

ESTABLISHING A JOINT VENTURE

Introduction

A JV can be defined as the engagement of two or more real or legal persons that are independent from each other both legally and economically, combining their resources, be it capital, credit, technical know-how, experience, equipment, workforce, etc., in order to undertake a common commercial task.

The JV structure has been gaining popularity between the local and foreign contractors in Türkiye since the late '80s, especially for larger infrastructure projects.

Specific provisions regarding the JVs do not exist in the Turkish commercial or obligations codes. However, as a JV can be established in the form of an ordinary partnership (contractual JV) or a commercial entity (corporate JV), e.g. a joint stock company (JSC) or a limited liability company (LLC), relevant provisions of both the commercial and obligations codes, as well as some other laws and regulations, are applicable to JVs.

Generally speaking, a JSC is a more preferable route for a JV in comparison to an LLC or an ordinary partnership as it has obvious advantages over the latter two structures such as the less complicated procedure for share transfer as well as stronger limitation on the liability of the shareholders.

In this article, unless otherwise stated, contractual JV structures, i.e. ordinary partnerships, will be discussed.

Ordinary Partnership

Under current Turkish law and practice, contractual JVs are formed as ordinary partnerships.

An ordinary partnership does not have a legal personality. Direct result of not having a legal personality is that its partners are jointly, severally and unlimitedly liable against the creditors of the ordinary partnership.

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There is no special establishment procedure for ordinary partnerships. They do not even need to have articles of association. In fact, legally speaking, an ordinary partnership can even be established verbally. In practice, partners usually conclude a written partnership agreement to form a JV.

Business partnerships and Consortiums

According to the Public Tender Act, the JVs can be established in two types: Business partnership and consortium. In a business partnership, the partners are jointly and severally responsible for the whole project. On the other hand, the consortium members are only required to perform the part of the tender awarded to each of them.

Partners of a JV

Real and legal persons, either public or private, can become partners in a JV. However, it is not permitted for a joint venture to become a partner in another joint venture.

By definition, there must be at least two partners in order to establish a JV. Even though a JSC or an LLC can be established by a sole shareholder, a corporate JV established in the form of a JSC or an LLC must have at least two shareholders.

Partners in an ordinary partnership share the profit or loss equally among themselves unless stated otherwise in the JV agreement. Each party is responsible for the whole business, not certain parts.

The partners of a JV can borrow in the name of the JV but the liability to repay such loans is on the partners, since the JV lacks legal personality.

Registration at the Trade Registry

In April 2009, Ministry of Trade (then the Ministry of Industry and Trade) published a Communiqué that enabled the JVs to get registered with the Trade Registry. The Communiqué does not mention the word “joint venture” but states that the ordinary partnerships that were established by two

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corporations can be registered at the trade registry offices, if its founders request to do so.

It should be noted that, even after the said Communiqué, the JVs still do not have legal personality under Turkish law. The fresh breath brought by the Communiqué is that it is now possible to register the JVs at the trade registry which will provide them a legal framework as well as a corporate outlook. Furthermore, it will also be possible to check the status of a registered JV and obtain information for the interested third parties.

In order to register the JV at the trade registry, the JV agreement must be notarized. The JV agreement should include the names, trade names, leading partner and the registered addresses of the partners of the JV and the scope of their authorities. It should also be expressly stated in the agreement that the partners have established the JV in order to operate a commercial enterprise.

It is possible to deregister a JV from the trade registry upon applying the trade registry office with an application letter signed and sealed by the representatives of the partnering corporations.

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Capital

For a corporate JV such as a JSC or an LLC, the respective minimum capital requirements will apply.

For establishing a contractual JV, there is no minimum capital requirement. The expenses of the JV are covered by the partners according to their shares in the JV.

Contribution in kind is permissible for both types of JV. For the contractual JVs, i.e. the ordinary partnerships, the Code of Obligations expressly states that each shareholder must subscribe to the share capital either with money, receivables or other assets or services.

Approvals and Licenses

While establishing the JV, certain approvals or licenses may be needed depending on the project to be undertaken by the JV

such as a construction permit from the relevant ministry, license from the Energy Market Regulatory Authority or the approval of the Competition Board. The merger and acquisition transactions which exceed certain thresholds must be notified to the Competition Board.

Duration

A corporate JV is in principle established for an indefinite period of time.

On the other hand, as the contractual JVs are normally established in order to undertake specific projects such as the construction of a highway or a dam, they are usually dissolved once the project is finished.

Management

In principle, unless otherwise stipulated in the partnership agreement, the decisions must be taken unanimously, and all the partners are entitled and obliged to participate in the management of the partnership.

However, in practice the managerial powers as well as the decision quorums are stipulated in detail in the JV agreements. In principle, the decision to amend the partnership agreement and to accept a new partner to the partnership are important decisions and must be taken unanimously. For ordinary issues, a simple majority quorum is normally needed.

Liability

Unless otherwise agreed in the partnership agreement, the partners are jointly and severally liable for the losses of the partnership as well as against the third parties for the debts and obligations of the ordinary partnership.

Unless otherwise stipulated in the partnership agreement, each partner has to share any losses or profits equally, no matter how much capital each of them injected into the partnership.

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Only those partners who contribute their efforts or labour instead of cash can be kept immune from the losses of an ordinary partnership.

Tax

Under the current corporate tax law, the JV partners, provided that their JV meets certain requirements, can choose the tax status of the JV. They can choose their JV to be subject to corporate tax; otherwise, the partners will be subject to corporate or income tax for the income generated by the JV. In the latter case, the JV is only liable for the payment of VAT (Value Added Tax) and withholding tax but has to pay neither corporate nor income tax.

There are certain requirements in order to be able to choose corporate tax: At least one of the JV partners must be a corporate tax payer, the JV agreement must be in writing, its scope of the activity must be specific, a definite term for fulfilling the aim of the JV must have been designated, partners must be liable for the successful performance of the business, the income must be shared between the parties, etc.

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Termination

A corporate JV, such as a JSC or an LLC, is normally established for an indefinite period of time. Provisions regarding when and how a JSC or an LLC is liquidated are found in the Turkish Commercial Code.

A contractual JV formed as an ordinary partnership, on the other hand, will be dissolved in one of the following situations;

- a) When the aim of the partnership is fulfilled or becomes impossible to be fulfilled,
- b) Death of a partner (unless the continuation of the partnership with the deceased's legal heirs agreed in the partnership agreement),
- c) Bankruptcy or mental incapacity of a partner or when enforcement proceedings were started against a partner,
- d) Agreement of all the partners to dissolve the partnership,
- e) Expiration of the term where there is a fixed duration for the partnership,

- f) Notification for termination by a partner in case the partnership is established with an unlimited term or with a term limited to the lifetime of any of the partners,
- g) A court verdict rendered upon the application of one of the partners on reasonable grounds.

Unless otherwise stated in the agreement, the partners all together have to follow the liquidation procedures of an ordinary partnership. However, this duty can be given to one or more partners by agreement. If they cannot reach an agreement, upon application to a court, the court can appoint a liquidator to liquidate the partnership.

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