

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



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

A COMPARATIVE APPROACH

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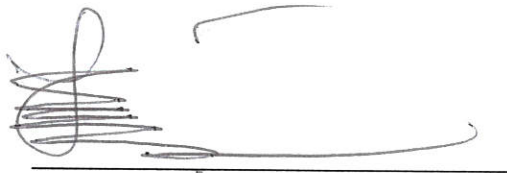
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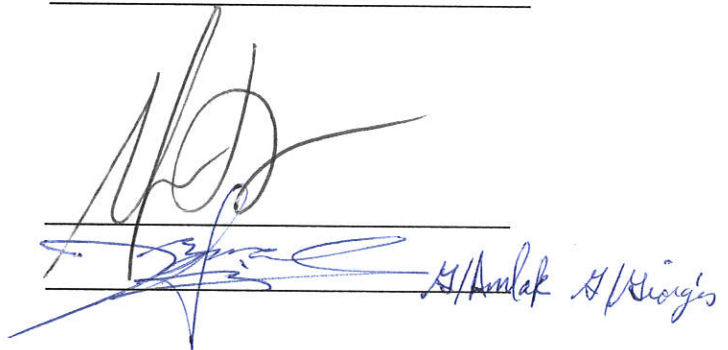
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P R E F A C E

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.

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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.’¹ Similarly, West’s Encyclopedia of American Law considers Joint Venture as a “business structure formed by two or more parties for a specific purpose.”² 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.”³ 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.”⁴ 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.”⁵ He further explained that Joint Ventures “are agreements between parties or firms for a particular purpose or venture”⁶. In our Commercial Code, ‘Joint Venture’ is also defined as “an agreement between

¹ Bryan A. Garner (ed.), “**Black’s Law Dictionary**”, (7th 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.

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

³ Ibid.

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

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

⁶ Ibid.

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

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....”⁸

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.”⁹ 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

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

⁸ Ibid.

⁹ 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.”¹⁰

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 law¹¹. 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.”¹²

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.”¹³ 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.

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

¹¹ 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.

¹² Irwin J. Schiffres, *supra* at note-9, P.20.

¹³ *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 is¹⁴:-

- 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.”¹⁵ 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.”¹⁶ 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 decisions¹⁷. 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**

¹⁴ 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 emphasis on the joint management as well as on the specificity of purpose as emphasized for ‘joint venture’ herein.

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

¹⁶ Supra at note-2.

¹⁷ 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.”¹⁸

It was in late 1980's, joint ventures in USA increasingly expanded in the service industries as businesses looked for new and competitive strategies¹⁹. 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 example²⁰.

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 practice²¹. 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,....”²²

¹⁸ Ibid.

¹⁹ Supra at note-2.

²⁰ Supra at note-4, P. 162.

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

²² 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 law²³. 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 legislation²⁴. 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)²⁵. 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 companies²⁶. 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

²³ Ibid, P. 108.

²⁴ 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.

²⁵ Ibid, P.54.

²⁶ 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 companies²⁷.

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...²⁸ 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.

²⁷ 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.

²⁸ 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 investors²⁹. 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 “ቅንጅት”³⁰, rather than “የሽርክ ማኅበር” 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 dollars³¹. According to this proclamation, the equity share of the domestic partners in a joint investment shall not be less than 27%,³² 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 Code³³. 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 Code³⁴.

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

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

³⁰ Ibid, Article-5.

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

³² Ibid, Article 2(2)

³³ Ibid, Article 10(2).

³⁴ 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 adventure³⁵. 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 law³⁶. 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.”³⁷ 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 arrangement³⁸.

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.”³⁹ Some sources assimilate this arrangement with joint venture⁴⁰, and it is also

³⁵ Supra at note-14, P. 24.

³⁶ Supra at note-6, Article 228(1).

³⁷ Supra at note-1.

³⁸ 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.

³⁹ 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 agreement⁴¹. 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’ ...”⁴²

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 area⁴³. 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.”⁴⁴

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...

⁴⁰ Ibid.

⁴¹ 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.

⁴² Ibid, P. 127.

⁴³ Supra at note-1.

⁴⁴ 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....”⁴⁵

Though Henry G. Henn and John R. Alexander try to emphasize the difference between Joint Venture and partnership⁴⁶, Joint Venture is however usually viewed by some other literatures and scholars as a form or variety of partnership – specifically, a form of general partnership⁴⁷. 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.⁴⁸ 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.**

⁴⁵ Henry G. Henn & John R. Alexander, “Laws of Corporations” (3rd 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).

⁴⁶ Henry G. Henn & John R. Alexander, Ibid, P. 107.

⁴⁷ Supra at note-4, P. 161

⁴⁸ 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 purposes⁴⁹.**

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 losses⁵⁰.**

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”⁵¹. 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”⁵².

Our Commercial Code has also viewed Joint Venture as a partnership⁵³ 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:-

⁴⁹ Ibid, PP. 162-163

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

⁵¹ Ibid.

⁵² Ibid.

⁵³ 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."⁵⁴

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 Code⁵⁵. 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."**⁵⁶

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 partnership⁵⁷.

⁵⁴ Supra at note-23, P.55.

⁵⁵ See the discussion on 'Societe en Participation', Infra Section 4.1.

⁵⁶ Supra at note-23, P.55.

⁵⁷ 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”⁵⁸ 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.”⁵⁹ 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.”⁶⁰

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.”⁶¹

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.”⁶² 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.”⁶³ By this ‘fiduciary duty’ it

⁵⁸ 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).

⁵⁹ Goldberg, “Introduction to the Commercial Code”, Unpublished, Law Faculty, P. 7.

⁶⁰ Supra at note-23, P.55.

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

⁶² Ibid, P. 276 (*emphasis added*)

⁶³ 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.”⁶⁴

Informality: - Under normal circumstances, “no formality is usually required” to establish a Joint Venture⁶⁵. 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 law⁶⁶. 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...”⁶⁷ 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 Winship⁶⁸.

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:-

⁶⁴ Ibid, P. 107.

⁶⁵ Ibid, P. 105.

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

⁶⁷ Supra at note-5.

⁶⁸ 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 operation⁶⁹.

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 parties⁷⁰.

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 entity⁷¹.

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.”⁷² 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.”⁷³

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

⁶⁹ Peter Naylor, “Business Law in the Global Marketplace”, (2006), Butterworth-Heinemann, Oxford, UK, P. 181.

⁷⁰ Ibid, P. 182.

⁷¹ Ibid.

⁷² Supra at note-59.

⁷³ Ibid.

sharing or the creation of a separate entity.”⁷⁴ 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’⁷⁵ or ‘cooperative agreement’⁷⁶, usually used for “shared resource agreements, pilot projects, Research and Development collaborations, joint production arrangements, and network alliances.”⁷⁷ 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.”⁷⁸ 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.”⁷⁹ 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...⁸⁰

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 agreement⁸¹.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Supra at note-2.

⁷⁷ Supra at note-59.

⁷⁸ Supra at note-2.

⁷⁹ Supra at note-38.

⁸⁰ Ibid.

⁸¹ 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 businesses⁸².

“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 them⁸³.

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”⁸⁴, and they concluded that Joint Venture in literal sense can be a corporation, a limited liability company, a partnership, or any other legal structure⁸⁵.

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,

⁸² Supra at note-61, P. 378

⁸³ Ibid.

⁸⁴ Supra at note-38.

⁸⁵ 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 treatment⁸⁶.

Having said the above general remarks, we can now see the following merits of Joint Venture⁸⁷:-

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 demerits⁸⁸:-

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

⁸⁶ Supra at note-61, P. 41.

⁸⁷ 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.

⁸⁸ 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 own⁸⁹:-

- Limited liability,
- Existence of detailed legal framework regulating companies which provides a degree of certainty regarding the rights and obligations of the participants,
- Wider options for raising finance, such as issuing shares, borrow in its own name, etc...,
- 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 Nayler⁹⁰:-

- Financial information of the company shall be given to government and to the public, limiting the degree of privacy of the parties,
- 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
- 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.

⁸⁹ Supra at note-69, P. 183.

⁹⁰ 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 development⁹¹. 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 market⁹².

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 endeavor⁹³.

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

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

⁹² Ibid

⁹³ 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 change⁹⁴.

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;...”⁹⁵

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.”⁹⁶

⁹⁴ Supra at note-61, PP. 6-7.

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

⁹⁶ 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”⁹⁷. 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.”⁹⁸ 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 profit⁹⁹.

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 price¹⁰⁰.

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

⁹⁷ Supra at note-69, P. 180.

⁹⁸ Supra at note-61, P. 3.

⁹⁹ Supra at note-4, P. 162

¹⁰⁰ Ibid, P. 5.

a vehicle for an ongoing co-operative relationship of indefinite duration¹⁰¹. 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 labor¹⁰². Existence of joint venture as one alternative business organization arrangement will have an important legal significance to business people in materializing their business objectives.



¹⁰¹ Supra at note-69, P. 180

¹⁰² 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 existence¹⁰³. In India, Joint Venture companies are the preferred forms of corporate investment, however there is no separate law for joint ventures¹⁰⁴. There are basically three different modes of Joint Ventures in India¹⁰⁵, and many Joint Ventures are formed as public limited companies because of the advantages of limited liability¹⁰⁶.

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,

¹⁰³ Supra at note-2.

¹⁰⁴ Ibid.

¹⁰⁵ 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.

¹⁰⁶ 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)¹⁰⁷. 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 provided¹⁰⁸. Apart from the afore-mentioned business organizations, the French Commercial Code also contains a unique economic group known as *Groupeement D’Interet Economique (GIE)*¹⁰⁹. This is a special type of entity which is introduced in French Company law in 1967¹¹⁰. In GIE business undertakings group themselves for certain limited purposes while retaining their individuality and autonomy in other aspects¹¹¹. 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.”¹¹²

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 persons¹¹³. Apart from these, the GIE has also some other advantages such as formal requirements of formation (i.e. its constituting statutes

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

¹⁰⁸ Ibid, Article L-210-6.

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

¹¹⁰ 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.

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

¹¹² 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)

¹¹³ 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)¹¹⁴. 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)*¹¹⁵. *Societe en participation* is also called 'silent partnership'¹¹⁶ 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'¹¹⁷. The French law provides that 'its existence and membership must not be disclosed to third parties by the partners.'¹¹⁸ 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...¹¹⁹ 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 authorities¹²⁰. It seems that in France the importance of SP has diminished little with the introduction of GIE (Groupement D'Interet Economique)¹²¹.

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

¹¹⁴ J.P. Le Gall, supra at note-111, P. 31-35

¹¹⁵ 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.

¹¹⁶ J.P. Le Gall, supra at note-111, P. 15.

¹¹⁷ Ibid.

¹¹⁸ Id.

¹¹⁹ Ibid, PP. 16-17

¹²⁰ 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.

¹²¹ Ibid, P. 16

flexibility.”¹²² 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.”¹²³

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 companies¹²⁴. 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.”¹²⁵

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 Code¹²⁶. 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 form¹²⁷. 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.”¹²⁸ 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 entity¹²⁹. However, when the participants to a joint venture are Romanian legal

¹²² 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/>

¹²³ Ibid, P. 24

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

¹²⁵ Ibid.

¹²⁶ Supra at note-38.

¹²⁷ Ibid.

¹²⁸ Id.

¹²⁹ 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 authority¹³⁰.

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 business¹³¹. Regarding the tax liability, a Joint Venture under the Cyprus law has separate tax liability¹³². 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."¹³³ 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 law¹³⁴.

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 capital¹³⁵. According to the Chinese law, the Joint Venture has two legal documents, i.e. the Joint Venture

¹³⁰ Id.

¹³¹ Infra at note-207.

¹³² Ibid.

¹³³ Id.

¹³⁴ Id.

¹³⁵ 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 precedence¹³⁶.

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 permissions¹³⁷ 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 directly¹³⁸. 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 arrangement¹³⁹.

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:-

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

¹³⁶ Ibid.

¹³⁷ 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....

¹³⁸ Id.

¹³⁹ Id.

- 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 publicity¹⁴⁰. This Joint Venture in the OHADA instrument is almost identical to the Ethiopian Joint Venture in its most aspects¹⁴¹. 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 personality¹⁴². 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 liable¹⁴³.

¹⁴⁰ 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.

¹⁴¹ Ibid, BOOK-5.

¹⁴² Ibid, BOOK-7.

¹⁴³ 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 management¹⁴⁴. 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.”¹⁴⁵ 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 company¹⁴⁶.

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.

¹⁴⁴ Ibid, P.3.

¹⁴⁵ Ibid, P.2.

¹⁴⁶ 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”¹⁴⁷, 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:-

- **Secrecy:-** the joint venture should not be known to third parties¹⁴⁸;
- **Informality:-** no formal requirements for the validity of a joint venture formation, i.e. need not be in writing, no registration, or no publicity¹⁴⁹;
- **No legal personality** of its own¹⁵⁰; and
- **No name** of its own: partners deal with third parties in their own names¹⁵¹.

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

¹⁴⁷ Supra at note-6, Article 271.

¹⁴⁸ Ibid, Article 272(1)

¹⁴⁹ Ibid, Article 272(2).

¹⁵⁰ Ibid, Article 272(3).

¹⁵¹ 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 “አሽመድ” 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 “አሽመድ” in the major Amharic dictionaries.¹⁵² In Desta Teklewold’s Dictionary, there is a word ‘ሸመድ’, its meaning being similar to ‘አሽመድ’, which is defined as “ተዘዋዋሪ ነገር፣ አግባብ፣ ምፃት፣ ለበጣ፣ ወሻን ሰድቦ ሰወን እንደመሰደብ ያለ፡፡” (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 “ከሣቴ ብርሃን ተሰማ የዐማርኛ መዝገበ ቃላት” we find an Amharic term “አሽመድ ንግድ”, which is defined as “ኸለት በኸለት፣ ወይም በሽሪክነት፣ በአንድነት፣ በአጋርነት የሚገደው ንግድ ‘አሽመድ ንግድ’ ይባላል፡፡”

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 by the plaintiff says ‘the amount’ but is not completed.” However, the appellate court reversed

¹⁵² The four dictionaries referred to herein are: Desta Teklewold’s “ዐዲስ ያሙርኛ መዝገበ ቃላት”, (1962ዓ.ም.፣ አርቲስቲክ ማተሚያ ቤት፣ አዲስ አበባ፡፡); Kidanewold Kifle’s “መፅሐፈ ሰዋሰው ወግስ ወመዝገበ ቃላት ሐዲስ”, (Publisher Desta Teklewold, Artistic Printing Press, 1948E.C, Addis Ababa); Tesema Habtemichael’s “ከሣቴ ብርሃን ተሰማ የዐማርኛ መዝገበ ቃላት”, (Artistic Printing Press, Addis Ababa, 1951E.C.); and Ethiopian Languages Studies & Research Center’s “አሙርኛ መዝገበ ቃላት” (Publisher Addis Ababa University, Artistic Printing Press, Addis Ababa, 1993E.C.).

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:-

- “Joint venture is an agreement between partners *on terms mutually agreed...*”¹⁵³;
- 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 partners¹⁵⁴;
- 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 consensus¹⁵⁵;
- 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 publicized¹⁵⁶;
- The extent of non-manager partners’ liabilities is even left to be fixed by the agreement of the partners¹⁵⁷, except for the case of liability of partners who participate in management where their liability will be joint and several by virtue of the law¹⁵⁸;

¹⁵³ Supra at note-6, Article 271.

¹⁵⁴ Ibid, Article 273.

¹⁵⁵ Ibid, Article 274(2).

¹⁵⁶ Ibid, Article 275(4).

¹⁵⁷ Ibid, Article 276(2).

¹⁵⁸ 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).

- The partners can even agree on the continuity/perpetuity of the Joint Venture despite the death, bankruptcy, or incapacity of a partner¹⁵⁹;
- Partners can also agree to empower the manager to dissolve the Joint Venture in their memorandum of association¹⁶⁰; and
- Partners are also allowed to agree on the expulsion of a partner¹⁶¹.

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.”¹⁶²

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”¹⁶³. As to what is ‘an actual partnership’ is not hinted anywhere in the law.

¹⁵⁹ Ibid, Article 278(1)(h).

¹⁶⁰ Ibid, Article 278(1)(i).

¹⁶¹ Ibid, Article 279(2).

¹⁶² Supra at note-23, P.57.

¹⁶³ 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 lose 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 dissolution¹⁶⁴. 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."¹⁶⁵

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

¹⁶⁴ 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."

¹⁶⁵ 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 calimed 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 fact¹⁶⁶. 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.

¹⁶⁶ 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 2008¹⁶⁷. 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 arrangement¹⁶⁸. 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

¹⁶⁷ 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.

¹⁶⁸ 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 arrangement¹⁶⁹. 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 section¹⁷⁰.

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

¹⁶⁹ See Appendix-K, Letter Written by the Ethiopian Contractors’ Association to the Ministry of Justice, dated 26/06/2001, Ref. no. አ.ኮ.ሥተ.ማ/ 0056/2001.

¹⁷⁰ 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 purpose¹⁷¹ 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.

¹⁷¹ 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 bank¹⁷². 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 Government¹⁷³. 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 “ቅንጅት” rather than the term “አሸመድ ማከበር” as used in the Commercial Code Amharic version.

¹⁷² 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.

¹⁷³ Investment Proclamation no. 280/2002, Federal Negarit Gazeta, 8th 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.

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 law¹⁷⁴. 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 cases¹⁷⁵. 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

¹⁷⁴ Ibid, Article 10(2).

¹⁷⁵ 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 investors¹⁷⁶. 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

¹⁷⁶ 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 body¹⁷⁷. 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 companies¹⁷⁸. 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

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

¹⁷⁸ Ibid.

Ethiopian Airlines¹⁷⁹. 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 privatized¹⁸⁰. 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*.”¹⁸¹ 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 “ከመንግስት ጋር በቅንጅት ኢንቨስት ለማድረግ”.

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

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

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

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

and directions of the country¹⁸². 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 Company¹⁸³.

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%¹⁸⁴.

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

¹⁸³ 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.

¹⁸⁴ 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 Agreement¹⁸⁵. 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 body¹⁸⁶, 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 plan¹⁸⁷. 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.

¹⁸⁵ Ibid, See Article 7.4.

¹⁸⁶ See Appendix-O.

¹⁸⁷ 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 them¹⁸⁸. 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

¹⁸⁸ 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...”¹⁸⁹

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.”¹⁹⁰

¹⁸⁹ Source: Legal Directorate office of Ministry of Trade.

¹⁹⁰ 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 ^{to make} 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 capital¹⁹¹. 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

¹⁹¹ 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.”¹⁹²**

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

¹⁹² 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 activity¹⁹³. 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 persons¹⁹⁴, 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.

¹⁹³ Commercial Registration & Business Licensing Proclamation no. 686/2010, Negarit Gazeta, 16th 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.”

¹⁹⁴ 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.”¹⁹⁵ 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 company¹⁹⁶. 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 position¹⁹⁷.

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 several¹⁹⁸. 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 contributions¹⁹⁹. 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 contributions²⁰⁰.

¹⁹⁵ Supra at note-38.

¹⁹⁶ Ibid.

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

¹⁹⁸ Articles 255(3) and 294 of the Commercial Code.

¹⁹⁹ Article 296 of the Commercial Code.

²⁰⁰ 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 association²⁰¹, but the liability of the manager to third parties is full and unlimited²⁰². However, partners who take part in the management of the business shall be jointly and severally liable as between themselves and with the manager²⁰³. 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.”²⁰⁴ 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.”²⁰⁵

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 jurisdictions²⁰⁶.

²⁰¹ Supra at note-6, Article 276(2).

²⁰² Ibid, Article 276(1).

²⁰³ Ibid, Article 276(4).

