Romania

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Introduction

Although joint ventures had not been formally repealed as legal instruments, from an economic perspective, such business methods had been banned and forgotten for almost forty-five years, until the fall of the communist regime in 1989. The early 1990s marked a turning point, a moment when democracy was re-established, thus creating favorable conditions for reverting to joint ventures.

Private entrepreneurs rapidly embraced this new opportunity, primarily because of the liberal fiscal regime and the ease of setting up joint ventures. State-owned companies made use of this scheme frequently in their restructuring process, as well as for the purpose of their development in partnership with private investors.

Generally, a joint venture is defined as a form of partnership between two or more investors (the partners) for the purpose of jointly conducting a commercial activity or even an entire business, with a view to obtaining a profit. To this purpose, each party makes a contribution (in the form of capital, in-kind contribution, know-how, and the like), bears its share of expenses, and is entitled to part of the profit resulting from the joint venture business operations.

According to the Romanian Commercial Code[1] and the Romanian Civil Code,[2] joint ventures are defined as *de facto* partnerships, rather than legal entities serving as investment vehicles. Consequently, from a strictly legal perspective, a joint venture established in Romania under the Romanian Commercial Code is regulated basically by the same principles as summarized above, but with one important feature: the setting up of a joint venture does not involve the creation of a new

1 Commercial Code of Romania, published in the *Official Gazette* of 27 June 1997, as further amended and supplemented.

2 Civil Code of Romania, published in the *Official Gazette* of 26 July 1993, as further amended and supplemented.

legal entity, all of the joint venture business activities being practically assumed by one of the parties to the partnership.

However, if investors decide to engage in a joint venture and set up a new legal entity for this purpose, this may be achieved through the incorporation of a new company, in accordance with the provisions of the Company Law.[3]

Consequently, from a legal perspective, a joint venture may be implemented in two distinct forms: either in accordance with the provisions of the Commercial Code as a partnership, or under the regulations of the Company Law as a separate company.

Opting for one of the two forms of joint ventures requires thorough consideration, as the legal status of a partner and of a shareholder are hardly similar. Each type of joint venture is subject to a different legal regime, especially in the field of liabilities (between parties and toward third parties) and fiscal treatment. This can be explained by the fact that *de facto* joint ventures, although established under the Commercial Code, are basically of a contractual nature, and hence the parties must determine the rights and obligations that will govern their relationship.

On the other hand, the regime for companies is controlled by the Company Law, several regulations being compulsory and unavoidable. Considering the specific characteristics for each of the joint venture forms, this chapter will address each one separately.

Joint Ventures Regulated by the Commercial Code

In General

The aspect that gives a joint venture regulated by the Commercial Code its distinctiveness from the general perception of joint ventures is the fact that it lacks legal personality. In other words, the partners develop a business relationship between themselves only on a contractual basis. There are no specific formalities for establishing a joint venture; however, the existence and conditions of these formalities may only be evidenced by a written deed (i.e., a contract).

3 Law Number 31/1990 on commercial companies, republished in the *Official Gazette*, Part I, Number 1066, of 17 November 2004, as further amended and supplemented.

Features and Operation

The parties to a joint venture may be merchants or companies, or even non-merchants. However, non-merchants may be parties only to the extent of the commercial activities performed by them. The number of parties is not restricted, and there are no prohibitions with respect to the category of partners that may participate. Nevertheless, the nationality of a party triggers a differentiated fiscal treatment, as elaborated below.

There also are no restrictions regarding the scope of the joint venture, which may envisage one or more business operations or an entire business, save for situations where non-merchants are involved, in which case only business operations considered *ut singuli* may be subject to the joint venture.

Entering into a joint venture partnership does not create a corporate entity with a legal personality separate from the partners. To this end, third parties may face difficulties in enforcing the rights arising from the joint venture operations. In order to remedy this shortcoming, the Commercial Code provides that business operations must be carried out only by one of the partners (the "main partner") on behalf of the partnership.

Consequently, although acting for the benefit of the joint venture and on behalf of the other partners (the "secondary partners"), the main partner is the only one who may enter into agreements with third parties. All rights and undertakings that arise under contracts with third parties are assumed by the main partner in its own name; accordingly, all liabilities in connection with the joint venture operations toward third parties also are incurred by the main partner alone.

The Commercial Code creates a link between the joint venture and third parties (the link being the main partner), but the obligations between partners have not been clearly outlined. Although it is expressly stipulated that the secondary partners are entitled to be informed regarding the status of the contributions brought by them, and also regarding the benefits and losses of the joint venture, these rights are not accompanied by appropriate guarantees. To this extent, the joint venture agreement should provide for protection instruments and appropriate mechanisms that will ensure that the secondary partners are accurately informed of and involved in the contemplated business operations.

