

A Study of the Joint Venture Company between Albania and Japan: Focusing on the Problem of Deadlock

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要 旨

本論文はアルバニアと日本間の合弁会社に関する研究である。

近時、アルバニアと他の諸外国との経済関係は増大しているが、将来日本をはじめとする諸外国の企業がアルバニアへの投資に積極的な関心を示すことが期待されている。かかる理由から、アルバニアと日本との間の国際合弁会社を具体的手がかりとして、外国投資を研究することを試みた。外国投資はアルバニア経済の発展に非常に重要だからである。国際合弁会社には多くの問題点があるが、本稿では、対等持分の合弁会社において特に発生し得るデッド・ロックの問題に焦点を絞って研究し、いくつかの解決策を提示する。

デッド・ロックの発生を防止する方法の分析を通じて得られた結論は、対等持分の合弁会社は適切ではないということである。むしろ、決定権のある多数派を有する合弁会社の方がより良い選択であると考えられる。

Key Words: Albania, Joint Venture, Board of Directors, Supervisory Council, Assembly of Shareholders, Deadlock.

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Introduction

This paper is intended to be a study of the joint venture between Albania and Japan.

From 1945 to 1990 Albania was a communist state. The characteristic of this system was the isolation of the country from the western countries and collaboration with other communist states. Overall collectivization¹ of private property was carried out based on the *Property Collectivization Law*. Economic activities by private entities were prohibited by the law.

This legislation remained effective until July 31st of 1990 when Parliament enacted the “Economic Activity in SPRA (*Socialist People Republic of Albania*) with Participation of Foreign Capital Law”. This was the first step toward the market economy. However, all activities with the participation of foreign capital were carried out by the state.

Although the democratic and economic transformation in Albania began later than in other Central and Eastern European countries, the implementation of the initial phase of reforms was rapid and impressive. Foreign investors began to invest in Albania, but the reforms in the public administration and financial sectors advanced at a much slower pace².

According to “*Repertory of Economic Enterprise*” of *INSTAT (Institution of Statistics)*, out of 61,859 active enterprises in Albania at the end of 2001, 1,793 (2.9 percent) were partly foreign-owned companies (joint ventures) and 1,122 (1.8 percent) were wholly foreign owned companies³. At the end of 2002, the value of private *FDI* stock (*Foreign Direct Investment*) was 945 million US\$⁴.

But the economic transition of Albania was made without adequate preparation for a free-market economy. This situation caused various problems represented by the pyramid schemes⁵, including the collapse, which triggered the civil crisis of 1997 and continued with the imperfection of the economic system⁶. Civil unrest broke out in February 1997 and spread quickly across Albania, causing the fall of government and precipitating new elections. The government which took office after the election of July 1997 quickly re-established macroeconomic control and in late 1997 started to implement a broad-based program of reforms in the public administration and financial sector including institution-building, civil sector reform, preparation of legal framework for foreign investment and privatization of state-owned banks under the

support of the international donor community led by *IDA (International Development Association)* and *IMF(International Monetary Fund)*⁷.

Recently the economic relations between Albania and other countries are increasing. More and more companies in expansion have decided to enter and are replacing individual investors. In this respect, *Albanian Economic Development Agency (AEDA)* was founded as a government body in August 1998 and an economic policy focusing on foreign investment has come to be implemented by it. One of main aims of *AEDA* is the creation of a favorable environment for foreign investments in the country by proposing suggestions and recommendations to the government to improve the legislation and legal procedures⁸.

Foundation of international joint venture companies might bring a new international economic relation of Albania, leading to a more developed Albanian economy.

For this reason this study will attempt to examine the concrete problem in the case of actually founding an international joint venture in Albania based on the above-mentioned situation. The study in detail of all conditions, rules, legal issues and legal framework of a joint venture company and its problems would help foreign and Albanian investors interested to invest in Albania as well.

In Chapter I, in order to examine the legal form suitable for an international joint venture, legal examination centering on the Albanian Commercial Company Law of 1992 is performed. According to this Law, there are four types of companies: Unlimited Partnerships or General Partnerships [*Shoqerite kolektive*], Limited Partnership [*Shoqerite komandite*], Limited Liability Companies [*Shoqerite me pergjegjesi te kufizuar or Sh.P.K*] and Joint Stock Companies [*Shoqerite anonime or Sh.A*].

Comparing the advantages and disadvantages of the above-mentioned four types of companies, the form of the Joint Stock Company is considered to be a suitable form for an international joint venture company. They are divided into two types. One is a joint stock company without public offer and the other is joint stock company with public offer. The difference between them is that the shares of joint stock company with public offer are listed on the stock market, while shares of joint stock company without public offer are not listed on the stock market.

