

JOINT VENTURES UNDER TURKISH LAW

JV agreements should be well drafted to avoid Turkey's burdensome legal standards, says *Sezer Caliskan*

Joint ventures are partnerships whereby two or more legal entities or individuals who are independent of each other in legal and economical terms gather for the accomplishment of a common task. According to the Turkish Code of Obligations (the TCO) and the Turkish Commercial Code (the TCC) a joint venture is deemed a type of general partnership (*adi ortaklik*).

According to Article 520 of the TCO, general partnership is a type of partnership whereby two or more persons agree on allocation of a specific contribution for the purpose of accomplishing a common purpose. The legal scholars and the High Appeals Court have extended the scope of general partnership and defined it as the agreement on a partnership relationship lacking a legal entity status whereby the partners contribute a specific value for the accomplishment of a common purpose and are jointly and severally liable against the third parties. The main elements of a general partnership are the partners (as either individuals or the legal entities), common purpose, continuing effort to accomplish such purpose, contribution and agreement of the partners.

Unless otherwise agreed in the partnership agreement, all partners are entitled and under obligation to participate in the management of the general partnership. As a general rule, the ordinary managerial activities of the partnership are conducted by the unanimity of the partners. Furthermore, unless otherwise agreed upon in the

partnership agreement, the partners are jointly and severally liable against third parties for the obligation of the general partnership. However, this obligation is not inclusive of the claims of third parties arising out of acts of tort.

Unless otherwise agreed in the partnership agreement, the partners hold the title of the partnership estate collectively in result of which any transaction related thereto shall be subject to the unanimous decision of the partners. Contrary to joint ownership where the owners are allowed to exploit all their rights in proportion to their stake in the related estate, the collective title holders shall have no proportionately exploitable rights. Therefore, any decision with respect thereto would require the agreement of all partners. However, the partners may opt in to agree otherwise in the partnership agreement. Unless otherwise agreed in the partnership agreement, the partners shall assume the loss and gain the profit equally whereby the amount of the loss and profit will be divided with the number of partners. As per Article 532 of the TCO, no partner is allowed to transfer its stake in the general partnerships without the consent of the other partners. The transfer in breach of this provision shall not be valid. It is believed that otherwise may be agreed among the partners in the partnership agreement.

The general partnership will be dissolved in case (i) the common purpose is accomplished or in the event of the impossibility of such accomplishment, (ii) any of

the partners passes away in absence of an agreement with the deceased's heirs, (iii) an executory proceeding is realised for the stake of any of the partners, or the bankruptcy or mental incapacity thereof, (iv) the partners agree on dissolution, (v) the term of the partnership is expired, (vi) six months prior dissolution notification is served by any of the partners in case the partnership is established with an unlimited term or with a term limited to the life time of any of the partners, (vii) the court decides on the dissolution due to just causes. Unless otherwise agreed in the partnership agreement, the dissolution is required to be pursued by the participation of all partners.

Apart from the above-mentioned general classification of the TCO in the Turkish legal system, the "joint ventures" are specifically regulated also under the Public Tender, FDI and Corporate Tax legislations. The term joint venture (*ortak girisim*) is defined in Article 4 of the Public Tender Law as the business partnerships or the consortia which has been established by the individuals or the legal entities pursuant to an agreement executed for the participation in a state tender. It is important to note that a joint venture cannot be a partner in a joint venture beside the individuals and legal entities. Under Article 14 of the Public Tender Law, it is stated that joint ventures can be established solely in two types. Accordingly, in business partnerships, the business partners undertake the accomplishment of the awarded tender jointly and severally. On the other hand,

Ventures comprising of business partnerships and consortia are established through the execution of a joint venture agreement

in case of consortia, the members will be under duty to perform the related part of the awarded tender which they have specifically undertaken. Therefore, when a performance failure in a state tender occurs, all business partners will jointly and severally be liable for any and all partners' breach whereby the consortia members will be released from their obligations in proportion to the accomplishment of their specifically undertaken obligations. The business partnerships are allowed to participate in any state tenders but the consortia can only participate therein in proviso that the relevant tender specification consents thereto. The joint ventures comprising of business partnerships and consortia are established through the execution of a joint venture agreement which shall be submitted to the related governmental authority prior to the finalisation of the tender process.

However, if the tender is awarded to the related joint venture, it is a prerequisite for the joint venture members to submit the joint venture agreement to the tender commission in a notarised form. In case of business partnerships, the agreement is required to include the provisions concerning the joint and several liabilities of the partners and the identification of the leading partner. However, in case of consortia, it is a requisite to identify the coordinator and to specify the liability of the members for their specifically-owed obligations.

The Corporate Tax Law and the Corporate Tax General Communiqué Serial Number 1 (the Communiqué) do not specifically regulate the joint ventures. As per Article 15.3.1.1 of the Communiqué, it is set forth that "the firms gathering for the accomplishment of a certain project

are allowed to establish three types of partnerships, namely general partnerships, business partnerships and consortia. It is noteworthy to highlight the fact that the corporate tax approach focuses on the subject matter of the taxable body corporate rather than the determination of the features of these terms. Article 2(7) of the Corporate Tax Law addresses the corporate tax payers. According to the Article, the business partnerships are defined as the partnerships that are established by and among the corporate tax payers or by and among the corporate tax payers and individuals or collective companies for the joint accomplishment of a single project.

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In order for a business partnership to be deemed as a corporate tax payer, a request related thereto is required. It is also set forth in the same Article that lack of being established in a form of a legal entity shall make no difference to such status. As one may easily observe, the Corporate Tax legislation has defined business partnerships as an establishment involving at least one corporate tax payer. In other words, the establishments incorporated solely by collective companies or solely by individuals are not deemed as a business partnership which necessitates the involvement of at least one corporate tax payer. Article 2.5.2 of the Communiqué requires the existence of corporate tax payer partner, single commercial purpose (project) to be completed in a specific time period, written agreement, undertaking agreement between the

partnership and the project holder, joint and several liabilities of the partner and profit sharing so as to be deemed a corporate tax payer business partnership.

In respect of the FDI law, foreign investors are defined as the foreign individuals, legal entities, institutions or Turkish nationals residing abroad. The foreign investment is pursued through the incorporation of new companies or establishment of branch or liaison offices or participation therein through share purchases. The companies in which the FDI can be made are the ones set forth in the TCC and the partnerships regulated under the TCO. Pursuant to Article 9 of the Regulation on the Implementation of

FDI law, (contrary to the abolished Law on Incitement of Foreign Investment) joint ventures and business partnerships are deemed as general partnerships and are accepted as models for FDI.

Joint venture, apart from the interdisciplinary measures in Foreign Public Tender, FDI and Corporate Tax legislations, are deemed as general partnerships under Turkish law. The provisions in the TCO are mostly complementary rules to be applicable in case the partners to a joint venture agreement fail to agree otherwise. The most important complementary provisions are the ones related to the title to partnership estate, management and loss and profit. Therefore, the joint venture agreements aiming to be regulated under Turkish law are strongly recommended to be well drafted so as not to be subject to such onerous legal standards. ♦

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