

**ADDIS ABABA UNIVERSITY, SCHOOL OF LAW,  
GRADUATE SCHOOL**



**THE EXPLORATION OF THE LEGAL  
FRAMEWORK AND THE PRACTICE  
RELATING TO “JOINT VENTURES” IN  
ETHIOPIA:**

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**A COMPARATIVE APPROACH**

**By SAMUEL ASFAW**

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## **ABSTRACT**

This is a comparative research work on the law and practice of “joint venture” in Ethiopia with an objective of exploring the various available legal frameworks there for and the associated problems therein. In this small LLM thesis, it has been endeavored to overview the various joint venture legal structures in different jurisdictions and to also compare and contrast these ‘joint venture’ frameworks with those “joint ventures” in Ethiopia. The paper finally comes up with some conclusions drawn from the legal loopholes and the practical problems observed in the practices, and it also recommends some pragmatic legal frameworks to be put in place for the proper practice of joint ventures so as to address the increasingly pressing needs for such joint venture arrangements. The term ‘joint venture’ has been put in quotation all over the paper, to indicate that this term is not necessarily referring to the Joint Venture provided under the 1960 Commercial Code, but rather to the ‘joint venture’ in its broader sense as conceived worldwide.

## **CHAPTER-ONE: INTRODUCTION**

### **1.1. Background**

Business organizations in their different forms play vital role in the economic function of a country and thereby facilitate investment and movement of capitals. Since there are various types of business organizations, business persons and investors will select the type of business organization that will be suitable for their peculiar interest and their particular scenario. Simplicity of formalities, flexibility, taxation liability, and limitation of liability being among the main criteria to determine such choice, there are also other factors that influence the choice of a particular type of business organization. ‘Joint Venture’ is one of the types of business organizations in many jurisdictions despite the fact that there are differences in the respective legal frameworks governing such type of business organization. Joint Venture, just like the other business organizations, is a vehicle to the economic activities of a country and being so it would be pertinent to explore the salient features of such business organization with a view to assess its legal and economic significance. Particularly in current Ethiopian context, it will be high time to revisit the existing legal framework for ‘Joint Venture’ business and the practice around it.

### **1.2. Statement of the Problem**

‘Joint Venture’ is taken by some as a business entity formed by two or more persons having its own legal personality while some other sources define it as mere contractual arrangement between partners without having its own distinct legal personality. From this, we can easily observe that there is a conceptual disparity among various sources, literatures and jurisdictions on Joint Venture because for the former ones ‘Joint Venture’ is ‘a business undertaking’ but for the latter ones ‘joint venture’ is ‘an agreement’. This being just by way of demonstration to show how ‘joint venture’ might have different conceptual differences in various literatures or jurisdictions, it would also be important to note that many scholars agree that there is some difficulty in determining when the legal relationship of joint venture exists mainly due to disagreements among authorities in the essential elements of Joint Venture.

The above conceptual disparity will become clearer to us when we further read and find out the fact that there are jurisdictions which give legal personality to joint ventures and in some countries joint ventures shall also pay their own taxes. However, in some jurisdictions for instance in France, there is such a special type of business organization, whereby business undertakings group themselves for certain limited purposes while retaining their individuality and autonomy in other aspects. According to some sources, such business organizations will have their own legal personality and should be registered and entered in to the commercial registers, but they will not pay corporate tax. Under the 1960 Commercial Code of Ethiopia, Joint Venture is provided as a business organization without a legal personality as well as without any legal formalities and requirements for registration. What is the legal rationale behind this type of unique business organization? Is it being practically implemented or not? These queries will be among the main points of discussion in the thesis, and the fact that this type of business organization is not as common as the other business organizations in practical implementation is also worthy of exploration.

The concept and practice of Joint Venture in some other jurisdictions is totally different, where Joint Venture might have its own legal personality and should also fulfill the necessary registration and publication requirements like other companies. Joint Venture in such jurisdictions is different from other ordinary companies only in that it is designed for a very limited purpose/project and/or period. It is also a common practice worldwide to establish a joint venture with its own legal personality by two or more persons for limited purpose, with a an objective to separately address some legal issues related to property ownership, tax issues, employee matters, liability, etc....Though joint venture is designed in many jurisdictions for limited purpose and period with distinct legal effects, the Ethiopian ‘joint venture’ does not however seem to give any special legal effect to such limited objective/purpose companies. So, if two business entities enter in to a sort of contractual joint venture arrangement for only a limited project/purpose and period, it is obvious that their relations will be governed by the joint venture legal framework in the Commercial Code. If on the other hand they want to form a distinct legal personality for such limited purpose or period, then their relation will be governed by the standard statutory provisions applicable for partnerships or companies without any special treatment.

Under the current Ethiopian economic context, there is need for Joint Venture establishments by various companies for specific purposes, but in such cases the arrangement will be either based on purely contractual basis or by forming a distinct entity but without any special legal effects. In such events, issues of legal personality, tax matters, staff management, liability to third parties, governing law, etc... can be raised as areas of problems. Ethiopia being in the waves of both foreign and domestic investment ventures, wouldn't it be appropriate to align its legal frameworks to those of commonly practiced joint venture arrangements with distinct legal effects and consequences? Don't we need a joint venture having legal personality with its own legal effects for all practical purposes?

### **1.3. Objective and Significance of the Thesis**

The objective of this research thesis is to explore the conceptual differences of Ethiopian Joint Venture from the Joint Venture legal frameworks of other jurisdictions. It is also the objective of this thesis to examine the practical problems being encountered in the implementation of such business organization both in its contractual as well as in the corporate form. In fact, the reason why this paper through out the text uses the term ‘joint venture’ in the quotation is to depict the dilemma as whether ‘joint venture’ in Ethiopian context can also include those in the corporate forms? Finally, the thesis will also recommend a revision of the applicable law to address the pertinent legal issues in a pragmatic approach. The thesis will contribute both for the academic arena as well as for the practice by being a source for the literature and for comparative analysis, and it will be also helpful for the legislative organs to enable them to revisit the existing legal framework and thereby inviting for possible revision of the law.

### **1.4. Methodology**

The research methodology for the thesis will be principally analysis of literatures as secondary resources and exploration of applicable laws as primary resources. However, to enrich the research with the perspectives of other jurisdictions a comparative research methodology will be applied. Besides, review of practical “joint venture” arrangements of some selected sectors in Ethiopia will be made. Interviews have been also conducted with concerned government

authorities and with concerned company officials to identify what practical problems they encounter in the formation and execution of “joint ventures”.

### **1.5. Thesis Content**

This thesis contains six major chapters. In Chapter-two we will review some important literature backgrounds around Joint Venture such as definitional issues, merits and demerits, historical developments, etc...Chapter-three of the thesis discusses the legal and economic significances of Joint Venture both at micro and macro levels. In Chapter-four, an endeavor has been made to examine some prominent legal issues related to ‘joint venture’ with a view to deeply grasp the nature of joint venture. Comparative outlook of joint venture legal frameworks will be dealt under Chapter-five with an objective to reveal the conceptual disparities and treatments in various jurisdictions including Ethiopia. Chapter-six is dedicated on the practical applications of ‘joint ventures’ formations in Ethiopia and the major problems revolving around there. Finally, Chapter-seven makes some conclusions based on findings and advances recommendations for the way forward.

## CHAPTER-TWO: GENERAL BACKGROUNDS ON JOINT VENTURE

### 2.1. Defining “Joint Venture”

The major problem we may encounter in defining ‘Joint Venture’ is to distinguish as to whether Joint Venture is really a business organization or just a contractual arrangement. In respect we find different literatures or legal instruments defining Joint Venture in different ways.

Just to demonstrate this problem of definition, let us examine some selected examples of definitions on ‘Joint Venture’. ‘Joint Venture’ is defined by Black’s Law Dictionary as ‘a business undertaking by two or more persons engaged in a single defined project.’<sup>1</sup> Similarly, West’s Encyclopedia of American Law considers Joint Venture as a “business structure formed by two or more parties for a specific purpose.”<sup>2</sup> This latter encyclopedia further states that “a Joint Venture is a business enterprise undertaken by two or more persons or organizations to share the expense and profit of a particular business project.”<sup>3</sup> In a similar fashion, Joint Venture is also defined as “an association of two or more persons or entities who combine their property skill, or knowledge to carry out a single enterprise for profit.”<sup>4</sup> To the contrary of the above definitions, however, some scholars and literatures define Joint Venture in terms of a mere contractual arrangement. For instance, Charles P. Lickson, asserts that “Joint ventures are not business organizations in the sense of proprietorships, partnerships or corporations.”<sup>5</sup> He further explained that Joint Ventures “are agreements between parties or firms for a particular purpose or venture”<sup>6</sup>. In our Commercial Code, ‘Joint Venture’ is also defined as “an agreement between

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<sup>1</sup> Bryan A. Garner (ed.), “**Black’s Law Dictionary**”, (7<sup>th</sup> ed., West Group, St. Paul, Minn., 1999) Please also note that Black’s Law Dictionary describes the followings as the basic elements of Joint Venture: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each members’ equal voice in controlling the project.

<sup>2</sup> West’s Encyclopedia of American Law, “**Joint Venture**”, at <http://www.answers.com/topic/joint-venture>, visited on 14/05/2010.

<sup>3</sup> Ibid.

<sup>4</sup> Deborah E. Bouchoux, “**Business Organizations for Paralegals**”, (3<sup>rd</sup> ed., 2004, Aspen Publishers, New York), P. 161.

<sup>5</sup> Joint Ventures, at <http://www.answers.com/topics/joint-venture> , visited on 14/05/2010.

<sup>6</sup> Ibid.

partners on terms mutually agreed and is subject to the general principles of a law relating to partnership.”<sup>7</sup>

In connection with this major problem of definition, the issue of legal personality is also another disparity in the definition of Joint Venture. So, some define Joint Venture as an entity having its own legal personality while others define it as an arrangement without its own legal personality. To underscore the latter position it would be easier to quote Charles P. Lickson who asserts as follows:-

**“Unless the joint venture is formalized by creation of a corporation or partnership, it never ripens in to a tax-paying legal entity on its own. Instead, the joint venture functions through the legal status of the venture participants, known as co-venturers or venture partners. Since the joint Venture is not a legal entity on its own, it does not hire people, enter into contracts, or have its own tax liabilities. These matters are handled through the co-venturers....”<sup>8</sup>**

In line with this latter stand Henry G. Henn and John R. Alexander also assert that “joint venture is not as much of an entity as is a partnership.”<sup>9</sup> Irwin J. Schiffres similarly gives a more detailed and comprehensive definition of Joint Venture as following:-

**“ [Joint Venture] is an association of persons with an intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation, or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the understanding, and that each joint ventures must stand in the**

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<sup>7</sup> Commercial Code Proclamation no. 166 of 1960, Negarit Gazeta, Extraordinary Issue, No. 3 Addis Ababa, 1960, Article 271.

<sup>8</sup> Ibid.

<sup>9</sup> Henry G. Henn & John R. Alexander, *Infra* at note-44, P. 103.

**relation of principal, as well as agent as to each of the other coventurers within the general scope of the enterprise.”<sup>10</sup>**

Though this provision appears to define ‘Joint venture’ in terms of ‘an agreement’, it is however imperative to look this provision against Articles 210, 211 and 212 of the Commercial Code, evidencing that joint venture is also a business organization under Ethiopian law<sup>11</sup>. The definition under Article 271 is also a bit mixed approach considering Joint Venture as both a contractual arrangement, but at the same time as a business organization arising out of a partnership agreement.

From these various definitions, we can easily observe that there is a conceptual difference between the definitions because for some ‘Joint Venture’ is ‘a business undertaking’ and for others ‘joint venture’ is just ‘an agreement’; and on the other hand, for some Joint Venture has legal personality while for others Joint Venture has no its own legal existence. Due to such disparities in the definition of Joint Venture, it has been said that in some jurisdictions courts have not laid down any certain definition of what constitutes a joint venture, nor have they established boundary for the concept, contenting themselves in determining whether the facts of a particular case constitutes the relationship of Joint Ventures.”<sup>12</sup>

Contemporary literatures on Joint Venture tend to define ‘Joint Venture’ in terms of ‘purpose’ rather than in terms of ‘a type of entity’. There are a lot of sources which hold the position that “the term ‘Joint Venture’ refers to the purpose of the entity and not to a type of entity.”<sup>13</sup> The fact that joint venture is to be made for a single defined project or for a specific purpose is an emphasized element in many of the above definitions, indirectly supporting that joint venture is better described in terms of purpose rather than in terms of a type of business organization.

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<sup>10</sup> Irwin J. Schiffres, ‘**Joint Venture**’, American Jurisprudence, (2<sup>nd</sup> ed., Vol. 46, 1994), PP. 19-20.

<sup>11</sup> Note that Article 211 of the 1960 Commercial Code defines ‘partnership agreement’ as “a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any.” This definition narrows down the scope of Joint Venture only to economic activities with a sharing of profits and losses, and thereby precluding other non-economic arrangements or arrangements without share of profit and loss.

<sup>12</sup> Irwin J. Schiffres, *supra* at note-9, P.20.

<sup>13</sup> *Supra* at note-2. See also Rubin Meyer Doru *Infra* at note-37 on this regard.

Joint venture is a venture in which the venturers agree to share profits and losses can also be deducted from the above selected definitions.

Despite all the above disparities in the definition of Joint Venture, there may be a consensus that Joint Venture is<sup>14</sup>:-

- a collaboration between two or more persons;
- through an agreement in any form;
- to pool their capital and resources together;
- to jointly manage their business;
- for a specific or defined purpose; and
- to share costs and profits.

## **2.2. Historical Evolution of Joint Venture**

### ***Worldwide***

Some sources assert that “[t]he concept of Joint Venture as a legal relationship or association sui generis is purely of American origin dating from about 1890.”<sup>15</sup> Some other sources also confirm in a similar fashion that in the United States, the use of joint ventures “began with railroads in the late 1800s.”<sup>16</sup> However, these sources admit the fact that the concept was unknown to the Common law legal system and its recognition as a legal entity is of relatively recent origin, purely being the creature of American courts by their judicial decisions<sup>17</sup>. The following quotation from the above cited source might suffice to show how courts created the concept:-

**“...Courts developed the concept that a status may be created by persons  
combining their properties or services in the conduct of an enterprise**

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<sup>14</sup> We can observe the similarity of these elements with the ones under Article 211 of the 1960 Commercial Code, but the definition of ‘partnership’ under Article 211 does not emphasize on the joint management as well as on the specificity of purpose as emphasized for ‘joint venture’ herein.

<sup>15</sup> American Jurisprudence, “**Joint Venture**”, 2<sup>nd</sup> ed., Vol. 46, the Lawyers’ Co-operative Publishing Company, Rochester, N.Y., 1969, P. 23.

<sup>16</sup> Supra at note-2.

<sup>17</sup> Supra at note-14, P.23.

**without forming a partnership, at least not a formal partnership in the legal or technical sense of the term. ...[T]he creation of a joint venture creates status or relationship between the parties but does not create an independent legal or business entity.’’<sup>18</sup>**

It was in late 1980’s, joint ventures in USA increasingly expanded in the service industries as businesses looked for new and competitive strategies<sup>19</sup>. The creation and development of cross border or international joint venture is also related to impositions and restrictions made by many states on foreign investors and the Joint venture of Pepsi Cola in China in 1993 is usually mentioned as a good example<sup>20</sup>.

### ***In Ethiopia***

In the broader sense of the term, we can comfortably assert that business arrangements by two or more persons jointly have long existed in Ethiopia and same is confirmed by Paul McCarthy, who wrote on Ethiopian partnership law and practice<sup>21</sup>. Paul McCarthy further wrote on the system of relationships prevalent among the Gurage merchants in Addis Ababa, and according to him:-

**“[a] merchant who wishes to invest in a new business will seek someone who knows how to run such a business and in whom he has confidence. When he can find such a person, they will enter into an agreement whereby the one will contribute the necessary capital to start the business and the other will actually operate it.... Under such an agreement, the two men will share both profits and losses, usually equally. The parties consider themselves to be joint owners of the business (building, inventory, etc...) and both may participate in decisions. Upon termination of the arrangement, after all debts are paid, the capital contribution will be returned to the contributor,....’’<sup>22</sup>**

<sup>18</sup> Ibid.

<sup>19</sup> Supra at note-2.

<sup>20</sup> Supra at note-4, P. 162.

<sup>21</sup> Paul McCarthy, “**De Facto’ and Customary Partnerships in Ethiopian Law**”, Journal of Ethiopian Law, Vol. 5, No. 1, June 1968, P. 105.

<sup>22</sup> Ibid, P. 106.

In his above cited article, Paul McCarthy has discovered that all these partnerships are neither registered nor publicized as per the requirements of the law<sup>23</sup>. So, in view of this discovery we can assertively conclude that if these partnerships are not partnerships per se, as not fulfilling the legal requirements, they would definitely fall under the definition of Joint Venture and thus we can say that Joint Venture in Ethiopia existed long time ago. The court decisions discussed under Chapter-6 below support this assertion.

In Ethiopian history of the law of business organizations, we can see that joint venture was introduced to our legal system since 1933 by the Law of Business Organizations of 1933. This law of Business Organizations was said to have been inspired in its main points by French legislation<sup>24</sup>. According to this proclamation, joint venture (in a different name) was recognized as one type of business organizations, and Peter Winship wrote that Joint Venture was regulated by Articles 131-133 of this Ethiopian Law of Business Organizations (of 12 July, 1933)<sup>25</sup>. The proclamation recognized different types of companies; namely, limited liability companies of persons (such as Companies in Collective name, Simple Joint stock companies, and Societies), Companies of capital, and Mixed companies<sup>26</sup>. Besides, this law also permitted, under the same article cited above, for the formation of participating associations which have no juridical existence in so far as third parties are concerned. Article 131 of this proclamation provided that “[a] Participating Association can be concluded for a determined business, for series of operations or for the performance of a commerce.” According to Articles 4 and 132 of this proclamation, Participating Association has no legal personality as against third parties.

Subsequently, the 1960 Commercial Code has replaced and amended this Proclamation and in this Code also joint venture has been recognized as one of the six business organizations in Ethiopia. The Commercial Code has provided a little bit detailed provisions compared to the previous law, but it still has only nine (9) provisions and maintains the basic feature of such organization, i.e. no legal formalities for its formation and no legal personality. In his Expose des Motifs Professor Escara had forwarded to the Codification Commission as to whether or no to

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<sup>23</sup> Ibid, P. 108.

<sup>24</sup> Peter Winship, “**Background Documents of the Ethiopian Commercial Code of 1960**”, (Edited & Translated), 1974, Faculty of Law, HSIU, Artistic Printers, A.A., Ethiopia, P. 25.

<sup>25</sup> Ibid, P.54.

<sup>26</sup> Article 3 of the Law of Business Organizations of 1933.

include other types of business organizations such as stock partnerships (*societe en commandite par actions*), business organizations with variable capital (*societe a capital variable*), cooperative societies, insurance companies, financing institutions, saving institutions, semi-public business organizations (*societe d’economie mixte*, i.e. companies formed with the participation of the state), nationalized business organizations, and investment companies<sup>27</sup>.

Apart from what has been provided in the Commercial Code for Joint Venture, there was also other investment-related proclamation made during the Derg regime, which introduced the option of Joint Venture investment between foreign investors and the Ethiopian Government. This proclamation is Proclamation no. 235/83 and following the promulgation of this Proclamation there were some major Joint Ventures established between the Ethiopian Government and foreign investors, such as Ethio-Yemen, ETC...<sup>28</sup> This Proclamation has introduced a separate legal framework for joint venture of foreign investors with the Ethiopian Government. The Proclamation provided detailed rules and provisions for the formation, management, and dissolution of the Joint Venture and the Joint Venture is not to be formed neither in the form of share company nor in private limited company form. During this period joint ventures involving the Ethiopian Government were to be set up in accordance with the Joint Venture Establishment Proclamation no.235/1983 prevailing at the time. Though such “Joint Ventures” were established as corporate joint ventures having their own legal personality they did not however take any of the business organization legal forms in the Commercial Code, i.e. neither Share Company nor private limited company nor partnership. The Joint Venture as envisaged by this special proclamation was a limited liability entity and it was governed by this specific joint venture establishment proclamation. Joint Ventures to be set up per this proclamation would be well structured with all the necessary corporate governance structures in place. For all practical purposes, we can consider such Joint Ventures as having all characteristics of share companies under the Commercial Code.

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<sup>27</sup> *Supra* at note-23, P. 23. In this *Expose des Motifs*, Professor Escara opined that most of these types of business organizations are not useful for the Ethiopian economy at that time (*Ibid*). We can easily observe that many of the types of organizations mentioned by Escara have been subsequently incorporated into Ethiopian legal system.