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

²⁰⁵ 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).

²⁰⁶ 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.”²⁰⁷ 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 partners²⁰⁸.

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 taxation²⁰⁹. However, in some jurisdictions like partnerships Joint Ventures may elect to be taxed as corporations²¹⁰. Usually, however, all of the income is passed through to the Joint Ventures,

²⁰⁷ Demetris Loizides, “Cyprus Joint Ventures: Flexibility for Russia, CIS and India”, available at www.worldcommercereview.com, visited on December 15, 2009.

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

²⁰⁹ *Supra* at note-4, P. 2.

²¹⁰ *Ibid*, P. 163

who then declare their respective shares of the income (or losses) on their individual tax returns²¹¹.

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 effects²¹². 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 participants²¹³. 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 losses²¹⁴. According to Ian Hewitt, this partnership Joint Venture taxation approach is usually the preferred vehicle due to its tax efficiency on the following points²¹⁵:-

- 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
- 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 taxation²¹⁶.

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

²¹¹ Ibid.

²¹² Supra at note-61, PP. 349-352.

²¹³ Ibid, P. 351.

²¹⁴ Ibid.

²¹⁵ Ibid, P. 352.

²¹⁶ 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...²¹⁷

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

²¹⁷ Ibid, PP. 353-354

practice submit their agreements to the tax authority²¹⁸. 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 hand²¹⁹. 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 venture²²⁰. 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 purpose²²¹. 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?

²¹⁸ 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.

²¹⁹ Ibid.

²²⁰ Source: Tax Audit Process Co-ordinator Office at Large Tax Payers' Office in Federal Inland Revenue Authority.

²²¹ 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.”²²² 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.”²²³

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 process²²⁴. 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 welfare²²⁵. 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 systems²²⁶.

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:-

²²² Ibid, P. 378.

²²³ Ibid.

²²⁴ Supra at note-91, P. 979.

²²⁵ Ibid.

²²⁶ 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.”²²⁷**

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.”²²⁸ 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*²²⁹, 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.’²³⁰

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).”²³¹

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.”²³² 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

²²⁷ Ibid, P. 983

²²⁸ Ibid.

²²⁹ Ibid, P. 984

²³⁰ Ibid.

²³¹ Ibid, P. 985

²³² 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.”²³³

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.”²³⁴

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.”²³⁵ 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.”²³⁶

²³³ Ibid, P. 986

²³⁴ 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)

²³⁵ Supra at note-61, P. 390

²³⁶ 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.”²³⁷

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 4 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.

²³⁷ Article 6(1) of the Trade Practice Proclamation no. 329/2003, *Federal Negarit Gazette*, 9th 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 far²³⁸, 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 “ተመሳጥሮ መጫረት”²³⁹ 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

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

²³⁹ Trade Practices and Consumer Protection Proclamation no. 685/2010, Negarit Gazetta, th16 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 “በሽርክና መጫረት” to “ተመሳጥሮ መጫረት” is to avoid any confusion with an already existing partnership concept in the law. (Source: the Council of Ministers’ 3rd Election Period 107th Regular Meeting Minute). This implies that joint tendering in partnership arrangement might not be considered as ‘collusive’ for the purpose of the law.

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 transferred²⁴⁰. However, it is common practice that “virtually all Joint Ventures do contain restrictions on transfer.”²⁴¹ 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 conditions²⁴²:-

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.

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.

²⁴⁰ Supra at note 61-, P. 275.

²⁴¹ Ibid, P. 276.

²⁴² Ibid, PP. 276-290.

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 Venture²⁴³:-

- 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 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

²⁴³ Ibid, PP. 300-301.

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...."²⁴⁴ 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 management²⁴⁵:-

- 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?
- 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

²⁴⁴ Supra at note-23, P.57.

²⁴⁵ Supra at note-61, PP. 182-185

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 form²⁴⁶.

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 management²⁴⁷. This is because of the very fact that decisions of shareholders in private limited companies and share companies are to be made based on shareholders votes, which are also based on the number of shares²⁴⁸. Moreover, some major and decisive measures and decisions are also to be made by majority of members representing a certain % of the capital²⁴⁹.

²⁴⁶ Ibid, P. 185

²⁴⁷ 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.

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

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

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."²⁵⁰ 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."²⁵¹

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."²⁵² It is, however, admitted that these protections rarely protect against simple bad management by the majority shareholder or its nominee directors²⁵³. 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."²⁵⁴ 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 Exit²⁵⁵. The issue whether such contractual protections are enforceable or not still remain controversial, the answer to which varying from jurisdictions to jurisdictions.

²⁵⁰ Supra at note-61, P. 211

²⁵¹ Ibid.

²⁵² Id.

²⁵³ Id.

²⁵⁴ Ibid, P. 212

²⁵⁵ Ibid, P. 213

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’²⁵⁶.

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 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

²⁵⁶ Ibid.

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 nature²⁵⁷. 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.”²⁵⁸ 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 employees of the Joint Venture Company or (2) remain the employees of their previous employer but will be seconded to work for the Joint Venture²⁵⁹. In connection with Corporate

²⁵⁷ Ibid.

²⁵⁸ Ibid, P. 436

²⁵⁹ Ibid.

Joint Venture there might be raised a lot of employment issues, among which are the followings²⁶⁰:-

- 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 contract²⁶¹. With a similar fashion to this, the Privatization Proclamation does also oblige an investor who purchases a public enterprise to 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

²⁶⁰ Ibid, P. 437

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

the employees of the enterprise under sale²⁶². 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.”²⁶³

For example, in some jurisdictions Joint Ventures are generally governed by state partnership and contract law²⁶⁴. 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.”²⁶⁵ 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.”²⁶⁶ In some other jurisdictions, courts generally apply partnership law to joint ventures²⁶⁷.

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

²⁶³ Supra at note-19, P. 111

²⁶⁴ Supra at note-4, P. 162

²⁶⁵ Supra at note-69, P. 211

²⁶⁶ Ibid, P. 212

²⁶⁷ 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 reasons²⁶⁸. 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.”²⁶⁹ 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’²⁷⁰.

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.

²⁶⁸ Supra at note-2.

²⁶⁹ Ibid.

²⁷⁰ 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 laws²⁷¹. 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 law²⁷².

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} Agreement under Appendix-J, 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 Venture), can

²⁷¹ Id.

²⁷² Demetris Loizides, Supra at note-114.

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' agreement²⁷³. 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."²⁷⁴ 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)²⁷⁵.

According to Ian Hewitt²⁷⁶, 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/Articles of Association would impose obligations on the Joint Venture Company, which are directly enforceable against the Joint Venture Company and its directors.

²⁷³ Supra at note-61, P. 225

²⁷⁴ Ibid, P. 296

²⁷⁵ Ibid, P. 225

²⁷⁶ Ibid, PP. 295-296

- 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 part²⁷⁷, 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 respect²⁷⁸.

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. ...”²⁷⁹**

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 will not make the private arrangement of the parties public as a registered one under Article 219²⁸⁰.

²⁷⁷ “የተሻሻለው የኢትዮጵያ ንግድ ሕግ የአጭር ሪፖርት”, የካቲት 1994ዓ.ም.፣ የፍትሕ ሚኒስቴር፣ ከአንቀፅ 223 እስከ 231.

²⁷⁸ See Appendix-K.

²⁷⁹ 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.

²⁸⁰ Ibid, PP. 21-22.

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.

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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Appendix

A

COMMERCIAL CODE

case specified in Article L.237-10, file the accounts with the court registry or request the approval of these by the courts, this shall be punished by a prison sentence of six months and a fine of 9,000 euros.

Article L247-7

(Law No 2001-420 of 15 May 2001 Article 122 (2) Official Gazette of 16 May 2001)

(Law No 2003-706 of 1 August 2003 Article 134 (I) Official Gazette of 2 August 2003)

The following omissions on the part of a liquidator called upon to liquidate a company pursuant to the provisions of Articles L. 237-14 to L. 237-31 give rise to application of the penalties provided for in Article L. 247-6:

1. Failure to submit a report, within six months of being appointed, on the assets and liabilities situation and the ongoing liquidation operations, and failure to apply for the authorisations required to complete them;

2. Failure to draw up annual accounts for inventorying purposes and likewise a written report giving details of the liquidation operations carried out in the previous financial year within three months of the close of each financial year;

3. (deleted);

4. and 5. Paragraphs cancelled;

6. Failure to deposit the sums allocated for distribution among the partners and the creditors in an account opened with a lending institution in the name of the company in liquidation within fifteen days of the decision to effect a distribution, or failure to deposit with the Caisse des dépôts et consignations any sums allocated to creditors or to partners which they have not claimed.

Article L247-8

If a liquidator, in bad faith:

1° Uses the property or credit of the company being wound up in a way which he knows is contrary to the interests of this company, for personal purposes or to encourage another company or undertaking in which he is directly or indirectly involved;

2° Assigns all or part of the assets of the company being wound up contrary to the provisions of Articles L.237-6 and L.237-7,

this shall be punished by a prison sentence of five years and a fine of 9,000 euros.

SECTION IV

Offences relating to public limited companies with a management and a supervisory board

Article L247-9

Article L247-9

The penalties specified by Articles L.247-1 to L.247-4 in respect of the chairmen, managing directors and directors of public limited companies shall apply, according to their respective powers, to the members of the management and to the members of the supervisory board of the public limited companies governed by the provisions of Articles L.225-57 to L.225-93.

SECTION V

Offences relating to companies with variable capital

Article L247-10

Article L247-10

If the chairman, manager or, in general, the director of a company using the option specified in Article L.231-1 does not mention this circumstance by adding the words "à capital variable" (with variable capital) to all instruments and documents originating from the company and intended for third parties, this shall be punished by a fine of 3,750 euros.

CHAPTER VIII

Provisions relating to the deputy managing directors of public limited companies

Article L248-1

Article L248-1

(Act No. 2001-420 of 15 May 2001 Art. 107 5 Official Journal of 16 May 2001)

(Act No. 2005-842 of 26 July 2005 Art. 11 II Official Journal of 27 July 2005)

The provisions of the present Part applicable to the general managers of limited companies or European companies are applicable, commensurate with their remits, to chief executive officers.

TITLE V

Economic interest groupings

Articles L251-1 to L252-13

CHAPTER I

Economic interest grouping governed by French law

Articles L251-1 to L251-23

Article L251-1

Two or more natural or legal persons may between them form an economic interest grouping for a fixed term.

The aim of the grouping shall be to facilitate or develop the economic activity of its members and to improve or increase the results of this activity. The aim is not to make profits for the grouping.

The activity of the grouping must be linked to the economic activity of its members and may not be additional to this.

COMMERCIAL CODE

Article L251-2

Persons practising a profession subject to rules established by acts or regulations or whose title is protected may form an economic interest grouping or participate in this.

Article L251-3

The economic interest grouping may be formed without any capital.

The rights of its members may not be represented by negotiable securities. Any clause to the contrary shall be deemed to be unwritten.

Article L251-4

The economic interest grouping shall enjoy legal personality and full capacity from the date of its registration in the commercial and companies register, without this registration leading to a presumption of commerciality of the grouping. The economic interest grouping whose aim is commercial may usually and principally carry out all commercial instruments on its own behalf. It may hold a commercial lease.

Persons who have acted in the name of an economic interest grouping being formed, before it has begun to enjoy legal personality, shall be bound, jointly, severally and indefinitely, by the acts thus carried out, unless the grouping, after having been duly formed and registered, assumes the commitments made. These commitments shall then be deemed to have been made from the start by the grouping.

Article L251-5

(Law No 2003-7 of 3 January 2003 Article 50 (II) Official Gazette of 4 January 2003)

The nullity of the economic interest group and of its actions and deliberations can only result from a violation of the imperative provisions of the present Chapter, or from one of the causes of nullity of contracts in general.

An action for voidance of contract lapses if the cause of nullity has ceased to exist on the day on which the court rules on the merits in the first instance, unless that nullity is founded on the unlawfulness of the group's object.

Articles 1844-12 to 1844-17 of the Civil Code are applicable to economic interest groups.

Article L251-6

Members of the grouping shall be liable for the debts of the latter in respect of their own assets. However, a new member may, if the agreement allows this, be exonerated from the debts arising prior to their entry into the grouping. The exoneration decision must be published. Members shall be jointly and severally liable, unless otherwise agreed with the third party to the agreement.

Creditors of the grouping may bring proceedings against a member for the payment of debts only after having sent formal notice to the grouping by extra-judicial means without this producing any effect.

Article L251-7

The economic interest grouping may issue bonds, in accordance with the general conditions of issue of these securities by companies, if it is itself composed exclusively of companies meeting the conditions specified by this book for the issue of bonds.

The economic interest grouping may also issue bonds, in accordance with the general conditions of issue of these securities specified by Act No 698 of 11 July 1985 authorising the issue of securities by certain associations, if it is itself composed exclusively of associations meeting the conditions specified by this Act for the issue of bonds.

Article L251-8

I.- The economic interest grouping agreement shall determine the organisation of the grouping, subject to the provisions of this chapter. It shall be prepared in writing and published according to the terms fixed by a Conseil d'Etat decree.

II.- The agreement shall contain the following information in particular:

- 1° The name of the grouping;
- 2° The surnames, company names or business names, legal form, address of the domicile or registered office and, if applicable, identification number of each of the members of the grouping, and, where applicable, the town where the registry is situated with which it is registered or the town where the chamber of trade is situated with which it is registered;
- 3° The term for which the grouping is formed;
- 4° The object of the grouping;
- 5° The address of the grouping's registered office.

III.- All amendments to the agreement shall be prepared and published in accordance with the same conditions as the agreement itself. These shall be binding on third parties only from the date of this publication.

Article L251-9

The grouping, during its existence, may accept new members in accordance with the conditions fixed by the formation agreement.

Any member of the grouping may withdraw in accordance with the conditions specified by the agreement, provided that they have fulfilled their obligations.

Article L251-10

The meeting of members of the grouping shall be authorised to take all decisions, including on early dissolution or extension, in accordance with the conditions determined by the agreement. This agreement may specify that all decisions, or some of these, shall be taken in accordance with the quorum and majority conditions which it establishes.

COMMERCIAL CODE

If the agreement is silent on this, decisions shall be taken unanimously.

The agreement may also assign to each member a number of votes different from that assigned to the other members. Failing this, each member shall have one vote.

The meeting must meet at the request of at least one-quarter of the members of the grouping.

Article L251-11

The grouping shall be administered by one or more persons. A legal person may be appointed as administrator of the grouping provided that this person appoints a permanent representative who shall be subject to the same civil and criminal liabilities as if they were administrator in their own name. The administrator or administrators of the grouping, and the permanent representative of the legal person appointed as administrator, shall be individually or jointly and severally liable, as applicable, towards the grouping of third parties, for breaches of the acts and regulations applying to groupings, for the violation of the grouping rules and for their management errors. If several administrators have cooperated in the same acts, the court shall determine the contribution of each one to the compensation for the damage.

Subject to this reservation, the grouping agreement or, failing this, the meeting of members shall freely organise the administration of the grouping and shall appoint the administrators whose competence, powers and conditions of dismissal it shall determine.

In relations with third parties, an administrator shall commit the grouping by any act falling within its object. Any limitation of powers shall not be binding on third parties.

Article L251-12

The supervision of the management, which must be entrusted to natural persons, and the supervision of the accounts shall occur in accordance with the conditions specified by the grouping's formation agreement.

However, when a grouping issues bonds in accordance with the conditions specified by Article L.251-7, the supervision of the management shall be carried out by one or more natural persons appointed by the meeting. The term of their duties and their powers shall be determined in the agreement.

The supervision of the accounts in the groupings referred to in the above paragraph and in groupings which have one hundred employees or more at the end of a financial year must be carried out by one or more auditors chosen from the list referred to in Article L.225-219 and appointed by the meeting for a term of six financial years. The provisions of this code on the incompatibilities, powers, duties, obligations, liability, withdrawal, dismissal and remuneration of the auditor of public limited companies and the penalties specified by Article L.242-27 shall apply to the auditors of economic interest groupings, subject to the rules specific thereto.

In the cases specified by the above two paragraphs, the provisions of Articles L.242-25, L.242-26, L.242-28 and L.245-8 to L.245-17 shall apply to the managers of the grouping and to the natural persons managing member companies or who are permanent representatives of the legal persons managing these companies.

Article L251-13

In groupings meeting one of the criteria defined in Article L.232-2, the administrators shall be required to prepare a statement of the liquid and current assets, excluding operating assets, and of the current liabilities, a projected profit and loss account and a financing table at the same time as the annual balance sheet and a projected financing plan.

A Conseil d'Etat decree shall specify the frequency, deadlines and terms for preparing these documents.

Article L251-14

The documents referred to in Article L.251-13 shall be analysed in written reports on the development of the grouping prepared by the administrators. The documents and reports shall be notified to the auditor and to the works council.

If the provisions of Article L.251-13 and the above paragraph are not observed, or if the information given in the reports referred to in the above paragraph requires observations therefrom, the auditor shall indicate this in a report to the administrators or in the annual report. The auditor may request that this report is sent to the members of the grouping or that it is brought to the attention of the meeting of members. This report shall be notified to the works council.

Article L251-15

When the auditors identify, while carrying out their work, facts likely to compromise the continued operation of the grouping, they shall inform the administrators of these, in accordance with the conditions fixed by a Conseil d'Etat decree. The administrators shall be required to reply to the auditors within fifteen days. The reply shall be notified to the works council. The auditors shall inform the president of the court of this.

If these provisions are not observed, or if it is noted that, despite the decisions taken, the continued operation of the grouping remains compromised, the auditors shall prepare a special report and shall ask the administrators, in writing, to ensure that the next general meeting deliberates the facts identified. This report shall be notified to the works council.

If, at the end of the general meeting, the auditors note that the decisions taken do not allow the continued operation of the grouping to be ensured, they shall inform the president of the court of the steps taken and the results of these.

Article L251-16

The works council or, failing this, the employees' representatives shall exercise, in economic interest groupings, the powers specified by Articles L.422-4 and L.432-5 of the Labour Code.

The administrators shall inform the auditor of requests for explanations made by the works council or the employees' representatives, the reports sent thereto and the replies made pursuant to Articles L.422-4 and L.432-5 of the Labour Code.

Article L251-17

The instruments and documents originating from the grouping and intended for third parties, particularly letters, invoices, notices and various publications, must legibly indicate the name of the grouping followed by the words: "groupement d'intérêt économique" (economic interest grouping) or the abbreviation: "GIE".

Any breach of the provisions of the above paragraph shall be punished by a fine of 3,750 euros.

Article L251-18

Any company or association whose object corresponds to the definition of the economic interest grouping may be converted into such a grouping without giving rise to the dissolution or creation of a new legal person.

An economic interest grouping may be converted into a general partnership without giving rise to the dissolution or creation of a new legal person.

Article L251-19

The economic interest grouping shall be dissolved:

1° When the term is reached;

2° When its object is achieved or terminated;

3° When its members decide this in accordance with the conditions specified by Article L.251-10;

4° By a court decision, for due reasons;

5° By the death of a natural person or by the dissolution of a legal person, where these are members of the grouping, unless otherwise stipulated in the agreement.

Article L251-20

(Law No 2003-7 of 3 January 2003 Article 50 (II) Official Gazette of 4 January 2003)

If one of the members is disqualified by law, declared bankrupt or prohibited from running, managing, administering or controlling a commercial business, regardless of its type, or a non-commercial private-law corporation, the group is dissolved, unless its continuation is provided for in the contract or the other members so decide unanimously.

Article L251-21

The dissolution of the economic interest grouping shall lead to its winding-up. The personality of the grouping shall continue for the purposes of the winding-up.