Security also should be considered with regard to each partner’s contribution, as well as with regard to the proper sharing of the

obtained profit. One possible solution may be to create a security interest in the form of a receivables assignment agreement, which would allow the main partner to be replaced by the secondary partners in its contractual relationship with third parties, thus enabling the secondary partners to gain control over commercial operations. Furthermore, the payment of the relevant share of the revenues to each partner may be secured by mortgages, pledges, or various financial instruments, such as on-demand bank letters of guarantee.

Liabilities

The partners usually agree that should the main partner's liability be engaged by third parties, it will be indemnified by the secondary partners, either *pro rata* their contribution to the joint venture, or in another percentage agreed to *a priori*. Moreover, the joint venture does not have the capacity to sue and be sued. As a result, any contractual claim relating to the operation of the joint venture must be brought against the main partner, and insolvency procedures may be commenced only for each of the partners separately.

Thus, except for the main partner, the other partners to the joint venture do not gain any rights against, and may not be held liable toward, third parties. Nevertheless, secondary partners, along with the main partner, may choose to always contract directly with third parties, in which case liability toward third parties is shared, due to the direct contractual relationship.

In connection with the parties' liability toward each other, the rights and undertakings of the main partner and of the secondary partners need to be clearly stipulated within the joint venture agreement. As a general rule, the liability between partners will be a contractual liability, governed by the contractual liability principles that will ultimately depend on the specific scheme elected for the implementation of the contemplated business (operating rules of the joint venture). These rules may be determined freely by the parties because, under Romanian legislation, joint venture agreements have not been regulated in detail.

Since a joint venture established under the Commercial Code is not a legal entity, it cannot be held liable, and accordingly, third parties, which are not in a contractual relationship with the main partner, may claim the repair of damages resulting from the joint venture operations under specific tort liability regulations. Consequently

such claims will have to be filed only against the partner or partners directly responsible for the damage. According to Romanian law, tort liability can be engaged provided the plaintiff cumulatively proves the following:

(1) The extent of the damage;
(2) That such damage was personally caused by the defendant;
(3) That the damage was the defendant's fault and
(4) That the actions causing the damage represent a breach of law.

The injured third party may obtain indemnification for the entire damage from any of the responsible partners, the latter being held jointly liable towards third parties. Although the partners may agree on sharing liability towards third parties between each other, such agreement cannot be enforced against third parties.

Contributions

An important aspect of a joint venture agreement is that, in the absence of provisions to the contrary, the assets contributed to the partnership become the property of the main partner. The ownership right is irrevocably and unconditionally transferred to the main partner, in exchange for the partners' right to participate in the partnership's gains and losses resulting from the contemplated business.

Nevertheless, under the existing laws, a clause within the joint venture contract may stipulate that a secondary partner is entitled to regain the ownership right over its contributed assets upon expiry or termination of the partnership.

Should the restitution of the contributed assets be impossible, the contributing partner is entitled to claim indemnification only from the main partner. However, the parties may agree for the secondary partner to contribute only the usage right over certain assets, while maintaining ownership over these assets. In this case, the main partner is entitled to operate the relevant assets as it best sees fit, without having any disposal rights over the asset.

Contributions toward the business activity of the joint venture may be in various forms, such as capital, assets, know-how, and labor contribution. Basically, any kind of work or services will represent a valid contribution.

Termination of a Joint Venture

The general cases that could lead to the termination of a contractual joint venture are:

(1) Mutual agreement of the parties;
(2) Expiry of the term agreed to *a priori* by the partners, and, if the partners omit to set a fixed term, the joint venture will be limited to the duration of the envisaged commercial activity;
(3) Fulfillment of the scope of the joint venture;
(4) Insolvency or winding-up of any of the partners;
(5) Termination through court decision, due to non-fulfillment of major undertakings; and
(6) Termination under specific cases set forth in the joint venture agreement.

Given that a joint venture does not create a new legal entity, its dissolution is not followed by liquidation.

Fiscal Regime

Revenues obtained from joint venture business operations are subject to taxation according to the provisions of the Romanian Fiscal Code.[4] As the joint venture is merely a contract, and as it does not set up a legal entity with legal personality, the revenues achieved and expenses incurred by the joint venture are distributed to the partners *pro rata* to their particiaption in the joint venture, and each partner is subject to taxation separately. To this extent, the Fiscal Code clearly specifies that a joint venture is not to be regarded as a separate legal entity for taxation purposes.