The joint stock company with public offer has some advantages such as easiness of funding from the stock market, credibility of being a reliable company and limited liability of shareholders. It provides a clear structure for the internal accounting and internal reporting and, at the same time, it is a well-recognized entity with an established body of corporate laws and judicial precedents⁹. However, the procedure to establish a joint stock company with public offer is rather complicated. Thus, Albanian promoters usually prefer to

establish a joint stock company without public offer¹⁰. This trend emerges, because if they wish to offer its shares for sale in stock market, it is easy for them to convert one without public offer into one with public offer afterward.

Finally, in order to detect the problem of an international joint venture more concretely, examination is required, assuming that a joint venture company is founded between Albania and Japan (Chapter II). This company is created between an Albanian construction company and Japanese construction company to set up construction business in Albania. Both parties invest on a 50:50 bases and have the right to appoint the management and control of the Joint Venture Company equally.

In this kind of Joint Venture Company where both shareholders possess the equal percentage of shares¹¹ and where the number of members of the Board of Directors and the number of members of the Supervisory Council from both parties is the same, in most instances, the possibilities for a dead-lock to arise are much greater.

In this type of company the deadlock can arise in each decision making level, namely:

- 1) Board of Directors level
- 2) Supervisory Council level, and
- 3) Shareholders level

The analysis of the deadlock will be made by each level and the suggestions will be made as a possible solution to the problem.

Although there are many problems in an international joint venture all cannot be taken up in this study. This paper focuses on the deadlock problem, which is especially probable in the case of an equally owned joint venture company, and presents some possible solutions.

I. Legal Scheme for the International Joint Venture Company

There are one thousand seven hundred ninety three (1,793) joint venture companies that are created between Albanian and foreign companies¹². These companies are operating in the territory of Albania and, there are about one thousand one hundred twenty two (1,122) wholly foreign owned companies¹³.

1. Applicable Law to Joint Venture Company

The basic legal frame, where the international joint venture companies in Albania are subordinated, consists of “Constitution”¹⁴, “Foreign Investment Law” and “Commercial Company Law”.

1-1 Constitution

The Constitution of Albania defines and protects the freedom of private property and initiative, private activity of Albanian and foreign companies which are carrying on their activity in the territory of the Republic of Albania.

1-2 Foreign Investment Law

Foreign Investment Law No.7764, November 2nd 1993 [*Ligj Nr 7764, date 2.11.1993 Per Investimet e Huaja*] rules that foreigners, either juridical or physical persons, are entitled to the right to carry on different economic activities in Albania and to invest their capital in different sectors of Albanian economy¹⁵. We can summarize this law as follows:

This law defines that:

- “Albania” means the Republic of Albania;
- “Territory” means the territory under Albania’s sovereignty
- “Authorization” means an authorization for investment issued under this law;
- “Foreign investor” means:
 - a) Any natural person that is a citizen of a foreign country
 - b) Any legal person that either is incorporated or constituted under a law that is not the Albanian law, or has its seat outside Albania
 - c) An Albanian citizen with a permanent domicile abroad

1-3 Types of Foreign Investment

“Foreign investment” shall comprise every kind of asset and, in particular, any foreign investment in:

- a) Movable and immovable property tangible or non-tangible and any other property right
- b) Shares in, stock and debentures of a company, and any other form of participation in a company
- c) Loans, claims to money or to any performance under contract having an economic value
- d) Intellectual property rights, including technical process and know how
- e) Economic rights granted by public law, including the right to search for, extract or exploit natural resources¹⁶

1-4 Restriction to foreign investors

A foreign investor can carry on his activity in all sectors of the economy, provided that he shall not;

- a) Affect the national security and defense interests of Albania
- b) Infringe the regulations in force meant to protect the environment
- c) Harm the legal and public order, health and good morals¹⁷

2. General Definitions of Four Types of Albanian Companies

I will study in the next chapter the main law, which defines and regulates the activity of companies. In this section the types of Albanian companies will be discussed.

According to Commercial Company Law No. 7638 of November 19th 1992, there are four types of companies:

2-1 Unlimited Partnerships or General Partnerships [*Shoqerite kolektive*]

All partners of this type have unlimited liability. They have the capacity of merchant and hold responsibilities without any limit and in solidarity for the debts of the company¹⁸.

The name of the Unlimited Partnership may also include the name of one or more partners, with the words “Unlimited Partnership” coming before or immediately after it. For example, in the case where three partners, named A, B and C establish a General Partnership, they have to decide for the name of their company to be

called “A, B and C Unlimited Partnership [*A, B dhe C Shoqeri Kolektive* or *A, B dhe C Sh. Kolektive*]”, or “Unlimited Partnership A, B and C [*Shoqeri Kolektive A, B dhe C* or *Sh. Kolektive A, B dhe C*]”¹⁹.