Article L251-22

The winding-up shall occur in accordance with the provisions of the agreement. Failing this, a liquidator shall be appointed by the meeting of members of the grouping or, if the meeting could not make this appointment, by a court decision.

After paying the debts, the surplus of assets shall be distributed between the members in accordance with the conditions specified by the agreement. Failing this, the distribution shall be made in equal parts.

Article L251-23

(Order No. 2000-916 of 19 September 2000 Article 3 Official Gazette of 22 September 2000 effective 1 January 2002)

(Law No 2003-7 of 3 January 2003 Article 50 (II) Official Gazette of 4 January 2003)

The designation "economic interest group" and the acronym "EIG" can only be used by groups which are subject to the provisions of the present Chapter. The illicit use of that designation or that acronym or any expression likely to cause confusion in relation thereto carries a penalty of two years' imprisonment and a fine of 6,000 euros.

The court may also order publication of the judgment, at the convicted person's expense, in a maximum of three periodicals, and posting thereof under the conditions laid down in Article L. 131-35 of the Penal Code.

CHAPTER II

European economic interest grouping

Articles L252-1 to
L252-13

Article L252-1

European economic interest groupings registered in France in the commercial and companies register shall enjoy legal personality from their registration.

Article L252-2

European economic interest groupings shall be civil or commercial in nature, depending on their object. Registration shall not lead to a presumption of commerciality of a grouping.

Article L252-3

The rights of members of the grouping may not be represented by negotiable securities.

Article L252-4

The collegial decisions of the European economic interest grouping shall be taken by the meeting of members of the grouping. However, the rules may stipulate that these decisions, or some of them, may be taken in the form of a consultation by exchange of letters.

Article L252-5

The manager or managers of a European economic interest grouping shall be individually or jointly and severally liable, as applicable, towards the grouping or third parties for breaches of the acts or regulations applying to the

Appendix

B

APPENDIX-

B

LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON CHINESE-FOREIGN CONTRACTUAL JOINT VENTURES

(Adopted on April 13 1988 at the First Session of the
Seventh National People's Congress)

[Article 1] This law is formulated to expand economic co-operation and technological exchange with foreign countries and to promote the joint establishment, on the principle of equality and mutual benefit, by foreign enterprises and other economic organizations or individuals (hereinafter referred to as the foreign party) and Chinese enterprises or other economic organizations (hereinafter referred to as the Chinese party) of Chinese-foreign contractual joint ventures (hereinafter referred to as contractual joint venture) within the territory of the People's Republic of China.

[Article 2] In establishing a contractual joint venture, the Chinese and foreign parties shall, in accordance with the provisions of this law, prescribe in their contractual joint venture contract such matters as the investment or conditions for co-operation, the distribution of earnings or products, the sharing of risks and losses, the manners of operation and management and the ownership of the property at the time of the termination of the contractual joint venture.

A contractual joint venture which meets the conditions for being considered a legal person under Chinese law, shall acquire the status of a Chinese legal person in accordance with law.

[Article 3] The State shall, according to law, protect the lawful rights and interests of the contractual joint ventures and of the Chinese and foreign parties.

A contractual joint venture must abide by Chinese laws and regulations and must not injure the public interests of China.

The relevant State authorities shall exercise supervision over the contractual joint ventures according to law.

[Article 4] The State shall encourage the establishment of productive contractual joint ventures that are export-oriented or technologically-advanced.

[Article 5] For the purpose of applying for the establishment of a contractual joint venture, such documents as the agreement, the contract and the articles of association signed by the Chinese and foreign parties shall be submitted for examination and approval to the department in charge of foreign economic relations and trade under the State Council or to the department or local government authorized by the State Council (hereinafter referred to as the examination and approval authority). The examination and approval authority shall, within 45 days from the date of receipt of the application, decide whether or not to grant approval.

[Article 6] When the application for the establishment of a contractual joint venture is approved, the parties shall, within 30 days of receiving the certificate of approval, apply to the administrative authorities for industry and commerce for registration and to obtain a business license. The date of issuance of the business license of a contractual joint venture shall be the date of its establishment.

A contractual joint venture shall, within 30 days of its establishment, carry out tax registration with the tax authorities.

[Article 7] If the Chinese and foreign parties, during the period of operation of their contractual joint venture, agree through consultation to make major modifications to the contractual joint venture contract, they shall report to the examination and approval authority for approval. If the modifications include items involving statutory industry and commerce registration or tax registration, they shall register the modifications with the administrative authorities for industry and commerce and with the tax authorities.

[Article 8] The investment or conditions for co-operation contributed by the Chinese and foreign parties may be provided in cash or in kind, or may include the right to the use of land, industrial property rights, non-patent technology or other property rights.

[Article 9] The Chinese and foreign parties shall, in accordance with the provisions of the laws and regulations and the agreements in the contractual joint venture contract, duly fulfill their obligations of contribution full investment and providing the conditions for cooperation. In case of failure to do so within the prescribed time, the administrative authorities for industry and commerce shall set another time limit for the fulfillment of such obligations. If such obligations are still not fulfilled by the new time limit, the matter shall be handled by the examination and approval authority and the administrative authorities for industry and commerce according to relevant State provisions.

The investments or for co-operation provided by the Chinese and foreign parties shall be verified by an accountant registered in China or the relevant authorities, who shall provide a certificate after verification.

[Article 10] If the Chinese or foreign party wishes to make an assignment of all or part of its rights and obligations prescribed in the contractual joint venture contract, it must obtain the consent of the other party or parties and report to the examination and approval authority for approval.

[Article 11] A contractual joint venture shall conduct its operational and managerial activities in accordance with the approved contract and the articles of association for the contractual joint venture. The right of a contractual joint venture to make its own operational and managerial decisions shall not be interfered with.

[Article 12] A contractual joint venture shall establish a board of directors or a joint managerial institution which shall, according to the contract or the articles of association for the contractual joint venture, decide on the major issues concerning the venture. If the Chinese or foreign party assumes the chairmanship of the board of directors or the directorship of the joint managerial institution, the other party shall assume the vice-chairmanship of the board or the deputy directorship of the joint managerial institution. The board of directors or the joint managerial institution may decide on the appointment or employment of a general manager who shall take charge of the daily operation and management of the contractual joint venture. The General manager shall be accountable to the board of directors or the joint managerial institution.

If a contractual joint venture, after its establishment, chooses to entrust a third party with its operation and management, it must obtain the unanimous consent of the board of directors or the joint managerial institution, report to the examination and approval authority for approval, and register the change with the administrative authorities for industry and commerce.

[Article 13] The employment, dismissal, remuneration, welfare, labour protection and labour insurance, etc... Of the staff members and workers of a contractual joint venture shall be specified in contracts concluded in accordance with law.

[Article 14] The staff and workers of a contractual joint venture shall, in accordance with law, establish their trade union organization to carry out trade union activities and protect their lawful rights and interests.

A contractual joint venture shall provide the necessary conditions for the venture's trade union to carry out its activities.

[Article 15] A contractual joint venture must establish its account books within the territory of China file its accounting statements according to relevant provisions and accept supervision by the financial and tax authorities.

With respect to contractual joint ventures that, in violation of the provisions prescribed in the preceding paragraph, do not establish their account books within the territory of China, the financial and tax authorities may impose a fine, and the administrative authorities for industry and commerce may order them to suspend their business operations or revoke their business licenses.

[Article 16] A contractual joint venture shall, by presenting its business license, open a foreign exchange account with a bank or any other financial institution which is permitted by the exchange control authorities of the State to conduct transactions in foreign exchange.

A contractual joint venture shall handle its foreign exchange transactions in accordance with the provisions of the State on foreign exchange control.

[Article 17] A contractual joint venture may obtain loans from financial institutions within the territory of China and may also obtain loans outside the territory of China.

Loans to be used by the Chinese and foreign parties as investment or conditions for co-operation, and their guarantees, shall be provided by each party on its own.

[Article 18] The various kinds of insurance coverage of a contractual joint venture shall be furnished by the insurance institutions within the territory of China.

[Article 18] A contractual joint venture may, within its scope of operation approved, import materials it needs and export products it produces. A contractual joint venture may purchase on the domestic market and the world market, raw and processed materials, fuels, etc... within its scope of operation approved.

[Article 20] A contractual joint venture shall achieve on its own the balance of its foreign exchange receipts and expenditures. If a contractual joint venture is unable to achieve the balance of its foreign exchange receipts and expenditures on its own, it may, in accordance with State provisions, apply to the relevant authorities for assistance.

[Article 21] A contractual joint venture shall, in accordance with State provisions on tax, pay taxes and may enjoy the preferential treatment of tax reduction or exemption.

[Article 22] The Chinese and foreign parties shall distribute earnings or products; undertake risks and losses, in accordance with the agreements prescribed in the contractual joint venture contract.

If, upon the expiration of the period of a venture's operation, all the fixed assets of the contractual joint venture, as agreed upon by the Chinese and foreign parties in the contractual joint venture contract, are to belong to the Chinese party, the Chinese and foreign parties may prescribe in the

contractual joint venture contract the ways for the foreign party to enjoy a priority in recovering its investment during the period of the venture's operation. If the foreign party, as agreed upon in the contractual joint venture contract, is to recover its investment prior to the payment of income tax, it must apply to the financial and tax authorities, which shall examine and approve the application in accordance with State provisions concerning taxes. If, according to the provisions of the preceding paragraph, the foreign party is entitled to a priority in recovering its investment during the period of the venture's operation, the Chinese and foreign parties shall, as provided by the relevant laws and the contractual joint venture contract, be liable for the debts of the venture.

[Article 23] After the foreign party has fulfilled its obligations under the law and the contractual joint venture contract, the profits it receives as its share, its other legitimate income and funds it receives as its share upon the termination of the venture, may be remitted abroad according to law.

The wages, salaries or other legitimate income earned by the foreign staff and workers of contractual joint ventures, after the payment of individual income tax according to law, may be remitted abroad.

[Article 24] Upon the expiration or termination in advance of the term of a contractual joint venture, its assets, claims and debts shall be liquidated according to legal procedures. The Chinese and foreign parties shall, in accordance with the agreement specified in the contractual joint venture contract, determine the ownership of the venture's property.

A contractual joint venture shall, upon the expiration or termination in advance of its term, cancel its registration with administrative authorities for industry and commerce and the tax authorities.

[Article 25] The period of operation of a contractual joint venture shall be determined through consultation by the Chinese and foreign parties and shall be clearly specified in the contractual joint venture contract. If the Chinese and foreign parties agree to extend the period of operation they shall apply to the examination and approval authority 180 days prior to the expiration of the venture's term. The examination and approval authority shall decide whether or not to grant approval within 30 days of receipt of the application.

[Article 26] Any dispute between the Chinese and foreign parties arising from the execution of the contract or the articles of association for a contractual joint venture shall be settled through consultation or mediation. In case of a dispute which the Chinese and foreign parties are unwilling to settle through consultation or mediation, or of a dispute which they have failed to settle through consultation or mediation, the Chinese or foreign parties may submit it to the Chinese arbitration agency or any other arbitration agency for arbitration in accordance with the arbitration clause in the contractual joint venture contract or a written agreement on arbitration concluded afterwards.

The Chinese or foreign party may bring a suit in a Chinese court, if no arbitration clause is provided in the contractual joint venture contract and if no written agreement is concluded afterwards.

[Article 27] The detailed rules for the implementation of this law shall be formulated by the department in charge of foreign economic relations and trade under the State Council and reported to the State Council for approval before implementation.

[Article 28] This law shall come into force on the day of its promulgation.

Appendix

C





Chinese-foreign Equity Joint Ventures Law

Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures

Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979

Revised in the Third Session of the Seventh National People's Congress on April 4, 1990

Revised for the second time in accordance with "Resolution on Revision of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Venture" of the Fourth Session of the Ninth National People's Congress on **March 15, 2001**.

Article 1 With a view to expanding international economic co-operation and technical exchange, the People's Republic of China permits foreign companies, enterprises, other economic organizations or individuals (hereafter referred to as "foreign joint ventures") to joint with Chinese companies, enterprise or other economic organizations (hereafter referred to as "Chinese joint ventures") in establishing joint ventures in the People's Republic of China in accordance with the principle of equality and mutual benefit and subject to approval by the Chinese Government.

Article 2 The Chinese Government protects, in accordance with the law, the investment of foreign joint ventures, the profits due to them and their other lawful rights and interest in a joint venture, pursuant to the agreement, contract and articles of association approved by the Chinese Government.

Joint ventures shall follow the provisions of the laws and regulations of the People's Republic of China in all their activities.

The state does not practice nationalization and expropriation of a joint venture; under special circumstances, the state, in accordance with the needs of social public interest, expropriates a joint venture pursuant to legal procedures and offers corresponding compensations.

Article 3 The joint venture agreement, contract and articles of association signed by the parties to the venture shall be submitted to the competent authorities of foreign economic relations and trade (hereafter referred to as approval authorities), and the approval authorities shall, within three months, decide whether to approve or disapprove them. After approval, the joint venture shall register with the state competent authorities of administration for industry and commerce to obtain a license to do business and start operations.

Article 4 A joint venture shall take the form of a limited liability company. The proportion of the investment contributed by the foreign joint venturer(s) shall

generally not be less than 25% of the registered capital of a joint venture. The parties to the venture shall share the profits, risks and losses in proportion to their respective contributions to the registered capital. No assignment of the registered capital of a joint venturer shall be made without the consent of the other parties to the venture.

Article 5 Each party to a joint venture may make its investment in cash, in kind or in industrial property rights, etc.

The technology and the equipment that serve as a foreign joint venturer's investment must be advanced technology and equipment that actually suit our country's needs. If the foreign joint venturer causes losses by deception through the intentional use of backward technology and equipment, it shall pay compensation for the losses. The investment of a Chinese joint venturer may include the right to the use of a site provided for the joint venture during the period of its operation. If the right to the use of the site does not constitute a part of a Chinese joint venturer's investment, the joint venture shall pay the Chinese Government a fee for its use. The various investments referred to above shall be specified in the joint venture contract and articles of association and the value of each (excluding that of the site) shall be jointly assessed by the parties to the venture.

Article 6 A joint venture shall have a board of directors, which shall have its size and composition stipulated in the contract and the articles of association after consultation between the parties to the venture, and the directors shall be appointed and replaced by the parties to the venture. The Chairman and the vice-chairman are determined by the parties to the venture or elected by the board of directors. Either party of the Chinese-foreign joint venturers may be the chairman and the other shall assume the office of vice-chairman. In handling major problems, the board of directors shall reach a decision through consultation by the parties to the venture, in accordance with the principle of equality and mutual benefit.

The board of directors is empowered, pursuant to the provisions of the articles of association of the joint venture, to discuss and decide all major problems of the venture: expansion programmes, proposals for production and operating activities, the budget for revenues and expenditures, distribution of profits, plans concerning manpower and pay scales, the termination of business and the appointment or employment of the president, the vice-president(s), the chief engineer, the treasurer and the auditors, as well as their powers and terms of employment, etc.

The offices of president and vice-president(s) (or factory manager and deputy manager(s)) shall be assumed by the respective parties to the venture. Contracts shall be entered into in accordance with the law to prescribe the recruitment, dismissal, remuneration, welfare, labor protection, labor insurance, etc...

Article 7 The staff employees of the joint venture may establish trade unions in accordance with the law, carry out the activities of the trade union and defend the lawful rights and interests of the employees.

Joint ventures shall provide necessary conditions for the activities of the trade unions thereof.

Article 8 After payment, pursuant to the provisions of the tax laws of the People's Republic of China, of the joint venture income tax on the gross profit earned by the joint venture and after deduction from the gross profit of a reserve fund, a bonus and welfare fund for staff and workers, and a venture expansion fund, as provided in the articles of association of the joint venture, the net profit shall be distributed to the parties to the joint venture in proportion to their respective contributions to the registered capital. A joint venture may enjoy the preferential treatment of reduction of or exemption from tax pursuant to relevant state taxation laws or administrative decrees. A foreign joint venturer that reinvests in China its share of the net profit may apply for refund of a part of the income taxes already paid.

Article 9 A joint venture shall, with its business license, open a foreign exchange account at the banks or other financial organizations approved by the state foreign exchange control administrative organs to handle foreign exchange business. The pertinent foreign exchange transactions of a joint venture shall be conducted in accordance with the regulations on foreign exchange control of the People's Republic of China.

In its operating activities a joint venture may directly raise funds from foreign banks. All insurances of joint ventures shall be procured at the insurance companies within the territory of the People's Republic of China.

Article 10 The Joint venture may purchase the materials such as raw materials, fuels, etc. as needed within the approved scope of business either on the domestic or international market according to the principle of fairness and reasonableness. A joint venture is encouraged to market its products outside China. Export products may be distributed to foreign markets through the joint venture directly or through associated agencies, and they may also be distributed through China's foreign trade agencies. Products of the joint venture may also be distributed in the Chinese market. Whenever necessary, a joint venture may establish branches outside China.

Article 11 The net profit that a foreign joint venturer receives after fulfilling its obligations under the laws and the agreement and the contract, the funds it receives at the time of the joint venture's scheduled expiration or early termination, and its other funds may be remitted abroad in accordance with the foreign exchange regulations and in the currency specified in the joint venture contract. A foreign joint venturer shall be encouraged to deposit in the Bank of China foreign exchange that it is entitled to remit abroad.

Article 12 The wages, salaries and other legitimate income earned by the foreign staff and workers of a joint venture, after payment of the individual income tax under the tax laws of the People's Republic of China, may be remitted abroad in accordance with the foreign exchange regulations.

Article 13 The contract period of a joint venture may be decided differently according to its particular line of business and circumstance. The joint ventures of some trades should decide the contract period; and other may or may not decide the contract period. A joint venture that has set a contract period should, if the parties to the joint venture agree to extend the contract period, apply to the approval authorities six months ahead of the expiration of the contract period. The latter should make the decision of approval or disapproval within one month as of the date of application.

Article 14 In case of heavy losses, failure of a party to fulfill the obligations prescribed by the contract and the articles of association, force majeure, etc, the contract may be terminated through consultation and agreement by the parties to the venture, subject to approval by the approval authorities and to registration with the state competent authorities of administration for industry and commerce. In cases of losses caused by a breach of contract, the financial responsibility shall be borne by the party that has violated the contract.

Article 15 Disputes arising between the parties to a joint venture that the board of directors cannot settle through consultation may be settled through mediation or arbitration by a Chinese arbitration agency or through arbitration by another arbitration agency agreed upon by the parties to the venture.

Where no arbitration clauses have been included in the joint venture contract or no written arbitration agreement have been reached after a dispute arises, any party may bring a suit with the people's court.

Article 16 This Law shall come into force on the date of its promulgation.

Appendix

D

APPENDIX-



**EXTRACT FROM OHADA'S UNIFORM ACT RELATING TO GENERAL
COMMERCIAL LAW**

**BOOK 5
THE JOINT VENTURE**

**TITLE 1
GENERAL PROVISIONS**

Article 854

A joint venture shall be an entity whose partners agree not to register it in the Trade and Personal Property Credit Register and not to give it a corporate personality. It shall not be subject to publicity.

The existence of a joint venture may be proved by any means.

Article 855

The partners shall freely agree on the object, duration, conditions of functioning, rights of partners and termination of the joint venture, subject to there being no derogation from the mandatory rules of the provisions common to companies, with the exception of those relating to corporate personality.

**TITLE 2
RELATIONS AMONG PARTNERS**

Article 856

Unless a different organization has been provided for, the relations between partners shall be governed by the provisions applicable to private companies.

Article 857

The assets necessary for the company's activity shall be placed at the disposal of the manager of the company. However, each partner shall remain owner of the assets he places at the disposal of the company.

Article 858

The partners may agree to put certain assets in joint ownership or that one of the partners, in relation to third parties, shall be owner of all or part of the assets he acquires with a view to the realization of the company's object.