<sup>28</sup> *Infra* at note-237.

During the transitional Government period there was this Encouragement, Expansion and Coordination of Investment Proclamation no. 15/1992, which provided for investment areas reserved for the Government of Ethiopia by its own or in ‘partnership’ with private investors<sup>29</sup>. Though this proclamation used the term ‘partnership’ it was not however used in its technical or legal sense because the corresponding Amharic version uses the word “ ”<sup>30</sup>, rather than “ ” as used in the Commercial Code. Later on, Investment Proclamation no. 37/1996 had also provided an investment option for foreign investors to invest in the following specified areas of investments, i.e. on engineering and metallurgical industries, pharmaceutical industries, basic chemical and petrochemical industries, and fertilizer industries, in joint partnership with domestic investors where the investment exceeds 20 Million US dollars<sup>31</sup>. According to this proclamation, the equity share of the domestic partners in a joint investment shall not be less than 27%,<sup>32</sup> and regarding the legal form of the investment the law provided that any business organization of investment shall be registered in accordance with the Commercial Code<sup>33</sup>. So, in a way we can say that this proclamation has incorporated an equity-based and corporate type of joint venture in our laws.

Currently, Investment Proclamation no. 280/2002 also provides the option of joint venture and joint investment to be established by foreign investors with either the Ethiopian Government or with domestic investors, but it should be noted that the idea of joint venture as envisaged in this Proclamation is not the same as the nature of joint venture in the 1960 Commercial Code<sup>34</sup>.

However, we can say that these proclamations of 1983 as well as that of 2002 have introduced the idea of equity joint venture in Ethiopian legal system because they provide that the joint ventures to be established as per these proclamations should be share-based and they should have their own capital. Since the legal formations of these joint ventures follow either of the legal

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<sup>29</sup> Encouragement, Expansion and Coordination Proclamation no. 15/1992, Negarit Gazeta, 51<sup>st</sup> Year, No. 11, Addis Ababa, May, 25, 1992.

<sup>30</sup> Ibid, Article-5.

<sup>31</sup> Investment Proclamation No. 37/1996, Federal Negarit Gazeta, 2<sup>nd</sup> Year, No. 25, Addis Ababa, June 18, 1996, Article 7(1).

<sup>32</sup> Ibid, Article 2(2)

<sup>33</sup> Ibid, Article 10(2).

<sup>34</sup> See Discussion Infra at Section 4.2.2.

forms of Share Company or private limited company, we can also say that these proclamations have introduced a corporate joint venture in Ethiopia.

### 2.3. Joint Venture and Other Similar Arrangements Distinguished

There are a lot of other similar arrangements that might confuse with Joint venture, and it will be prudent enough to distinguish some of them for the purpose of this paper. Among some of these similar arrangements we can find the followings:-

***Joint Ownership and Tenancy in Common:*** - these are distinguished from Joint Venture in that they lack the feature of adventure<sup>35</sup>. Our Commercial Code is also clear on this distinction between joint ownership and partnership because it clearly provides that Joint Ownership of properties do not constitute a partnership agreement in the meaning of the law<sup>36</sup>. Article 228(2) provides that Joint members may create partnership for the management of the property jointly owned. So, not only joint ownership but also joint management is necessary to qualify for ‘partnership’.

***Alliances:*** - ‘alliance’ is usually defined in a very broad sense as “a bond or union between persons, families, states, or other parties.”<sup>37</sup> So, the elements of sharing profits and losses, pooling of resources, etc... might not be found in alliance arrangement. Many authorities agree that Joint Venture is distinguishable from a strategic alliance because the latter is said to be much less rigid arrangement<sup>38</sup>.

***Syndicate:*** - this is said to be more of a business word than a legal term, and is defined as “an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested.”<sup>39</sup> Some sources assimilate this arrangement with joint venture<sup>40</sup>, and it is also

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<sup>35</sup> Supra at note-14, P. 24.

<sup>36</sup> Supra at note-6, Article 228(1).

<sup>37</sup> Supra at note-1.

<sup>38</sup> Robin Meyer Doru & Trandafir, “**Joint Ventures under Romanian Law**”, <http://english.hotnws.ro/stiri-business-6161719-joint-ventures-under-Romanian-law.htm>, visited on 14/05/2010.

<sup>39</sup> Supra at note-14, P. 24.

observed by some writers that in some syndicates, all members of the syndicate participate directly and are parties to the loan agreement<sup>41</sup>. However, the above assertion of similarity between syndicate and joint venture might be more convincing when “only one lender is a party to the agreement and the participation of the other syndicate members is undertaken pursuant to a collateral agreement” because in such a case “the fact of syndication is not normally disclosed to the borrower, and the result is called a ‘participation’ or ‘sub-participation’...”<sup>42</sup>

**Franchise:** - this is just the right granted by an owner of a trade mark or trade name to engage in business or to sell a good or service in a certain area<sup>43</sup>. There will be a franchise fee to be paid to the owner, otherwise there is no sort of joint business venture by the two parties with a view to share profit and loss.

**Sub-contracting:-** this is different from joint venture because it involves an independent contractor “who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without actual partnership or corporate designation.”<sup>44</sup>

The main distinguishing criteria that differentiate the aforementioned arrangements from Joint Venture are: lack of profit sharing between the parties, lack of joint management of the business, independent liability of the parties, lack of common business objective, no contribution by the parties, etc...

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<sup>40</sup> Ibid.

<sup>41</sup> Donald H. Bunker, “**The Law of Aerospace Finance in Canada**”, McGill University, Montreal, Quebec, 1988, P. 127. The writer of this thesis is of the opinion that if the syndicate partners are parties to the loan contract, there will not be as such ‘joint venture’ for the purpose of the third party.

<sup>42</sup> Ibid, P. 127.

<sup>43</sup> Supra at note-1.

<sup>44</sup> Supra at note-14, P. 23.

## 2.4. Salient Features of Joint Venture vis-à-vis Partnership

Just as a demonstration to show how ‘joint venture’ might have different conceptual differences reflecting the difficult nature of joint venture, it would be relevant to quote the two scholars who assert as follows:-

**“There is some difficulty in determining when the legal relationship of joint venture exists, with authorities disagreeing as to the essential elements....”<sup>45</sup>**

Though Henry G. Henn and John R. Alexander try to emphasize the difference between Joint Venture and partnership<sup>46</sup>, Joint Venture is however usually viewed by some other literatures and scholars as a form or variety of partnership – specifically, a form of general partnership<sup>47</sup>. However, this is not to deny the existence of differences between Joint Venture and partnership, because even the latter scholars hold that ‘Joint Venture’ can best be described as a short term partnership.<sup>48</sup> Otherwise, the similarities between partnerships and Joint Ventures is much emphasized in many literatures than their differences, and just to illustrate this we can see the following lists of similarities between the two:-

- 1. There must be an agreement between joint venturers to do business together. This agreement may be oral or written.**
- 2. No formalities to form a Joint Venture.**
- 3. Joint venturers share profits and losses according to their agreement.**
- 4. Joint venturers have unlimited liability for the venturer’s debts and obligations.**

<sup>45</sup> Henry G. Henn & John R. Alexander, **“Laws of Corporations”** (3<sup>rd</sup> edition, St. Paul, Minn., West Publishing Co., 1983), P. 104. See also Betlev F. Vagts, who asserts that “The Joint Venture is basically a partnership limited in duration or scope or both. It is difficult to formulate any usable test for distinguishing the two organizations and it is doubtful whether any special consequences should follow from the distinction....” (Betlev F. Vagts, P. 31). Despite their general assertion on the difficulty of determining existence of Joint Venture as legal relationship, Henry G. Henn & Alexander further assert that most would agree on the following to be essential elements of ‘Joint Venture’: (1) express or inferred agreement; (2) joint interest (contribution); (3) sharing of profits and losses; (4) unlimited liability, and (5) mutual right to control. (Henry G. Henn & Alexander, P. 106).

<sup>46</sup> Henry G. Henn & John R. Alexander, Ibid, P. 107.

<sup>47</sup> Supra at note-4, P. 161

<sup>48</sup> Ibid, P. 162

5. **Joint venturers share the right to manage and control the business.**
6. **Joint venture is treated as a partnership for tax purposes<sup>49</sup>.**

The salient features of a Joint Venture as listed down by many literatures can strengthen the above assertion of its similarities with partnership. For instance, some other scholars identified the following lists as being the main elements of Joint Venture:-

1. **an express or implied agreement to carry on an enterprise.**
2. **a manifestation of intent by the parties to be associated as joint ventures,**
3. **a joint interest as reflected in the contribution of property, finances, effort, skill, or knowledge by each party,**
4. **a measure of proprietorship of joint control of the enterprise, and**
5. **a provision for the sharing of profits and losses<sup>50</sup>.**

Even having identified the above elements of a Joint Venture, which elements are much similar to those of partnership, A. James Barnes and his co-writers still underline the difference between the two arrangements by saying that “the major distinction between a Joint Venture and partnership is that a Joint Venture relates to a single enterprise or transaction and a partnership relates to a continuing business”<sup>51</sup>. In terms of legal formalities, also, A. James Barnes and his co-writers underline the fact that “[t]he requirement for joint ventures is less formal and may be implied entirely by conduct”<sup>52</sup>.

Our Commercial Code has also viewed Joint Venture as a partnership<sup>53</sup> and this evidences their similarity even before the eyes of the law. However, it is important to underscore the fact that these two organizations are not one and the same because they have also differences between them. Among their differences, we can see the following as salient features of Joint Venture:-

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<sup>49</sup> Ibid, PP. 162-163

<sup>50</sup> A. James Barnes, Terry Morehead Dworkin, & Eric L. Richards, “**Law for Business**”, 7<sup>th</sup> ed. (2000), McGraw – Hill Higher Education, United States, P. 438.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Supra at note-6, Article 271.

***Lack of Legal Personality:*** - Though there are joint ventures with legal personality in many jurisdictions, it can however generally be held that joint venture does not have legal personality in the original sense of the term. Peter Winship had written that “...the essential characteristic of the Joint Venture is that it does not have legal personality...”, and he further explained the consequences of this lack of personality by the following statement: “It does not have a firm name; does not possess capital, assets or liabilities; does not have a head office; cannot be sued as a business organization and can not be declared bankrupt.”<sup>54</sup>

***Secrecy regarding partners:*** - The writer of this thesis did not find the secrecy of joint venture as one peculiar nature in other literatures or in other jurisdictions, except in French Company Code<sup>55</sup>. In fact, some writers emphasize the secrecy about the partners as one advantage of contractual joint venture. For example, Peter Winship, writing on Ethiopian law of business organizations, asserted the following on the secrecy of Joint Venture:-

**“...although from one point of view a Joint Venture is one of the most rudimentary forms of organization, it does have two important advantages which makes it useful for the above operations:-**

- a) transactions can remain secret because of the secret nature of the Joint Venture, only the manager being made known to the public while the members remain in the shadows;**
- b) the members are exempted from the requirements of publicity imposed on commercial business organizations.”<sup>56</sup>**

Coming to our law, we can easily observe that secrecy is one legal feature of joint venture because Article 272(1) clearly states that “Joint Venture should not be divulged to third parties.” In fact, our law even provides a legal effect on divulgence, i.e. if a joint venture is divulged to third parties then it is no more joint venture but will be just a partnership<sup>57</sup>.

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<sup>54</sup> Supra at note-23, P.55.

<sup>55</sup> See the discussion on ‘Societe en Participation’, Infra Section 4.1.

<sup>56</sup> Supra at note-23, P.55.

<sup>57</sup> Supra at note-6, Article-272(4).

**Limited purpose/duration:** - It seems that this distinction is made mainly in terms of the duration or the life span of the partnership. To further illustrate this assertion, scholars explain that “[t]he primary distinction between a Joint Venture and a partnership is that a partnership is usually formed to engage in some ongoing business activity whereas the Joint Venture is formed to carry out a particular venture.”<sup>58</sup> Even Goldberg, writing on Ethiopian Commercial Code, he wrote that Joint Venture “is usually formed with a relatively small number of persons for a limited purpose or short period of time.”<sup>59</sup> However, Peter Winship had expressed a different view in this respect alleging that “[a]lthough in practice the Joint Venture is frequently used for a single business transaction it can also be used for a number of transactions and for a more or less long period of time.”<sup>60</sup>

**Joint management by partners:** - As a general rule, the partners in a joint venture normally want to have joint management role in the Joint Venture operation. As Ian Hewitt wrote on this point, “[i]n a joint venture context, all parties are likely to be participating directly to a material extent in the management and operation of the venture.”<sup>61</sup>

**Personal nature of the relationship:** - The partners choose each other in consideration of their personal characters, and this renders to Joint Venture a unique feature of personal nature, which might not be in line with the legal norms for corporate entities, where for example transferability of interest is easy. In this regard, it has been held that in joint venture, transferring “shares to any third party without constraint is contrary to the basic *personal nature* of a ‘joint’ venture.”<sup>62</sup> This assertion clearly emphasizes the personal nature of joint venture.

**Fiduciary Relationship:** - the fact Joint Venture partners have fiduciary duties to each other is also an emphasized nature of ‘Joint Venture’. Harry G. Henn and John Alexander clearly provide that “[t]he parties to a Joint Venture are in a fiduciary relationship.”<sup>63</sup> By this ‘fiduciary duty’ it

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<sup>58</sup> Supra at note-4, PP. 161-162. See also Henry G. Henn & John R. Alexander, according to whom “Joint Venture differs from other business undertakings by two or more persons in that it is usually formed to carry out a particular venture, dissolving upon the completion thereof.” (Henry G. Henn & John R. Alexander, supra at note-44, P. 105).

<sup>59</sup> Goldberg, “**Introduction to the Commercial Code**”, Unpublished, Law Faculty, P. 7.

<sup>60</sup> Supra at note-23, P.55.

<sup>61</sup> Ian Hewitt, “**Joint Ventures**”, (4th ed.), Sweet & Maxwell, August 2008, P. 211.

<sup>62</sup> Ibid, P. 276 (*emphasis added*)

<sup>63</sup> Supra at note-44,(Henry G. Henn & John Alexander) ,P. 105.

is to mean that the parties will assume the strictest loyalty to each other. It seems that “...many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties.”<sup>64</sup>

**Informality:** - Under normal circumstances, “no formality is usually required” to establish a Joint Venture<sup>65</sup>. The implication of this informality for Joint Venture establishment is that the partners’ agreement can be made even by oral and it will be subject to the general principles of contract law<sup>66</sup>. Charles P. Lickson expressed the simplicity of formation of joint venture stating that “[t]heir formation may be very informal, such as a handshake and an agreement for two firms to share a booth at a trade show...”<sup>67</sup> The formalities of forming a company need some mandatory legal requirements such as written form, registration, and/or publicity. Unlike such legal requirements for other business organizations, the formation of a joint venture does not require such legal formalities. It can even be created by express or implied agreement of the parties. The fact that it can even be implied from the conducts of the partners evidences its informality nature.

**Non-continuity:-** Non-continuity of joint venture is also mentioned as one of its salient features irrespective of whatever legal form it takes. For example, the fact that Joint Venture is dissolved on the death, bankruptcy, or incapacity of the members is also mentioned as one distinctive legal characteristic of Joint Venture by Peter Winship<sup>68</sup>.

## 2.5. Types of Legal Forms of Joint Venture

There are different types of legal forms for Joint Ventures and these forms might vary depending on our perspective to look at the matter. For example, from legal structure point of view, a Joint Venture will normally take one of the following three legal forms:-

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<sup>64</sup> Ibid, P. 107.

<sup>65</sup> Ibid, P. 105.

<sup>66</sup> See Henry G. Henn & John Alexander, Supra at note-44, P. 106.

<sup>67</sup> Supra at note-5.

<sup>68</sup> Supra at note-23, P.55.

***Contractual Joint Venture:*** - is a relationship based on a contract between two parties and is governed by the general principles of contract law. There is no specific body of legal rules governing this type of Joint Venture and as a result the Joint Venture agreement will have to provide for every aspect of the Joint Venture’s operation<sup>69</sup>.

***Partnership Joint Venture:*** - in such kind of joint venture, a true partnership relationship exists between the parties, with all the legal implications this has. The most significant consequence of operating through this type of structure is that the partners are both jointly and individually liable to the full extent of the partnership’s liabilities. This implies that in cases where no manager(s) is/are appointed, each party acts as a representative of the venture and as such will bind the other participants to transactions concluded with outside parties<sup>70</sup>.

***Corporate Joint Venture:*** - a corporate Joint Venture involves the creation by the participants of a separate legal entity through which to pursue the venture. The parties to the joint venture will be the parent shareholders in the entity<sup>71</sup>.

On the other hand, from capital investment point of view Joint Ventures can be also divided in to two as follows:-

***Equity Joint Ventures:*** - This type of Joint Venture is “where each of the parties contributes capital to a jointly-owned business which is conducted as an identifiably separate business with some degree of independent management.”<sup>72</sup> From legal structure point of view this type of joint venture is a corporate joint venture, and to this effect Ian Hewitt described that “[w]here business objectives call for a high degree of integration and commitment, an equity joint venture is generally the appropriate structure.”<sup>73</sup>

***Non-Equity Joint Ventures:*** - In non-equity joint venture the partners do not contribute capital or equity, and more precisely Ian Hewitt described it as not involving “direct profit or equity

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<sup>69</sup> Peter Nayler, “**Business Law in the Global Marketplace**”, (2006), Butterworth-Heinemann, Oxford, UK, P. 181.

<sup>70</sup> Ibid, P. 182.

<sup>71</sup> Ibid.

<sup>72</sup> Supra at note-59.

<sup>73</sup> Ibid.

sharing or the creation of a separate entity.”<sup>74</sup> It is evident from description that non-equity joint venture is a contractual joint venture and in many sources it is also referred to as ‘collaborative arrangement’<sup>75</sup> or ‘cooperative agreement’<sup>76</sup>, usually used for “shared resource agreements, pilot projects, Research and Development collaborations, joint production arrangements, and network alliances.”<sup>77</sup> Similarly, another authority puts that in such non-equity joint ventures “the parties seek technical service arrangements, franchise and brand use agreements, management contracts, rental agreements, or one-time contracts, e.g. for construction projects.”<sup>78</sup> We can observe here that non-equity joint venture is assimilated with alliances, franchise agreements, and even with rental agreements, which is understandably stretched assimilation.

Though not a commonly used categorization, there are also some literatures that categorize joint ventures in terms of the ownership status of the venturers, and accordingly Joint Venture can also be divided as follows:-

***Public-Private Joint Venture:*** - these are also called Public-Private Partnerships (PPPs), and they “are partnerships between public authorities and private business.”<sup>79</sup> What distinguished such PPPs from ordinary private partnerships is the fact that they should normally oblige the PPP’s contracts to comply with some specific public legislation and they should be conducted through public contracts after public tenders, etc...<sup>80</sup>

***Private-Private Joint Venture:*** - This Private-Private joint venture is a joint venture between private subjects and as being so they are normally subject to the normal Commercial Code, Contract laws, etc..., and the partners are relatively free to determine their rights and obligations by the joint venture agreement<sup>81</sup>.

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<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Supra at note-2.

<sup>77</sup> Supra at note-59.

<sup>78</sup> Supra at note-2.

<sup>79</sup> Supra at note-38.

<sup>80</sup> Ibid.

<sup>81</sup> Id.

From competition and merger laws point of view, there are also the following two types of Joint Ventures:-

**“Full-function” Joint Venture:** - this is also called Merger-type Joint Venture, and it is a Joint Venture that will be created by the mergers of existing businesses<sup>82</sup>.

**“Non-full-function” Joint Venture:** - this is also known as “Co-operative Joint Venture”, and is created when the joint venture partners retaining their separate identities and businesses but with significant co-ordination or co-operation between them<sup>83</sup>.

From jurisdictional point of view, there are also two types of Joint Ventures, namely **International Joint Venture** and **Domestic Joint Ventures**. International Joint Venture is when the partners are from different countries while domestic joint ventures are where the partners are from one country.

In many jurisdictions, Joint Venture is not a different type of business organization per se since it can take either of the available legal forms such as share companies, private limited company, limited partnership, etc... In this connection, Rubin Myer Doru and Trandafir rightly asserted that “the term Joint Venture refers to the purpose of the entity and not to a type of entity”<sup>84</sup>, and they concluded that Joint Venture in literal sense can be a corporation, a limited liability company, a partnership, or any other legal structure<sup>85</sup>.

## 2.6. Merits and Demerits of Joint Venture

Just like any other legal arrangements, joint ventures as form of business organizations will have their own advantages and disadvantages. In fact, it is an important legal norm to always consider the advantages and disadvantages of a particular form of joint venture in terms of commercial, legal, tax, regulatory, and accounting considerations before its formation. In this connection,

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<sup>82</sup> Supra at note-61, P. 378

<sup>83</sup> Ibid.