The taxation procedure depends, however, on the nationality of the partner. In case all partners are of foreign nationality, they are required to appoint one of themselves to act as a representative before the fiscal authorities. The appointed representative will have to perform all mandatory fiscal procedures, and then pay the income tax on behalf of the relevant partners. Should the partners comprise both partners of Romanian and foreign nationality, then the mandatory fiscal procedures must be performed by a Romanian partner. Each Romanian partner is to perform the formalities for itself.

4 Fiscal Code of Romania, published in the *Official Gazette*, Part I, Number 927, of 23 December 2003.

Joint Ventures Regulated by the Company Law

Possession of Legal Personality

Although not expressly stated under Romanian legislation, the purpose of a joint venture also may be achieved through the use of various forms of legal entities that, therefore, have a legal personality. The Company Law allows for several different types of companies; however, practice has proved that limited liability companies and joint stock companies are the most relevant choices in the implementation of joint venture projects.

In comparison to joint ventures regulated by the Commercial Code, the establishment and operation of companies is of a more complex nature, and has less flexibility. One of the most important differences, *stricto sensu*, between a contractual joint venture and a company is the fact that a company has a distinctive legal personality. This feature leads to significant changes from the structure, operation, and legal regime of a joint venture under the Commercial Code. Therefore, the following sections will focus on these distinctive features, as they are applicable both to limited liability companies and joint stock companies (collectively referred to as "companies").

Establishment of Companies

Companies must meet certain mandatory requirements for incorporation. First, the setting up of a company is to be authorized by the judge commissioned to the trade registry office within the tribunal in which jurisdiction the registered office of the company is located; hence, an agreement between the shareholders is not sufficient. Furthermore, companies are required to have:

(1) A constitutive deed, which comprises the articles of association and bylaws and that must be executed in notarized form (in case of land being contributed to the share capital, or if a joint stock company is incorporated through a public offering), and that contains information regarding the shareholders, name and logo of the company, scope of business, registered office, share capital, duration, termination of the company, as well as any other relevant information regarding the operation of the company;
(2) A registered office;
(3) A minimum share capital, which is approximately EUR 60 for limited liability companies and at least EUR 25,000 for joint

stock companies, and which may be paid in capital and in-kind contributions, the shareholders to a joint stock company also having the option to contribute with receivables;[5]

(4) A scope of business, which includes a primary scope of business, with a secondary scope of business being optional;[6]

(5) A specific form of management, as well as one or several appointed directors; and

(6) A specific formula for distribution of profits or losses.

Operation

The corporate body of a company, responsible for making decisions and exercising general supervision of business activities, is the general assembly of shareholders. On the other hand, the day-to-day business of a company is carried out by the company's directors, which are entitled to act independently, provided the constitutive deed does not require for joint decision making. However, according to law, as a general rule a company is represented by each of its directors, unless otherwise provided in the constitutive deed, or decided by decision of the general assembly. Directors however, may not appoint a third party as representative of a company unless authorized to do so under the constitutive deed or with prior authorization by the general assembly of the shareholders.

Assignment

In general, the assignment of the shares held in a joint stock company may be made freely, without any restrictions, unless otherwise provided within the constitutive deed.

In the case of limited liability companies, the shares may be conveyed freely between shareholders, but the transfer in favor of third parties is conditioned upon the approval of the holders of three-quarters of the share capital.

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5 Contributions consisting of supply of work and services are expressly prohibited by the Company Law.

6 However, the description and content of any scope of business is regulated by law (which is similar to and based on the International Standards Industry Classification, Revision 4 and NACE Revision 2 of the European Union), the shareholders merely having the option of choosing from a predetermined list.

Dissolution

According to the law, the following situations constitute generally applicable cases for a company's dissolution:

(1) Expiry of the period for which the company was established;
(2) Impossibility of achieving the company's scope of business;
(3) Company voidance;
(4) Decision of the general meeting of shareholders;
(5) Severe conflict between shareholders that prevents the company's successful operation;
(6) Bankruptcy;
(7) Decrease of the share capital below the legal threshold;
(8) Decrease of the number of shareholders below the legal threshold; or
(9) Court decision, according to law.

As a result of dissolution, companies enter into the liquidation procedure. The liquidation will not release the shareholders or prevent the opening of the company bankruptcy procedure. The liquidation of a company's assets involves the conversion of the company's assets into cash, and the cashing in of receivables that the company holds against third parties.