Article 859

The assets acquired by application of funds or re-investment of joint earnings shall be deemed to be joint holdings throughout the duration of the company, as well as assets which were joint before being placed at the disposal of the company.

The same shall apply to assets which the partners may have agreed to put into joint ownership.

Article 860

Unless otherwise provided for by the articles, no partner may request the sharing of joint assets as long as the company is not wound up.

TITLE 3

RELATIONS WITH THIRD PARTIES

Article 861

Each partner shall contract in his personal name and shall be solely liable to third parties.

However, where the partners act expressly in their capacity as partners towards third parties, each of those who acted shall be liable for the commitments of the others.

Any bonds subscribed to under these conditions shall commit them indefinitely, jointly and severally.

The same shall apply to a partner who, by interference, has made the contracting partner believe that he intended to commit himself on the partner's behalf and it is proved that he reaped profit from the enterprise.

TITLE 4

WINDING UP OF THE COMPANY

Article 862

A joint venture shall be dissolved by the same events which terminate a private company.

The partners may, however, agree in the Articles of Association or in a subsequent deed that the company will continue in business in spite of such events.

Article 863

Where the company is of an unspecified duration, its winding up may come at any time after notification, by hand-delivered letter against a receipt or by registered letter with acknowledgement of receipt, from one partner to all the others, provided that the notification shall be in good faith and not at the wrong moment.

BOOK 7

THE ECONOMIC INTEREST GROUP

TITLE 1

GENERAL PROVISIONS

Article 869

An economic interest group shall be one which has the exclusive object of putting in place for a specified duration all the means necessary to facilitate or develop the economic activity of its members and to improve or increase income from the said activity.

Its activity shall mainly be connected with the economic activity of its members and shall not be of an auxiliary nature in relation thereto.

Article 870

The economic interest group shall not by itself give rise to the realization or sharing of profits.

It may be formed without capital.

Article 871

Two or more natural persons or corporate bodies, including persons exercising a liberal profession governed by a legislative or statutory instrument or whose title is protected, may form between them an economic interest group.

The rights of members of the group may not be represented by negotiable instruments. Any clause to the contrary shall be deemed to be unwritten.

Article 872

An economic interest group shall have corporate personality and full capacity with effect from registration in the Trade and Personal Property Credit Register.

Article 873

The members of the economic interest group shall be liable for the debts of the group on their assets proper. However, a new member may, where the contract permits, be exempted from the debts contracted before he joined the group. The exoneration decision shall be published.

The members of the economic interest group shall be jointly and severally liable for payment of the debts of the group, unless otherwise agreed with a contracting third party.

Article 874

The creditors of the group may take action for the settlement of debts against a partner only after unsuccessfully notifying the group by an extra-judicial act.

Article 875

An economic interest group may issue bonds under the general conditions of issue of such bonds where the group exclusively comprises companies authorized to issue bonds.

Article 876

Subject to the provisions of this Uniform Act, a contract shall determine the organization of the economic interest group and shall freely lay down the contribution of each member to the debts of the group. Failing this, each member shall bear an equal part of the debt.

During its existence, the group may accept new members under the conditions laid down by contract.

Any member may withdraw from the group under the conditions laid down in the contract, subject to having fulfilled his obligations.

The contract shall be in writing and shall be subject to the same conditions of publicity as the companies concerned by this Uniform Act.

It shall in particular contain the following details :

- (1) the name of the economic interest group ;
- (2) the name, trade name or corporate name, legal form, address of the domicile or head office and, as the case may be, the registration number in the Trade and Personal Property Credit Register of each member of the economic interest group ;
- (3) the duration for which the economic interest group is formed ;

(4) the object of the economic interest group :

(5) the address of the registered office of the economic interest group.

Any amendments to the contract shall be drawn up and published under the same conditions as the contract itself. They shall be demurrable to third parties from the date of such publicity.

The deeds and documents emanating from the economic interest group intended for third parties, in particular letters, invoices, various notices and publications shall clearly show the name of the group, followed by the words " economic interest group " or the acronym " E.I.G. "

Any violation of the provisions of the above paragraph shall be punished with penalty for simple offences.

Article 877

The general meeting of members of the economic interest group shall be competent to take any decision, including premature winding up or extension of the existence of the group under the conditions laid down in the contract.

The contract may provide that all or some decisions shall be taken under the conditions of quorum and majority it shall determine. Where the contract is silent, decisions shall be taken unanimously.

The contract may also allocate to each member of the economic interest group a number of votes different from that allocated to others. Failing this, each member shall have one vote.

Article 878

The meeting shall meet as of right at the request of at least one quarter of the members of the economic interest group.

Appendix

E

APPENDIX- E
Privatization by Joint Venture Modality
(From 1987 To 2003 E.C.)

S.No.	Name of Enterprise	Buyer	Gov't Share
1	National Tobacco Enterprise	Sheba Inv. Holding	22%
2	Matador-Adis Tyre S.C.	MATADOR	61%
3	Repi Soap Factory	Shandong	51%
4	Dire Dawa Cement and lime Factory	East African Group	80%
5	Abijata Soda Ash. S.C.	National Mining Corporation	51%
6	Ambo Mineral Factory	SAB Miller & South West PLC.	-
7	Gihon Hotel	DNKNESH Vermögensverwaltung GmbH	20%
8	Sodere	under process	
9	Anbessa Shoe S.C	under process	
10	Adami-Tulu Pesticide Processing S.C	under process	
11	Meta Abo Brewery S.C	under process	

*Source: Public Enterprises Privatization & Supervising Authority, Corporate Communication Department (November, 2010)

Appendix

F

Appendix F

JOINT INVESTMENT AGREEMENT

By and between

DNKNESH Vermögensverwaltung GmbH

And

The Privatization & Public Enterprises Supervising Agency

To build a new 4star standard Hotel and a new 5 Star plus Hotel and to refurbish a set of bungalows all situated on a parcel of land known as Ghion Hotel.

All known as

GRAND GHION HOTEL

Dated 30th August 2010

This Joint Investment Agreement (the "Agreement") is entered into as of this 30th of August 2010, in Addis Ababa, in accordance with the provisions of the applicable laws of Ethiopia, by and between,

(1) **DNKNESH Vermögensverwaltung GmbH:**

A legal entity established under the laws of the Federal Democratic Republic of Germany (hereinafter referred to as "DNKNESH ") having its principal place of operation in Germany. Nuremberg represented by Aklile Berhan Mekonen Haile Sellasie, Business address in Poppenreuther Straße 59 D-90419 Nuremberg Germany. (Copies of legal establishment and incorporation documents attached hereto as Appendix 2)

And

(2) **The Privatization & Public Enterprises Supervising Agency,**

(here in after referred to as "PPESA") a legal entity established under the laws of the Federal Democratic Republic of Ethiopia having its principal place of operation in Addis Ababa, Ethiopia established by Proclamation No. 412/2004 (copy of the proclamation is attached hereto as Appendix 1)

Each of the companies and persons listed above may further be referred to as a "Party" and jointly be referred to as the "Parties".

PREAMBLE

WHEREAS:

(A) PPESA, representing the Government of Ethiopia, is the owner in possession of Ghion Hotel and of all other buildings and bungalows that are part of the said hotel, wishes to upgrade, develop and properly manage the same through the Company.

(B) Subject to the terms and conditions of this Agreement:

- i. PPESA and DNKNESH agree to establish a Joint Investment Company under the laws of Ethiopia for the up-grading, development and or reconstruction, management and conducting the business of Ghion Hotel as upgraded and of the other hotel as built by the Joint Investment Company and do any other business as permitted under the Memorandum of Association of the Company to be drawn by the parties to this agreement from time to time;

- ii. PPESA and DNKNESH agree that PPESA will have 20% shareholding in the Joint Investment Company and DNKNESH V. GmbH will have 80% shareholding in the Joint Investment Company to be established in Ethiopia named **GRAND GHION HOTEL SHARE COMPANY** and agree to deal with their respective shareholdings and manage the Joint Investment Company in the spirit of the aforesaid shareholding.
- (C) The PPESA and DNKNESH, through this Agreement have decided to lay down the basis for the establishment of a Company, which shall be named as **GRAND GHION HOTEL SHARE COMPANY**.
- (D) DNKNESH and the PPESA agree that the relationship under this Agreement shall be of a long-term relationship;

NOW, THEREFORE, in consideration of the above, the Parties hereby agree to establish a Joint Investment Company subject to the terms and conditions herein and the relevant laws of Ethiopia:

ARTICLE 1

DEFINITIONS AND INTERPRETATIONS

1.1. Definition

- i. "Agreement" shall mean this agreement including all the appendices attached hereto.
- ii. "Handover" shall mean the handover of Ghion Hotel including fixed & movable assets, stocks, properties, documents and business to the Joint Investment Company.
- iii. "Handover Completion Date" shall mean the date when the handover is completed and handover document is signed.
- iv. "Formation Date" shall mean the date when the establishment of the Company is completed.
- v. "Company" shall mean a Joint Investment Company to be established jointly by the Parties to this agreement under a Memorandum and Articles of Association in accordance with the Commercial Code of Ethiopia, which shall be named as **GRAND GHION HOTEL SHARE COMPANY**.
- vi. "Auditors" shall mean external auditors of the Company.

- vii. "Commercial Code" shall mean the Commercial Code of Ethiopia of 1960.
- viii. "PPESA" shall mean Privatization & Public Enterprises Supervising Agency, the contracting party hereto, established by Proclamation No. 412/2004.
- ix. "PPESA's Contribution" shall have the meaning assigned to it under Articles 5.4 & 6.1. ii hereof.
- x. "Ghion Hotel" shall mean Ghion Hotel of Addis Ababa located at Kirkos Kifle Ketema, Kebele 15/16, with all its land and building and bungalows, excluding National Hotel & all branch hotels, all land within the Ghion Hotel complex to be transferred as a going concern to the Company by PPESA as a contribution in kind and for issuance of 20% registered shares of the Company in its name.
- xi. "Memorandum and Articles of Association" shall mean the Memorandum and Articles of the Company to be drawn in accordance with the terms and conditions of this Agreement.
- xii. "DNKNESH" shall mean DNKNESH Vermögensverwaltung GmbH, the contracting party hereto.
- xiii. "DNKNESH'S Contribution" shall have the meaning assigned to it under Articles 5.8 & 6.1.vi hereof.
- xiv. "Material Adverse Effect" means an event, circumstance or development that causes or a series of events, circumstances or developments which in the aggregate cause or is likely to cause the Party to (a) suffer losses in a material amount or (b) suffer costs or losses of income or reductions in net asset value in a material amount.
- xv. "Shares" shall mean the shares specified in the Memorandum of Association of the Company.
- xvi. "Shareholders" shall mean the shareholders of the Company:
- xvii. "Shareholders' Meeting" means the shareholders' meeting of the Company in accordance with the Article of Association and applicable Ethiopian laws.
- xviii. "Taxes" shall mean any and all taxes, duties, levies, charges and dues required to be paid according to the Ethiopian Federal or Regional laws.

- xix. "Business Plan" shall mean the Business Plan, concept, drawings, and action plan submitted by DNKNESH.

1.2 Interpretation

Unless the context requires otherwise or the contrary intention is stated herein:

- 1.2.1. A reference to a provision of a legal regulation or an agreement refers to that provision as modified by all its subsequent amendments or its re-enactment or replacement.
- 1.2.2. Unless otherwise stated in this Agreement, any reference to a legal regulation is a reference to a legal regulation of the Federal Democratic Republic of Ethiopia.
- 1.2.3. A reference to an Article, Section or Appendix is a reference to an article or section of or an appendix to this Agreement.
- 1.2.4. A person or entity includes its successors and permitted assignees.

ARTICLE 2

REPRESENTATIONS OF DNKNESH

2.1. DNKNESH hereby represents to the PPESA that:

- 2.1.1 DNKNESH has full legal capacity to enter into this Agreement and to perform all of its obligations hereunder. The representative of DNKNESH, Mr. Aklile Berhan Mekonen Haile Sellasie, is duly authorized to sign this Agreement on behalf of DNKNESH and his authorizations are based on the extract from Commercial Register, which is attached as Appendix No. 3 hereof.
- 2.1.2 DNKNESH enters into this Agreement in accordance with the applicable law and confirms that this Agreement imposes on DNKNESH legally valid obligations that are binding on it and that may be enforced in full against it in accordance with the provisions of this Agreement.
- 2.1.3 The execution and performance of this Agreement by DNKNESH will not breach any organizational document of DNKNESH, any material contractual or other obligation of DNKNESH or the provisions of any law, decision of state administration Agency, court verdict or other legal act binding upon DNKNESH.

- 2.1.4 No acts have been taken and no proceedings are being conducted before any court, arbitration court or arbitrator, public administrative Agency, institution or other body which would affect the validity or enforceability of this Agreement with respect to DNKNESH, or its ability to satisfy its obligations hereunder, and to the best knowledge of the DNKNESH no such actions are pending or threatened.
- 2.1.5 Statements of fact and information provided to the PPESA by DNKNESH were true and accurate and not intended to mislead in any respect. There are no liabilities or claims that could have a material adverse effect on DNKNESH as of the date of this representation that have not been fully and fairly disclosed to the PPESA;
- 2.1.6 DNKNESH has its own or has secured sufficient funds necessary to fulfill all of its obligations hereunder. If there is any loan that would be availed by DNKNESH, then the Company shall not be responsible for the liability on the loan.
- 2.2. Disclaimer of DNKNESH'S Liability for Other Representations**
- The PPESA agrees and acknowledges that:
- a) The representations of DNKNESH set forth in Sections 2.1 hereof are the only representations given by DNKNESH and these are the only representations for which DNKNESH accepts responsibility; and
 - b) The PPESA reserves the right to file claims against DNKNESH or its representatives arising out of any misrepresentation as to the statement given in 2.1 hereof or DNKNESH'S non-performance of obligations as contemplated herein.

ARTICLE 3

REPRESENTATIONS OF THE PPESA

- 3.1. The PPESA hereby represents to DNKNESH that:
- 3.1.1 The PPESA enters into this Agreement in accordance with applicable law and confirms that this Agreement imposes on the PPESA legally valid obligations that are binding on it and that may be enforced in full against it in accordance with the provisions of this Agreement.
 - 3.1.2 The PPESA's contributions have not been subject to any bankruptcy or composition proceedings.

- 3.1.3 The execution and performance of this Agreement by the PPESA will not breach any of its organizational document, any material contractual or other obligation of the PPESA, or the provisions of any law, decision of the State Administration Agency, court verdict or other legal act binding upon the PPESA;
- 3.1.4 No acts have been taken and no proceedings are being conducted before any court, arbitration court or arbitrator, public administrative Agency, institution or other body which would affect the validity or enforceability of this Agreement with respect to the PPESA, or its ability to satisfy its obligations hereunder, and to the best knowledge of the PPESA, no such actions are pending or threatened.
- 3.1.5 Statements of fact and information provided to the DNKNESH by the PPESA were true and accurate and not intended to mislead in any respect. There are no liabilities or claims that could have a material adverse effect on PPESA as of the date of this representation that have not been fully and fairly disclosed to DNKNESH;
- 3.2. DNKNESH agrees and acknowledges that:
- a) The representations of PPESA set forth in Sections 3.1. hereof are the only representations given by the PPESA or on its behalf, and these are the only representations for which the PPESA accepts responsibility; and
 - b) DNKNESH reserves the right to file claim against PPESA or its representatives arising out of any misrepresentation as to the statement given in 3.1. hereof or the PPESA's non-performance of its obligations as contemplated herein.

ARTICLE 4

ESTABLISHMENT OF THE COMPANY

4.1. General Provisions

- 4.1.1. Subject to the terms and conditions set forth in this Agreement, DNKNESH and PPESA shall establish a Company in Ethiopia incorporated and operating under the laws of Ethiopia.
- 4.1.2. DNKNESH has nominated three other shareholders in the new Share Company each holding a number of shares from DNKNESH's total subscribed Shares (as specified in Articles 5.5-5.7). These three shareholders

will be Aklile Berhan Makonnen Haile Selassie, Adalgisa Marselli and Christian Makonnen H. Selassie. DNKNESH hereby accepts all duties, responsibilities and obligations of these three other shareholders up to the Registration Date including timely payment of all contributions to be made to the Share Company.

4.1.3. The Registration of the new Share Company will allow the allocation of the Shares to PPESA, DNKNESH and the other three shareholders nominated by DNKNESH, as specified in Article 5.

4.1.4. The Parties shall agree on the Articles and Memorandum of Association to be drawn to establish the Company. The Memorandum and Articles of Association of the Company shall be drafted by including all the rights and obligations of the Parties under this Agreement.

4.1.5. Without prejudice to the above, the Parties shall, except for the need for compliance with the law, cooperate to the fullest possible extent with respect to establishment and registration of the Company in accordance with this Agreement.

4.2. Name of the Company

The name of the Company shall be **GRAND GHION HOTEL SHARE COMPANY**.

4.3. Duration and Extensions of the Joint Investment

4.3.1. The Company shall be established for an indefinite period of time.

4.3.2. Subject to the terms of this Agreement, the Company may establish branches and/or subsidiaries in Ethiopia.

4.4. Business Objectives of the Company

The Company shall undertake the following activities and such other activities as are permitted under the Memorandum and Articles of Association;

- a) Construction of a new 4star hotel in lieu of the preexisting Hotel Ghion and of a new 5 star plus Hotel and the improvement and expansion of the existing buildings and refurbishment of the bungalows by rehabilitating the existing infrastructure, investing in additional capacity through upgrading current services & products and introducing new operating and management systems;
- b) To implement the Business Plan time by time as necessary;
- c) To engage in any and all acts, things, businesses and activities that are related, directly or indirectly, to the achievement of the business to be carried out by the Company.

4.5. Obligations and Rights of the Parties

4.5.1. DNKNESH, in addition to its commitment to own 80% of the subscribed and registered share capital of the Company as detailed in Articles 5.8 & 6.1.vi of this Agreement below, shall have the following obligations:

- a. To deposit the agreed cash into the account established in the name of the Company on Completion as specified in **Article 6**.
- b. To avail of the financial resources necessary for the upgrading & expansion of Ghion Hotel as stated in Art. 4.4;
- c. To avail of the know-how, technology and system for the successful business of the Company.
- d. To construct on the parcel of land where is situated at present the complex known as Ghion Hotel a new 4 star Hotel in accordance with the following time schedule:
 - i. Completion of final design and building plans : 3 months
 - ii. Preparation of tender document : 5 months
 - iii. Publishing tender : 1 month
 - iv. Construction work of new 4 star Hotel and to refurbish the existing bungalows according to the plans and drawings herewith attached as Appendix 4. : 1 year and 4 months
- e. Subsequent to the commencement of operation of the new 4-Star Hotel, to demolish the existing Ghion Hotel and to build an additional 5-Star plus hotel. For the said 5 star plus hotel it is foreseen that a construction period of two years and half starting from the date of complete demolition of the existing structure.
- f. Be responsible for bringing a hotel management team with rich international experience and run the day-to-day operational activities & services of the Company from the date of Handover of the existing Ghion Hotel to the Company by PPESA. The Board of Directors shall approve DNKNESH's proposal on the management team/Chief Executive Officer.
- g. The Company will tender internationally among selected building international contractors the building construction of the above said project and the Board of the Company shall nominate a building contractor of international repute to render for the said project. The company will accept the bidding of an international Building contractor solely if it is an AAA rated and

gives a guarantee through an international AA rated Bank responsible for the construction & execution of the project.

h. Perform other obligations stipulated in this Agreement.