<sup>84</sup> Supra at note-38.

<sup>85</sup> Ibid.

many literatures in general agree that we need to consider the following important issues before deciding the legal form of a joint venture; namely, Tax costs; Regulatory requirements; Ease of setting up; Nature of the board or management structure; Ease of termination or unwind; Administration cost; Reporting and publicity requirements; and Accounting treatment<sup>86</sup>.

Having said the above general remarks, we can now see the following merits of Joint Venture<sup>87</sup>:-

1. It can be formed easily.
2. Shared management – decisions can be made jointly.
3. Other partners can serve as additional sources for capital – partners may have additional capital to make loans to the partnership or may have strong credit backgrounds and can readily obtain a loan from bank.
4. Sharing of profits and losses.
5. Joint ventures do not pay corporate income tax. Income earned is *passed through* to the individual partners who declare and pay tax on their respective share of partnership profits.

On the other hand, Joint venture, as being assimilated with partnership, has also the following demerits<sup>88</sup>:-

1. **Unlimited personal liability** and also joint and several liability.
2. **Lack of continuity**: - a partnership cannot survive the death or withdrawal of a partner. This lack of continuity is an unattractive feature and provides less stability than does a corporation, which can ensure perpetuity.
3. **Difficulty in Transferring Interest**: - Because it is a voluntary arrangement, one partner cannot simply sell his interest to another because admission of a new partner

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<sup>86</sup> Supra at note-61, P. 41.

<sup>87</sup> Supra at note-4, P. 41. See also Peter Nayler, supra at note-69, PP. 181-182, where he listed down almost identical advantages, but qualifying these advantages only for contractual joint ventures.

<sup>88</sup> Supra at note-4, PP. 41- 43.

requires consent from the other partners. Partnership agreements make it difficult for partners to withdraw early by providing a term for the existence of the partnership, i.e. partners may withdraw earlier but may be unable to withdraw their contributions.

However, it is also important to note that in view of the fact that there are various types of joint ventures, the above merits and demerits might not apply to all types of joint ventures. In fact, the majority of the above merits and demerits apply to contractual and partnership joint ventures, rather than corporate joint ventures because it is evident that due to their corporate nature, ‘corporate joint ventures’ might have the following advantages of their own<sup>89</sup>:-

- Ø Limited liability,
- Ø Existence of detailed legal framework regulating companies which provides a degree of certainty regarding the rights and obligations of the participants,
- Ø Wider options for raising finance, such as issuing shares, borrow in its own name, etc...,
- Ø The identity of the members can change without the need for a fundamental restructuring exercise being done.

The followings are also mentioned as disadvantages of corporate joint ventures by Peter Nayler<sup>90</sup>:-

- Ø Financial information of the company shall be given to government and to the public, limiting the degree of privacy of the parties,
- Ø The profits of the company shall be taxed separately and no guarantee that any credit will be given for this when the profits are distributed to the parent shareholders in the form of dividends, and
- Ø If the joint venture incurs losses, it may not be possible to offset these against profits made by the parents in connection with their other separate business interest.

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<sup>89</sup> Supra at note-69, P. 183.

<sup>90</sup> Ibid, PP. 183-184. Peter Nayler also hints that the matter of crediting for corporate tax might depend on particular jurisdictions stands.

## CHAPTER-THREE: PURPOSE AND SIGNIFICANCE OF JOINT VENTURES

### 3.1. Purpose/Objective of Joint Venture at Micro Level

Joint Ventures are created for many purposes; the term covering a wide range of business arrangements, from the establishment of a new corporate entity by two competitors to a joint purchasing scheme or joint research and development<sup>91</sup>. So, depending on the specific purpose of a particular joint venture, joint ventures might have various benefits to the respective partners.

One benefit of joint venture at micro level can be creating an opportunity to combine capital and knowledge of partners. One partner may have only knowledge or technology or invention, but the other partner having only the capital without knowledge or technology to realize a particular project. For instance, joint venture may be formed outside the business or commercial context when one party, such as a university, does not have sufficient resources to commercially develop an invention or discovery, and thus forms a Joint venture with another party, which provides funding and capital to bring the invention to market<sup>92</sup>.

Another good example for the benefit of joint venture at micro level can be enabling exporters to access a specific market. An exporter might wish to enter into a Joint venture with a local enterprise; such venture can have advantages for both parties to the arrangement. The synergy resulting from a pooling of their respective expertise, financial resources, skills, knowledge and experience may lead to a more profitable exploitation of the market potential than would arise from individual endeavor<sup>93</sup>.

There are also other various specific benefits of joint ventures at micro level. As one scholar put it very clearly, joint venture will have also some specific objectives and purposes for joint venture partners; namely, cost saving; risk sharing; access to technology; expansion of customer

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<sup>91</sup> Paul Craig & Grainne de Burca, “EU Law Text, Cases, and Materials”, 2<sup>nd</sup> ed. (1998), Oxford University Press, NY, P. 984.

<sup>92</sup> Ibid

<sup>93</sup> Supra at note-69, P.180.

base; entry into emerging economies; entry into new technical markets; pressures of global competition; leverage for financing; creeping sale or acquisition; and catalyst for change<sup>94</sup>.

### **3.2. Economic Significance of Joint Venture at Macro Level**

At macro level also, joint ventures play important roles in the overall economic performance of a country. The economic significance of joint venture is tremendous and it contributes a lot to a country’s overall economic growth by attracting foreign investors to local market. These objectives can be easily extracted from the preambles of relevant laws some of which we can see here below:-

**“ Whereas, in order to build a strong national economy and achieve a higher standard of living, it is necessary to develop the natural resources of the country;**

**Whereas, the participation of foreign capital with Ethiopian public capital in joint ventures and the transfer of foreign technology through such participation can play a role in the realization of the objectives mentioned above;...”<sup>95</sup>**

Ian Hewitt wrote on the growing trend towards joint ventures and alliances as follows:-

**“There is a strong competitive trend towards globalization in many industries and sectors. Greater access is now available to the emerging markets of the world’s developing countries. Revenues from international markets have increased substantially for Western companies. A large number of alliances over the past decade or so have evolved ‘cross-border’ relationships.”<sup>96</sup>**

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<sup>94</sup> Supra at note-61, PP. 6-7.

<sup>95</sup> The Joint Venture Establishment Proclamation no. 235/1983, Negarit Gazzeta, 42<sup>nd</sup> Year, No. Addis Ababa, January 22, 1983, Preamble. (Emphasis added).

<sup>96</sup> Supra at note-61, P. 3.

Joint venture is also helpful for developing countries to easily obtain technology transfer from developed countries. As Peter Nayler pointed out “[d]eveloping countries often see the establishment of Joint Venture’s as a way of technological investment from the more advanced economies”<sup>97</sup>. In this connection, there is this study proving that “[j]oint ventures and alliances enable companies to access innovative technology without making outright acquisitions or incurring excessive expenditure before the technology is fully proven.”<sup>98</sup> This technology transfer to developing countries will also in turn contribute to the economic growth of the country.

Joint ventures can also benefit in promoting foreign investments at macro level depending on various investment policies of countries. It is becoming increasingly common to see joint ventures formed for the purpose of conducting business activities in a variety of foreign countries, including activities involving agricultural enterprises, construction ventures, and telecommunication businesses, often because many countries restrict the activity of foreign companies to own businesses or remove profit<sup>99</sup>.

Enhancing the overall economic growth of the country by increasing the values of investments is also one benefit of joint venture at macro level. Some studies also show the fact that joint ventures can also have a positive effect on a public company’s share price<sup>100</sup>.

### **3.3. Legal Significance of the Joint Venture Framework**

The legal significance of joint ventures is principally providing alternative business framework for business people to fit for their particular business need. For instance, for persons not willing to establish an ongoing business relationship, joint venture framework can serve as a legal vehicle to venture for some specified projects. As put by some writer, joint ventures can be formed for a single activity or project may be having a limited life span, or they can be created as

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<sup>97</sup> Supra at note-69, P. 180.

<sup>98</sup> Supra at note-61, P. 3.

<sup>99</sup> Supra at note-4, P. 162

<sup>100</sup> Ibid, P. 5.

a vehicle for an ongoing co-operative relationship of indefinite duration<sup>101</sup>. This creates flexibility in the legal regime to accommodate some particular business needs.

Another legal significance of joint venture can be its flexible implications on various matters such as tax liability, legal personality, etc...This flexibility enables business people to decide the nature of their joint investment in such a way to enable them reap the maximum benefit out of the arrangement. For instance, as correctly observed by one writer, foreign investors can often expect to reap the benefits of tax and other financial incentives, a more relaxed regulatory regime governing matters such as planning and a plentiful supply of skilled and cheap labor<sup>102</sup>. Existence of joint venture as one alternative business organization arrangement will have an important legal significance to business people in materializing their business objectives.

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<sup>101</sup> Supra at note-69, P. 180

<sup>102</sup> Ibid.

## CHAPTER-FOUR: COMPARISON OF VARIOUS “JOINT VENTURE” LEGAL FRAMEWORKS

### 4.1. Legal Frameworks of Joint Venture in Other Jurisdictions

In various jurisdictions, ‘joint venture’ has been approached in different ways and different solutions have been applied to solve the problems associated thereto. Under this section, we will endeavor to explore some legal frameworks of joint ventures in various jurisdictions with a view to provide some comparative insight for the various issues revolving around there, such as legal personality, taxation, governing law, etc...

In many common law countries (example, U.K., India, United States, etc...), a joint venture becomes a new entity upon its formation and for this it must file with the appropriate authority its Memorandum of Association (which is a statutory document), which informs the outside public of its existence<sup>103</sup>. In India, Joint Venture companies are the preferred forms of corporate investment, however there is no separate law for joint ventures<sup>104</sup>. There are basically three different modes of Joint Ventures in India<sup>105</sup>, and many Joint Ventures are formed as public limited companies because of the advantages of limited liability<sup>106</sup>.

The current French Commercial Code of 2006 provides for different types of business organizations such as General Partnership, Limited Partnership, Partnership Limited by shares, Limited Liability Companies (SARL), Joint stock companies, Simplified Joint stock companies,

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<sup>103</sup> Supra at note-2.

<sup>104</sup> Ibid.

<sup>105</sup> Id. These three modes of Joint Ventures in India are: (1) two parties subscribe to the shares of the Joint Venture company in agreed proportion, in cash, and start a new business; (2) two parties, individual or companies, incorporate a company in India (business of one party is transferred to the company and as consideration for such transfer, shares are issued by the company and subscribed by that party and the other party subscribe for the shares in cash.); and (3) promoter shareholder of an existing Indian company and a third party, individual or company, collaborate to jointly carry on the business of that company and its share are taken by the said third party through payment in cash.

<sup>106</sup> Id. According to the Indian Companies Act of 1956 a public company must have at least 7 shareholders; have at least 3 directors; have government approval for the appointment of its management; have both trading certificate and certificate of incorporation; publish a prospectus; etc...

and Public Companies (SA)<sup>107</sup>. This same law also provides that these companies shall have legal personality effective from their registration, and this implies that registration is mandatory to all and no exception is provided<sup>108</sup>. Apart from the afore-mentioned business organizations, the French Commercial Code also contains a unique economic group known as *Groupeement D’Interet Economique (GIE)*<sup>109</sup>. This is a special type of entity which is introduced in French Company law in 1967<sup>110</sup>. In GIE business undertakings group themselves for certain limited purposes while retaining their individuality and autonomy in other aspects<sup>111</sup>. According to Article L-251-1 of the French Commercial Code:-

**The aim is not to make profits for the grouping. The activity must be grouping shall be to facilitate or develop the economic activity**  
**“Two or more natural or legal persons may between them form an economic interest grouping for a fixed term. The aim of the of its members and to improve or increase the results of this activity. linked to the economic activity of its members and may not be additional to this.”**<sup>112</sup>

J.P. Le Gall pointed out that GIE has extraordinary flexibilities, because it has the following distinguishing characteristics; namely, having its own legal personality after being registered in the commercial register; fiscal neutrality since it does not pay corporate taxation on its profits; it need not be intended to make profits; can be set up without having any share capital; and can be formed by two or more individuals or juridical persons<sup>113</sup>. Apart from these, the GIE has also some other advantages such as formal requirements of formation (i.e. its constituting statutes

<sup>107</sup> Book II of the French Commercial Code of 2006, also available at [http://195.83.177.9/upl/pdf/code\\_32.pdf](http://195.83.177.9/upl/pdf/code_32.pdf) visited on December 20, 2010 at 7:00P.M. (See also Appendix-A).

<sup>108</sup> Ibid, Article L-210-6.

<sup>109</sup> See Appendix-A, an Extract from Book II of the French Commercial Code of 2006, from Articles L-251-1 to L-251-23.

<sup>110</sup> J.P. Le Gall, *Infra* at note-111, P. 28. Note that this introduction is after the promulgation of our Commercial Code in 1960, probably explaining the reason for non-inclusion of such type of business organization in our Commercial Code.

<sup>111</sup> J.P. Le Gall, *French Company Law*, Oyez Publishing, London (1974), P. 28.

<sup>112</sup> See Appendix-A. According to J.P. Le Gall, this provision was previously read as follows: “two or more individuals or juristic persons may form a GIE, for a specified term in order to employ means to facilitate or develop the economic activities of its members, or to improve or increase the profits or benefits of such activities.” (See J.P. Le Gall, *supra* at note-172, P. 28)

<sup>113</sup> J.P. Le Gall, *supra* at note-111, PP. 28-30.

shall be duly signed and notarized); and the statute shall contain provisions for the supervision of management of the GIE and the submission of accounts to its members and its audit, and the manner in which the affairs of the GIE will be managed and controlled (e.g. by a board of directors and the general meeting of the members)<sup>114</sup>. These latter features of GIE render it to have more of structured corporate governance.

Two other important business organizations in French Commercial law related to Joint Venture are *Societe en participation (SP)* and *Societe par Actions Simpliffee (SAS)*<sup>115</sup>. *Societe en participation* is also called ‘silent partnership’<sup>116</sup> and this type of business organization in French law does not have legal personality, and it is said that it is ‘purely private arrangement between the partners’<sup>117</sup>. The French law provides that ‘its existence and membership must not be disclosed to third parties by the partners.’<sup>118</sup> This type of business organization in France has almost identical rules and legal provisions with the provisions of Joint Venture under Ethiopian Commercial Code. The SP is simply a contract between the partners; no special form is prescribed for the SP contract; no legal requirements such as registration and publicity; the SP is subject to the general principles of partnership; etc...<sup>119</sup> According to J.P. Le Gall, despite no requirement of publicity and registration of SP, the existence of the SP is however normally disclosed to the tax authorities<sup>120</sup>. It seems that in France the importance of SP has diminished little with the introduction of GIE (Groupement D’Interet Economique)<sup>121</sup>.

On the other hand, *Societe par Actions Simpliffee (SAS)* was also introduced in French Company law in 1994 “with a particular view of promoting joint ventures and enhancing managerial

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<sup>114</sup> J.P. Le Gall, supra at note-111, P. 31-35

<sup>115</sup> Though the writer of this paper did not find these two types of business organizations in the current French Commercial Code of 2006, there are however some recent sources who assert that these two types of organizations do still exist in French law (see *Frédéric Grillier & Herbert Smith, Structures, France, International Joint Ventures*”, available at <http://plc.practicallaw.com/7-107-4058>, visited on December 20, 2010 at 7:00 P.M. According to *Frédéric Grillier & Herbert Smith* SAS is the most flexible legal framework for joint venture in France.

<sup>116</sup> J.P. Le Gall, supra at note-111, P. 15.

<sup>117</sup> Ibid.

<sup>118</sup> Id.

<sup>119</sup> Ibid, PP. 16-17

<sup>120</sup> Ibid, P.16. From Le Gall assertion it is not clear as to whether this disclosure to tax authorities is a legal requirement or just normal practice.

<sup>121</sup> Ibid, P. 16

flexibility.”<sup>122</sup> According to this new French company law, for SAS to be established “[t]here must be at least two shareholders and these must be legal entities having capital of at least FF 1,500,000.00”; and “a minimum capital of 250,000 FF is specified for this type of limited company and its shares cannot be available to the public.”<sup>123</sup>

In German law, there is no any specific law governing Joint Venture as a distinct form of business organization; i.e. Joint Venture can take any of the available legal forms for partnership or for limited companies<sup>124</sup>. This is not however to mean that there are no some other specific laws regulating Joint Ventures, because as Joachim Rudo puts it well “joint ventures in Germany are subject to German, to European Antitrust Law, to merger control as well as to the prohibition on cartels.”<sup>125</sup>

Under Romanian law, on the other hand, Joint Venture is a partnership without legal personality. Under the Romanian law, Joint Ventures are to be governed by the provisions of the Commercial Code and the Fiscal Code<sup>126</sup>. Joint ventures under Romanian Commercial Code do not require any formality requirements as required for the formation of other companies, except the Joint Venture should be in a written form<sup>127</sup>. However, it is interesting to note that there is one compulsory formality required from Joint Ventures, i.e. “joint ventures must be registered with the competent fiscal authority before the commencement of any activity.”<sup>128</sup> With regard to taxation and keeping of accountancy records, the Romanian law provides two different rules for Joint Ventures. When the Joint Venture is between a Romanian individual and a Romanian legal entity or between a foreign and a Romanian legal entity, the one responsible for keeping the accounts and making the payment of the profit tax is the manager of the joint venture, i.e. the Romanian legal entity<sup>129</sup>. However, when the participants to a joint venture are Romanian legal

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<sup>122</sup> Centre for Law and Business, Faculty of Law, University of Manchester, “**Company Law in Europe: Recent Developments**”, a survey of developments in core principles of companies regulation in selected national systems, Feb.,1999, P.24, available at <http://webarchive.nationalarchives.gov.uk/tna/+http://www.dti.gov.uk/cld/milman.pdf/>

<sup>123</sup> Ibid, P. 24

<sup>124</sup> Joachim Rudo, “**German Business Law**”, available at <http://www.germanbusinesslaw.de/>, visited on December 20, 2010 at 7:00P.M.

<sup>125</sup> Ibid.

<sup>126</sup> Supra at note-38.

<sup>127</sup> Ibid.

<sup>128</sup> Id.

<sup>129</sup> Id.

entities the manager of the joint venture must keep the accounts of the joint venture by registering all the income and expenses generated by the activity and afterwards it must transmit the records corresponding to the contribution of the other participant to the latter, who must register them in its own accounts; and finally both must pay the corresponding profit tax to the competent authority<sup>130</sup>.

In Cyprus, Joint Venture has a separate legal personality whose members' liability is limited to the amount of capital they respectively contributed to in to the business<sup>131</sup>. Regarding the tax liability, a Joint Venture under the Cyprus law has separate tax liability<sup>132</sup>. Although Cyprus joint venture is principally constituted by two legal instruments, i.e. memorandum of association and articles of association which are to be filed in the commercial register, there is also an additional a joint venture agreement between partners, which will “in appropriate circumstances be specifically enforceable.”<sup>133</sup> Accordingly, they will be entitled to all available remedies in the general contract principles for breaches, such as specific performance, damages, injunctions, etc..., and in this regard the partners are also free to choose any law (forum) to govern the joint venture agreement although the Cyprus law is the relevant law for governing the memorandum of association and articles of association regardless of the partners' chosen law<sup>134</sup>.

May be it will also be imperative to look in to the Joint Venture legal framework of China as it will enrich our comparative insight because of its unique features. In China, there are the following basic types of Joint Ventures:-

***Sino-Foreign Equity Joint Venture (EJV)***: - it is incorporated between a Chinese partner and a foreign company with limited liability; and the partners share profits, losses and risk in equal proportion to their respective contributions to the venture's registered capital<sup>135</sup>. According to the Chinese law, the Joint Venture has two legal documents, i.e. the Joint Venture

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<sup>130</sup> Id.

<sup>131</sup> Infra at note-207.

<sup>132</sup> Ibid.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Supra at note-2.

agreement/contract and the Articles of Association, and in the event of conflict between these two documents the Joint Venture contract has precedence<sup>136</sup>.

***Sino-Foreign Cooperative Joint Venture (CJV)***:- this is also called Contractual Operative Enterprise, and there are basically two types of CJV's, i.e. a CJV with a legal personality and a CJV without a legal personality. The CJV can also be either with a limited liability or with unlimited liability, where the limited CJV will be similar to EJV in its status of permissions<sup>137</sup> while unlimited CJV is similar to a partnership, where the parties jointly incur unlimited liability. In both latter cases, however, the status of the formed enterprise is of a legal person which can hire labor directly<sup>138</sup>. In China, the CJV has convenient and flexible characteristics and it is easier to find cooperative partners and to reach an agreement. The Chinese law is flexible to the extent of allowing a foreign investor to easily merge with a Chinese company for a quick start and in such a case the foreign investor does not need to set up a new corporation in China, i.e. it can use the Chinese partner's business license under a contractual arrangement<sup>139</sup>.