Payment of the company's debts toward its creditors is performed from the amounts obtained from liquidating the company's assets. For the purpose of settling the company's debts, the liquidators may issue bills of exchange, enter into loan agreements, or may pay debts out of their own resources.

Liabilities

The civil liability of the shareholders is limited to their share capital contribution, and only toward the company. This is because a company engages in business operations and enters into agreements with third parties in its own name, and not as a representative of the shareholders, the contractual obligations existing only between the company and the third party.

Hence, third parties may file claims only against the company, without the option to sue the shareholders directly.

Fiscal Regime

In accordance with the Fiscal Code, companies are subject to taxation on the profit obtained in relation to the joint venture business operations. The shareholders can neither be held liable for any of the company's tax liabilities nor do they have any other obligation in relation to tax liabilities, save for the approval of the company's annual balance sheet and the budget for the year subsequent to the one for which the annual balance sheet was approved.

The dividends received by the shareholders also are subject to taxation, each shareholder having its own fiscal responsibility for dividends received. The conclusion of a shareholders' agreement, followed by the setting up of a company does not create a different fiscal regime for the shareholders of the company.

Joint Ventures with State-Owned Companies and Local Authorities

State-owned companies are permitted to enter into either of two forms of joint ventures: a joint venture regulated by the Commercial Code or a joint venture implemented by the setting up of a company. However, according to Law Number 15 of 1990 on the restructuring of state-owned economic enterprises as state-owned companies (i.e., *regies autonomes* and commercial companies),[7] the joint venture agreement must include provisions with regard to the following: the partners, the contemplated business operations, the contribution of each partner, the management and administration of the joint venture, the distribution formula for the profit, termination, and assets restitution.

Moreover, pursuant to Law Number 215 of 2001 on local public administration,[8] local authorities have the right to set up joint ventures with foreign and Romanian legal persons, but only for the purpose of jointly financing and accomplishing activities, individual operations, services, and projects of local public interest.

7 Law Number 15/1990 on reorganization of the state economic units as state-owned and commercial companies, published in the *Official Gazette*, Part I, Number 98, of 8 August 1990, as further amended and supplemented.

8 Law Number 215/2001 on local public administration, republished in the *Official Gazette*, Part I, Number 123, of 20 February 2007, as further amended and supplemented.

Joint ventures have often been entered into by state-owned companies or local authorities, as they lack the know-how and the financial resources necessary in sophisticated structure developments. For instance, several local communities appeal to foreign investors in order to be able to extend and to restore utilities networks (i.e., water and sewerage systems). This particular type of joint venture is highly advantageous to both parties — the community enjoys the use of such systems at higher standards and with broader coverage while, at the same time, the investors have a predictable, stable, and sustainable margin of profit.

More recently, in major cities that are faced with the growing need for homes, local communities have entered into joint ventures for the purpose of developing housing projects. In these cases, the city is usually the one providing the necessary land for construction, while a private investor erects housing facilities at its own expense. Upon completion of projects of this nature, the profits from the resulting facilities are divided according to a ratio agreed upon in the joint venture agreement.

Conclusion

Considering the regime of joint ventures with and without legal personality, it is for the partners to appreciate the form that is most suitable for a specific project. Joint ventures that are regulated by the Romanian Commercial Code provide more flexibility, with the partners being allowed to decide every aspect of the contemplated project, save for the mandatory obligations of the main partner.

Moreover, with the existence of joint ownership, the secondary partners may benefit from a high degree of discretion or even total obscurity, as the main partner has the option of concealing from third parties the extent of its capacity or the real beneficiaries of the business operation.

One of the most important advantages of joint ventures established under the Commercial Code is that revenues obtained from and expenses incurred by the joint venture activity are distributed to the partners without taxation at the level of the joint venture. It is only upon calculation of the resulting profit that the relevant partner must fulfill its fiscal duties.

There also are some disadvantages to such joint ventures, which could make the setting up of a company the better choice. One such disadvantage may derive from the main partner's absolute control over business operations, which gives rise to the need for creating appropriate measures for securing the partners' rights and involvement in operations. Also, unless stipulated otherwise, the assets contributed to the joint venture remain in the property of the main partner.

The use of a company for the purpose of a joint venture has its own advantages. As the company has its own legal personality, the obligations of the company and of its shareholders are separate. In addition, each partner becomes directly involved as a shareholder, and thus participates in the decision making of the company and in the supervision of its statutory bodies. A further advantage is that all contributed assets become the property of the company and not of any of the shareholders. However, from a fiscal perspective, the joint venture partners would be disadvantaged because the revenues are first subject to profit tax applied to the company, and then further taxed as dividend income to the shareholders.