Since several people are linked in a single association to the same member, the solidarity of their debts and credits with the latter is not presumed.
- 2 - The exercise of the rights of information, supervision and intervention in management by the various members shall be regulated in the agreement; in the absence of such regulation, the rights of information and supervision may be exercised individually and independently by each of them, and the consents required by Article 26 , paragraph (1), points b) and c), and paragraph (2), must be given by the majority of the members.

#### **Article 23°**

##### **Form of agreement**

- 1- The agreement of association in participation is not subject to any special form, with the exception of that required by the nature of the assets contributed by the member.
- 2- However, only clauses that exclude the member's participation in business losses and those that establish the member's unlimited liability for such losses can be proven in writing.
- 3- Failure to comply with the form required by the nature of the assets contributed by the member only annuls the entire deal if it cannot be converted, in accordance with the provisions of article 293.º of the Civil Code, so that the contribution consists of the simple use and enjoyment of the assets whose transfer determines the special form.

#### **Article 24°**

##### **Member contribution**

- 1 - The member must make or undertake to make a contribution of a patrimonial nature which, when it consists of the constitution of a right or its transfer, must enter the assets of the member.
- 2 - The member's contribution can be waived in the agreement if they participate in the expenses.

- 3 - The agreement may stipulate that the contribution provided for in paragraph 1 of this Article is subsumed by reciprocal participation in an association between the same persons, simultaneously agreed.
- 4 - The member's contribution must be assigned a value in cash: the valuation may, however, be made judicially, at the request of the interested party, when it becomes necessary for the purposes of the agreement.
- 5 - Unless otherwise agreed, a member's default suspends the exercise of their legal or agreement rights, but does not affect the enforceability of their obligations.

#### **Article 25°** **Profit and loss sharing**

- 1 - The amount and enforceability of the member's participation in profits or losses shall be determined by the rules set out in the following paragraphs, unless a different regime results from an express agreement or the circumstances of the agreement.
- 2 - If only the criterion for determining the member's share of profits or losses is agreed, the same criterion shall apply to determining the member's share of losses or profits.
- 3 - If the shareholding cannot be determined in accordance with the provisions of the previous paragraph, but if the contributions of the member and the associate are assessed, the associate's share of profits and losses shall be proportional to the value of his contribution; in the absence of such an assessment, the associate's share shall be half of the profits or half of the losses, but the interested party may apply to the courts for a reduction that is deemed equitable, taking into account the circumstances of the case.
- 4 - The member's participation in the losses of operations is limited to their contribution.
- 5 - The member participates in the profits or losses of operations pending at the start or end of the agreement.
- 6 - The member's participation refers to the results of the financial year, calculated according to the criteria established by law or resulting from commercial practice, taking into account the circumstances of the company.
- 7 - From the profits which, under agreement or legal terms, fall to the member for a financial year, losses incurred in previous financial years shall be deducted, up to the limit of the member's liability.

#### **Article 26°** **Members' duties**

- 1 - The member's duties are, in addition to others arising from the law or the agreement:
  - a) To proceed in management with the diligence of a careful and orderly manager;
  - b) To preserve the essential bases of the association as the member might expect them to be preserved, having regard to the circumstances of the agreement and the operation of similar undertakings; in particular, it may not, without the member's consent, terminate or suspend the operation of the undertaking, replace its object or change the legal form of its operation;

- c) Not to compete with the company with which the association has been agreed, except under the terms expressly granted:
  - d) Provide the member with the information justified by the nature and purpose of the agreement.
- 2 - The agreement may stipulate that certain management acts must not be carried out by the member without the member's prior hearing or consent.
- 3 - The member shall be liable to the associate for any damages suffered by the latter as a result of management actions carried out without complying with the agreement stipulations set out in the previous paragraph, without prejudice to other sanctions provided for in the agreement.
- 4 - Changes in the partners or management of the associating company are irrelevant, unless otherwise provided by law or agreement.