Apart from the aforementioned general features of Joint Venture in the Chinese law, we can also observe from the Chinese-Foreign Joint Venture legal frameworks (Appendix- B and Appendix- C) the following specific flexible and favorable characteristics:-

- Ø Joint Venture can be set up by two or more partners-no restriction on this regard.
- Ø Joint venture partners can be either individual persons or juridical bodies- no limitation.
- Ø Joint Venture with limited liability or with unlimited liability is possible.
- Ø Joint venture with equity shares as well as contractual non-equity joint venture having distinct legal personality is possible.
- Ø Joint Venture agreement/contract has legal recognition and will be enforceable.

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<sup>136</sup> Ibid.

<sup>137</sup> Id. However, there are the following other differences between EJV and CJV: (1) in a CJV share of profit can be as agreed by the parties, not necessarily in proportion to capital contribution; (2) operation in CJV is possible only in a restricted area; (3) a CJV allows negotiated levels of management and financial control; (4) subject to the parties agreement, the foreign participant can recover its investment during the term of the venture; etc....

<sup>138</sup> Id.

<sup>139</sup> Id.

Ø Joint Venture shall have a corporate governance structures like board of directors, wherein partners will be represented and will have equal participation in the management of their Joint Venture.

At this juncture, it would be pertinent to briefly review the content of the OHADA’s instrument on Joint Venture. According to the OHADA’s Uniform Act Relating to General Commercial Law, ‘joint venture’ shall not have legal personality, no requirement of registration and publicity<sup>140</sup>. This Joint Venture in the OHADA instrument is almost identical to the Ethiopian Joint Venture in its most aspects<sup>141</sup>. It is, however, important to note that this OHADA instrument has also contained a unique type of entity which is known as Economic Interest Group (EIG), which shall be registered and will have its own legal personality<sup>142</sup>. It can be observed that this latter type of organization is almost similar to the EIG in French law as we have seen above.

Finally, it is also prudent to say something on the position of the International Trade Centre on the legal framework of ‘joint venture’ in general, and particularly on Incorporated Joint Venture Agreements. According to the International Trade Centre document, there can be both Contractual and Incorporated Joint Ventures, and these joint ventures will have the following features:-

- 1- Contractual Joint Venture: - will have greater flexibility and allows considerable freedom for the parties to regulate contractual relationships, which are not governed by the more stringent company law regulations; and will have also greater exposure, i.e. as not being a distinct legal entity, it cannot shield the parties from being directly liable for the debts and losses of the joint venture, i.e. they will be held jointly and severally liable<sup>143</sup>.

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<sup>140</sup> See Appendix-D , BOOK-5, an Extract from OHADA’s Uniform Act Relating to General Commercial Law. OHADA is an Organization for the Harmonization of Business Law in Africa.

<sup>141</sup> Ibid, BOOK-5.

<sup>142</sup> Ibid, BOOK-7.

<sup>143</sup> ITC, supra at note-208, P. 2.

- 2- Incorporated Joint Venture: - is suitable for new business which is intended to have a long life and a reasonably separate identity or management<sup>144</sup>. According to this ITC document “an incorporated joint venture takes the form of a new legal entity...organized as a corporation or similar business organization provided by company law” and “it is usual for the joint venture parties, prior to creating a joint venture company under a specific national law, to enter into an agreement setting out the arrangements for the formation of the new jointly owned company and its operation.”<sup>145</sup> The ITC document provides that the Joint Venture Agreement will have three major objectives; namely, (1) to regulate the collaboration among the parties and the obligations of each of the parties during this incorporation stage; (2) to spell out how the company operates after formation, what type of company form it takes, how its statute shall be drafted, etc...; and (3) to regulate the relationship of the parties and their respective duties and rights following the establishment of the new company<sup>146</sup>.

With the above objectives in mind, the ICT document provides various Standard Joint Venture Agreements, in which various joint venture related issues such as corporate governance, the parties’ representation in the board of directors, etc... are properly addressed.

#### **4.2. Legal Frameworks and Practices of “Joint Ventures” in Ethiopia**

Joint venture under Ethiopian law can be said to be found under three separate legal frameworks; namely, the 1960 Commercial Code, the Investment Proclamation no.280/2002, and the Public Enterprises Privatization Proclamation no. 146/1991 (with its amendment Proclamation no. 182/1992) . These legal frameworks do provide different types of “joint ventures” and thus we will explore these legal frameworks herein under.

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<sup>144</sup> Ibid, P.3.

<sup>145</sup> Ibid, P.2.

<sup>146</sup> Ibid, PP. 3-4.

#### 4.2.1. “Joint Venture” Under the 1960 Commercial Code

##### 4.2.1.1. Contractual Joint Venture Framework

###### *Joint Venture as “Business Organization”*

The definition of Joint Venture under the 1960 Commercial Code apparently seems to be given in terms of ‘an agreement’, and so one can be tempted to conclude that the law provides just for contractual Joint Venture. However, when we continue the reading of the definition it further provides that Joint Venture “is subject to the general principles of law relating to partnerships”<sup>147</sup>, which phrase clearly implies that Joint Venture is not only mere agreement, but is a partnership between the venturers. Besides, under Article 212 Joint Venture is listed as one of the six forms of business organizations and reading this vis-à-vis Article 210(1) evidences that Joint Venture is a business association arising out of a partnership agreement. Therefore, from these provisions we can safely conclude that Joint Venture under the Commercial Code of Ethiopia is a ‘business organization’, not a mere contractual relationship.

###### *Its ‘Clandestine’ Nature*

Despite the fact that Joint Venture is considered as a business organization under Ethiopian law, we can however see that Joint Venture in Ethiopia has the following basic legal features:-

- Ø **Secrecy**:- the joint venture should not be known to third parties<sup>148</sup>;
- Ø **Informality**:- no formal requirements for the validity of a joint venture formation, i.e. need not be in writing, no registration, or no publicity<sup>149</sup>;
- Ø **No legal personality** of its own<sup>150</sup>; and
- Ø **No name** of its own: partners deal with third parties in their own names<sup>151</sup>.

The aforementioned legal features make it difficult to treat Joint Venture as a business organization per se.

<sup>147</sup> Supra at note-6, Article 271.

<sup>148</sup> Ibid, Article 272(1)

<sup>149</sup> Ibid, Article 272(2).

<sup>150</sup> Ibid, Article 272(3).

<sup>151</sup> Ibid, Article 276(5). This provision states that “Every partner shall deal with third parties in his own name.” It is not clear from this provision whether or not a Joint Venture can have its own name, but the writer of this thesis opines that as having no legal personality, it may not have its own name.

The writer of this paper attempted to discover as to whether there was an intentional drafting to make this type of business organization secret from the public. If we start from the etymology of the term “ ” in Amharic we cannot correlate its meaning with the term ‘Joint Venture’, which has no any sense of secrecy in its literal meaning. Besides, there is no also Amharic word “ ” in the major Amharic dictionaries.<sup>152</sup> In Desta Teklewold’s Dictionary, there is a word ‘ ’, its meaning being similar to ‘ ’, which is defined as “ ” (i.e. indirect meaning, sarcastic, etc...), which meaning has similar sense like ‘secrecy’. However, it is clear that this meaning does not go in line with the meaning of ‘joint venture’, which simply implies partnership investment between two or more persons without implying any secrecy. On the other hand, in “ ” we find an Amharic term “ ”, which is defined as “ ”

The case between Jemmanesh Dugda and Getachew Degaga (Appendix-H) shows that lack of formalities does not deprive a partnership agreement of its legal existence and its consequent legal effects. The plaintiff and the defendant had established a ‘partnership’ based on two consecutive written agreements but without fulfilling the legal requirements for formation of partnership, and also without specifying the amount of the capital. When dispute is raised between them due to defendant’s failure to account/report to the plaintiff, the latter brought the case to court demanding for the appointment of auditor. Since the defendant denied the existence of a partnership between them alleging that their agreement does not specify the amount of the capital, it has become an issue whether a partnership exists or not. The lower court decided this issue in favor of the defendant holding that there was no partnership between the parties and reasoned out as follows: *“a partnership is said to exist when it is recognized by law and the agreement has to follow the form prescribed for forming partnership. The instrument submitted*

<sup>152</sup> The four dictionaries referred to herein are: Desta Teklewold’s “ ”, (1962 . . . ); Kidanewold Kifle’s “ ”, (Publisher Desta Teklewold, Artistic Printing Press, 1948E.C, Addis Ababa); Tesema Habtemichael’s “ ”, (Artistic Printing Press, Addis Ababa, 1951E.C.); and Ethiopian Languages Studies & Research Center’s “ ” (Publisher Addis Ababa University, Artistic Printing Press, Addis Ababa, 1993E.C.).

by the plaintiff says ‘the amount’ but is not completed.” However, the appellate court reversed this decision and held that there was a partnership agreement. From this case, we can observe that both courts made errors. Because the lower court totally made their relationship without any legal effect and status simply based on lack of formalities and missing of capital amount in their agreement (which are not at least necessary requirement for Joint Venture) whereas the appellate court simply said ‘there is a partnership’ agreement without identifying which type of business organization it is and which part of the law shall be applicable.

### ***Emphasis of the Law on Contractual Terms of the Partners***

It seems that the contractual nature of the relationship is given more emphasis in our law because the law in many provisions left many aspects of the relationship to be governed by the agreement of the parties. We can examine the following provisions just to demonstrate this assertion:-

- Ø “Joint venture is an agreement between partners *on terms mutually agreed...*”<sup>153</sup>;
- Ø Though the law provides that every partner owns his own contribution, this is however applicable, only provided that the partners did not provide otherwise, i.e. they can agree that contributions are to be owned by one of the partners or jointly owned by the partners<sup>154</sup>;
- Ø Shares may be assigned only with the agreement of all the partners, but the partners can still stipulate otherwise, i.e. they may provide that shares can be assigned by majority vote rather than by consensus<sup>155</sup>;
- Ø Powers of the manager shall be specified in the memorandum of association, but this is only to bind the partners each other, not to bind third parties since the memorandum of association is not to be registered and publicized<sup>156</sup>;
- Ø The extent of non-manager partners’ liabilities is even left to be fixed by the agreement of the partners<sup>157</sup>, except for the case of liability of partners who participate in management where their liability will be joint and several by virtue of the law<sup>158</sup>;

<sup>153</sup> Supra at note-6, Article 271.

<sup>154</sup> Ibid, Article 273.

<sup>155</sup> Ibid, Article 274(2).

<sup>156</sup> Ibid, Article 275(4).

<sup>157</sup> Ibid, Article 276(2).

<sup>158</sup> Ibid, Article 276(4). According to the Expose des Motif of M. Jean Escarra, this solution is arrived at by applying the rule that in commercial affairs joint and several liability is derived only from the law. (See Peter Winship, Supra at note-22, P.57).

- Ø The partners can even agree on the continuity/perpetuity of the Joint Venture despite the death, bankruptcy, or incapacity of a partner<sup>159</sup>;
- Ø Partners can also agree to empower the manager to dissolve the Joint Venture in their memorandum of association<sup>160</sup>; and
- Ø Partners are also allowed to agree on the expulsion of a partner<sup>161</sup>.

Therefore, despite the fact that the law states that Joint Venture “is subject to the general principles of law relating to partnerships”, it is however observable that this rule is only a gap-filling clause to govern the partners’ relationship only in the event of lack of special agreements in many aspects of their relations. However, there are some few legal rules on which the parties to a Joint Venture cannot agree otherwise. One good example can be the rule provided under Article 277, which states that a manager shall account to the partners and any provision to relieving him from this duty shall be of no effect. According to the Expose des Motif of M. Jean Escarra, “[t]his rule is a matter of public policy and members are not permitted to agree otherwise.”<sup>162</sup>

### ***Applicability of the ‘Partnership’s General Principles***

Assuming that the partners did not agree otherwise in many aspects of their relations or in the event of gap occurring between their agreement and the Joint Venture provisions of the law, then which partnership’s general principles apply? There are three types of partnerships under Ethiopian law; namely, Ordinary Partnership, General Partnership, and Limited Partnership. Article 271 refers to ‘general principles of law relating to partnerships’, but it does not specify as to which specific principles among the three types of partnerships. Same problem can be faced when a Joint Venture is divulged to third parties because Article 272(4) states that in such event the Joint Venture shall be deemed “an actual partnership”<sup>163</sup>. As to what is ‘an actual partnership’ is not hinted anywhere in the law.

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<sup>159</sup> Ibid, Article 278(1)(h).

<sup>160</sup> Ibid, Article 278(1)(i).

<sup>161</sup> Ibid, Article 279(2).

<sup>162</sup> Supra at note-23, P.57.

<sup>163</sup> Note that in Expose des Motif of M. Jean Escarra, this provision was drafted as follows: - “If a Joint Venture is made known to third parties it will be treated as a de facto business organization.” (Peter Winship, supra at note-23, P.55).

The case of Gebre Tensae Tedla vs. Mr. Evangelos Ortenzatos (Appendix-H) can be a good example for the necessity of cross referring to partnership provisions of the Commercial Code. The parties in this case had partnership agreement and their dispute was that during plaintiff's management of the business the profit was 6,950 Birr whereas during the defendant's management the profit became Birr 69. The plaintiff lost his trust and good faith on the defendant and doubted the proper management of the business; accordingly, he demanded dissolution per Articles 218, 278(1)(f), 278(2), and 277 and for appointment of auditor. The defendant's basic defense was lack of court's jurisdiction on this case alleging that the Joint Venture agreement provides for any dispute to be referred to arbitration. The court dismissed the defendant's objection stating that pursuant to Articles 218(1), 278(1)(f), 278(2) of the Commercial Code a court can decide dissolution of a firm upon the request of one partner where there is good reason, notwithstanding any agreement to the contrary. The court cross referred to Article 218(2) to determine the meaning of 'good reason' in Article 278(1)(f) and held that a serious disagreement between the partners constitute 'good reason' for this purpose.

### ***Dissolution***

The idea of dissolution is also provided under our law for Joint Venture. The dissolution envisaged herein is referring only to the dissolution of the relationship rather than to dissolution of an entity as in other business organizations. So, the dissolution is more of 'cancellation' of their Joint Venture agreement. However, it is important to note that the law provides for detailed grounds of dissolution for a Joint Venture under Article 278(1)(a)-(i), and we may easily observe that this is one of the few parts of Joint Venture provisions, where the law deprives the partners to stipulate otherwise regarding dissolution<sup>164</sup>. In the Expose des Motif, M. Jean Escarra explained that many of the grounds of Joint Venture are common to all types of business organizations and thus the reasons for dissolution can be brought together in one section of general rule.”<sup>165</sup>

The case between Shaik Tahir Oumer Badir and Abdela Yussuf Saique (Appendix-H) shows the practical implementation of dissolution of a joint venture. A partnership was established between

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<sup>164</sup> Supra at note-6, Article 278(2) provides that “[t]he provisions of this Article shall apply notwithstanding any provision to the contrary in the memorandum of association.”

<sup>165</sup> Supra at note-23, P.57.

plaintiff and defendant respectively contributing Birr 5,625 and Birr 3,590. A dispute has been raised between them due to the defendant’s failure to share the proceeds of their business venture to plaintiff; as result plaintiff claimed for the return of his contribution Birr 5,625, interest, court fee, and lawyer fee. Finally, the court held that the agreement signed by plaintiff and defendant on December 26, 1962 established a commercial business organization, but did not follow the formalities, and as a result the organization between the two parties is to be governed by Article 271(3) of the Commercial Code. Regarding the plaintiff’s claim of contribution return, the court however held that before demanding return of contribution, plaintiff should have first claimed for the dissolution of the organization pursuant to Article 278(1)(f) of the Commercial Code.

### **Contractual Joint Ventures in Practice**

In the general business community, Joint Ventures usually take informal forms of business partnerships rarely recording their terms of agreements in written form. Due to lack of legal requirements of registration and publicity it is even very difficult to find any official statistics of such kinds of joint ventures in Ethiopia since they are made normally in clandestine fashion. The interview the writer of this paper has made with the Legal Directorate of the Ministry of Trade and Industry confirms this fact<sup>166</sup>. This is not however to say there are no joint ventures, but it is just to say that their secret nature makes it very difficult to know their actual existence and their practical experiences. This fact makes it very difficult even to assertively conclude that among the various types of business organizations joint venture is the most unfrequented one because joint venture business being undertaken underground or in the shadow might be numerous to defeat such assertion. So, the maximum that can be said about joint venture in the general business community is that it is an unknown zone to explore. Just to demonstrate the fact that such joint business arrangements are common between business people it would suffice to see the selected court cases attached herewith as Appendix-H. Besides, some Joint Venture agreements have been selected randomly from different sectors, and we can see the features of these agreements here below.

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<sup>166</sup> Interview with Ato Anteneh Mengistu, Director of Legal Directorate of the Ministry of Trade and Industry, made on Novemebr 1, 2010.

One practical example for contractual Joint Venture is from the construction industry. Currently, one existing legal framework for joint venture partners in road construction sector is the directive issued from the Ministry of Works and Urban Development to Ethiopian Roads Authority in 2008<sup>167</sup>. According to this directive, the Authority is directed to entertain the bids of joint partner contractors for single projects based on their internal joint venture agreement containing their respective obligations for the project at tender. This directive requires such joint venture agreement not only to be in a written form but also to be authenticated by the concerned documents authentication and registration office. Though the fact that such arrangement being disclosed to Ethiopian Roads Authority (ERA) makes the joint venture to be a partnership to ERA purpose, we can however observe that the arrangement is still joint venture for the general public and for other third parties purpose. In view of this, we can say that the said directive has practically ‘amended’ the Commercial Code joint venture provisions for such particular sector purpose, though the issue still remains as to whether this directive will have any legal force in case of any disputes with regards to the form of the joint venture. Nevertheless, there is no doubt that this directive has in a way filled the loophole in the legal framework, and waiting for any forthcoming legal framework for such purpose contractors are enjoying the existence of this directive to win some projects by joint venture arrangements.

Accordingly, the practice in the construction industry is that the Client (e.g. Ethiopian Roads Authority) will make joint partners to sign a Joint Venture agreement wherein they have clearly agreed to be jointly and severally liable. The Joint Venture Agreements between HAZI II GENERAL CONSTRUCTION & TRADING and Dunyalar Asphalt Road Transport Structure Contracting Mining Trading Ltd Co Ethiopia (Appendix-J) as well as the one between AHMET AYDENIZ INSAAT TURIZM GIDA EGITIM OGRETIM ITHALAT IHRACAT VE TICARET A.S and KMC Constructions Limited (Appendix-L) can be illustrative ones to show the overall structure of this arrangement<sup>168</sup>. According to these Joint Venture Agreements, the joint venturers will be jointly and severally liable to Ethiopian Roads Authority for the execution of the contract. The parties have however limited their liability to the extent of their contributions among themselves. Besides, the parties provide a detailed management structure to ensure for the

<sup>167</sup> See Appendix-I, Directive Issued by the Ministry of Urban Works & Development on 13/1/2000, Ref. no. 82700250/9 addressed to the Ethiopian Roads Authority.

<sup>168</sup> See Appendix-J and Appendix-L.

joint management of the Joint Venture. The Joint Venture Agreements have also contained a representation clause whereby one of the parties has been authorized to represent the Joint Venture with any third parties. These Joint Venture Agreements seem to be in line with the relevant provisions of the Commercial Code as well as with the directive issued by the Ministry of Urban Works and Development.

This arrangement is not yet welcome by the stakeholders because of its many draw backs. One major problem in such contractual ‘joint venture’ arrangement is the fact that the ‘joint venture’ has no legal personality of its own. The other major problem is in terms of the partners’ liability, i.e. this ‘joint venture’ legal framework under Ethiopian law is almost like partnership agreement as it is already disclosed to the Client, where the partners will be jointly and severally responsible and their liability will be unlimited while Contractors basically need their liability to such venture be limited to their actual contribution to the ‘joint venture’. What the Industry is demanding seems to be a ‘Joint Venture’ legal entity with limited liability of partners but without stringent formation and exit requirements as provided for other relatively ‘permanent’ business organizations. The issue of double taxation has been also one major concern for joint partners in the sector. Such a demand was sent to concerned Government authorities for consideration and for preparation of the appropriate legal framework suitable for such type of limited purpose arrangement<sup>169</sup>. Under Ethiopian Commercial Code context, it is not even inviting to establish either a private limited company or share company by construction partners because of mainly non-continuity nature of their engagement, exposure to double taxation scenario, problem of lengthy exit process, etc....Because of the aforementioned problems, in some instances construction partners would be forced to go abroad and establish a Joint Venture company with limited liability under foreign jurisdictions. The discussion the writer of this paper has made with concerned Government and non-Government bodies confirmed these problems in this section<sup>170</sup>.