4.5.2 PPESA, in satisfaction of its commitment to own 20% of the total registered share capital of the Company as detailed in Article 5.4. & 6.1.ii of this Agreement below, shall have the following obligations:

- a. Contribute Ghion Hotel as a going concern, including fixed assets and land use right used by the Ghion Hotel. This valued at USD 100 million (One Hundred Million USD) as accepted by the other partners and constituting full payment of its commitment towards the capital of the Company.
- b. Facilitate and assist in the establishment and commencement of operations of the Company.
- c. PPESA undertakes to facilitate and expedite for the smooth and speedy implementation of the Grand Ghion Hotel project as above.
- d. Perform other obligations stipulated in this Agreement.

4.5.3 The shareholders shall be responsible for the selection & appointment of the project management & construction team.

4.5.4 Unless provided otherwise, the Parties, shall be liable for the non-fulfillment of all their obligations set forth in the clauses above.

4.5.5 Each Shareholder shall at all times exercise its voting rights and other powers of control available to it in relation to its contribution in the Company so as to:

- a. Carry out and conduct its business and affairs on a commercial basis, in a proper, lawful and efficient and transparent manner and for its own benefit;
- b. Not do any act or omit to do any act where such act or omission would be in conflict or otherwise inconsistent with any terms of this Agreement, and otherwise observe and comply with the terms of this Agreement to the extent that they relate to or are applicable to the Company;
- c. Ensure that all business of the Company, other than routine business is undertaken or supervised by the Management of the Company,
- d. Perform its obligations under this Agreement.

ARTICLE 5

REGISTERED CAPITAL OF THE JOINT INVESTMENT

- 5.1. The Company shall have an initial registered capital of the Birr equivalent of **510 Million USD** (Five Hundred Ten Million USD) calculated at the exchange rate of the Commercial Bank of Ethiopia on the registration date of the Company.
- 5.2. The entire registered capital of the Company shall be divided into a number of shares equivalent to the total registered capital in Birr as calculated in Article 5.1 divided by 10,000 (Ten Thousand), this being the par value of each share.
- 5.3. The Shares shall be registered Shares issued in the names of the Shareholders, and are not publicly tradable; each Shareholder has the right of pre-emption as detailed hereunder and in the Articles of Association of the Company.
- 5.4. The PPESA shall be issued **20%** of fully paid-up Shares of the total registered capital of the Company in return for contributing Ghion Hotel as fixed asset & business to the Company. The Parties agree that the total value of Ghion Hotel in favour of the Company has been fixed at **100 million USD** (One Hundred Million USD) ("**PPESA's Contribution**").
- 5.5. Aklile Berhan Haile Sellasie shall subscribe to one share.
- 5.6. Adalgisa Marselli shall subscribe to one share.
- 5.7. Christian Makonnen H. Selassie shall subscribe to one share.
- 5.8. DNKNESH shall subscribe to the number of shares that have an aggregate par value that is the Birr equivalent of **102.5 Million USD** (One Hundred Two Million Five Hundred Thousand USD) calculated at the exchange rate of the Commercial Bank of Ethiopia on the registration date of the Company less three shares.
- 5.9. DNKNESH and the three other shareholders nominated by it shall subscribe for **80%** of the total registered capital of the Company ("**DNKNESH's Contribution**"). The payment in lieu of these shares shall be as set in article 6 below.

ARTICLE 6

CAPITAL CONTRIBUTIONS

- 6.1. The subscribed capital of the Company shall be paid-up in the following manner:
 - i. The paid up capital of the Company will be the Birr equivalent of **202.5 Million USD** (Two Hundred Two Million Five Hundred Thousand USD), calculated at the exchange rate of the Commercial Bank of Ethiopia on the registration date of the Company, contributed in kind and in cash.
 - ii. PPESA shall be deemed to have fully paid the subscribed amount of the Birr equivalent of **USD 100 Million** (One Hundred Million USD) of this paid-up capital by having contributed, as contribution in kind, Ghion Hotel at Addis Ababa, the land title deeds and all the fixed assets as detailed in Appendix 5.

- iii. Aklile Berhan Makonnen Haile Selassie shall pay 10,000 Birr which represents his fully subscribed capital (one share).
- iv. Adalgisa Marselli shall pay 10,000 Birr which represents his fully subscribed capital (one share).
- v. Christian Makonnen H.Selassie shall pay 10,000 Birr which represents his fully subscribed capital (one share).
- vi. DNKNESH, shall pay the Birr equivalent of **USD 102.5 million** (One Hundred Two Million Five Hundred Thousand USD) less thirty thousand Birr, calculated at the exchange rate of the Commercial Bank of Ethiopia on the Completion Date in cash, being 25% (twenty five percent) of their contribution to the subscribed capital, by both Parties. The cash contributed shall be held in the account established in the name of the Company in the Commercial Bank of Ethiopia prior to the registration of the Company and the cash shall be used only for the purpose indicated in Article 4.4 article 5.4 above.
- vii. If DNKNESH fails to effect the initial payment of its share of the contribution towards the subscribed & registered capital, as stipulated in Article 6.1.vi above, then the registration of the Company shall not be realized and this Agreement shall become null & void.
- viii. DNKNESH and the other three shareholders that it will nominate, shall raise the remaining 75% of the registered share capital, as per the timetable in the Business Plan and the requirements of the Commercial Code.

6.2. Additional Capital

The total cost of the construction Project has been evaluated at 410 Million (Four Hundred Ten million USD) to be totally financed by DNKNESH, at zero interest. Should the need of additional capital arise, the relevant amount will be timely provided for at zero interest by DNKNESH. Such a contribution by DNKNESH will change the contractual 20%-80% shareholding ratio accordingly.

6.3. Penalty

- 6.3.1 Failure to avail the investment required, as stipulated in Article 6.1.viii above, for developing & expanding Ghion Hotel shall entitle PPESA to seek damages up to 5% of the unpaid & outstanding balance of the total subscribed capital of the Company.

202.5

ARTICLE 7

RIGHTS AND OBLIGATIONS OF THE PARTIES

- 7.1. A shareholder has voting rights in proportion to the number of shares held, each share carrying one vote.
- 7.2. A shareholder is entitled to a share in any profit (dividend) set aside by the Shareholders' Meeting and as proposed by the Board of Directors for distribution depending on the financial results of the Company. Any dividend shall be paid to each shareholder equal to such shareholder's pro rata share of the total paid-up capital of the Company.
- 7.3. In the event of dissolution of the Company or liquidation, a Shareholder shall be entitled to a share in the liquidation proceeds equal to a Shareholder's pro rata share of the total paid-up capital of the Company.
- 7.4. A Shareholder shall be entitled to, in accordance with the law and in according with this Agreement and the Memorandum and Articles of Association to participate in the management of the Share Company.
- 7.5. DNKNESH shall have the right of preemption in respect to PPESA's share in the Company as per the terms of this Agreement and the Memorandum and Articles of Association of the Company. DNKNESH's option to acquire through time all the shares owned by PPESA shall be specified in the Articles of Association of the Company. DNKNESH's right to exercise its preemptive rights shall be subject to the attainment of measurable increments achieved in the performance of the Company under the Management to be established.
- 7.6. The Company shall continue employment contracts of all employees of Ghion Hotel and guarantees the rights and benefits of their years of service up to and beyond the handover of Ghion Hotel to the Company and thereafter, pursuant to the labor Proclamation. No. 377/2003 and management administration regulations and other laws enforce in Ethiopia.
- 7.7. The Company shall continue making pension contributions with regard to all permanent employees of the Ghion Hotel and shall transfer such contributions, together with the contribution of the employees to the Social Security Agency.
- 7.8. The Company shall accept and employ all previous workers whose reinstatement to their job is ordered by court even when such an order is made after the handover of the Ghion Hotel.

7.9. All liabilities, which can be attributed to before the Handover Date, shall not be transferred to the Company.

7.10. No current assets, including cash, receivables, and stocks, except spare parts, accumulated up to the Handover Date shall be transferred to the Company.

ARTICLE 8

CORPORATE GOVERNANCE

8.1 The Company will have the following bodies:

- a) Shareholders,
- b) The Board of Directors,
- c) A General Manager
- d) External Auditors.

ARTICLE 9

AUDITORS

The Shareholders' Meeting shall elect or mandate the board to elect one or more Auditors to discharge their obligations set out in the Memorandum and Articles of Association and the Commercial Code of Ethiopia.

ARTICLE 10

ACCOUNTING AND AUDITING

10.1 The Company's accounts shall be prepared and audited in accordance with Ethiopian and international accounting standards.

10.2 The Company's accounts shall be audited by a reputable auditing firm selected by the Board of Directors and approved by the Shareholders.

10.3 The Company's accounts are open to inspection by the shareholders in the Company Headquarters at all times during usual business hours of the Company.

10.4 The Company's fiscal year shall start on 1 July and end on 30 June in accordance with the Gregorian calendar.

ARTICLE 11

INTERNAL RELATIONS

11.1 Internal relations shall be governed by a set of organizational guidelines (organization code, work code, signature rules, etc.) issued by the Board of Directors and as stipulated in the Commercial Code of Ethiopia.

11.2 The internal control system shall be approved by the Board of Directors.

- 11.3 Unless otherwise required by Federal or Regional Authorities, all internal documents relating to the operation of the Company and its bodies, and its accounting and auditing shall be executed in the the English language.

ARTICLE 12

CONDITIONS PRECEDENT

12.1 Conditions Precedent

The establishment of the Company pursuant to this Agreement shall be subject to the following conditions (the "Conditions Precedent");

- a) The representations of DNKNESH set forth shall be true and correct in all material respects on the Formation Date,
- b) The representations of the PPESA set forth shall be true and correct in all material respects on the Formation Date;
- c) There are no ongoing proceedings or investigation being conducted before, and no decision having being made by (and still being effective) a court or other public authority having the power to bind by its decisions either Party, directly or indirectly prohibiting Completion;
- d) Subject to the terms of this Agreement, during the period between the date of signing this Agreement and the Formation Date, all obligations of DNKNESH and all obligation of the PPESA have been duly complied with in all material respects, or in the event of any such non-compliance, that the non-compliance has been cured to the reasonable satisfaction of the Party entitled to the benefit of such obligation.

12.2 Fulfillment and Waiver of Formation Conditions

12.2.1 The Parties shall use their best efforts and fully cooperate to bring about the fulfillment of the Formation Conditions at the earliest possible date.

12.2.2 The Formation Condition set forth in Article 12.1.a is stipulated for the sole benefit of the PPESA, and the Formation Condition set forth in 12.1.b is stipulated for the sole benefit of DNKNESH, and these respective Formation Conditions may only be waived in writing by the respective beneficiary. Any other Formation Condition may be waived only by mutual agreement of the Parties in writing. Any such waiver is without prejudice to the right of a Party to compensation in respect of a breach or inaccuracy of any representation or covenant.

12.3 Date of Registration

12.3.1 On the Formation Date, DNKNESH, the three other shareholders nominated by DNKNESH and the PPESA shall execute:

- a) Memorandum of Association and Articles of Association of the Company to be established;
- b) Request for registration of the Company in the Commercial Register;
- c) Request for investment & business licenses necessary for Company operations within the scope specified in Article 4.4;
- d) All other documents that are necessary for the establishment of the Company in accordance with this Agreement;

12.3.2. The Parties shall fully cooperate and take all necessary action to ensure the prompt accomplishment of the establishment and registration of the Company in accordance with this Agreement.

ARTICLE 13

Post Formation Obligations

13.1. PPESA shall have an obligation to transfer the title deed of all movable fixed assets (Vehicle, etc) and immovables (land and building) existing in the name of the GHION HOTEL to the Company within one month from the date of formation of the company.

13.2. PPESA shall assist the Company, in particular by providing support and facilitating the realization of the Company and executing all other issues in accordance with this Agreement.

13.3 DNKNESH shall assist the Company, in particular by:

- a) Implementing the Business Plan and preliminary drawings submitted for the Company (Appendix 4)
- b) Making available and using modern and appropriate know-how and increasing the skill and qualification of the Company's staff.
- c) Introducing and implementing up-to-date organizational methods and systems.
- d) Availing all resource expected of it.
- e) Executing all other issues in accordance with this Agreement.

ARTICLE 14

LIABILITY

- 14.1 Each Party shall compensate the other for any damages (including any expenses and costs, court fees and lawyers' fees) that a Party incurs as a result of any representation made by the other Party hereunder proving to be untrue or misleading or as a result of the other Party's partial or complete failure to comply with its obligations hereunder.

ARTICLE 15

TERMINATION

- 15.1 This Agreement may be terminated by either party in any of the events specified below:
- a) Failure to deposit and contribute the paid-up capital as detailed in Art. 6.1.
 - b) Failure to effect the transfer of the specified deeds, asset ownership and land title deed documents essential to the Company.
 - c) Failure to implement the Business Plan.
 - d) Cases of Force Majeure as stipulated in the Civil Code of Ethiopia, persisting for over 3 (three) months.
- 15.2 In the event of termination, the party initiating termination shall give 90 (Ninety) days written notice to the defaulting party. If the default is not remedied within that period the Agreement shall stand terminated at the option of the party not in default.
- 15.3 Termination of this Agreement from whatever cause shall be without prejudice to the rights of the parties accrued under this Agreement up to the time of termination, including incurred expenses and damages as appropriate according to the terms of Article 15.

ARTICLE 16

CONFIDENTIALITY

- 16.1 **Protection of Confidential Information**
- All communications between the parties, if it is marked "confidential" or if it is confidential by its nature and information related to the business transactions of the Company, shall be kept confidential.
- 16.2 **Exceptions**
- The foregoing confidentiality obligation shall not apply to information that:

- a) Becomes part of the public domain through no fault of the recipient of confidential information;
- b) Is already known by the recipient prior to the time of disclosure to the recipient of such confidential information;
- c) Is rightfully received by the recipient from a third party which, to the knowledge of the recipient, is not also a party subject to a non-disclosure agreement concerning such information; or
- d) Is disclosed by the recipient pursuant to a requirement that it be disclosed by law, a competent court, an applicable regulatory Agency or by an Agency adjudicating a dispute between the Parties or where it is disclosed to a competent court or to an Agency adjudicating a dispute between the Parties.

ARTICLE 17

GENERAL PROVISIONS

17.1 Expenditures

Each Party shall bear its own respective costs and expenses incurred in connection with the negotiation and execution of this Agreement. The Parties shall share any and all fees, costs and expenses including stamp duty incurred in connection with registration of the Company.

17.2 Amendment to this Contract

Any change in this Agreement shall be made in writing and approved and signed by authorized representatives of both parties.

17.3 Resolution of Disputes

17.3.1 The Parties have agreed that any disputes concerning the Agreement shall be settled in the first instance by negotiation and in good faith.

17.3.2. Where no settlement is attained by negotiation, all disputes arising between the Parties in connection with this Agreement, including any question regarding its violation, termination, existence, validity and rights hereunder, that are not settled by the Parties by negotiation within sixty (60) days then the dispute shall be settled through court of law in Ethiopia.

17.3.3. Each Party shall bear its own expenses to start the process in 17.3.2. All other costs and expenses, shall be covered in accordance with the decision of the court.

17.4 Governing Law

This Agreement is governed by and construed in accordance with the law of the Federal Democratic Republic of Ethiopia. It is subject to interpretation in accordance and exclusively according to these legal regulations.

17.5 Assignment

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assignees and PPESA agrees to sell its share in the Company as may be stipulated in the Article of Association subject to art 7.5.

17.6 Notifications and Consents

17.6.1 Any notifications and other required or voluntary correspondence, made in accordance with this Agreement, shall be in writing.

17.6.2 Depending on importance, these documents can be delivered:

- a) Personally, with written confirmation of receipt by the addressee, or
- b) By a courier, or
- c) By a registered letter, or
- d) By fax
- e) By e-mail

to the contact details given below or to another address for the Party announced in the manner described above.

A. DNKNESH:

Attention of: Aklile Berhan Mekonen Haile Sellasie:

Headquarters Via Motta 18

P.O. Box 1564 CH 6830 CHIASSO 1 Ticino Switzerland

Tel: 0041 91 695 1818

Fax: 0041 91 695 1828

E-mail: a.mekonnen@libero.it

: info@DNKNESH-portfolio management.eu

: a.makonnen@DNKNESH-portfolio management.eu

B. Aklile Berhan Mekonen Haile Sellasie

As indicated in A above.

C. Adalgisa Marselli

Via Aklile Berhan Mekonen Haile Sellasie



D. Christian Makonnen H.Selassie

Via Aklile Berhan Mekonen Haile Sellasie

E. Privatization & Public Enterprises Supervising Agency (PPESA):

Privatization & Public Enterprise Supervising Agency

Attention of: Mr. Beyene G/Meskel

Address: P.O. Box: 27444 Code -1000 Addis Ababa, Ethiopia

Tel: 251 11 5522616

Fax: 251 11 5536629

E-mail: epa.et@ethionet.et

17.7 Prevalence of the Agreement

This Agreement, with all provisions contained herein and appendices hereto, constitute the whole agreement between the Parties and supersede all previous written and oral agreements between the Parties. However, issues not addressed in this Agreement could be included in the Articles and Memorandum of Association of the Share Company subject to the consent of the Parties.

17.8 Language of the Contract and Counterparts

This Agreement has been executed between the contracting Parties in five original of the English language. Each original is equally authentic & each party shall receive one original.

17.9 Validity of the Agreement

17.9.1. This Agreement shall become effective as of the day of its signature by both Parties after the written approval of the same by the concerned authorities.

17.9.2. Should any provision of this Agreement be determined by a court or any other competent legal Agency to be invalid or unenforceable, all other provisions shall remain valid and enforceable.

17.10 Dates

All the dates and periods included or anticipated in this Agreement shall be governed by the Gregorian calendar.

17.11 Amendments

This Agreement may be amended only by the written agreement of the parties; and any other purported amendments included otherwise shall be invalid.

Appendix

G

Appendix G

Part 1: Section 4

Bidding Forms

- 1.5 Qualifications and experience of key personnel proposed for administration and execution of the Contract. Attach biographical data.

Position	Name	Qualifications	Years of experience (general)	Years of experience in proposed position
(a)				
(b)				

- 1.6 Proposed subcontracts and firms involved.

Sections of the Works	Value of subcontract	Subcontractor (name and address)	Experience in similar work
(a)			
(b)			

- 1.7 Financial reports for the last five years: balance sheets, profit and loss statements, auditors' reports, etc. List below and attach copies.

- 1.8 Evidence of access to financial resources to meet the qualification requirements: cash in hand, lines of credit, etc. List below and attach copies of support documents.

- 1.9 Name, address, and telephone, telex, and facsimile numbers of banks that may provide references if contacted by the Employer.

- 1.10 Information on current litigation in which the Bidder is involved.

Other party (ies)	Cause of dispute	Amount involved
(a)		
(b)		

- 1.11 Proposed Program (work method and schedule). Descriptions, drawings, and charts, as necessary, to comply with the requirements of the bidding documents.

2. Joint Ventures

- 2.1 The information listed in 1.1 - 1.10 above shall be provided for each partner of the joint venture.

- 2.2 The information in 1.11 above shall be provided for the joint venture.

Bidding Forms

- 2.3 Attach the power of attorney of the signatory(ies) of the Bid authorizing signature of the Bid on behalf of the joint venture.
- 2.4 Attach the Agreement among all partners of the joint venture (and which is legally binding on all partners), which shows that
 - (a) All partners shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms;
 - (b) One of the partners will be nominated as being in charge, authorized to incur liabilities, and receive instructions for and on behalf of any and all partners of the joint venture; and
 - (c) The execution of the entire Contract, including payment, shall be done exclusively with the partner in charge.
- 3.1 Bidders should provide any additional information required in Sections 2 or 3 of the Bidding Document or to fulfil the requirements of Sub-Clause 4.1 of the Instructions to Bidders, if applicable.