#### **Article 27º**

##### **Termination of membership**

The association is extinguished by the events provided for in the agreement and also by the following:

- a) For the complete realization of the association's purpose;
- b) The impossibility of achieving the association's purpose;
- c) By the will of the successors or by the expiry of a certain period of time after the death of a party, under the terms of Article 28.º;
- d) By the extinction of the agreement's legal person, under the terms of article 29.º;
- e) By confusing the positions of member and associate;
- f) By the unilateral will of one party, under the terms of Article 30.º;
- g) The bankruptcy or insolvency of the member.

#### **Article 28º**

##### **Death of the member or associate**

- 1- The death of the member or associate produces the consequences set out in the following paragraphs, unless otherwise stipulated in the agreement or agreed between the member and the member's successors.
- 2- The death of the member does not terminate the association, but the surviving party or the heirs of the deceased may terminate it, provided that they do so by declaration addressed to the other party within ninety days of the death.
- 3- If the member's liability is unlimited or exceeds the contribution made or promised by the member, the association shall be extinguished ninety days after the member's death, unless within that period the member's successors have declared that they wish to remain a member.
- 4- The member's successors, in the event of the association's extinction, shall not bear any losses incurred from the time of death until the time of extinction provided for in the preceding paragraphs.

**Article 29°**  
**Termination of membership**

- 1 - The provisions of the preceding Article shall apply to the extinction of the associated legal person, and for this purpose the person or persons to whom the position of the legal person in the association will fall upon liquidation shall be considered successors.
- 2 - The association ends with the dissolution of the associating legal person, unless the agreement provides otherwise or it has been decided by the members of the dissolved company that it should continue trading; in the latter case, the association ends when the company is extinguished.
- 3 - Once the association has been terminated by the dissolution of the associating company and revoked by de- release of the partners, the association shall continue without interruption if the partner so wishes, by declaration addressed to the other party within ninety days of becoming aware of the revocation.
- 4 - The successors of the defunct legal person are liable for any compensation owed to the other party.

**Article 30°**  
**Termination of agreement**

- 1- Agreements concluded for a fixed period of time or which have as their object de- terminated operations may be terminated early at the will of one party, based on just cause.
- 2- If the cause consists of an intentional or culpable act on the part of one party, that party must pay compensation for the damage caused by the termination.
- 3- Agreements the duration of which is not fixed and the subject matter of which does not consist of specific operations may be terminated at the will of one of the parties at any time after ten years have elapsed since their conclusion.
- 4- The termination of the agreement under the terms of paragraph (3) of this article does not release from liability when the exercise of the respective right must be considered illegitimate, in accordance with article 334.º of Portuguese the Civil Code.

**Article 31°**  
**Accountability**

- 1- The member must render accounts at the times legally or established for the member's participation in profits and losses and for each calendar year of the association's duration.
- 2- The accounts must be submitted within a reasonable time after the end of the period to which they relate; if the member is a commercial company, the deadline for submitting the accounts to the general meeting shall apply for this purpose.
- 3- The accounts must provide a clear and precise indication of all transactions in which the member is interested and justify the amount of the member's share of profits and losses, if any at the time.
- 4- If the member fails to submit accounts, or if the member does not agree with the accounts submitted, the special accounts procedure governed by articles 1014.º et seq. of the Code of Civil Procedure will be used.

5- The member's share of profits or losses is immediately payable if the accounts have been submitted to the courts; otherwise, the share of losses, to the extent that it exceeds the contribution, must be satisfied within a period of not less than fifteen days from the member being called to account.

**Article 32º**  
**Repeal of legislation**

Articles 224.º to 227.º of the Commercial Code are repealed.

Seen and approved by the Council of Ministers on June 11, 1981. - Francisco José Pereira Pinto Balsemão.

Promulgated on July 15, 1981.

Publish.

The President of the Republic, ANTÓNIO RAMALHO EANES.