One potential problem in such practice is the fact that the Joint Venture is being considered as a legal person by the parties as well as by third parties, and all related agreements and legal

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<sup>169</sup> See Appendix-K, Letter Written by the Ethiopian Contractors’ Association to the Ministry of Justice, dated 26/06/2001, Ref. no. / 0056/2001.

<sup>170</sup> Interview made with Ato Aschalew Asfaw, Senior Legal Expert in Ethiopian Roads Authority (ERA) conducted on November 8, 2010; and interview with Ato Melaku Tadesse, General Manager of the Ethiopian Contractors’ Association, conducted on November 3, 2010.

documents are prepared with such view in mind. For instance, if we see the Joint Venture agreements at Appendices-J and L, we can see that they give name to the Joint Venture and they also mention about representing the Joint Venture with third parties, about acting on behalf of the Joint Venture, etc..., which are not in line with the legal status of a Joint Venture under Ethiopian law. The worse scenario is the fact that a third party (e.g. Ethiopian Roads Authority) also takes the Joint Venture as a person and concludes a contract with the Joint Venture as a person and in the name of the Joint Venture, the case for illustration being the contract between Ethiopian Roads Authority and Ahmet Aydeniz – KMC Joint Venture (see Appendix-N).

#### **4.2.1.2. Corporate ‘Joint Venture’ Under Ethiopian Commercial Code**

Having seen the above basic features of Joint Venture as envisaged under the 1960 Ethiopian Commercial Code, it is however important to note that formation of corporate ‘joint venture’ in its broader sense of the term is not totally precluded from being a possibility under Ethiopian Commercial Code. This is to say that two or more persons can still form a corporate ‘joint venture’ by choosing any of the other legal forms such as partnership, private limited company, or share company. This assertion holds true only if we consider ‘joint venture’ in terms of purpose, and not in terms of a different type of business organization. One practical example to illustrate the possibility of a corporate “Joint Venture” is the formation Premier Switch Solutions Share Company by United Bank S.C, Awash International Bank S.C, and NIB International Bank S.C. as the major shareholders thereto. The purpose of this special company is to establish a common electronic card payment system and the three banks, together with some nominal shareholders, have joined their capitals and resources and formed the share company as an independent entity with all having equal equity shares. This company can be one good example to show the need for joint venture companies even among competitors for some specific purpose<sup>171</sup> and the problems surrounding its establishment need to be explored to show the practical legal impediments for the formation of such ‘joint ventures’ in Ethiopia.

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<sup>171</sup> The very purpose of their venture is not to form a business organization for profit; rather it is to minimize their investment costs and to make the operation of their main business as efficient as possible (see Appendix-M). In view of this very fact, it can be argued here that their venture is more of Economic Interest Group to be treated by a different legal framework as in other jurisdictions (e.g. France and the OHADA Document).

The first problem they encountered in the process of the formation was NBE’s unwillingness to permit such formation, strictly requiring that the share company to be established shall fulfill all the legal requirements needed for the formation of a bank<sup>172</sup>. However, this was not the end of their problem because after choosing this particular type of business organization they still face one major legal impediment, i.e. the number of share holders. According to the 1960 Commercial Code, the minimum number of shareholders required to form a share company is five. The banks venturing to this particular special purpose company are only three and thus practically speaking this would have meant that they cannot establish such ‘joint venture’ unless they opt to a private limited company, which is not also favored by many due to its loose legal frameworks for corporate governance. So, in order to fulfill this legal requirement they were obliged to include other nominal shareholders, i.e. three individual persons from each bank, making the total number of shareholders twelve (12) altogether.

Having been now formed as an independent entity, the three banks have selected their respective representatives to form a Board of Directors and we can see that in a way the three banks are jointly managing the new company, proving that their business is more of a joint venture where all the partners wish to have a say in the management.

#### 4.2.2. “Joint Ventures” Under Investment Proclamation no. 280/2002

The Investment Proclamation no. 280/2002 under its Article 5(2) provides for areas of investments which investors shall be allowed to invest only in ‘**joint venture**’ with the Government<sup>173</sup>. At face value, the term ‘joint venture’ as used here may mislead a reader that it is the one as envisaged in the 1960 Commercial Code. However, a close look at the overall proclamation evidences that these two joint ventures are not one and the same because when this proclamation uses the term ‘joint venture’ it is not in its technical or legal sense. The emphasis in the proclamation is only about the joint investment in its literal sense, and this sense can be further evidenced by the Amharic version of the corresponding article, which uses the word “ ” rather than the term “ ” as used in the Commercial Code Amharic

<sup>172</sup> Interview made with Ato Ephraim W/Mariam, Legal Services Manager of the United Bank Share Company, conducted on October 25, 2010, at around 10:00A.M.

<sup>173</sup> Investment Proclamation no. 280/2002, Federal Negarit Gazeta, 8<sup>th</sup> Year, No. 27, Addis Ababa, July 2, 2002. These areas reserved for joint venture investment with the Government are: manufacturing of weapons and ammunition; and telecommunication services.

version. Not only this, but also regarding the legal forms of investment business organizations, the Proclamation further provided that business organizations can be one form of investment and any business organization for investment shall be registered in accordance with the Commercial Code or any other relevant law<sup>174</sup>. Thus, since business organizations under the investment law shall be registered unlike joint venture in the Commercial Code, we can easily notice that they are two different types of business organizations.

At this juncture, it is important to note that the Investment Proclamation did not exclude the possibility of joint investment between foreign investors and domestic investors other than the Government. The law still allows a foreign investor to invest jointly with domestic investors, provided that the foreign investor invests minimum of 25,000.00 US dollars in areas of engineering, architectural, accounting and audit services, project studies or business and management consultancy services or publishing or 60,000.00 US dollars in all other cases<sup>175</sup>. So, we can raise here an issue of whether a foreign investor can form a joint venture business organization as envisaged under the 1960 Commercial Code? Is Article 10(2) of the Proclamation quoted above a restrictive one to this possibility?

Article 10(2) of the Investment Proclamation provides that any business organization as per the investment law shall be registered in accordance with the Commercial Code. What the implication of this rule in our investment law is worth of examining. One possible way of interpretation is that the business organization should be registered if it requires registration in the Commercial Code, but does not need to be registered if it is a type of business organization that is exempted of registration requirements like Joint Venture. This interpretation can be strengthened by the rule of interpretation that dictates the special law prevails over the general law because the Commercial Code being special when it comes to business organizations it should prevail over the Investment law in this regards. Besides, the Investment law does not stipulate an exceptional clause requiring that even joint ventures should be registered. However, it can be interpreted, on the contrary, alleging that the Investment law providing investment requirements and incentives it can be considered as special law when it comes to investment

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<sup>174</sup> Ibid, Article 10(2).

<sup>175</sup> Ibid, Article 11(2) and (3).

companies and so its requirement of registration of business organizations can be considered as exceptional rule to prevail over the Commercial Code provisions. So, in line with the latter interpretation we can say that Joint Venture as envisaged under the Commercial Code is precluded from the types of business organizations recognized for Joint Investment.

Therefore, we can deduce that the following two types of “joint ventures” are impliedly recognized under the Investment law:-

- a. Corporate “Joint Ventures”:** - these corporate joint ventures can be either in the form of Share Company or in the form private limited company.
  
- b. Partnership “Joint Ventures”:** - these joint ventures can be in any of the three recognized partnerships under the Commercial Code, provided that they should be registered.

There are some legal issues to be raised in connection with Investment joint ventures relating to their legal forms. One important point to underline at the outset is the fact that the current investment law, unlike the previous investment law, does not provide for minimum shares to be held by domestic investors in their Joint investment with foreign investors<sup>176</sup>. The implication of this is that foreign investors can hold any proportion of the Joint investment shares less than 100%, with a consequence of forming joint investment companies with a significantly nominal share by domestic investors. The effect will be that the domestic investors will be definitely influenced by the foreign investor in any operation and decisions of the ‘joint venture’. Since such joint investment companies might be formed in any of the business organization legal forms, such majority dominance might be more exacerbated the more the legal form is one of the legal structures like partnerships or private limited companies.

The other legal point to look in to is the fact that the Investment proclamation does not dictate any type of legal form even for joint investment between foreign investors and the Government. Pursuant to the relevant provisions we have seen herein above it can be deduced that any joint

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<sup>176</sup> See Article 2(2) of Investment Proclamation no. 37/1996, supra at note-31.

investment with Government may in take any of the legal forms recognized under the Commercial Code, i.e. share company, private limited company, or partnership. However, given the public interest behind such Government related joint investment, it is obvious that the legal forms of business organizations with very loose legal structures and governance control might not be viable for such ventures. In relation to this, we can easily observe that the Joint Venture proclamation no. 235/83 was a well structured legal framework for such types of Government joint investments in terms of ensuring the necessary corporate governance and control systems for such ventures. In view of this, we can conclude that the current investment law has failed to dictate a mandatory legal form with respect to such Public-Private Joint Venture.

Even if Share Company can be the preferred legal form to address the above issues, it is nevertheless important to note here that ‘minority protection’ is not incorporated in our Commercial Code relevant provisions. So, in terms of protecting and encouraging investment, it would be prudent to look in to our existing laws and to incorporate such kinds of legal frameworks.

Currently, there are a lot of investment related corporate “Joint Ventures” formed in accordance with the current Investment law, and the writer of this paper has discovered that in the practical implementation of the Investment Proclamation, there are two different types of approaches for ‘Joint Ventures’ involving the Government on the one hand and ‘Joint ventures’ with private domestic investors on the other hand. In the former case, the legal forms of the joint ventures are invariably share companies, the rationale behind being want of well structured corporate body<sup>177</sup>. On the other hand, joint ventures of foreign investors with private domestic investors usually take the private limited liability legal form, with only few being formed as share companies<sup>178</sup>. One good example from the private sector in this respect can be the recent joint venture investment between Ethiopian Airlines and a Chinese Construction company to establish a standard hotel that can be jointly owned and managed by the two companies by way of creating a separate legal entity. The information and facts in this section of the paper is based on the interview the writer of this paper has made with the Legal Counselor and Corporate Secretary of

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<sup>177</sup> Interview with Ato Tewodros Tameru, Legal Directorate Director, Investment Authority, conducted on Novemebr 1, 2010.

<sup>178</sup> Ibid.

Ethiopian Airlines<sup>179</sup>. Again, one major problem they encountered in their venture is the choice of the legal form, and after noting that many of the business organizations in the commercial Code are loose in their corporate governance structures, they finally opted for a share company to be the legal form of their joint venture. However, being two in number and due to the minimum requirement of five shareholders to form a share company, they were also obliged to involve three other shareholders unlike their original intention (the Chinese investor agreeing to nominate these three additional shareholders.)

#### 4.2.3. “Joint Ventures” in Public Enterprises Privatization Proclamation

According to the Privatization of Public Enterprises Proclamation no. 146/1998, Privatization agency is authorized to convert existing public enterprises in to share companies for those public enterprises intended to be privatized<sup>180</sup>. Then, this specific law has also entrusted to the Privatization Agency under Article 7 the duty of undertaking studies to adopt detailed procedures enabling the use of various appropriate modalities of privatization and to propose the appropriate modality for privatization, which proposal shall be further approved by the Privatization Board. Though joint venture as one modality is not indicated in this Proclamation, the modality is however hinted under Article 6(2) (b) of the Privatization and Public Enterprises’ Supervising Authority Establishment Proclamation no. 412/2004, which empowered the Agency to “evaluate and submit to the Ministry for its approval project proposals presented by investors intending *to invest in partnership with the Government.*”<sup>181</sup> The usage of the term ‘partnership’ in this law is not in its legal or technical sense as the corresponding Amharic version of this provision says “ \_\_\_\_\_ ”.

So, “Joint Venture” is one modality of privatizing such public enterprises allowing investors to purchase only partial shares of the tendered public enterprise, the Government retaining some shares of the enterprise for major strategic sectors so as to execute the overall economic policy

<sup>179</sup> Interview made with W/t Rahel Zerihun, Legal Counsellor & Corporate Secretary of Ethiopian Airlines, conducted on October 13, 2010.

<sup>180</sup> Privatization of Public Enterprises Proclamation no. 146/1998, Negarit Gazeta, 5<sup>th</sup> Year, No. 26, Addis Ababa, December 29, 1998, Article 5(1).

<sup>181</sup> Privatization and Public Enterprises’ Supervising Authority Establishment Proclamation no. 412/2004, Negarit Gazeta, 10<sup>th</sup> Year, No. 57, Addis Ababa, August 2, 2004.

and directions of the country<sup>182</sup>. Though there is no clear and specific legal requirement that prescribes such Joint Venture modality should be made necessarily in a share company legal form, Article 5 can be however the relevant provision that records the intention of the law maker with this regard. There are about eleven (11) enterprises privatized in such ‘joint venture’ form (see Appendix-E for their lists), and all have been formed in the form of share companies. This implies that the investor who wishes to purchase the public enterprise shall come up with other potential shareholders so as to fulfill the minimum number of shareholders required by the law. Pursuant to the Privatization of Public Enterprises Proclamation no. 146/1998, it seems that the ‘Joint Venture’ seems to be executed by forming a share company, wherein both the investor as well as the Government shall have agreed numbers of shares. So, it is evidently clear that this specific law adopts a Corporate Joint Venture arrangement, and to execute this, a standard Joint Investment Agreement has been prepared by the Authority, which agreement obliges the investor to nominate additional shareholders for the fulfillment of the minimum legal requirement on the number of shareholders for formation of Share Company<sup>183</sup>.

There are important legal issues to be raised in connection with this legal framework in the Privatization law. To begin with, in view of the minimum legal requirement of five shareholders to form a share company, wouldn't it be a legal impediment to the investment to require minimum of four (4) potential investors to join their capital and resources with the Government? Shouldn't such privatization law be as flexible as possible for investors to venture? Should the legal form of such type of investment through privatization be legally different from that of other direct investments under our investment law, where there is no legally prescribed form business organization?

A Joint Investment Agreement has been made recently between the Ethiopian Government and DNKNESH Vermögensverwaltung GmbH, to jointly invest to further develop the existing Ghion Hotel in to two 4 star and 5 star hotels, respectively having equity shares of 20%-80%<sup>184</sup>.

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<sup>182</sup> Interview with Ato Daniel Benti, Partnership Team Leader of Privatization & Public Enterprises Supervising Agency, conducted on November 1, 2010.

<sup>183</sup> See Appendix-F. Though this is a specific Joint Venture Agreement entered into with a particular investor, the writer of this paper has however found out that the standard Joint Venture Agreement is almost identical with this one except with minor modifications here and there.

<sup>184</sup> See Appendix-F.

The two parties have agreed in their Joint Investment Agreement to subsequently establish a share company with a number of five shareholders, the foreign investor nominating three individual shareholders with nominal shares. This obligation on the foreign investor is due to the legal requirement of minimum 5 shareholders for establishment of a share company. While a flexible legal framework can be set up for foreign investors to be as convenient as possible to involve in a joint investment, it does not seem to be advisable to create such a legal impediment in the legal framework.

An interesting feature of the Joint Investment Agreement between the two parties is that it contains a clause which entitles a shareholder to participate in the management of the share company in accordance with this Joint Investment Agreement<sup>185</sup>. Article 13 of the Agreement also provides for post formation obligations of the parties. It is understandable that such pre-formation Joint Investment Agreement can be an enforceable legal document for the parties’ duties and obligations during the pre-formation stage. However, the enforceability of such agreement post formation and in the face of statutory instruments like Memorandum of Association and Articles of Association under Ethiopian law will be highly disputable.

Regarding qualification of Joint Venture partners, by practice the Privatization Authority requires the joint investor to be a company, i.e. a corporate body<sup>186</sup>, and the rationale behind such special requirement seems to be to ensure that the investor has well regulated and structured management structure enabling it to execute its business plan<sup>187</sup>. However, it is the opinion of this writer that since the Authority’s qualification requirement is not specifically referring to ‘share company’, where we normally find such structured corporate governance, it seems that the ‘company’ can even be a private limited company, where there might not be a solid legal distinction between the partners and the management, in which case the Authority’s requirement will be simply unnecessary legal impediment for potential individual investors.

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<sup>185</sup> Ibid, See Article 7.4.

<sup>186</sup> See Appendix-O.

<sup>187</sup> Supra at note-182.

#### **4.2.4. ‘Joint Venture’ in Public Procurement Agency Standard Bidding Document**

The Public Procurement Agency’s Standard Bidding Document Section-4, item-2, envisages for the possibility of bidders to tender for public procurement by forming Joint Venture arrangement among them<sup>188</sup>. According to this bidding document, if bidders are to tender by way of Joint Venture they shall disclose themselves and the joint venture arrangement to the bidding organization requiring also the attachment of power of attorney for the signatories to sign on behalf of the Joint Venture. Moreover, the bidding document also requires the attachment of the joint venture agreement of the partners, wherein all the partners shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms. It is fairly obvious that this disclosure requirement is not in line with the Commercial Code’s Joint Venture, which is principally secret to third parties as we have discussed earlier.

Furthermore, the rule of this Bidding Document on the joint and several liabilities of the partners seems to be in line with the legal norm provided for joint venture partners under the Commercial Code. According to Article 272(4) of the Commercial Code, if the joint venture is made known to third parties, it shall be deemed to be an actual partnership in so far as such parties are concerned. Since the Bidding document requires disclosure of the parties, then these parties shall be jointly and severally liable pursuant to the rules of partnership we discussed previously. Besides, Article 276(4) of the Commercial Code provides that partners to a joint venture shall be jointly and severally liable as between themselves and with the manager if they take part in the management. The Bidding document when requiring one of the partners to be nominated as being in charge does not totally preclude the partners’ right for joint management.

#### **4.2.5. The Role of Bilateral Trade Agreements for “Joint Venture” Businesses**

Finally, let us examine the role of bilateral agreements in facilitating or encouraging ‘Joint Venture’ businesses. The Ethiopian Government does normally enter into so many bilateral trade agreements with many countries, and so it will be prudent to explore the roles and features of

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<sup>188</sup> See Appendix-G, Standard Bidding Document for the Procurement of Works issued by PPA (Version 1, January 2006).

such agreements in promoting ‘Joint Venture’ businesses between peoples of the respective countries. With this objective in mind, the writer of this thesis has tried to review some bilateral trade agreements to which Ethiopia is a party, and has found out that there is one standard provision in such types of agreements that is relevant to ‘joint venture’. For instance, the following Article 2(a) has been taken from the bilateral trade agreement between the Ethiopian government and the Republic of Djibouti:-

**“Article-2: The cooperation envisaged under Article 1 shall cover, inter Alia, (a) encourage the private sector of both sides to set up and run Joint Venture enterprises...”<sup>189</sup>**

This is almost similar and standard provision in most bilateral trade agreements. The purpose of this provision seems to be just to enhance cooperation in encouraging the establishment of ‘joint venture’ enterprises in the respective countries. Otherwise, such bilateral trade agreements do not provide or dictate for any particular types of ‘joint ventures’, and thus we cannot take bilateral trade agreements as providing a special legal framework for the establishment and operation of ‘joint venture’ companies. In fact, reading the above provision vis-à-vis Article-1 of the bilateral trade agreement underscore the fact that such types of businesses shall be established in accordance with the laws and regulations of the respective countries at hand. Article-1 of this bilateral trade agreement, which is also almost standard in many agreements, provides as follows:-

**“The parties contracting shall take all appropriate measures to encourage, and facilitate trade cooperation between the two countries and to promote the harmonious development and diversification of their trade in accordance with the laws and regulations in force in each country. In this regards, the contracting parties subject to their relevant laws and regulations in force in either country shall provide the maximum facilities possible for the purpose of increasing the volume of trade between the two countries.”<sup>190</sup>**

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<sup>189</sup> Source: Legal Directorate office of Ministry of Trade.

<sup>190</sup> Ibid.

Therefore, in view of the above standard framework in bilateral trade agreements, the implementation and execution of forming business enterprises can be said to be exclusively left for respective domestic laws and regulations, which fact showing that the trade agreements do not themselves provide a special legal framework for joint ventures. The only role such bilateral agreements play in this respects will be promoting and encouraging cooperation between the respective countries to facilitate for the establishment of ‘joint venture’ enterprises. This in fact is an important impetus as it will push respective countries their ‘joint venture’ legal frameworks as convenient as possible in order to achieve the main objective set by the trade agreement. This will in turn demand the respective countries to harmonize their legal frameworks with international standards as much as possible.