3. Additional Requirements

Appendix

H

Appendix H

Civil Case 109/62

Tahsas 8, 1962

Plaintiff: Ato Ghebre Tensae Tedla

Defendant: Mr. Evangelos Ortenzatos

Judgment

According to plaintiff's claim written on Meskerem 24, 1962 (Eth.Cal.) he and the defendant have a joint venture, established by an agreement entered into on Tir 21, 1960, which deals in pastries. According to the agreement, defendant worked as the administrative manager and the plaintiff as the technical manager. After working as technical manager during 1960, plaintiff went abroad in 1961 for his private affairs but with the agreement of both partners and stayed abroad for eight months. During plaintiff's management the profit was 6,950 dollars, whereas during the defendant management the business made only 69 dollars profit. Plaintiff's strong suspicion of the good faith and proper management of the defendant caused serious disputes between the partners. Plaintiff therefore wants the dissolution of the joint venture pursuant to Articles 218, 278(1)(f), 278(2) and 277 of the Commercial Code and also wants the appointment of an auditor

Plaintiff, in a reply written on Hedar 2, 1962, argued as follows: According to Articles 8 and 9 of the partnership agreement signed on Tir 30 1968 [Tir 21, 1960?], any dispute concerning the dissolution of the joint venture or the reasons for dissolution should be submitted to arbitration. This agreement being binding on both parties because of Article 1731 of the Civil Code, the present dispute should be submitted to arbitration. Although plaintiff has sent a letter dated Sene 14 asking defendant to come with his arbitrators because plaintiff wanted to cancel the agreement, plaintiff did not specify the issues he wanted to discuss. He did not name his arbitrators. He gave the defendant only a period of two days instead of thirty days. Thus, because the letter does not qualify as a notice under Article 3333 of the Civil Code, it cannot be said that defendant refused to submit to arbitration. Because of these reasons, attorney for defendant prayed the court to direct the case to arbitrators for lack of jurisdiction under Article 244(2)(a) and (f) of the Civil Procedure Code.

Under Article 218(1) of the Commercial Code, a court can decide the dissolution of a firm upon the request of one partner where there is good reason, notwithstanding any agreement to the contrary. Similarly, under

Article 278(1)(f) of the Commercial Code, a joint venture can be dissolved by court order at the request of one partner where there are good reasons. In addition, Article 278(2) provides that the provisions of Article 278(1) are applicable even if the memorandum of association provides to the contrary. The meaning of "good reasons" is expressly provided in Article 218(2) of the Commercial Code. One of these is where there is a serious disagreement and dispute between the partners. The existence of a serious dispute and disagreement has not only been declared in court but has also been affirmed by the defendant. Thus what has been expressly provided by the Commercial Code concerning the court's power to order dissolution of a joint venture cannot be restricted by the Civil Code or the memorandum of association. Hence, the court by virtue of the power vested in it by the Commercial Code has to order dissolution and appoint an auditor. This was the counter-argument of plaintiff's attorney.

We have examined the arguments of both parties and their evidence. Article 218(1) provides that a business organisation can be dissolved for good cause by the court on the application of a partner, notwithstanding any provision to the contrary. Sub-article (2) of the same article also provides that serious disputes and disagreements between the partners are good cause for dissolution. Moreover, Article 278(1)(f) and (2), which is more directly relevant to the issue at hand, provides that the court can order dissolution for good cause at the request of one partner notwithstanding any agreement to the contrary in the memorandum of association. Thus, the issue to decide is whether there was a serious dispute and disagreement between the partners. It has been proved that plaintiff had enjoined defendant by court order. It has also been proved that before this law suit was instituted on Sene 7, 1961 plaintiff asked defendant in writing to name his arbitrators and come to arbitration. Thus, there being no agreement between the partners, this is good cause for the dissolution of the firm under Articles 218(1) and 278(1)(f).

Therefore, because defendant's argument that the case be referred to arbitration is not sustainable under Articles 278(2) and 218(1) of the Commercial Code, we decide that the joint venture known as "Ghebre Tensae Tedla and Evangelos Ortenzatos" is dissolved. We have appointed Ato Assefa Metaferia as the liquidator for the dissolved firm.

[This case was translated from Amharic by Ato Zemariam Berhe (1971)]

Plaintiffs: 1. Ato Lebssu Bocru
2. Ato Yohannes Bocru
Defendant: Ato Isak Fessehatsion

Judgment

The cause for the dispute is this. Plaintiffs, the defendant and another person had established a firm on Tahsas 5, 1957 (Eth.Cal.) to press white wine under the trade name "Isak's Company". The defendant, being manager, was not willing to give the firm's profit and loss accounts when asked by the members. He has also changed the trade name from "Isak's Company" to "Isak" without the permission of the members. The plaintiffs now pray the court to order defendant to give an account of the firm's dealings in a short time and to retain the previous trade name. The request is submitted in their capacity as members and on the basis of their contract.

This law suit was first started in the Asmara Awradja Court. It was sent to this court on the basis of Article 15(d) of the Civil Procedure Code.

The main points of defendant's reply to plaintiffs' claims, as submitted by defendant's attorney, are the following:

Although the firm was not established according to the Commercial Code, their agreement as ordinary partners to establish a wine press and the manner in which the scheme was to be managed has been put in a private written document. Moreover, present defendant has repeatedly notified the members that the firm was going bankrupt and house rent and workers' wages were long overdue. There was a written suggestion that the firm's property be sold and defendant requested that he or another partner be allowed to buy the property at its cost price. But nothing resulted from this suggestion.

Thus, it has not been denied that four people had established a partnership to establish a wine press. But there was no agreement that there will only be one trade name; nor was it a legally-protected trade name under the Commercial Code. Although there was a label on the bottles with the words "Isak's Company" there is nothing that prevents defendant from changing the label or the name, whether to his own name or someone else's. In fact, present plaintiffs cannot claim to be partners under Article 9 of the partnership agreement because they have abandoned the partnership.

It is the defendant's will that the firm's accounts be audited by an auditor for the time when plaintiffs fully participated in the firm as partners. The accounts for the period in which plaintiffs did not participate, however, has nothing to do with this dispute. In addition, without pointing out any legal provision or a separate agreement which protects the trade name, plaintiffs have requested that it be protected. Such a request is not legally tenable.

As we have examined the arguments of both parties, it is proved that an ordinary partnership was established under the name of "Isak's Company" by the plaintiffs and the defendant to press wine. Moreover, the suit was instituted because defendant refused to give accounts and also changed the trade name.

However, this dispute was initially started in the Asmara Awradja Court. It was sent here pursuant to Article 15(2)(a) and (2)(d) of the Civil Procedure Code because it involved a trade mark. But as we find the case to be now, both parties have contributed money and agreed to form a partnership with "Isak's Company" as a trade name and with its license to be in the name of the defendant. The trade name, however, was not registered and publicized as required by the Commercial Code. Thus, the case at hand does not involve a trade mark; the High Court does not have exclusive jurisdiction under Article 15 of the Civil Procedure Code over this dispute. Under Article 18 of the Civil Procedure Code we return the case to the Awradja Court for that court to examine and decide the case as it is within that court's jurisdiction. We have also been considerate and order each party to bear his own expenses.

[This case has been translated from Amharic by Ato Zemariam Berhe (1971)]

Plaintiff: Shaik Tahir Oumer Badir

Defendant: Abdella Yussuf Saigue

Cause of Action: 5,625 dollars partnership money

(1) According to the plaintiff's pleadings, he and the defendant started a commercial partnership on December 26, 1962 (Gr.Cal.) with 5,625 Ethiopian dollars contributed by the plaintiff and 3,590 Ethiopian dollars contributed by the defendant. It is not known who is responsible for management.

(2) A document signed by the defendant on April 30, 1963, which is now submitted by the plaintiff, reads as follows:

Defendant has sold five tons of coffee in Jidah for £1,286.10. Shaik Tahir Oumer Badir (plaintiff) has a share in the proceeds. Defendant is ready to pay this share to Shaik Tahir Oumer Badir as soon as the money arrives. This has been signed by the defendant.

(3) Plaintiff's claims filed in the Massawa Awradja Court on August 8, 1963 were the following:

(a) We agreed to have an agent in Saudi Arabia. Since one Mohammed Ali Alamin lives in Saudi Arabia I suggested that we appoint him to be our agent there. Present defendant accepted my suggestion. On August 5, 1962, defendant sent a letter asking me to pay 5,625 dollars to send merchandise to one called Abdu Gullai Hirssi. On January 5, 1963 five tons of coffee were exported. The price of £1,286 was to be paid through the Ethiopian Bank [State Bank?] in accordance with our agreement. We waited but the money never came.

(b) The defendant told me that Mohammed Ali Alamin has sent 4,000 dollars. When I asked defendant how the money which was supposed to come through the Bank came to him, he said that Mohammed Ali Alamin had sent it to him but, he, the defendant, has returned the money to the sender. When Mohammed Ali Alamin came to Massawa, I asked him about the matter and he assured me that it was all false. Defendant agreed that he was a liar in front of many people, including Hassen Ahmed Kekia, Abdella Mohammed Marzuque, and Hummed Ahmed Kekia. After that, when plaintiff tried to collect the money from Abdu Gullai Herssi, in Jidah, through an agent, it was discovered that Mohammed Ali Alamin presented his agency documents given to him by present defendant and collected 17,000 dollars.

(c) To end the dispute between plaintiff and defendant conciliation was

tried but failed. Thus court proceedings were resumed on Nehasse 6, 1955 (Eth.Cal.) in the Awradja Court of Massawa.

(d) The claim submitted by plaintiff's attorney on Hedar 17 requested the return of 5,625 dollars, interest on this sum, court fees and lawyer's fees.

(e) A letter written by Mohammed Ali Alamin to Abdella Mohammed Yussuf Saique, on January 20, 1963 (Gr.Cal.) in Jidah, reads as follows: "I have received your letters. The coffee you sent me is not like the sample, so I had a hard time selling it. In any case, I have sold it to five merchants. There are only five more sacks unsold and these I am going to sell either today or tomorrow." He also wrote concerning other business and mentioned that they were going to meet soon since he was coming to Massawa.

(f) It is documented that Abdella Mohammed Yussuf Saique sent to Abdu Gullai Herssi, merchant in Jidah, 57 sacks of coffee with a gross weight of 4,948 kgs. and a total cost of £1,286.10 on January 4, 1963.

(g) On May 11, 1963 present defendant asked the police to arrest Mohammed Ali Alamin on the ground that he had received on his behalf the price of five tons of coffee from Abdu Gullai Herssi of Jidah, but had not given him (complainant) the money. The same claim was also filed on May 13, 1963 in this High Court.

Opinion

(1) The agreement signed by both plaintiff and defendant on December 26, 1962 established a commercial business organisation, but did not follow the formalities. The contract also states that 5,625 was contributed by plaintiff and 3,590 by defendant.

(2) Both parties accept that Mohammed Ali Alamin acted as their agent in Jidah for exports they sent through Massawa.

(3) This agent in Jidah was found to be trustworthy by plaintiff and defendant also agreed.

(4) Because the proceeds from the sale of five tons of coffee in Jidah, amounting to £1,286.10, was not paid by their agent, it is recorded that defendant notified the Police and brought a claim in this court on May 12 and 13, 1963 respectively. Moreover, it is recorded that defendant provided in writing that he will give to Tahir Oumer Badir, present plaintiff, his share in the proceeds from the sale of coffee as soon as he receives the money.

(5) It is crystal clear that the cause of the dispute between the two parties is the agent in Jidah.

(6) This court has not been provided with any documented proof, except for oral assertions, that this defendant has received money from the agent in Jidab.

(7) Plaintiff and defendant must both get their equal share of the profits or losses from this transaction.

(8) Attorney for plaintiff prays that defendant pay back the 5,625 dollars paid by plaintiff. In this request, he does not specify whether he is claiming the original contribution or a share in the profits. We understand, however, that it is the original contribution. He should have said this.

(9) Attorney for plaintiff has also asserted that plaintiff has a share of 4,000 dollars from the profits as a result of the sale of coffee. But finally he prays only for the original contribution, court fees, and lawyer's fees.

(10) The organisation established between the two parties is governed by Article 271(3) of the Commercial Code. Thus, before demanding the return of the contribution, plaintiff should have claimed the dissolution of the organisation under Article 278(f) of the Commercial Code. Otherwise this High Court cannot give any decision on the above point.

(11) Thus let plaintiff request the dissolution of the organisation first. He is able to demand the return of the contribution at the same time. Otherwise, it is not correct procedure for a partner to get back his contribution while he is still a partner.

[This case has been translated from Amharic by Ato Zemariam Berhe (1971)]

HIGH COURT

Civil Case 1557/62

Tahsas 1, 1963

Appellant: Wzo Jemmanesh Dugda

Respondent: Ato Getachew Dogaga

Judgment

This is an appeal submitted on Hamle 21, 1962 (Eth.Cal.) by Woizero Jemmanesh, the appellant. The ground of the appeal is that the judgment given by the Addis Ababa Awradja Court is totally erroneous and appellant prays that the appellate court:

- (1) reverse the lower court judgment and appoint an auditor;
- (2) if respondent denies that he received the capital of the partnership, the court should hear the testimony of witnesses who were present at the time of the agreement in accordance with Article 1730 of the Civil Code and Article 345 of the Civil Procedure Code.

The following is the summary of the facts of the case.

Present appellant, plaintiff in the lower court, asserted that she and the respondent have a partnership and requested the Awradja Court to issue an order under Article 18 of the Civil Procedure Code for reporting of account on Tikint 18, 1962.

The defendant, present respondent, Ato Getachew Dogaga, replied on Tahsas 22, 1962. "Plaintiff has introduced an instrument written on Hamle 13, 1959, which she claims to be evidence; but since the instrument does not show the working capital of the business it is not admissible." He did not say whether there was a partnership between them or not.

Then the issue of accounting was dropped and the arguments continued on whether or not there was a partnership.

Concerning this new issue, the plaintiff, present appellant, argued as follows:

- (1) The two parties signed a partnership agreement on Tir 1, 1958.
- (2) It is mentioned in the contract that respondent has contributed 5,054 dollars to the firm's capital.
- (3) Because both parties had a strong mutual trust the business has been running in good faith for a long time.
- (4) The contract signed on Hamle 13, 1959 was not to vary, to cancel or to modify the partnership agreement signed on Tir 1, 1958. It was only to require defendant to give a report and to transfer all his equib to

plaintiff's name because of his failure to report occasionally in accordance with the earlier agreement.

(5) When plaintiff asserted that there was a partnership, instead of affirming or denying the existence of the partnership as required by Article 235 of the Civil Procedure Code, defendant has tried to evade the issue, which is an indication that there was a partnership.

In his short defence, respondent argued, "The written instrument introduced as evidence by appellant has no legal force. It says 'working capital ...' with a blank space for the amount of the working capital. This is only a future intention, not a true agreement."

After hearing the above arguments and seeing the pieces of evidence introduced, the Addis Ababa Awradja Court decided on Sene 26, 1962 that there was no partnership and no auditing was necessary. The reasons given for the decision were:

(1) The agreement signed on Tir 1, 1958 mentions the sum without saying who gave it and who received it.

(2) In any case, the partnership agreement was established [signed?] on Hamle 13, 1959, while the document which shows the contribution is of an earlier date (Tir 1, 1958).

(3) A partnership agreement is said to exist when it is recognized by law, and the agreement has to follow the form proscribed for forming a partnership. The instrument introduced by the plaintiff says "the amount" but is not completed.

(4) One cannot say whether the document which mentions the sum is a partnership agreement or a receipt.

The presiding judge, in a dissenting opinion, said, "Instead of dismissing the case on vague grounds, it would be far better to hear the testimony of the witnesses mentioned in the agreement and ascertain whether or not there was a partnership between the two parties."

The appellate court is now called upon to decide whether or not the judgment given by the Awradja Court, that there is no partnership agreement, is right and legal.

We shall start our legal composition with the instrument which appellant introduced as evidence and which respondent said was only a draft and not a partnership agreement.

A draft is a prior agreement entered into to provide for entering into

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a later, final and binding contract. Such agreements are recognized by law. But an agreement is said to be a draft when it says, either on top, in the body or at the foot of the agreement that it is a draft. Since there is no indication in any of the documents introduced by appellant that shows that all or any of them is a draft we have rejected respondent's contention that they are drafts.

Secondly, respondent's major defence which has been repeatedly raised is "because the written document introduced to prove the existence of a partnership does not mention the amount of capital, it is invalid in the eyes of the law."

It is true, as respondent says, that a partnership agreement has to be complete like any other agreement. If a partnership agreement does not mention the capital, it cannot be said it is a complete agreement. Thus it is necessary to examine whether the agreement is complete or not; and, if it is found to be incomplete, to decide what legal consequences would follow.

It is to be remembered that two separate contracts were entered into by appellant and respondent on two different occasions. The writing says that both are partnership agreements. First, the contract signed on Tir 1, 1958 shows that appellant contributed 5,054 to the working capital of the firm. Thus, this first contract is not incomplete as the respondent says. The second agreement signed on Hamle 13, 1959 says "working capital ..." but is not completed. This can be said to be an incomplete agreement. The contract signed on Hamle 13, 1959 does not say that it cancels the earlier contract of 1958. It is clear that the partnership agreement was entered into by the complete agreement in which the amount of capital was mentioned and which was signed on Tir 1, 1958.

Even if the partnership agreement was established in 1959, as the AWRADJA Court found, we do not find it proper to pass over the Tir 1, 1958 agreement without comment.

We have reversed the majority opinion and have decided that there is a partnership agreement. We order the AWRADJA Court to give orders for auditing as requested by the appellant. Respondent shall pay damages and attorney's fees to the appellant.

Damages shall be awarded when the claim is submitted in accordance with Articles 463 and 464 of the Civil Procedure Code.