## CHAPTER-FIVE: PROMINENT LEGAL ISSUES RELATED TO JOINT VENTURE

### 5.1. Legal Personality

Legal personality is a legal craft whereby artificial entities become assimilated somehow to natural persons to be subjects of rights and obligations. Attributes of ‘legal person’ can be briefly summarized as being: capacity to perform any juridical acts; assuming rights and obligations; assumption of contractual or extra-contractual liabilities; assuming penal liabilities; to have name; nationality; limited liability; and capital<sup>191</sup>. In connection with Joint Venture, the issue of legal personality will be crucial in the event of contractual or non-incorporated joint venture since it will not have a distinct personality in such event. As it will have no legal personality, how to perform some major juridical acts might be areas of concerns.

Peter Winship wrote the following regarding the effect of lack of legal personality on ownership issue in Joint Venture:-

**“Since the organization has neither legal personality nor capital, the contributions of the members cannot become the property of the Joint Venture. The members merely place certain goods or assets at the disposal of the manager, who does not become the owner except in the case of fungible goods, especially cash. If the manager acquires goods with the property placed at his disposal he retains ownership of these goods but is obliged to the members for his acquisitions and if he resells these goods at a profit he must share the profit with the members. If the manager becomes bankrupt...the goods placed at his disposal by the members (unless they are fungible goods) do not form part of the assets of the bankrupt and each of the members may reclaim his contribution. Personal creditors of member retains**

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<sup>191</sup> Goldberg, supra at note-59, PP. 12-24.

**his rights over the goods placed at the disposal of the manager.  
Being the owners of their contributions the members may freely  
transfer the goods to third parties.”<sup>192</sup>**

The other issue with regard to ownership is the fact that contributions of the partners are said to remain under the ownership title of the respective contributing partners and thus it is not clear as to whether they can dispose their property during the joint venture period. It seems that the joint venture agreement shall specifically deal with such kinds of issues, which make the arrangement very difficult or uncertain if the agreement is silent on this regards. Even the fact that the properties of partners contributed to a joint venture are subject to attachment by their personal creditors might be a concern for the certainty of the joint venture.

Apart from the above ownership issues, as to how to perform some major juridical acts might be also areas of concerns for contractual joint venture as it will have no legal personality.

It the case between Lebssu Boeru & Yohannes Boeru vs. Isak Fessehatsion (see Appendix- H), the court seems to have erroneously render legal personality for the joint venture established between the parties. The facts of the case are that the plaintiffs and the defendant established a firm on Tahisas 5, 1957 E.C to press white wine under the trade name “Isak’s Company” by a private agreement. The defendant was the manager and he refused to give profit and loss accounts to the plaintiffs; he also changed the name to ‘Isak’ without agreement of the plaintiffs. The defendant’s claim in this case was that the firm was not established according to the Commercial Code. The court finally held that it is proved an ordinary partnership was established under the name of ‘Isak’s Company’ because the parties have contributed money and agreed to form a partnership with ‘Isak’s Company’ as a trade name with its license to be in the name of the defendant. The writer of this thesis is of the opinion that the court has made an error in concluding that “it is proved that *an ordinary partnership* was established under the name of ‘Isak’s Company’ ” because the facts of the case clearly prove that the parties have contributed money and formed a partnership to be named after one of them and also to conduct the business

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<sup>192</sup> Supra at note-23.

with the license of this partner. These facts would rather evidence the truth that the venture is a secret one more qualifying as joint venture than as an ordinary partnership.

The other related issue with lack of legal personality in the contractual Joint Venture is the distinct legal status of partners in the Joint Venture arrangement. Since contractual Joint Venture does not have legal personality unlike other business organizations, it seems that the partners to the Joint Venture maintain their distinct legal status and being so it seems that both or all partners shall be traders as per the meaning of the law. If we look at Article 280(2) of the 1960 Commercial Code, for instance, it provides that “[w]here the partnership is a commercial partnership, each partner shall have the status of a trader.” As to whether this rule will be applicable to ‘Joint Venture’ or not can be a legal issue to be disputed. However, the rule is very pertinent to our discussion because there are other relevant business licensing and registration legislations that also require both licensing and registrations for any person to be engaged in any commercial activity<sup>193</sup>. Besides, there is also an investment law that imposes restrictions, limitations, and requirements for investors. Therefore, by ‘distinct status of partners’ it is to mean that partners to a Joint Venture should fulfill all legal requirements individually before being engaged in a Joint Venture. Whether the secret nature of ‘joint venture’ under the commercial code makes this possible or not might be a point for further consideration.

Interestingly enough, the definition of “person” under the Income Tax proclamation no. 286/2002 is a catch-all type definition including individuals, companies, registered partnerships, corporate or unincorporated body of persons, association of persons<sup>194</sup>, and thus it can be said that for income tax purpose even Joint Venture is a ‘person’. From practical point of view, the implication of considering a joint venture as a person for tax purpose will be to treat its tax treatment separately, distinct from its partners. However, this does not give any legal significance because under the Commercial Code, Joint Venture is said to be a secret arrangement between persons without legal personality and thus the existence of such business organization may not be divulged to anybody, including even the tax authority.

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<sup>193</sup> Commercial Registration & Business Licensing Proclamation no. 686/2010, Negarit Gazeta, 16<sup>th</sup> Year, No. 42, Addis Ababa, July 24, 2010, Articles 6(1) & 31(1), respectively provide that “No person shall engage in any commercial activity unless registered in a commercial register.” and “...no person may carry on commercial activity without obtaining a valid license.”

<sup>194</sup> Articles 1,2, and 3.

## 5.2. Duties and Liability of Partners

The liability of the partners as between themselves will be usually as agreed in their Joint Venture agreement. However, the liability of the partners to third parties is only subject to their direct involvement and dealings with third parties. As a result, the partner who is in charge of the management of the joint venture will be assuming full responsibility and unlimited liability. The manager, “as a party to agreements with third parties, will be liable towards such third parties with his entire patrimony, and not merely with his contribution to the joint venture.”<sup>195</sup> In some jurisdictions, like for example in Romania, in order to avoid such unlimited liability imposed on the manager, a person may establish a limited liability company as per the provisions of the law just for the purpose of participating in the Joint Venture and thus this limited liability company will become the manager of the joint venture, and as consequence this limited liability company will be liable towards third parties up to the amount of the contribution of this person to the limited liability company<sup>196</sup>. However, in some jurisdictions like France, it is not possible for juridical or corporate bodies to be directors (i.e. ‘managers’), because only individuals are legally allowed to take such position<sup>197</sup>.

In terms of liability of partners, a corporate ‘joint venture’ might have different legal effects depending on the type of legal form chosen by them. If two or more joint venture partners form a registered ordinary or general partnership, then the liability of the partners will be joint and several<sup>198</sup>. If the joint venture partners, however, form a limited partnership, then some of the partners (i.e. the general partners) will assume full, personal, and joint and several liability whereas the limited partners will be liable only to the extent of their contributions<sup>199</sup>. On the other hand, if the corporate ‘joint venture’ partners form either a private limited company or share company, then their liability will be limited to the extent of their contributions<sup>200</sup>.

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<sup>195</sup> Supra at note-38.

<sup>196</sup> Ibid.

<sup>197</sup> J. P. Le Gall, *Infra* at note-111, P. 32. Though this legal stance in France is with regard to GIE (Groupment D’Interet Economique), it is relevant for this discussion for its basic similarities with Joint Venture.

<sup>198</sup> Articles 255(3) and 294 of the Commercial Code.

<sup>199</sup> Article 296 of the Commercial Code.

<sup>200</sup> Articles 304(2) and 510(1) of the Commercial Code.

Another pertinent legal issue to be considered will be the unlimited Liability of Managers and the issues of corporate Managers and non-partner Managers. As legal rule, the extent of liability of Joint Venture partners as between themselves can be limited by their memorandum of association<sup>201</sup>, but the liability of the manager to third parties is full and unlimited<sup>202</sup>. However, partners who take part in the management of the business shall be jointly and severally liable as between themselves and with the manager<sup>203</sup>. One possible legal issue to be raised in this connection will be whether a corporate partner can be a manager under Ethiopian law? The legal issue here seems to be clear, i.e. in such scenario the corporate entity will have ultimately limited liability by its nature. So, wouldn't this be contrary to the basic principle of unlimited liability of the manager under Ethiopian law? According to some literatures, “even in jurisdictions where a corporation may not be a partner [to a partnership], it usually has power to be a party to a Joint Venture, at least when within the corporate purposes.”<sup>204</sup> On the other extreme, however, it has been also held that “[c]orporations have been held to have no implied power to be general partners, on grounds that it was *ultra vires* their corporate powers and would divest their board of directors or the management of corporate affairs.”<sup>205</sup>

The other related issue is that the corporate partner will be ultimately represented by a person, but this person will be acting in the name and on behalf of the corporate partner, not in his own name as envisaged under Article 276(5). On the other hand, Article 276(1) provides that the manager is known to third parties and he shall be fully responsible for the liabilities of the joint venture. This rule can be logical for a natural person who is also a partner acting in his own name, not in the name and on behalf of somebody else. It appears that our law lacks some governing legal norms in this respect as provided in some other jurisdictions<sup>206</sup>.

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<sup>201</sup> Supra at note-6, Article 276(2).

<sup>202</sup> Ibid, Article 276(1).

<sup>203</sup> Ibid, Article 276(4).

<sup>204</sup> Henry G. Henn & John Alexander, *Infra* at note-44, P. 108.

<sup>205</sup> Henry G. Henn & John Alexander, *Infra* at note-44, P. 476. These writers did however indicate that in some cases a corporation will be allowed to be a limited partner. (P. 476).

<sup>206</sup> The French Commercial Code of 2006 provides specific rules allowing corporate bodies to be managers and also governing the full responsibility and liability of a person who represents a corporate party who becomes a manager by virtue of a partnership or a GIE agreement (See *Supra* at note-168, Articles L-221-3 and L-251-11).

Just by way of illustration, we can see the Joint Venture Agreements under Appendices-J and L, where the Joint Venture partners are corporate bodies and one of them was selected as a manager (i.e. as a ‘Lead Partner’). Here, a legal issue might be raised as to whether these two corporate bodies with limited liability can form a Joint Venture under the Commercial Code, one of them being a manager? If so, how can they assume unlimited liability while they are limited liability companies by nature? Besides, what will be the legal responsibility and liability of the natural person, who might be representing one of these corporate bodies to be the manager of the Joint Venture and will be acting in the name and on behalf of them? Will he be fully and unlimitedly liable as envisaged by the law?

### 5.3. Tax Liability and Accounting Issues

The issue of tax liability of the Joint Venture as well as the partners thereto can be viewed from various directions and as to whether separate taxation is appropriate or not may depend on our particular perspective. Because, in some instances the separate taxation of the joint venture can be viewed as advantage alleging that “it allows the Joint Venture parties a high degree of latitude in planning their own and their venture’s tax position.”<sup>207</sup> On the other hand, however, there are many authorities who consider such separate taxation as disadvantageous because it will subject them to double taxation, i.e. corporate profit tax and income tax on dividends to partners<sup>208</sup>.

Joint Venture, as it has not distinct legal personality, is like partnership for tax purpose in many cases and thus it is principally subject to *pass-through taxation*. ‘Pass through taxation’ is a concept that all profits and losses belong to the owner, who declares them on his or her individual tax return and thus general partnerships are subject to pass-through taxation<sup>209</sup>. However, in some jurisdictions like partnerships Joint Ventures may elect to be taxed as corporations<sup>210</sup>. Usually, however, all of the income is passed through to the Joint Ventures,

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<sup>207</sup> Demetris Loizides, “Cyprus Joint Ventures: Flexibility for Russia, CIS and India”, available at [www.worldcommercereview.com](http://www.worldcommercereview.com), visited on December 15, 2009.

<sup>208</sup> International Trade Centre UNCTAD/WTO, “TTC Incorporated Joint Venture Model Agreements”, Geneva, 2005, P. 3. See also Ian Hewitt, *supra* at note-59, P. 352.

<sup>209</sup> *Supra* at note-4, P. 2.

<sup>210</sup> *Ibid*, P. 163

who then declare their respective shares of the income (or losses) on their individual tax returns<sup>211</sup>.

Therefore, the issues of taxation in joint ventures is basically one major consideration in the choice of the legal form, i.e. whether Contractual Joint Venture, or Partnership Joint Venture, or Corporate Joint Venture due to their different tax effects<sup>212</sup>. Accordingly, Contractual Joint Venture offers the simplest arrangement for tax purposes and so the Joint Venture will not have a separate status for tax purposes, resulting effect of this being that it will not be the Joint Venture that is taxed but rather the participants<sup>213</sup>. In Partnership Joint Venture, in most cases the profits and losses of the business will be computed for corporation tax purposes as if the partnership were a company, but each partner will be subject to tax on its share of the partnership profits and losses<sup>214</sup>. According to Ian Hewitt, this partnership Joint Venture taxation approach is usually the preferred vehicle due to its tax efficiency on the following points<sup>215</sup>:-

- Ø Expenditures and losses of the joint venture could be set off for tax purposes against profits of a Joint Venture partner, which is not the case in a corporate joint venture; and
- Ø Tax losses of a Joint Venture party could be used to shelter profits earned by this Joint Venture party, which is not the case if the profit is received as dividend from a corporate joint venture.

On the other hand, Corporate Joint Venture structure may result in a double level of taxation<sup>216</sup>.

Apart from the above profit tax issues, there are also other tax consideration issues in the determination of where to locate to locate an international joint venture, such as corporate tax

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<sup>211</sup> Ibid.

<sup>212</sup> Supra at note-61, PP. 349-352.

<sup>213</sup> Ibid, P. 351.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid, P. 352.

<sup>216</sup> Ibid.

rate, tax incentives/holidays, withholding taxes, dividend income tax exemption, capital gains tax exemptions in case of assets contributions to the joint venture, double tax treaties, etc...<sup>217</sup>

At this juncture, it will be prudent to examine the treatment of “Joint Ventures” under Income Tax Proclamation no. 286/2002. First of all, it is logical to hold that Joint Venture as envisaged under the Commercial Code cannot be subject to its own tax as it has no legal personality. In this connection, it might be relevant to examine the legal import of Article 49 of the Income Tax Proclamation, which provides that “companies, partnership, and *other business organizations* shall submit to the Tax Authority a copy of their memorandum of association and statutes...” On the other hand, Article 272(2) provides that ‘a joint venture agreement need not be in writing’. So, how do we reconcile these two provisions in the two different regimes? The first question to be asked is whether the above provision of the Income tax proclamation does also apply to Joint Venture in the Commercial Code sense? Though whether Joint Venture is a business organization or not might not be a legal issue, it can be however a legal issue as to whether the memorandum of association of such Joint Venture shall be submitted to the Tax Authority due to the peculiar legal norm in the Commercial Code.

However, it is not oddity to consider that this particular income tax law is requiring even Joint Ventures to submit their agreements to the Authority. Some possible reason might be for income tax calculation purposes, for consideration of deductible expenses purposes, etc..., and the implication might be that unless such Joint Venture agreement is submitted to the tax authority a tax payer cannot legally declare some expenses related to the venture. We can also observe that there is similar fiscal policy and requirement even in other jurisdictions. This being so, the unresolved legal issue might be what if the Joint Venture is made just on verbal agreement basis, which is allowed by the law? Can the obligation still subsist?

The above being the provisions of the law and the vague intent of the legislature, the practice is however reveals double standards in taxation treatment of contractual joint ventures. Under normal circumstances, contractual Joint Ventures in the small scale business sectors do not as a

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<sup>217</sup> Ibid, PP. 353-354

practice submit their agreements to the tax authority<sup>218</sup>. However, in the large scale sense of the term, Joint Venture Agreements are normally submitted to the tax authority for the purpose of obtaining a Tax Identification Number (TIN) for the particular joint venture at hand<sup>219</sup>. One demonstrative case can be the joint venture between GIGA Construction PLC and MISR Concrete Development Co. (SEA), which has been submitted and filed to the tax authority and a TIN is issued for the joint venture<sup>220</sup>. According to Ato Mulugeta Balcha, once a TIN has been issued for the joint venture, then the joint venture will be considered as a separate entity for tax purpose and so separate accounts should be held for the joint venture so that the joint venture will be treated separately for taxation purpose<sup>221</sup>. The implication hereof will be that the joint venture partners, as distinct persons, will have their own respective TIN and their respective taxes will be treated separately from the joint venture taxation. It is clearly evident that this practice undoubtedly considered the joint venture as a person for tax purpose, and this is not in line with the commercial code conception of joint venture, where it has no legal personality. If it has no legal personality it logically follows that it cannot be a tax-paying entity. On the other extreme of the practice, those joint ventures that do not submit their joint venture agreements and do not obtain separate TIN for the joint venture will be paying taxes on their respective incomes from the joint venture business together with their other incomes. This being so, it seems that the latter will be benefiting from applying expenditures, losses, and expenses of the joint venture from their respective profits while in the former case this might not be feasible.

When it comes to tax liability of Joint Venture in the Commercial Code sense, the Joint Venture partners seem to be subject to income tax under Schedule-C, the tax liability being borne by the individual partners individually. On Schedule D Incomes, Article 34(1) of the Proclamation seems to refer only to dividends derived from share companies or withdrawals of profit shares from private limited companies, this evidencing that partnerships and other business organizations in the Commercial Code are not subject to dividend/profit share income tax of 10%. The issue to remain is however: whether all the partners shall pay income tax under Schedule C or only the one(s) in whose name the business is being made?

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<sup>218</sup> Interview with Ato Mulugeta Balcha, Tax Audit Process Co-ordinator of Large Tax Payers’ Office in Federal Inland Revenue Authority, conducted on March 18, 2011 at 3:00P.M.

<sup>219</sup> Ibid.

<sup>220</sup> Source: Tax Audit Process Co-ordinator Office at Large Tax Payers’ Office in Federal Inland Revenue Authority.

<sup>221</sup> Supra at note-218 above.

Regarding other corporate ‘Joint Ventures’ to be established as per other relevant laws, it seems that the income tax rules applicable to their special type of legal forms (i.e. share company or private limited company) shall apply, on top of other tax privileges and exemptions that will be provided to them under such special laws.

#### **5.4. Competition Issues vis-à-vis Joint Ventures**

As Ian Hewitt wrote, “[j]oint ventures, by their nature, frequently involve collaboration between actual or potential competitors in a way which restricts their independent freedom of action.”<sup>222</sup> According to him, “competition authorities are therefore concerned to ensure, broadly, that the benefits to the public of collaboration outweigh the apparent detriments flowing from a reduction in competition.”<sup>223</sup>

As we all know, horizontal mergers (those between companies which make the same products and operate at the same level of the market) are potentially the most damaging to competitive process<sup>224</sup>. The arguments against merger are that they will have a marked impact on competition, and that the new entity will set price and output in the same manner as a single firm monopolist, with the same consequences for consumer welfare<sup>225</sup>. Though merger and Joint Venture are not one and the same, but due to their similar impact on free competition in some jurisdictions there are similar legal norms governing them similarly. The fact that Joint Ventures can be created for various purposes (covering a wide range of business arrangements, from the establishment of a new corporate entity by two competitors to a joint purchasing scheme or joint research and development) is believed to cause problems for competition systems<sup>226</sup>.

Due to this reason, in many jurisdictions, for example in European Union, they strictly regulate the establishment of Joint Ventures. Art. 3(1) of the same Regulation 4064/89 as amended provides as follows:-

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<sup>222</sup> Ibid, P. 378.

<sup>223</sup> Ibid.

<sup>224</sup> Supra at note-91, P. 979.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid, P. 984

**“A concentration shall be deemed to arise where:**

- a. two or more previously independent undertakings merge, or**
- b. one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings.”<sup>227</sup>**

Though as a general rule, Article 3(1)(a) above is believed to cover the case of complete merger, “[t]he Commission has, however, made it clear that Article 3(1)(a) can bite in some circumstances where the undertakings retain their separate legal personalities, but create none the less a single economic unit.”<sup>228</sup> It is obvious that this broader interpretation squarely applies to the cases of Joint Ventures. More specifically, however, Article 3(1)(b) clearly applies to the cases of *change of control*<sup>229</sup>, and this will also apply to the cases of Joint Venture because in Joint Ventures ‘it is also possible for two or more undertakings to acquire joint control over another.’<sup>230</sup>

Following the above broader interpretation, Article 3(2) of Regulation 4064/89 as amended provides that:-

**“The creation of a Joint Venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph (1) (b).”<sup>231</sup>**

So, as per the above clear provision of the European Union law, Joint Venture can be an issue of competition, “provided that it constitutes an autonomous economic entity created on a lasting basis, and this is still the case even if it might result in the co-ordination of competitive behaviour between independent undertakings.”<sup>232</sup> Accordingly, it is held that joint venture will be covered under the Merger Regulation only if it results in the creation of an autonomous entity

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<sup>227</sup> Ibid, P. 983

<sup>228</sup> Ibid.

<sup>229</sup> Ibid, P. 984

<sup>230</sup> Ibid.

<sup>231</sup> Ibid, P. 985

<sup>232</sup> Ibid.

that performs functions on a lasting basis. This underlined phrase is very important because there might not be an issue of competition “where the joint venture only takes over a specific function of the parents’ business activities without access to the market, as in the case of joint ventures relating to research and development.”<sup>233</sup>

To underscore the above position, Article 2(4) of the above mentioned Regulation provides the following:-

**“To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 85(1) of the Treaty, with a view to establishing whether or not the operation is compatible with the Common Market.”<sup>234</sup>**

According to Ian Hewitt, non-full function Joint Ventures do not fall within the EU Merger Regulations, but they may fall under Article 81 of the EU Treaty, which prohibits “...all agreements between undertakings, decisions by association of undertakings and concerted parties which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”<sup>235</sup> It seems that such non-full function Joint Ventures are not subject to any regulatory control, i.e. “[i]t is up to the parties themselves to determine the extent to which Article 81 applies to a non-full function Joint Venture.”<sup>236</sup>

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<sup>233</sup> Ibid, P. 986

<sup>234</sup> Ibid, P. 985. In making this appraisal the Commission shall take in to account in particular : (1) whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or down stream from that of the joint venture or in a neighboring market closely related to this market; (2) whether the co-ordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question. (Paul Craig & Grainne de Burca, P. 985)

<sup>235</sup> Supra at note-61, P. 390

<sup>236</sup> Ibid.

Having seen the sensitivity of Joint Venture arrangement from competition point of view, it would be necessary to review the available legal rules as well as the practice for regulating the anti-competitive effects of Joint Venture in Ethiopian case. The Ethiopian Trade Practice Proclamation no. 329/2003, which was prevalent until 2010, provides for a general prohibition as follows:-

**“No person may directly or indirectly enter into any written or oral agreement that restricts, limits, impedes or in any other way harms free competition, in the process of production, supply, distribution, or marketing of goods and services.”<sup>237</sup>**

Apart from this and without affecting the generality of the above provision, Article 6(2) of the Proclamation does also provide some anti-competitive agreements, such as agreements of jointly fixing prices, agreements for collusive tendering as to determine market price, agreements as to market or consumer segmentation, agreements as to allocation by quota of production and sales, and concerted refusal to deal, sell, and render services. This list is non-exhaustive because the general prohibition under sub-article (1) will still enable us to include as many lists as possible so long as the list fulfils the legal elements enshrined under this general prohibiting provision. So, in view of this law, we can say that ‘Joint Venture’ arrangement was not as such a free-zone under Ethiopian law for business people to enjoy as they wish-i.e. the law has limitations and restrictions on agreements depending on the effect of the agreements. Specially, when it comes to a Joint Venture arrangement between competitors the aforementioned legal rules seem to be prohibitive on any agreement that harms free competition or jointly price-fixing or collusive tendering. Article 7 of this proclamation requires authorization from the Ministry of Trade and Industry if any agreement will be having any of the prohibited anti-competitive effects mentioned under Articles 6(1) and (2). This later regulatory and institutional framework strengthens our stance that a joint venture agreement is not a free zone area to enjoy without regulations.

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<sup>237</sup> Article 6(1) of the Trade Practice Proclamation no. 329/2003, **Federal Negarit Gazetta**, 9<sup>th</sup> Year, No. 49, Addis Ababa, April 17, 2003.

The above being the stance of our law, we can see the Joint Venture agreements between competitive contractors (see Appendices-J and L) might be falling within these prohibited anti-competitive practices. Even in the corporate sense of the term, the case of Premier Switch Solutions Share Company by United Bank S.C, Awash International Bank S.C, and NIB International Bank S.C can be raised as one demonstration to show the potential danger of collision between competitors that can be taken as jointly fixing prices or harming free competition. This is not to say that all joint arrangements between competitors should be considered as anti-competitive, and so when it comes to joint venture arrangement we need to have special and clear legal rules that unequivocally state which is allowed and which is not allowed.

Regarding the regulatory aspect of such arrangement the writer of this thesis has found out that there is no any control or regulation on joint venture formations so far<sup>238</sup>, which institutional or regulatory gap needs also to be filled by such special legal rules governing joint ventures.

Currently, the new Trade Practice and Consumers’ Protections Proclamation no. 685/2010, which repeals and replaces the Trade Practice Proclamation, has made some modifications to the above substantive rules regarding the definition of anti-competitive practices. According to the new proclamation, the Amharic counter-part of the term ‘collusive tendering’ has been given a new translation, which states “  
”<sup>239</sup>According to this new translation, it can be argued that not all tendering in partnerships are considered as ‘collusive’, it is rather only those tendering with negative intent of price determination that are prohibited. Besides, this new law does not contain the general prohibited anti-competitive practices as was the case under Article 6(1) of the previous law, nor for the requirement of authorization for agreements having potential anti-competitive effects. These latter drawbacks of the law manifest the fact that this latter law is

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<sup>238</sup> Interview with Ato Anteneh Mengistu, Legal Directorate of Ministry of Trade, conducted on March 15, 2011 at 9:00A.M.

<sup>239</sup> Trade Practices and Consumer Protection Proclamation no. 685/2010, Negarit Gazette, 16<sup>th</sup> Year, No. 49, Addis Ababa, August 16, 2010. The discussion made by council of ministers regarding this matter states that the reason for changing the words “  
” to “  
” is to avoid any confusion with an already existing partnership concept in the law.(Source: the Council of Ministers’ 3<sup>rd</sup> Election Period 107<sup>th</sup> Regular Meeting Minute). This implies that joint tendering in partnership arrangement will not be now considered as ‘collusive’ for the purpose of the law.

relatively loose compared to the previous one in terms of its regulatory and institutional framework.

### 5.5. Transferability of Interest and Exit Issues

The possibility of transferring shares/interest in a joint venture will principally depend on the types of legal forms used. Accordingly, in Contractual and Partnership Joint Ventures transfer of share or interest require the consent of the other partner while in Corporate Joint Venture, on the other hand, shares or interests can be easily transferred<sup>240</sup>. However, it is common practice that “virtually all Joint Ventures do contain restrictions on transfer.”<sup>241</sup> This is mainly because of Joint Venture’s basic personal relation nature, i.e. joint venturers choose each other based on their respective personal virtues. As a consequence, free transferability of shares/interests is usually restricted or prohibited in many Joint Ventures, subject to the following conditions<sup>242</sup>:-

***Free transferability:*** - is usually possible in multiple party ventures where many parties have largely passive investment, subject to some preconditions such as credit-worthiness of the transferee, prohibition against transfer to competitors).

***Limited transferability:*** - transfer permitted only to narrow categories of ‘permitted’ transferees.

***Transfer of share with Pre-emption rights:-*** is the most common transfer restriction in favor of the other existing parties, and it requires notice period to be given and only if the existing parties do not exercise their pre-emption right, the selling party is free to transfer its shares to a third party. Basically, there are two types of pre-emption rights; namely, (1) “right of first offer” (also ‘soft’ pre-emption right), which occurs where the selling party is not obliged to first identify a third party purchaser, and (2) “right of first refusal” (also ‘hard’ pre-emption right), which occurs where the selling party must first identify a third party purchaser.

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<sup>240</sup> Supra at note 61-, P. 275.

<sup>241</sup> Ibid, P. 276.

<sup>242</sup> Ibid, PP. 276-290.

***Transfer of share with “Tag-along” Obligation:*** - this is usually appropriate for a minority shareholder, where the selling party is obliged to ensure that the third party purchaser must extend its offer so as to include the existing party’s shares on the same terms.

***Transfer of share with “Drag-along” Right:*** - this is a right to the selling party to drag and oblige the existing parties to sell its shares to the third party purchaser, provided that the latter failed to exercise its pre-emption rights.

As a related issue to such transferability, exit from the Joint Venture will also be an important legal issue to be clarified by the Joint Venture partners. The following are normally points of considerations to determine exit or termination from the Joint Venture<sup>243</sup>:-

- 1- Fixed term/Joint renewal: - automatic termination after the agreed fixed period unless the parties jointly agree to renew.
- 2- Termination for convenience (“I want out”):- the right to terminate the Joint Venture relation irrespective of any ‘cause’ attributable to the other party.
- 3- Termination for cause:- termination or exit for some specified circumstances or causes, such as material default, insolvency of the other party, change of control, etc...
- 4- “Put” or “Call” Option:- a party will have a right to put its shares on the other party to buy; or a party will have a right to call for the other party’s shares to buy at specified times as part of a pre-agreed commercial deal.
- 5- Sale or Public Offering of the Joint Venture Company: - the right to initiate a sale of the Joint Venture Company as a whole through public offering.
- 6- Transfer of Interest: - subject to some restrictions and pre-emption rights.
- 7- Deadlock (“we can’t go on like this”):- termination right in case of deadlock or breakdown in the relationship.

Ethiopian law on the issues of transferability of shares/interest takes different positions depending of the particular legal form of the business organization. For instance, in the cases of transfer of shares in partnerships the freedom of the parties to do so is normally restricted, while

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<sup>243</sup> Ibid, PP. 300-301.

in the cases of transfer of shares in private limited company or share company though limitations can be set in memorandum of associations it is however permissible for shareholders to transfer their interest as freely as possible. This being the general legal stance, it is however important to note that transferability of shares is normally restricted in both contractual Joint Venture as well as in corporate Joint Ventures in any of the legal forms. As illustration, if we examine the Joint Investment Agreement between Ethiopian Privatization and DNKNESH GMBH for GHION Hotel (Appendix-F), we can observe that Article 7.5 provides preemptive right for DNKNESH GMBH, implying that the Ethiopian Government is not free to transfer its shares to any person it wants. The contractual Joint Venture Agreements (Appendices J and L) do also contain such restrictions on free transferability of shares of the joint partners (see Articles IX and 8, respectively).

## **5.6. Corporate Governance and Minority Shareholders’ Protection**

### **Corporate Governance Issues**

The manager acts in his/her own name and even the partners should deal with third parties in their own name. Peter Winship wrote that “[t]he members who are not managers retain their right of control over the activity of the manager in accordance with general rules. They cannot participate in the management, at least in the external management....”<sup>244</sup> Governance and management issues are also important and decisive matters for the success of a Joint Venture, and thus in general terms the following are the major issues revolving around Joint Venture’s governance and management<sup>245</sup>:-

- 1- Role of Joint Venture governing body: - what will be the role of a Joint Venture governing body? What will be its composition and procedures? What will be its decision-making authority? These are the major issues around this higher body of Joint Venture.
- 2- Control: - should the control of the Joint Venture be shared? Or can it be essentially held by one partner only?

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<sup>244</sup> Supra at note-23, P.57.

<sup>245</sup> Supra at note-61, PP. 182-185

- 3- Composition of Directors: - should each partner appoint a number of board members? Will there be independent directors?
- 4- Governance by the Joint Venture partners: - what decisions should be reserved for the Joint Venture partners rather than for the management body of the Joint Venture? What reporting and approval mechanisms need to be established to ensure an appropriate balance between supervisions and monitoring by the Joint Venture partners and autonomy for the Joint Venture?
- 5- Operational management: - what will be the structure for operational management, including composition and role of executive body of the Joint Venture?
- 6- Minority protection: - what influence or protection will a minority participant have in relation to the Joint Venture’s affairs?
- 7- Deadlock and Dispute resolution: - what appropriate or formal dispute resolution procedures to be established for deadlock between parties?

The above governance issues should be properly addressed and incorporated in the Joint Venture agreement/in the shareholders’ agreement or in the Memorandum of Association/Articles of Association as appropriate, subject to their possible enforceability depending on a particular jurisdiction or on the type of the legal form chosen. For example, in Contractual Joint Venture the governance issues can be fully addressed by the Joint Venture agreement of the parties while in Corporate Joint Venture the governance structure should be subject to relevant national corporate laws relating to the chosen corporate form<sup>246</sup>.

Apart from the liability aspect, corporate ‘joint venture’ under the Commercial Code lacks some basic features of ‘joint ventures’ in terms of corporate governance and the parties representation therein. While ‘joint venture’ under its technical sense of the term envisages the joint management of the company by both partners, the corporate structures of private limited company and share company under Ethiopian Commercial Code seem to be unsuitable for such joint management<sup>247</sup>. This is because of the very fact that decisions of shareholders in private

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<sup>246</sup> Ibid, P. 185

<sup>247</sup> Such joint management might be possible for partnership cases by virtue of Articles 234, 236, 238, 287, and 288(3), and according to these provisions in case of joint management decisions shall be made by majority votes of the partners.

limited companies and share companies are to be made based on shareholders votes, which are also based on the number of shares<sup>248</sup>. Moreover, some major and decisive measures and decisions are also to be made by majority of members representing a certain % of the capital<sup>249</sup>. The implications of these statutory rules are that minority shareholders in a joint venture company might lose their joint management right in the operation of their business.

### **Minority Shareholders’ Protection**

One basic feature of Joint Venture is the need by the parties to participate directly to a material extent in the management and operations of the venture. The implication of this is that “[a] minority party will expect strong rights than those granted by statutory or corporate law.”<sup>250</sup> Because of this legal lacuna, “[t]he extent of any ‘minority rights’ will be therefore be a matter for contractual negotiation and vary from case to case.”<sup>251</sup>

The minority party’s negotiating power may depend on a lot of other factors, but under all cases minority parties need protective measures that “will assist to prevent undue preference or misuse of control by a majority party.”<sup>252</sup> It is, however, admitted that these protections rarely protect against simple bad management by the majority shareholder or its nominee directors<sup>253</sup>. This is not, nevertheless, to ignore the basic interest of majority shareholders. As very well known, majority parties do normally want “...to maintain decisive power over management appointments; to ensure that clear decision-making processes exist by minimizing minority veto rights and establishing ‘deadlock-breaker’ devices where there are veto rights; and, frequently, to incorporate rights which support its ability to deliver a sale of the joint venture company as a whole to a third party.”<sup>254</sup> Apart from such statutory protections, a minority shareholder will resort to express contractual rights and protections to protect its interests in the areas of Board representation, Major decisions, Profit sharing (dividend policy), Improper issuance of shares (diluting its equity share), Information, Claims against Majority shareholders, and Exit<sup>255</sup>. The

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<sup>248</sup> Articles 345(3), 407, 421(3), 440(1), and 534(2) of the Commercial Code.

<sup>249</sup> See for example Articles 425(3), 462(1), 536, etc...of the Commercial Code.

<sup>250</sup> Supra at note-61, P. 211

<sup>251</sup> Ibid.

<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> Ibid, P. 212

<sup>255</sup> Ibid, P. 213

issue whether such contractual protections are enforceable or not still remain controversial, the answer to which varying from jurisdictions to jurisdictions.

So, this is where a balance-striking legal instrument is needed to provide for minority party protections; and these instruments can be either Contractual Protections or Statutory Protections. Statutory minority protections are usually provided in many legal systems for limited situations. For instance, in English Law, the followings are provided for minority protections: (a) the ability to block certain decisions which require 75% shareholder approval; (b) statutory rights to call for meetings, information, or formal regulatory investigations; (c) a right to initiate an action on behalf of the company against the directors for breach of duty; (d) a right to seek a remedy in the event of ‘unfairly prejudicial’ conduct by the majority shareholder; and (e) a right to seek for the winding of the Joint Venture on the grounds that it is ‘just and equitable’<sup>256</sup>.

Ethiopian law appears to be reluctant on the issue of protection of minority shareholders because there is no any legal rule in any of the pertinent laws under consideration that is designed to this effect. The investment law prevailing at the time of Derg regime had this mandatory shareholding requirement of minimum of 26% for domestic investors, and we can infer from this legal requirement that the intention of the lawmaker was to protect the minority shareholder from being dominated and from being subject to some major decisions that require minimum of 75% share. The effect of the law was that a foreign shareholder will have maximum of 74% shareholding, and so it will not have practical dominance to make some decisions. Currently, the prevailing investment law of Ethiopia does not contain any such or similar requirements targeting protection of minority shareholders.

The other deficiency of the Commercial Code, which makes it unsuitable for corporate ‘joint venture’, is that it does not provide any mandatory legal norm for the representation of minority shareholders in the management or board of directors’ composition. Private limited company does not have a governance structure like board of directors and so we cannot even talk of representation of minority shareholders in such activity. According to Article 350 of the Commercial Code directors of the company shall be appointed by the subscribers’ meeting or by

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<sup>256</sup> Ibid.

the general meetings of shareholders, which means majority shareholders can easily influence the composition of the board. Article 352 of the Commercial Code, under the title ‘Rights of a minority’, provides for the potential representation of groups of share holders with different legal status by at least one representative in the board of directors, and to ensure this the law obliges that the articles of association shall provide for such representation. The law does not define as to what ‘different legal status’ means, but one possible interpretation of this phrase of “different legal status” can be such class shares like preferred shares or other similar class shares. However, due to the non-clarity of the law this provision might be misleading as also referring to ‘minority shareholders’. It is the strong belief of the writer of this thesis that our law shall reformulate this provision so as to align it with the title as well as to ensure that minority share holders are really represented in the board.

The choice of Share Company by Premier Switch Solutions S.C partners is one demonstrative case to show the importance of corporate governance. The impediment they faced was the choice of a legal form for their joint investment, and the joint venture business organization as envisaged under the Commercial Code was among the lists in the option, but was dropped out due to its loose structure nature<sup>257</sup>. Ato Ephraim further elaborated that the joint venture in the commercial code has loose nature because it has no legal personality of its own and it is also difficult to establish a solid corporate governance structure under such arrangement. As a result they were obliged to choose Share Company as the form of their venture since it is a relatively solid and firm company having all the legal structures for corporate governance.

## **5.7. Employment and Labor Law Issues**

Employment issue might not arise in case of contractual joint venture because in such cases the status of employees will remain the same, i.e. “there will be no change in the employment relationship; the employees will remain to be the employees of each party respectively.”<sup>258</sup> However, in case of Corporate Joint Venture, which will have separate legal entity, the Joint Venture’s employees (usually coming from one of the partners) will either (a) become the

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<sup>257</sup> Ibid.

<sup>258</sup> Ibid, P. 436

employees of the Joint Venture Company or (2) remain the employees of their previous employer but will be seconded to work for the Joint Venture<sup>259</sup>. In connection with Corporate Joint Venture there might be raised a lot of employment issues, among which are the followings<sup>260</sup>:-

- 1- Identification: - which employees will work for the Joint Venture?
- 2- Workers’ Participation:- will the formation of the Joint Venture require the application of laws relating to workers’ participation? Are there consultation obligations in relation to setting up the Joint Venture?
- 3- Transfer:- will employees transfer automatically to the Joint Venture Company with any business being contributed to the Joint Venture? Or will individual consents to transfer be needed?
- 4- Terms of employment:- what terms and conditions will apply to the employees while they work for the Joint Venture?
- 5- Administrative procedures: - what will be the administrative procedure or mechanisms within the Joint Venture for hiring, firing, managing employees, etc...?
- 6- Work permits: - will work permits be required for foreign employees?
- 7- Employee benefits: - what employee benefits will be provided for the Joint Venture employees?
- 8- Pensions: - what pension benefits will be provided for the Joint Venture employees?

Since different countries might have different legal stances regarding the above selected and other employment-related legal issues, it is very imperative to always consider these points as they might be affecting the Joint Venture formation.

The Ethiopian Labor Law on the effect of transfer of a business by sale is pretty clear, i.e. conditions of employment will not be changed due to such change of ownership and will not have the effect of termination of employment contract<sup>261</sup>. With a similar fashion to this, the Privatization Proclamation does also oblige an investor who purchases a public enterprise to

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid, P. 437

<sup>261</sup> Articles 15, 16, and 23 of Labor Proclamation no. 377/2003.

assume all rights and obligations of the seller, which legal provision implying that the new investor shall also have the obligation to maintain the employment contracts and conditions of the employees of the enterprise under sale<sup>262</sup>. More precisely also, Article 12 of the Privatization Proclamation obliges the investor to continue the pension coverage of the employees existing before the privatization. The Joint Investment Agreement between Ethiopian Government and DNKNESH GmbH (Appendix-F) evidences the practical implementation of this legal norm, i.e. Article- 7.6 of the Agreement obliges DNKNESH GmbH to respect the employment contracts and conditions of the enterprise’s employees.