[This case has been translated from Amharic by Ato Zemariam Berhe (1971)]

Appendix

I



Appendix I

Ref. No. 82700200/9
Date 13/1/2000

የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
ሥራና ከተማ ልማት ሚኒስቴር
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
MINISTRY OF WORKS & URBAN DEVELOPMENT

አዲስ አበባ — ኢትዮጵያ
ADDIS ABABA - ETHIOPIA

ለኢትዮጵያ መንገዶች ባለሥልጣን
አዲስ አበባ

13/1/2000
Tm/66/15-939

ጉዳዩ፡ ሥራ ተቋራጮች በሽርክና የሚጫረቱበትን ሁኔታ ስለማመቻቸት

በአገራችን ውስጥ ያሉ ሥራ ተቋራጮች እርስ በእርሳቸውም ሆነ ከውጭ አገር ሥራ ተቋራጮች ጋር በመጣመር በጋራ ሕጋዊ ሰውነት ያለው ድርጅት አቋቁመው ጨረታ ለመወዳደርና የኮንስትራክሽን ሥራዎችን ለመሥራት የሚያስችልና በውጭ ሀገሮች የተለመደውን ዓይነት የ(Joint-Venture/ Consortium) ስያሜ ይዘው የሚሠሩበት የህግ ማዕቀፍ አለመኖሩ ለኮንስትራክሽን ኢንዱስትሪው ዕድገት መሰናክል እንደሆነ ከተለያዩ አቅጣጫ ሲነሳ ቆይቷል።

በአሁኑ ወቅት ደግሞ የኮንስትራክሽን ሥራ በመላው የሀገሪቱ ክልሎች ተስፋፋቶ የሚገኝ ከመሆኑም በላይ መንግሥትም በተለይ ለመንገድ ልማት ከፍተኛ በጀት መድቦ ፤ በርካታ የሥራ ፕሮግራሞችም ተዘጋጅተው የሚገኙ ሲሆን በመጠንና በዓይነት ብቃት ያላቸው ሥራ ተቋራጮችም በመንገድ ኮንስትራክሽን ጨረታ ለመሳተፍ ከፍተኛ ፍላጎት እያሳዩና ለዚህም አመቺ ሁኔታዎች ሁሉ እንዲመቻቹላቸው ጥያቄ እያቀረቡ ይገኛሉ።

የአገር ውስጥ ሥራ ተቋራጮች እርስ በእርሳቸውም ሆነ ከውጭ ሥራ ተቋራጮች ጋር በመጣመር ለመሥራት እንዲችሉ ማድረግ የፋይናንስ አቅም፣ ዕውቀትና የሥራ ልምድን ከማግለልበት አኳያ ለአገር ውስጥ የኮንስትራክሽን ዕድገት ከፍተኛ አስተዋጽኦ ሊኖረው እንደሚችል ግልጽ ከመሆኑም በላይ በሥራ ላይ ያሉትን ሁኔታዎች የህግ አማራጮች ሁሉ ተጠቅሞ የአገር ውስጥ ተቋራጮች በጋራ ለመሥራት ሂሳብ የሚያቀርቡትን ጥያቄ ተቀብሎ በልማት ሥራው እንዲሳተፉ ማድረግ መንግሥቱ ይገባል።

13/1/2000
Tm/66/15-939

ለመንገድ ልማት የያዘውን ዕቅድ ከማሳካትና ይህን ለማስፈፀም የመደበውን በጀት ሥራ ላይ ከማዋልም አኳያ አንገብጋቢ ጉዳይ ነው ።

ስለዚህም በኮንስትራክሽን ዘርፉ አስፈላጊነቱ የሚታመንበትን ሥርዓት ለመዘርጋት የሚያስችሉ ህጎችና ደንቦችን በተመለከተ የሚደረገው ጥናት እንዲቀጥል ሆኖ እስከዚያው ድረስ ግን የመንግሥትንም ንግግራዊ ለማሳካትና የሥራ ተቋራጮችንም ተሳትፎ ካሉት ህጎች ጋር አጣጥሞ ማስኬድ ተገቢ ሆኖ በመገኘቱ ይህ ደብዳቤ ከደረሳችሁ ጊዜ ጀምሮ በአሁኑ ወቅት በወጡም ሆነ ወደፊት በሚወጡ ጨረታዎች በጋራ ለመሥራት ውል ተዋውለው በጨረታ ለመሳተፍ ጥያቄ ሲያቀርቡ ፡

1ኛ. ለሚወዳደሩበት ንግድ እርስ በእርሳቸው የገቧቸውን ግዴታዎች የሚገልጸው ሰነድ መኖሩን ፤

2ኛ. ይኸው እርስ በእርሳቸው የተዋዋሉበት ሰነድ በሚመለከተው ውልና ማስረጃ ጽ/ቤት የተመዘገበ መሆኑን፤

3ኛ. ለንግድ የሚያስፈልገውን መስፈርት ማሟላታቸውን፤

4ኛ. የአገር ወስጥና የውጭ ሥራ ተቋራጮች በጋራ ለመሥራት በሚቀርቡበት ጊዜ የውጭ ሥራ ተቋራጭ ማንኛውም የውጭ ሥራ ተቋራጭ ወደ አገር ውስጥ ገብቶ ለመሥራት ማሟላት ያለበትን ሥርዓት መፈጸሙን፤

እና ሌሎችንም የጨረታ ደንብና ሥርዓት የሚጠይቃቸውን መመዘኛዎች አሟልተው የቀረቡ መሆናቸውን በማረጋገጥ በጨረታ እንዲሳተፉ እንዲደረግ አስታውቃለሁ።

ከሠላምታ ጋር

ግልጽ

- ለኢትዮጵያ መንገዶች ባለሥልጣን የዲሬክተሮች ቦርድ አዲስ አበባ



Appendix

J

Appendix J

AS AGREEMENT made on the 05th day of April 2010 at Addis Ababa, Ethiopia.

BETWEEN :

1. HAZILI GENERAL CONSTRUCTION & TRADING

CITY : ADDIS ABABA

SUB CITY : ARAK KALITY

KEBELE : 10

HOUSE No. : New

Tel : + 251 113 72 00 77

Fax : + 251 113 72 00 78

ETHIOPIA

2. Duniyalar Asphalt Road Transport Structure Contracting Mining Trading LTD Co Ethiopia

CITY : ADDIS ABABA

SUB CITY : Bole

KEBELE : 01

HOUSE No. : 2509

Tel : +251 11 6 26 30 23 / + 251 113 72 00 77

Fax : + 251 113 72 00 78

ETHIOPIA

Hereinafter together called the "HAZILI - Duniyalar Co Joint Ventures" and any one of them being called the "Joint Venturer".

WHEREAS

The Joint Venturers have agreed to go into the provision of Engineering services and/or Construction works under the joint name of "HAZILI - Duniyalar Co Joint Ventures".

Now Therefore, in consideration of the mutual benefits and undertakings of each Joint Venturer to the other IT IS HEREBY AGREED AS FOLLOWS:

Clause 1 - Purpose of This Agreement

The Joint Venturers hereby agree to collaborate in the Engineering Services and/or Construction Works for Ethiopian Roads Authority, ERA (Project Owner) for its Road and Bridge Construction projects hereinafter referred to as the "Works". The Joint Venturers shall enter into a contract with the Ethiopian Roads Authority, ERA in the manner hereinafter set out to execute the Works for the Project Owner.

Clause II - Joint Ventures Liability

The Joint Venturers will be jointly and severally liable to The Employer for the execution of the Contract.

CLAUSE III - Exclusivity

The Joint Venturers shall co-operate throughout the entire period of this Agreement on the basis of exclusivity, i.e. they shall not make arrangements or enter into agreement with any other firm or group of firms on matters relating to the works. Likewise, no Joint Venturer shall submit a separate prequalification or tender to the Employer offering execution of the Works or part thereof in its own and sole name. Each Joint Venturer shall do all in its power to ensure the observance of this prohibition by itself all subsidiaries and associated companies. Without limiting the foregoing it is agreed that the Joint Venturers shall not, by themselves or through any related corporations, reveal or divulge any information whatsoever concerning this agreement.

CLAUSE IV - Shares and Management of the Joint Venture

1. Shares

The participation shares for the purposes of this Agreement shall be 51% for HAZI.II General Construction & Trading AND 49% for Danyalar Asphalt Road Transport Structure Contracting Mining Trading LTD Co Ethiopia. All rights, interests, liabilities, obligations, risks, profits and losses arising out of the Contract and/or the Joint Venture shall be shared or borne by the Joint ventures in proportion to the above participation shares except the provision of collaterals for BID SECURITY, which is the sole responsibility of HAZI.II General Construction & Trading. Other responsibilities, including but not limited to pre-contract award costs, premiums, collaterals for Performance Bonds & Advance Guarantee, whether in cash or in kind as it is required shall be borne by the Joint Ventures according to their shares.

2. Management

2.1. The Joint Venture shall be managed jointly. To this each joint venturer shall appoint one Manager.

The joint Managers shall give joint decisions on the following policy matters:

- 2.1.1. Entering into any tenders of construction projects;
- 2.1.2. Giving guidance to an approve tender price offers;
- 2.1.3. Signing agreements when awarded;
- 2.1.4. Purchasing Construction equipments;
- 2.1.5. Providing collaterals for performance bond, advance guarantee and the like;
- 2.1.6. Appointing, deligating or terminating JV manager, Technical and/or project Manager and necessary qualified professionals on a higher level;
- 2.1.7. Opening a bank account in the name of the JV and sign cheques jointly;
- 2.1.8. Deciding on the working capital and capital investment for the JV;
- 2.1.9. Opening and organize an office for the JV.
- 2.1.10. Deciding on dividend payments of how and when to be effected to Each JV partner.

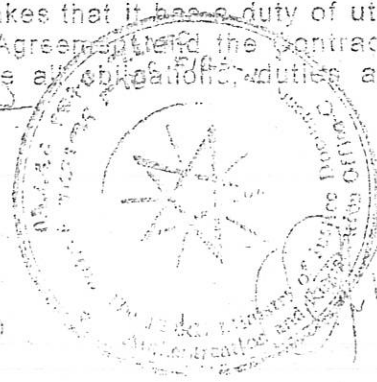
2.2. JV Management

2.2.1. Without prejudice to joint management as provided for hereinabove, HAZI.II General Construction and Trading shall be the lead company regarding the Joint Ventures engagement with the Project Owner of the construction Project. HAZI.II General Construction and Trading shall also be responsible for all administrative matters, financial transactions and logistics of the Joint Venture. HAZI.II General Construction and Trading shall prepare and submit a weekly report of all its activities to the joint managers.

2.2.2. For purposes of effectively carrying out its responsibilities stated under 2.2.1. hereinabove, HAZI.II General Construction shall have the power to hire and fire all the necessary staff and employees for the JV.

CLAUSE V- Discharge of Obligations

Each joint venturer acknowledges and undertakes that it has a duty of utmost faith to the other partner in the performance of this Agreement, the Contract and that it will faithfully perform, observe and discharge all obligations, duties and liabilities under this Agreement.



CLAUSE VI - Indemnity

Without prejudice to any other terms of this Agreement or the other rights and remedies of the Joint Venturers hereunder, where any of the Joint Venturers is in default under this Agreement or the Contract the Joint Venture in default shall and hereby undertakes to indemnify and keep indemnified the other form and against all losses, damages, costs, charges and expenses suffered or incurred by the others in consequence of such default.

CLAUSE VII - Duties of Joint Venturers

The Joint Venturers hereto shall make available to Joint Venture as relevant and appropriate, the technical advice and benefit of their individual experience. The Joint Venturers shall decide and organize in mutual agreement all matters of mutual interest and especially the planning and organization of the Works and the salary scale of all employees. The Bid price offers to be quoted for executing the various activities of project works to be undertaken will also be jointly prepared and submitted to the Employers after agreeing on the contents of the offer by both parties.

CLAUSE VIII - Representation

HAZILI General Construction & Trading Shall represent the Joint venture in dealing with matters of communications with third parties or any organization that have business matters with the Joint Venture in relations with the works to be undertaken.

CLAUSE IX - Assignment

None of the Joint Venturers hereto shall assign its rights and obligations arising out of or in connection with this Agreement to any other company, firm or person, without the consent of other Joint Venturers.

CLAUSE X - Termination

This Agreement shall become effective upon signature by the Joint Venturers and shall be terminated upon occurrence & any one of the following events: -

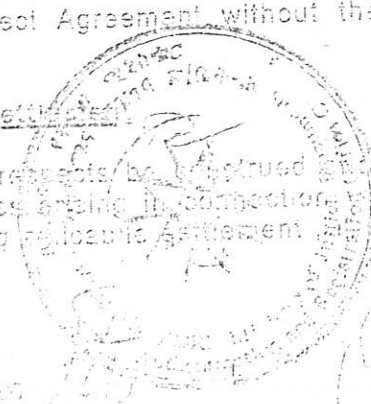
1. No agreement is concluded with the Project Owner;
2. The Joint Venture Agreement becomes ineffective;
3. The employer decides not to proceed with the Works;
4. The activity of any of the JO partners is found onerous and shall not guarantee the successful completion of the task of the JV;
5. The Construction Contract engaged by the JV is completed; final acceptance processed and certificate of completion issued by the Employer of the project.

CLAUSE XI - Variations

There shall be no variations to this Project Agreement without the prior written agreement of each of the joint Venturers.

CLAUSE XII - Law Applicable & Dispute Settlement

This Joint Venture Agreement shall in all respects be construed and interpreted in accordance with Ethiopian Law. All disputes arising in connection with the present Agreement shall be settled amicably. Failing amicable settlement, the dispute shall be referred to arbitration.



through arbitration under the auspices of the Ethiopian Arbitration and Conciliation Center composed of three arbitrators one each to be appointed by the parties and the chair to be appointed by the two chosen arbitrator. In case of disagreement to appoint the presiding arbitrator, the Ethiopian Arbitration and Conciliation Center shall appoint the joint request of both parties. The decision of the arbitrators shall be final & binding.

IN WITNESS whereof, the parties have entered into this agreement the day and the year first above written.

Witnesses

1. Zeirke A/Mama

2. Dehssa Bekuma

For Hallim Kellile

For
H&Z.II General Construction & Trading

For ANAR KIRAZILI
Dunyalar Asphalt Road Transport Structure Contracting
Mining Trading LTD Co Ethiopia

Witnesses

1. Zeirke A/Mama

2. Dehssa Bekuma



Appendix

K

ቀጽ አገልግሎት / 005/6 / 2001

ቀን 26 / 06 / 2001

Appendix K

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ

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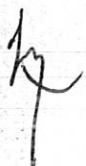
ጉዳዩ፡- በንግድ ሕጉ ሁለተኛ መጽሐፍ አንቀጽ 3 ላይ 'የእሽመር ማህበር' /Joint Venture/ በሚል የተቀመጠውን ይመለከታል፡፡

ማህበራችን በተለያዩ ዝግጅቶች ላይ 'የእሽመር ማህበር' /Joint Venture/ን በአገራችን የኮንስትራክሽን ዘርፍ ውስጥ ተግባራዊ ማድረግን በተመለከተ የተለያዩ ባለሙያዎችን እየጋበዘ አባላቱ ከውይይቱ ግንዛቤ እንዲያገኙ ሲያደርግ ቆይቷል፡፡

በንግድ ሕጉ ሁለተኛ መጽሐፍ አንቀጽ 3 'የእሽመር ማህበር' /Joint Venture/ በሚል የተቀመጠው ማህበራችን የሚያስበውን ወይም የማህበራችን አባላት ሊጠቀሙበት የሚችሉት ዓይነት እንዳልሆነ ከተለያዩ የሕግ ባለሙያዎች ከተሰጠን ትርጓሜና ማብራሪያ ለመገንዘብ ችለናል፡፡ ይኸው ፍላጎት በሚኒስቴር መ/ቤቱ በተከለሰው የንግድ ሕግ ረቂቅ ሰነድ ላይም የሚስተናገድበት ሁኔታ እንደሌለ የአዲስ አበባ የዘርፍ ማህበራት ምክር ቤት ባለሙያዎችን ጋብዞ በነበረው ሰነዱን የማዳበር ውይይት ላይ ይበልጥ ለመገንዘብ መልካም አጋጣሚ ፈጥሮልናል፡፡ እኛም ያለንን አስተያየት በውይይቱ ላይ ከማቅረባችንም በላይ የንግድ ምክር ቤቱ ለሚኒስቴር መ/ቤቱ በሚያቀርባቸው የክለሳ ሰነዱን ሊያዳብሩ ይችላሉ ከሚባሉ ሐሳቦች ውስጥ እንዲያካትትልን በፅሁፍ ፍላጎታችንን ገልፀናል፡፡

የማህበራችን አባላት የሚፈልጉት አቅማቸው የሚጎለብትበትንና ሥራ ሰጪ ደንበኞቻቸውን ሥራቸውን በገቡት ውል ላይ በተቀመጠ የጥራት ደረጃ፣ የበጀትና የጊዜ ገደብ ውስጥ አጠናቀው ማስረከብ የሚችሉበትን ሁኔታ መፍጠርና ማዳበር ነው፡፡ ይህ ደግሞ የኮንስትራክሽን ኢንዱስትሪያችንም የሚፈልገው መሆኑን ሁላችንም የምንጋራው ሐሳብ ነው ብለን እናምናለን፡፡ ሀገር በቀል ሥራ ተቋራጮች እዚህ ደረጃ ላይ መድረስ ከሚያስችላቸው መንገድ አንዱ በተለያዩ ህጋዊ የውል ትስስር ውስጥ ገብተው አቅማቸውን አቀናጅተው በጋራ የሚሰሩበትን ሁኔታ ሲፈጥሩ ነው፡፡

ሥራ ሰጪ አካላትም ሥራቸውን ለሥራ ተቋራጭ የሚሰጡት በቅድሚያ የሥራ ተቋራጩን የሥራ ልምድና ድርጅታዊ አቅም በተለያዩ መንገድ በመመዘን ነው፡፡ ለምሳሌ እንደ



ኢትዮጵያ መንገዶች ባለሥልጣን የመሣሰሉ ትልልቅ የመንገድ የኮንስትራክሽን ሥራ ሰጪ ድርጅቶች አንድ ሥራ ተቋራጭ፤

- ከታቀደው ሥራ ጋር ተመሳሳይ የሆነ ሥራ ላይ ልምድ ያለው፤
- በቂ መሣሪያና ብቁ ባለሙያዎች ማቅረብ የሚችል፤
- የተንቀሳቃሽ ገንዘብ አቅም ወይም ባንክ ሊያበድረው እንደሚችል ማስረጃ ማቅረብ የሚችል፤
- ቀደም ሲል /ብዙውን ጊዜ ለ5 ተከታታይ አመታት/ የነበረውን የሥራ እንቅስቃሴ የሚያሳይ፤ /turn over/ በገንዘብ ከተቀመጠው ዝቅተኛ ወለል በላይ የነበረው፤
- ከከባኝነቱ ውጪ በሆነ ኦዲተር የተረጋገጠ የሂሳብ ሰነድ ማቅረብ የሚችል የሚሉና የመሳሰሉትን መመዘኛዎች ማሟላት ይጠበቅበታል፡፡

ብዙውን ጊዜ አብዛኛዎቹ አገር በቀል ሥራ ተቋራጮች ለብቻቸው ይህን የአቅም ብቃት መመዘኛ ማሟላት ስለማይችሉ ሥራውን በተናጠልም ይሁን በቅንጅት በ/Joint Venture/ የውጪ አገር ሥራ ተቋራጮች ሲወስዱት ይታያል፡፡ ለምሳሌ የኢትዮጵያ የኢኮኖሚ ባለሙያዎች ማህበር እ.ኤ.አ በ2006/7 ዘርፉን በተመለከተ ባደረገው ጥናት ላይ እንደተመለከተው እ.ኤ.አ ከ1997/98 — 2005/6 ከተካሄዱ የአስፋልት መንገድ ግንባታዎች ውስጥ 81.2% የሆነው በውጪ አገር ሥራ ተቋራጮች ሲከናወን በአገር በቀል ሥራ ተቋራጭ የተሠራው ግን 10.7% ብቻ ሆኖ ይገኛል፡፡ ይህ በገንዘብ ሲሳሳ በውጪዎቹ የተሠራው ብር 10,988.5 ሚሊዮን ሲሆን የአገር በቀሎቹ ድርሻ ግን ብር 1,453.6 ሚሊዮን ብቻ እንደነበር በዚሁ ጥናት ተመልክቷል፡፡ ይህ በትክክል የሚያሳየው በአንድ በኩል አገሪቱ ከፍተኛ የሆነ የውጪ ምንዛሪ ጥቅም ማስቀረት አለመቻሏን ሲሆን በሌላ በኩል ደግሞ የአገር በቀል ሥራ ተቋራጮች ያለባቸውን ከፍተኛ የሆነ የአቅም ውስንነት ነው፡፡ ለዚህ ደግሞ የአገሪቱ የንግድ ህግ ዘርፉን በሚጠቅም መልኩ መሻሻሉ ዋና ዋና ከሚባሉ የአቅም ማሳደጊያ መፍትሔዎች ውስጥ አንዱ እንደሆነ በጥናቱ ላይ ተጠቁሟል፡፡

ባለው የንግድ ሕግ የአገር ውስጥ ሥራ ተቋራጮች “ኃ/የተ/የግ/ማህበር እና የመሳሰሉት” ድርጅቶቻቸው እንደተጠበቁ ሆነው ለአንድ ወይም ከዚያ በላይ ለሆነ ሥራ ብቻ አቅማቸውን በማቀናጀት ከሥራ ሰጪው አካል ጋር ውል እንዲገቡ የሚያስችል ዓይነት ‘የእሽመር ማህበር’ /Joint Venture/ ድንጋጌ እንዲሌለ ተረድተዋል፡፡ ለዚህ መፍትሔው ደግሞ በፍትሕ ሚኒስቴር ይህ ሊስተናገድ የሚችልበት አንቀጽ በንግድ ሕጉ ውስጥ ሲቀመጥ መሆኑንም ተገንዝበናል፡፡

ለጊዜው ይህን ክፍተት በመረዳት የሥራና ከተማ ልማት ሚኒስቴር አገር በቀል ሥራ ተቋራጮች ከውጪም ሆነ እርስበርሳቸው ተቀናጅተው፤ ሕጋዊ ምዝገባ ፈፅመው ከቀረቡ ሥራውን በጋራ ለመሥራት ውል እንዲፈፅሙ እንዲደረግ መመሪያ ለኢትዮጵያ መንገዶች ባለሥልጣን ሰጥቶ የነበረ ቢሆንም (የመመሪያው ቅጽ ተያይዟል) የሕግ ባለሙያዎች ያላቸው አስተያየት ግን አማራጩ በንግድ ሕጉ ውስጥ በውጪ ሀገር በኮንስትራክሽን ዘርፉ የተለመደውን ዓይነት ቅንጅት ‘የእሽመር ማህበር’ /Joint Venture/ የሚያስተናግድ አንቀጽ በማያሻማ ሁኔታ ማስቀመጥ እንደሆነ ተገልጿል፡፡

ስለዚህ ይህ ለአገራችን የኮንስትራክሽን ዘርፍ እጅግ ጠቃሚ የሆነ የሕግ አንቀጽ ሊካተት የሚችልበት መልካም አጋጣሚ መታለፍ የሌለበት መሆኑን እየገለጽን፤ ከላይ የተቀመጠውን ሁኔታ ሊያስተናግድ የሚችል አግባብ የሆነ ‘የእሽመር ማህበር’ /Joint Venture/ አንቀጽ በዚህ

በሚኒስቴር መ/ቤቱ በተዘጋጀው የማሻሻያ ሰነድ ውስጥ እንዲካተት እንዲደረግልን በእኩልነት እንጠይቃለን።

ከሰላምታ ጋር!