## **5.8. Governing Law and Dispute Settlement Issues**

### *Which Regime of law shall apply to Joint Venture?*

What regime of law should govern the relationship of joint venture can be raised as one main legal issue because there are different literatures and legal systems that approach the issue in different ways. Paul McCarthy wrote as follows in this regard: “In developing a special theory for partnerships, French law recognized that partnership agreements are specially complicated contracts, as such cannot always be subject to the normal rules of the Civil Code.”<sup>263</sup>

For example, in some jurisdictions Joint Ventures are generally governed by state partnership and contract law<sup>264</sup>. Peter Nayler has also pin pointed that “[a] contractual joint venture is a relationship based on a contract between the two parties and is governed by the general principles of contract law.”<sup>265</sup> It was rightly remarked by this scholar that while corporate joint venture and partnership have special bodies of legal rules governing them, this is not the case for contractual joint ventures, and thus “the Joint Venture agreement will have to provide for every aspect of the Joint Venture’s operation.”<sup>266</sup> In some other jurisdictions, courts generally apply partnership law to joint ventures<sup>267</sup>.

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<sup>262</sup> Article 13 of the Public Enterprises Privatization Proclamation no. 146/1998.

<sup>263</sup> Supra at note-19, P. 111

<sup>264</sup> Supra at note-4, P. 162

<sup>265</sup> Supra at note-69, P. 211

<sup>266</sup> Ibid, P. 212

<sup>267</sup> Supra at note-47, P. 438.

Even in case of Corporate Joint Ventures, since there is a Joint Venture agreement which normally precedes the incorporation of the Joint Venture Company, the enforceability of the Joint Venture agreement can be one of the pressing legal issues. Such Joint Venture agreements “may be called a Memorandum of Understanding” for some legal reasons<sup>268</sup>. However, if such Memorandum of Understanding has a binding nature the designation of it as Memorandum of Understanding will not preclude it from the realm of Contract laws, where it can be enforceable for contractual remedies such as damages, specific performances, injunctions, etc...Nevertheless, once the Joint Venture is incorporated and assuming that the Joint Venture agreement contains detailed agreements not included in the Memorandum of Association or in the Articles of Association, then the enforceability of such Joint Venture agreement remains disputable. As pointed out by some writers “[t]here are many features which have to be incorporated in the shareholders’ agreement which is quite private to the parties as they start off.”<sup>269</sup> So, the issue is: can we still apply such Joint Venture agreements in the face of statutory instruments like Memorandum of Association or Articles of Association? It has been written that in one major Indian court case, the Indian Supreme court has recently held that Memorandums of Understanding (whose details are not in the Articles of Association) are ‘unconstitutional’<sup>270</sup>.

It seems that such position is based on the fact that corporate entities should be transparent to the public, and it also seems logical that to bind third parties all agreements should be publicized. But what about matters concerning only the Joint Venture parties, i.e. matters not related to third parties or to the public? Should not the Joint Venture agreement be given enforceability as between the contracting Joint Venture parties?

In our Commercial Code governing partnerships, private limited companies, and share companies, it seems that Memorandum of Association and Articles of Association are the legally recognized instruments from which the rights and obligations of the parties emanate. So, it would be arguable as to whether Memorandum of Understandings shall be still enforceable after incorporation of such business organizations.

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<sup>268</sup> Supra at note-2.

<sup>269</sup> Ibid.

<sup>270</sup> Id.

One important legal issue to be raised on this regards is: whether the contractual joint venture arrangement between companies is purely contractual relationship or is it a joint venture business organization as envisaged in the 1960 Commercial Code? Assuming that the joint venture partners choose a foreign law to govern their relations, would such agreement be a valid and an enforceable one? If disputes arise between the partners or with third parties, which legal regime governs the matter- i.e. the law of contract or the law of business organization?

### *Choice of Law in International Joint Ventures*

When the Joint Venture is an International one, choice of governing law might be a pressing issue because the Joint Venture partners being from different countries they might have their own respective preferences to a specific country’s law to govern their relations. This can be more important issue in Contractual Joint Ventures, but the issue is still relevant even for Corporate Joint Ventures because there are Joint Venture Agreements at pre-incorporation stages.

In some jurisdictions (e.g. India) all agreements are under national laws<sup>271</sup>. But in many other jurisdictions, choice of law is left to the parties when it comes to international contracts, i.e. contracts involving parties from different countries. However, it should be noted that in some jurisdictions (e.g. Cyprus) Joint Venture parties may choose any law to govern the Shareholders’ Agreement, but whatever law is chosen the domestic law and regulations will be relevant to a Joint Venture for it applies to the Memorandum of Association and Article of Association regardless of the chosen law<sup>272</sup>.

Under Ethiopian law, parties are under normal circumstance free to choose their governing law. But as to whether this freedom is without any limitation can be a legal issue to be considered. For example, in the Joint Venture Agreements under Appendices J and L, one important related legal issue will be the following: the parties, being residing and operating in Ethiopia and also forming one type of business organization recognized by the Commercial Code (i.e. Joint

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<sup>271</sup> Id.

<sup>272</sup> Demetris Loizides, Supra at note-114.

Venture), can they choose a foreign governing law for the performance of the joint venture agreement, which is a statutory instrument to be interpreted and enforced as per the Commercial Code?

Ian Hewitt has also observed that in Civil Law countries there may be less flexibility to use shareholders’ agreement<sup>273</sup>. He also wrote that “[i]n many civil law countries, remedies of specific performance or an injunction may not be available to enforce a shareholder’s agreement.”<sup>274</sup> He further expounded that there are some jurisdictions where minority party is unsure of the law, or its enforcement, and thus prefers the maximum protection to be provided by establishing its rights in the public constitutional documents (i.e. Memorandum of Association and Articles of Association)<sup>275</sup>.

According to Ian Hewitt<sup>276</sup>, the following considerations or factors should be made to decide whether to address some issues in the Memorandum of Association/Articles of Association or in the Shareholders’ Agreement:-

- 1- It can be difficult to draft some provisions in the Memorandum of Association/Articles of Association as fully or in the same commercial manner as in the Joint Venture agreement/Shareholders’ agreement.
- 2- Amendment of a shareholders’ agreement usually requires the consent of all the parties to it while Memorandum of Association/Articles of Association can be amended by a special resolution. A minority party who cannot block such a special resolution is therefore better protected by contractual provisions in a shareholders’ agreement.
- 3- Memorandum of Association/Articles of Association will automatically bind any person who becomes a shareholder while shareholders’ agreement binds only the parties to it.
- 4- Memorandum of Association/Articles of Association binds the Joint Venture Company and its directors, and so inclusions of the provisions in the Memorandum of Association/

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<sup>273</sup> Supra at note-61, P. 225

<sup>274</sup> Ibid, P. 296

<sup>275</sup> Ibid, P. 225

<sup>276</sup> Ibid, PP. 295-296

Articles of Association would impose obligations on the Joint Venture Company, which are directly enforceable against the Joint Venture Company and its directors.

- 5- Memorandum of Association/Articles of Association gives greater public notice to third parties on the existence of some limitations or restrictions, etc...

### *Dispute Settlement Issues*

The Joint Venture parties can choose their own choice of dispute resolution mechanisms, among the court system and other Alternative Dispute Resolution (ADR) options. However, in the choice of forum of jurisdictions, there are some basic considerations to be made; namely, enforceability of foreign judgments or foreign awards and arbitral awards. In this connection, the ratification of the New York Convention or the availability of local arbitration laws based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law might be relevant to be duly considered.

Ethiopia did not ratify the New York Convention and also the existing arbitration law in Ethiopia is not designed in line with the UNCITRAL Model Law. So, in view of these facts the choice of jurisdiction shall be given due attention to assure the enforceability of foreign judgments in any of the chosen jurisdiction.

## CHAPTER-SIX: PRACTICAL PROBLEMS AND THE WAY FORWARD OF “JOINT VENTURES” IN ETHIOPIA

### 6.1. Major Departures and Practical Problems of Ethiopian “Joint Venture”

#### 6.1.1. Major Departures

It will now be prudent to summarize the major departures of our legal norms on joint venture as compared to other legal systems. Identifying these departures or loopholes might help us for further reviewing and streamlining of our legal norms in line with internationally recognized norms and practices of joint venture. The followings can be listed down as the major departures or differences of our joint venture legal norms which need to be looked in to:-

***Legal Personality:***-The fact that joint venture does not have legal personality is one departure because in many jurisdictions joint ventures with their own legal personality is recognized and given due legal treatment.

***‘Clandestine’ Nature of the Venture:*** - it seems that our Commercial Code gives more emphasis to the secret nature of joint venture and this nature gives a room for any underground relationships between individuals without fulfilling required legal obligations from business people, i.e. licensing, fiscal obligations, etc.... Such secret nature of joint venture is not an emphasized legal feature of joint ventures in other jurisdictions, even in their contractual form.

***Tax transparency and flexibility:*** - while many jurisdictions provide for flexible tax treatment of joint ventures whether in their legal personality form or otherwise, our law is however is indifferent when it comes to tax issues regarding joint venture business activities, except providing some tax incentives and exemptions in the investment law. The secrecy nature of joint venture being given more emphasis in our Commercial Code, it is the conviction of this writer,

however, that the law should not ignore the significance of tax implications behind this form of business organization. Besides, tax treatment of corporate joint ventures, especially those of non-full-function Joint Ventures shall be reconsidered to avoid any double taxation treatments and also to encourage foreign joint investments.

***Special Purpose Company:*** - although our law does not preclude the conclusion of a joint venture for a specified purpose or for a fixed period, the existing legal framework seems however to ignore the special legal treatments that should be accorded to limited purpose companies as given in other jurisdictions.

***Lack of Uniform Legal Rules for ‘Joint Ventures’:***- joint ventures in Ethiopia are governed by different legal regimes and these regimes exhibit disparities in their rules and requirements while there should be one unified body of law governing ‘joint ventures’ in their different aspects.

***Legal status of Joint Venture Agreement:*** - though the Joint Venture under the Commercial Code framework has given due emphasis to the Joint Venture Agreement (‘Memorandum of Association’) and gives it an enforceable legal status, it seems however that in case of corporate joint ventures in any of other legal forms (i.e. PLC, Share Company, Partnership) do not give such Joint Venture Agreements any legal status. So, whatever the agreement of the joint venturers behind the legal form it seems that under Ethiopian legal frameworks what will be enforceable will be only the memorandum of association or articles of association as registered in the commercial registers. There is no any legal provision which gives legal status to an agreement of shareholders before the formation. This legal loophole might have significant implication in the areas of foreign joint investments.

***Lack of Protection for Minority Shareholders:*** - as we have seen, many jurisdictions give due protection for minority shareholders and such protections are vital for Joint Venture arrangements. Our Commercial Code does not however provide such kinds of protections for minority shareholders, which make the existing business organization legal forms unsuitable for Joint Ventures. Similarly, we do not also find any minority shareholders protections in our

investment laws. These gaps in our law make it difficult for minority joint venture partners to have representation in the management and decision makings of the Joint Venture.

### **6.1.2. Practical Problems Encountered**

The practical problems observed from the above various ‘joint venture; practices can be summarized hereunder:-

1. The issue of lack of legal personality is the first problem to discourage any large scale joint venture investment under Ethiopian current legal framework, which problem requiring a legal framework bestowing legal personality to ‘joint venture’. Even though forming a corporate ‘joint venture’ as per other types of legal forms such as Share Company or private limited company is still a possibility, there are various legal impediments to be faced.
2. The only solid company with well structured corporate governance and other legal controlling and reporting requirements is a share company, but to choose this form of business organization the joint venturers shall be at least five in number. However, this might not be always a possibility to be fulfilled although in the cases we have seen the private joint venturers did so. Besides, the prevailing law should not be an impediment to investment and ventures; it should rather be a flexible and convenient legal vehicle to enable the parties to materialize their objectives.
3. The idea of special purpose company or undertaking (similar to Economic Interest Groups) is not known under Ethiopian legal framework, and as a result in some cases joint venturers might be required to fulfill all the legal requirements set for the establishment of a full-fledged business activity while the objective of the ‘joint venture’ might be to undertake a very small aspect of the partners’ business.
4. For an investor to participate in the ‘joint venture’ offer from privatization authority, it seems that it shall first establish a corporate entity (company) since the investor can not participate as an individual person. There is not such legal requirement in the relevant law, but the practice dictates this. This is a practical problem because in the first place the law does not

preclude individuals from such participation and thus they should not be denied such opportunity. Secondly, even if such individuals can practically establish a company for such participation purpose, but this seems unworkable because the ‘joint venture’ offer usually requires experience of certain years which will not be feasible in this case.

5. Corporate ‘joint ventures’ are being formed having joint venture agreement or memorandum of understanding behind them. However, the enforceability of such agreements in the presence of subsequently signed and registered memorandum of associations and articles of associations is not clear. There is no legal rule that gives recognitions to such agreements and this is one major practical problem.
6. Lack of specific legal frameworks for the protection of minority shareholders might be also a pressing problem in corporate ‘joint ventures’ in Ethiopia because the prevailing rules in the Commercial Code have some rigid and stringent rules and requirements for decision making and participation of shareholders, which marginalize minority shareholders in the management of their company.
7. It is now becoming a common phenomenon to observe that two or more contractors jointly bid for and undertake a particular construction project in Ethiopia. Such joint business is usually undertaken by way of forming a ‘joint venture’ between different contractors but as to whether such joint venture shall take a form of contractual joint venture or corporate joint venture is still a point of contention in the industry. One major reason for such contention is the fact that the venture is intended for a specified project and as being so it would not be feasible to establish a separate corporate joint venture. On the other hand, the contractual joint venture is not also feasible because it will not render the venture a distinct legal status having the capacity to make contracts by its own and also to assume its own liabilities.
8. The separate treatment of taxation for contractual joint ventures seem also one practical problem, because the joint venture as having no legal personality distinct from its shareholders it will not be fair and logical to make it a tax-paying entity. Such separate tax

treatment would deprive of the joint venture partners their rights to set off their losses and expenses in the joint venture against their other incomes.

9. There is also apparent loophole in the institutional and regulatory aspects of joint venture agreements. The current law seems to be more flexible in allowing as many kinds of joint venture agreements without the requirement for special authorization or regulation. This need to be reviewed in light of consumer protection principles and standards.

## 6.2. The Way Forward for ‘Joint Venture’ in Ethiopian Law

Draft revision proposal for the Commercial Code of Ethiopia has been prepared by the Ministry of Justice and has been forwarded to all stakeholders for comments and feedbacks. Unfortunately, this revision did not change any single provision of the Joint Venture part<sup>277</sup>, which the writer of this thesis has found out as a revision not taken in to consideration the practical needs of the business community. The letter sent to the Ministry of Justice from Ethiopian Contractors’ Association is one demonstrative reaction on the draft revision on this respect<sup>278</sup>.

The draft revision was also duly reviewed and commented by the business Community and accordingly the position of the business community on this part of the revision is as follows:-

**“...It is thus important to clarify this matter and make it mandatory that a joint venture agreement be in writing. ...”<sup>279</sup>**

In fact, this recommendation and position paper of the business community tries also to indicate the implication of such written requirement in compromising the secret nature of the business organization but still insists on such specific revision on the ground that such written requirement

<sup>277</sup> “

”, 1994 . . .

223 231.

<sup>278</sup> See Appendix-K.

<sup>279</sup> Addis Ababa Chamber of Commerce & Secretarial Associations, “**Recommendations and Position Paper of the Business Community on the Revision of the Commercial Code of Ethiopia**”, July 2008, P. 21.

will not make the private arrangement of the parties public as a registered one under Article 219<sup>280</sup>.

Developments in French Commercial Code do also indicate the necessity of creating a legal framework for joint venture organizations having their own distinct legal personality. The foundation of Ethiopian business organizations law being mainly the French law, we can reasonable expect a retouch of this part of the law so as to align it with its father law. The position of International Trade community on ‘joint venture’ business organizations might be a forthcoming force for us to review our stand thereon. Ethiopia being in the process of WTO accession, it needs to be ready to align its legal norms to the international standards.

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<sup>280</sup> Ibid, PP. 21-22.

## **CHAPTER-SEVEN: CONCLUSIONS AND RECOMMENDATIONS**

### **7.1 Conclusions**

In terms of practical implementation, we can assertively draw a conclusion that ‘joint venture’ in Ethiopia is not a special type of business organization per se. We have seen that the joint venture as envisaged in the 1960 Commercial Code has no official recordings to show its frequency and utility for the business people. ‘Joint venture’ as per other laws, example the investment law, is not as flexible as possible with regards to the legal forms it should take. So, despite the fact that the parties may intend to create a joint venture in its technical sense of the term (i.e. only for limited purpose or project), under the existing legal framework they will be however forced to establish either a share company or a private limited company which do not have the necessary legal frameworks suitable for such arrangements. So, joint venture in its broader sense of the term and having its own distinct features is not fully accommodated under Ethiopian laws, which legal loophole requiring the revision of the existing law.

Lack of unified and single legal framework for joint venture is also one problem discovered by this thesis paper, and due to such legal gap in practice different Government authorities set different requirements for the formation of ‘joint ventures’ in its broader sense of the term. Just to summarize, in some areas it is necessary to have an authenticated joint venture agreement while the law does not require but rather allows the secrecy of such arrangement. In the investment sector, when it comes to ‘joint venture’ investment with the Government , the practice dictates that such ‘joint venture’ shall be in the form of share company while there is no such legal requirement in the specific law. The privatization process and practice also dictates such specific legal form, but what is worse here is that the practice further requires that the joint venture partner shall be a corporate body (i.e. a company), which practice outrageously exclude individual partners who are not excluded by the law.

The existing legal frameworks pertinent to ‘joint ventures’ are not also sufficient enough to accommodate some specific issues related to ‘joint ventures’. For instance, the legal status of joint venture agreement in case of corporate joint venture will be disputable under Ethiopian law for the main reason that memorandum of associations and articles of associations are the statutory instruments recognized by the Commercial Code. As to whether the joint venture agreement or memorandum of understanding of the partners will be enforceable subsequent to formation of the company is open to debate. The fact that representation and participation of partners in the management of the business organization is subject to majority decision process as enshrined in the commercial code make these rules unsuitable for ‘joint venture’ companies where the partners by nature desire to be represented and participate in the management of the company.

## **7.2 Recommendations**

Based on the above conclusions and with a view to address the aforementioned legal loopholes and drawbacks, the writer of this paper finally recommends the following pragmatic legal framework changes and revisions to be made in the existing laws:-

- 1- We need to have a single unified legal framework for ‘joint ventures’ wherein we can have different types of joint ventures avoiding the different rules and practices being undertaken in various areas. The investment law should not preclude contractual joint ventures, which might not need registration and legal personality, but are still possible options for joint investments. However, other necessary legal requirements can be put in place for their investment permit and fiscal obligation purposes. The privatization law should also be as flexible as possible when it comes to the Joint Venture modality legal form, i.e. it should not be necessarily a share company provided that all other stringent legal frameworks for solid corporate governance are put in place.
- 2- The ‘joint venture’ concept as enshrined in the Commercial Code should be revised to omit the idea of ‘secrecy’ as one legal element so as to make the joint venture arrangement as transparent as possible for all practical and legal purposes. So, requirement of written form for such type of business organization is highly recommended.

- 3- A corporate ‘joint venture’ with a legal personality should also be introduced in our legal framework with a flexible legal requirements for its formations different from share company requirements, but with all the necessary solid corporate governance structures and protective clauses for minority shareholders to ensure their right for joint management. Such corporate Joint Venture shall also be a limited liability joint venture to be established only for limited or specified projects.
- 4- A legal framework shall be designed to give due legal effect and recognition for the enforceability of pre-formation Joint Venture agreements after the formation of a specific type of Joint Venture Company. The case of the Joint Venture Establishment Proclamation no. 235/1983 can be one good demonstration to prove that a separate legal framework for joint ventures can be possible without being trapped by some formation requirements.
- 5- The legal rules of taxation of contractual joint ventures shall be made as clear as possible so as to avoid the double standard prevailing in the practice. Besides, the separate taxation of contractual joint ventures as a legal entity should be rectified so as to align the practice in line with the concept as enshrined in the laws.
- 6- In some circumstances, for example for non-full-function –corporate ‘Joint Ventures’ or for sort of Economic Interest Group organizations, our tax law should be revisited to accommodate tax liability issues to be raised in case of ‘joint venture’ companies, particularly flexible tax structure should be put in place to enable corporate joint venturers to pay their own profit taxes independently to avoid double taxation (by way of dividend income tax as well as via profit tax).
- 7- Regulatory and institutional legal frameworks should be put in place to monitor and regulate the formation and execution of joint ventures with a view to minimize the anti-competitive effects of such agreements.

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