መላኩ ታደሰ
ሞና ሥራ አስኪሮች

ግልባጭ

- ለሥራና ከተማ ልማት ሚኒስቴር (4/7/2009)
- ለአገልግሎት ግንባታ ሚኒስቴር

16 MAR 2009
17/3/2009
በአዲስ አበባ ንግድና የዘርፍ ማህበራት ምክር ቤት
አዲስ አበባ

AACCSA - Archives

ሰነዱ ተፈጻሚ ሆኖ ይሰራል።
ከሰላምታ ጋር!
የአዲስ አበባ ንግድና የዘርፍ ማህበራት ምክር ቤት

Appendix

L

Appendix - L

JOINT VENTURE AGREEMENT

This Agreement is entered into on this 25th day of October 2007 by and between:

1. Ahmet Aydeniz İnşaat Turizm Gıda Eğitim Öğretim İthalat İhracat ve Ticaret Anonim Şirketi

Ayten Sokak, No: 9, Tandoğan, Ankara 06580 TURKEY

Tel : + 90 312 212 66 12

Fax : + 90 312 212 66 11

E-mail : firat@aydeniz.com - info@aydeniz.com

(hereinafter referred to as "AYDENİZ")

and

2. KMC Constructions Limited

MCH No. 555, Arora Colony, Road No. 3, Banjara Hills, Hyderabad - 500 034, Andhra Pradesh (State), INDIA

Tel: + 91 40 23543541 / 23543545

Fax: +91 40 23543538

E-mail: kmchyd@gmail.com - kmchyd@rediffmail.com - kmcbh@kmccl.com

(hereinafter referred to as "KMC")

(the above companies hereinafter also referred to individually as the "Party" and collectively as the "Parties")

WHEREAS "Ethiopian Roads Authority, Ethiopia" (hereinafter referred to as "the Employer") invited companies with the Invitation for Prequalification No.:W/14/07 ICB No.: 02 / 2007 that is issued on 07th September 2007; to submit their Prequalification Documents for "Aposto-Wendo-Negele Road Upgrading Project, Contract 2 : Irba Moda - Wadera Road (km 108.50)" (hereinafter referred to as "the Project") and intends to award contract (hereinafter referred to as "the Contract") for the execution of the Project.

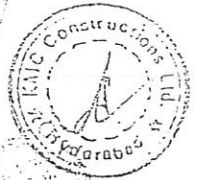
WHEREAS the Parties have decided to form a joint venture (hereinafter referred to as the "Joint Venture" or shortly as "JV") for the purpose of jointly submitting their prequalification and tender application, and in case of award of a Contract, to jointly execute and complete such Contract.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. The Parties shall submit their bid to the Employer as a Joint Venture.
2. The Parties shall be jointly and severally liable towards the Employer for all obligations arising out of the submission of the joint bid or proposal and in case of award of a Contract, execution of the Contract.
3. The name of the Joint Venture shall be AYDENİZ - KMC JOINT VENTURE, or shortly AYDENİZ - KMC JV.

Ahmet Aydeniz İnşaat
Ticaret Şirketi
Anonim Şirketi
Ayten Sokak, No: 9, Tandoğan - Ankara
Tel: +90 312 212 66 12
Fax: +90 312 212 66 11
E-mail: info@aydeniz.com

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4. AYDENIZ shall be the "Lead Partner" of the Joint Venture and shall represent the Joint Venture towards the Employer and third parties for the jointly submitted bid (bids) and the Contract (Contracts).
5. The Joint Venture shall be managed by the Supervisory Board. Each Party shall appoint one member for the Supervisory Board. The Supervisory Board shall be authorized and responsible for and shall decide on the general policy of the Joint Venture. All decisions of the Supervisory Board shall be taken by unanimous agreement. In case unanimity is not reached on any decision of urgent nature, the decision of the Chairman (representing the lead Partner) shall prevail.
6. The Project Manager shall be appointed by the Lead Partner.
7. The shares of the Parties in the Joint Venture shall be:

AYDENIZ : % 60 (Sixty)

KMC : % 40 (Forty)

The Parties shall share in the above proportions all rights and obligations (including but not limited with provision of all bonds and guarantees, capital contribution, share of profit/loss, etc.) arising out of or in connection with the proposal and the execution of the Contract.

8. The Parties agree that no Party of the Joint Venture shall sign, pledge, sell or otherwise dispose all or part of its respective interests in the Joint Venture to a third party without the express permission of the other Party.
9. Each Party shall separately and solely bear all costs and expenses it may have expended or incurred in connection with the preparation, submission and negotiation of the Bid until signing of the Contract.
10. The legal address of the Joint Venture shall be:

Ahmet Aydeniz Construction Company, Ethiopia Branch Office

Addis Ababa, Bole Kifle Ketema,

Kebele 19, House No. 0617

Fax : +251 11 6639775

Tel : +251 11 6639773

E-mail : fiat@aydeniz.com - info@aydeniz.com - ahmetaydeniz@ethionet.in

11. This Agreement shall come into force on the date of signature by the Parties and shall come to an end at the earliest of the following events:

- a. If the Contract (Contracts) is awarded to the Joint Venture, when all obligations and liabilities between the Parties as well as towards the Employer, the Joint Venture and contracted third parties have ceased and all bonds and guarantees have been released,
- b. If no Contract is awarded to the Joint Venture, when the tender security has been released by the Employer and the Parties have completed all obligations under this Agreement,
- c. If JV is not Pre-qualified by the Employer,
- d. At the latest on 30th October 2008 if, at that date no Contract is awarded and no bid is still valid;

(Signature)
 Ahmet Aydeniz
 Director General
 Ahmet Aydeniz Construction Company
 Addis Ababa - Ethiopia
 Telephone: +251 11 6639773
 Fax: +251 11 6639775
 E-mail: fiat@aydeniz.com



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POWER OF ATTORNEY

Know all men by these presents, AHMET AYDENİZ İNŞAAT TURİZM GIDA EĞİTİM OGRETİM İTHALAT İHRACAT VE TİCARET A.Ş. (hereinafter referred to as "AYDENİZ") a corporation duly incorporated and registered under the laws of Turk, KMC Construction Limited (hereinafter referred to as "KMC") a corporation duly incorporated and registered under the laws of India, whereas the Parties have decided to form a joint venture, the name of the Joint Venture shall be AYDENİZ - KMC JOINT VENTURE, or shortly AYDENİZ - KMC JV (hereinafter referred to as "Joint Venture" or shortly as "JV").

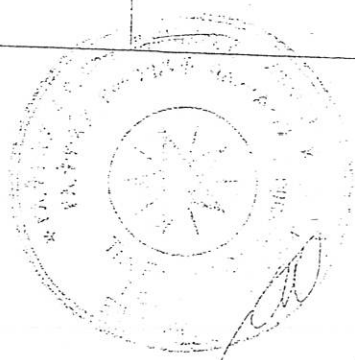
AYDENİZ - KMC JV is submitting a pre-qualification for the, "Apcsto- Wendo- Negele Road Upgrading Project, Contract 2: Irba Moda - Wadera Road" (hereinafter referred to as "PROJECT") as per the Invitation for Prequalification of which identification of contract ICB No. 02/2007 issued on 07 September 2007 by "Ethiopian Roads Authority, Ethiopia".

In this regard, AYDENİZ and KMC do hereby duly appoint and constitute AYDENİZ as being "Lead Partner" of the JV. AYDENİZ is authorized to act solely on behalf of the JV as the lead partner, appropriate to the conditions of the pre-qualification, tender and in case of award, the execution of contract. The notices sent to the Lead Partner shall be deemed to be sent to the JV itself. We further declare that AYDENİZ can sign and submit all documents, receive instructions and make modifications and clarifications on behalf of the JV, during the pre-qualification, tender and in case of award, the execution of contract.

In this regard, AYDENİZ and KMC do hereby duly appoint and constitute Mr. Firat Aydeniz as authorized individual and its attorney-in-fact on behalf of JV, with respect to execution of all PQ and Tender documents; and in case of award, the execution of Contract and the entire duration of the project Implementation; including signing, submitting and withdrawing any documents with regards pertaining to PROJECT. Mr. Firat Aydeniz is authorized to carry out the procedures and transactions on behalf of the JV, to represent and bind the JV, and if desired, to appoint, assign and dismiss all or some of their authorities to third persons.

IN WITNESS WHEREOF, the undersigned have executed this Power of Attorney, on 20th day of October 2007.

For and on behalf of AHMET AYDENİZ İNŞAAT TURİZM GIDA EĞİTİM OGRETİM İTHALAT İHRACAT VE TİCARET A.Ş. AYTEN Sokak, No: 9 Tandogan, Ankara 06580 TURKEY Mr Ahmet AYDENİZ Chairman of the Board and Authorized Representative  Ahmet Aydeniz İnşaat Ticaret Sicil No: 27110, Tic. Sic. No: 27110 Ankara Sokak No: 9 (Tandogan - Ankara) Tic. Sicil No: 27110, Tic. Sicil No: 27110 Mersis No: 06100002711000000000000000	For and on behalf of KMC Construction Limited MCH No. 555, Arora Colony, Road No. 3, Banjara Hills, Hyderabad - 500 034, Andhra Pradesh (State), INDIA Mr. J. Prabhakara Reddy General Manager (Finance and Authorized Representative For KMC CONSTRUCTIONS LTD.  Power of Attorney Holder
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Appendix

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ፕሪሚየር ስዊች ሶልዩሽንን መቋቋምን በተመለከተ የተዘጋጀ

ጋዜጣዊ መግለጫ

ፕሪሚየር ስዊች ሶልዩሽንን በሚል ስያሜ የተመሰረተ በዓይነቱ የመጀመሪያ የሆነና በሶስት የግል ባንኮች ጥምረት የተቋቋመ ከባንያ ዘመናዊ የካርድ ክፍያ ስርዓት ፕሮጀክት በይፋ ተመረቀ።

በሕብረት ባንክ ኢ.ማ.፣ አዋሽ ኢንተርናሽናል ባንክና ንብ ኢንተርናሽናል ባንኮች ጥምረት የተቋቋመውን ፕሪሚየር ስዊች ሶልዩሽንን ከባንያ ዘመናዊ የካርድ ክፍያ ስርዓት ፕሮጀክት አስመልክቶ ሐምሌ 8 ቀን 2002 ዓ.ም በሒልተን ሆቴል በተካሄደ የፕሮጀክቱ የምረቃ ስነ ስርዓት ላይ እንደተገለጸው የሶስቱ ባንኮች ጥምረት በአሁኑ ሰዓት ዘመናዊ የሆነ ብሔራዊ ወጥ የክፍያ ስርዓትን (National Payment System) በአገሪቱ ለመዘርጋት በኢትዮጵያ ብሔራዊ ባንክ በኩል እየተደረገ ያለውን ጥረት አጋዥ እንደሚሆን ይታመናል።

በስነስርዓቱ ላይ ንግግር ያደረጉት ፕሪሚየር ስዊች ሶልዩሽን የቦርድ ሊቀመንበር አቶ ብርሃኑ ጌታነህ እንደገለጹት ምንም እንኳን ባንኮቹ በተናጠል የካርድ ክፍያ ስርዓትን የመዘርጋት አቅም ያላቸው ቢሆንም የዚህን መሰል ጥምረት የመሰረተ ልማትንና ሃብትን በጋራ በመጠቀም ሊገኝ ከሚችለው ጥቅም ባሻገር በየጊዜው እያደገ የመጣውን የአገር ውስጥ ምርት በብሔራዊ ደረጃ ወጥ በሆነ ዘመናዊ የክፍያ ስርዓት ለደንበኞች ፈጣንና ቀልጣፋ አገልግሎት ለመስጠት የሚኖረው ፋይዳ እጅግ የጎላ ነው።

ከዚህም አንጻር ይህን አይነት የትብብር ስራ በአርአያነት ወደፊት ብዙ መሰል ድርጅቶች ሊከተሉት እንደሚችሉ የገለጹት አቶ ብርሃኑ ሁሉም ነገር በታሰበው የጊዜ ሰሌዳ መሰረት ከተከናወነ አገልግሎቱን ለደንበኞች በመጨመሩ ስድስት ወር ውስጥ ለማቅረብ መታቀዱንም ጨምረው ገልጸዋል።

ለዚህም ያግዝ ዘንድ ከባንያውን በቋሚነት የሚመሩ የቦርድ አባላት በእለቱ የተመረጡ ሲሆን ከባንያውን ለመምራት የሚችል የስራ ኃላፊ ለመምረጥም የጋራ መመሪያ ተነድፎ ቢሮውን የማደራጀት ስራ ውስጥ ለመግባት በዝግጅት ላይ መሆናቸውን ጨምረው ገልጸዋል።

Appendix

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Contract Agreement

THIS AGREEMENT made the 24th day of December, 2008, between Ethiopian Roads Authority (hereinafter "the Employer"), of the one part, and Ahmet Aydeniz-KMC Joint Venture (hereinafter "the Contractor"), of the other part:

WHEREAS the Employer desires that the Works known as Construction Works of Aposto - Wendo - Negele Road Upgrading Project Contract 2: Irba Moda Road-Wadera should be executed by the Contractor, and has accepted a Bid by the Contractor for the execution and completion of these Works and the remedying of any defects therein,

The Employer and the Contractor agree as follows:

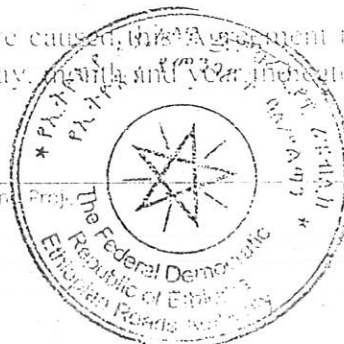
1. In this Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Contract documents referred to.
2. The following documents shall be deemed to form and be read and construed as part of this Agreement. This Agreement shall prevail over all other Contract documents.
 - a) The Contract Agreement;
 - b) The Letter of Acceptance;
 - c) The Letter of Tender
 - d) The Particular Conditions – Part A; (Contract Data)
 - e) The Particular Conditions – Part B; (Specific Provision)
 - f) The General Conditions;
 - g) Particular Technical Specifications;
 - h) ERA's Standard Technical Specifications 2002
 - i) The Drawings;
 - j) The Priced Bill of Quantities;
 - k) The Completed Schedules; and
 - l) Any other documents forming part of the Contract.

3. In consideration of the payments to be made by the Employer to the Contractor as indicated in this Agreement, the Contractor hereby covenants with the Employer to execute the Works and to remedy defects therein in conformity in all respects with the provisions of the Contract.

4. The Employer hereby covenants to pay the Contractor in consideration of the execution and completion of the Works and the remedying of defects therein, the Contract Price or such other sum as may become payable under the provisions of the Contract at the times and in the manner prescribed by the Contract.

IN WITNESS whereof the parties hereto have caused this Agreement to be executed in accordance with the laws of Ethiopia on the day, month and year indicated above.

Ahmet Aydeniz-Insoat
Turizm Caddesi, Dgr. Etk. No. 45
Ayten Sok. No: 9 Tandoğan - Ankara
Tel: 0 312-212 65 70 Faks: 0 312 215 61 44



[Handwritten signature]

Ahmet Ayteniz İnşaat
 Tekim Gıda Etil. San. Tic. Ltd. Şti.
 Ayten Sok. No: 9 Tandoğan - Ankara
 Tel: 0312-232 35 12 Faks: 0312-232 35 14



Signature _____

Signature _____

Privatization & Public Enterprises Supervising Agency
Advertisement to Invite Prospective Business Partners
For Expression of Interest

The Privatization & Public Enterprises Supervising Agency (PPESA) is an autonomous government office which is entrusted with the tasks of privatizing, supervising, guiding, supporting and controlling state-owned enterprises to render them competitive and profitable and thereby enabling them to play significant roles in the implementation of the country's industrial development strategy and the enhancement of economic growth.

Accordingly, PPESA invites capable domestic/foreign private/public companies to express their interest to develop/upgrade/expand the selected 3 public enterprises or units by concluding contracts with the Agency. **The preferred modality of the Agency is Joint Venture and partners need to specify this as their mode of engagement.**

The lists of public enterprises that are seeking strategic partners for the year 2010/11 are presented hereunder.

No.	Enterprise	Sector	Modality
1.	Anbessa Shoe S.C.	Leather & Shoe	Joint Venture
2.	Adami-Tulu Pesticide Processing S.C.	Chemical	Joint Venture
3.	Meta Abo Brewery S.C.	Beverage	Joint Venture

Partners must be legally established companies having operated at least for three years. Other conditions that partners need to comply shall be made available to partners up on submission of EOIs.

Interested parties, either individually or as a consortium should submit the Expression of Interest ("EoI"), together with company profiles to:-

Privatisation & Public Enterprises Supervising Agency
P.O. Box 11835
Addis Ababa, Ethiopia

Each EOI & Business Plan submitted must be clearly marked on the outside indicating the particular public enterprise chosen to work with.

The EOIs should provide the full name of the company & the contact person, postal address, telephone, fax number & e-mail address, ownership structure of the company, audited financial statements for the past five years, company profile/credentials including capital, turnover, markets, manpower, etc....

All EOIs and business plans must be received by mail or fax or by bringing them physically starting from the date of issue of this notice at the address stated above.

EOIs should be submitted before the end of the deadline, which is **November 5, 2010**. EOIs submitted after the deadline will not be acceptable. Short listed partners will be contacted within 2 weeks from the closing date.

The PPESA reserves the right to cancel the offer partially or fully.

Appendix

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