The company dissolves when a partner dies, in case of bankruptcy, deprivation of the right to exercise a commercial profession or incapability affecting one of the partners²⁰.

2-2 Limited Partnerships [*Shoqerite komandite*]

In this type of company partners with limited liability and partners with unlimited liability are included. Taking part in these companies, in addition to “unlimited” partners, who have the status of the Unlimited Partnership’s partners, are also “the limited” partners²¹. The “limited” partners hold responsibility for the obligations of the company up to the limit of the value of their contribution in basic capital [*kapitali themeltar*]²², which can be investment in money or investment in kind but cannot be a contribution in labor. The name of the Limited Partnership may also include the name of one or more partners and before or immediately after it are placed the words “Limited Partnership”.

The company continues its activity also when one of the “limited” partners dies, but dissolves in the case when a “limited” partner goes bankrupt, except in the case when its continuity is decided in articles of incorporation, or by the unanimity, the other partners decide its continuity after the re-buying the rights of the dead partner upon the company. The company dissolves in the case when one of the “unlimited” partners goes bankrupt²³.

2-3 Limited liability companies [*Shoqerite me pergjegjesi te kufizuar, Sh.P.K.*]

In this type of company are taking part only partners with limited liability.

A Limited Liability Company is founded by one or several partners, who pay for the losses up to the limit of the value of their contribution in the basic capital. If the company consists of only one person, it is called a “Sole Partner”²⁴. The basic capital is divided in equal parts, the nominal value [*vlera nominale e pjeseve te kapitalit themeltar*]²⁵ of which cannot be lower than one thousand lek, and the minimum value of basic capital is one hundred thousand lek²⁶. Decreasing of the capital less than mentioned value obliges the company to be transformed into another form, or otherwise, the company may increase the basic capital up to the mentioned value.

The shares of the basic capital are freely transferable by heritable forms. The shares can be transferred to third persons that are not members of the company, only after the approval by the majority of partners, who

represent more than three fourth of the basic capital shares²⁷.

The Limited Liability Company does not dissolve even if one of the partners goes bankrupt or becomes incapable. It is also continues to function even after one of the partners dies, unless otherwise sanctioned by the articles of incorporation²⁸.

2-4 Joint-stock companies [*Shoqerite anonime, Sh.A.*].

The Albanian Commercial Company Law defines a joint stock company as a company whose capital is divided into stocks, and it is founded between partners who have to pay for the losses up to the limit of the value of their contribution to the basic capital. This company is established by one or more partners named shareholder and they are liable only to pay up the full amount due in respect of the nominal amount of their shares. It has a name, which preceded or followed by the words Joint Stock Company and the value of the basic capital²⁹, such as: “ABC joint stock company, basic capital ten million lek”, [*ABC Shoqeri Anonime, kapitali themeltar dhjete milion lek or ABC Sh.a, kapitali themeltar dhjete milion lek*³⁰].

2-4-1 Supervisory Council and Board of Directors

As Commercial Company Law defines, Albanian Joint Stock Company typically has two boards:

- a) A supervisory board (Supervisory Council), which represents owners and employees, and:
- b) A management board (Board of Directors), which manages the company under the supervision of Supervisory Council.

The joint stock company is administered by the Board of Directors [*Drejtoria*]³¹. The Board of Directors consists of one or more than one members (directors).

Article 97 of Albanian Company Law defines that, the members of Board of Directors are appointed by the Supervisory Council [*Keshilli Mbikqyres*]. The Supervisory Council also appoints one of them as the Chairman of Board of Directors. The member of Board of Directors must be physical person otherwise their appointment is null and void³². The members of Board of Directors can be elected even out the community of shareholders. The Board of Directors has full competences to act in all circumstances by the name of the company but is limited from the operations that need the permission of Supervisory Council and exerts its functions under the control of Supervisory Council³³. The competences of Supervisory Council are defined in Article 103 of Albanian Company Law, which defines: Supervisory Council carries on continuously control toward the Board of Directors for the administration of company. The Supervisory Council has the right to

perform in any time verifications and controls that he estimates that are reasonable, and at the same time has the right to ask to be recognized with documents, which he considers that are necessary to realize his duty. At least, every three months, the Board of Directors must present a report to the Supervisory Council. Within the term of three months from the day of conclusion of annual year, the Board of Directors presents to the Supervisory Council for the intention of verification and control, the annual financial statements, and if necessary, the consolidated financial statements too.

The Supervisory Council is elected in accordance with Article 105 and 109 of Commercial Company Law that stipulates; two thirds of members of this Council are elected directly from the Meeting of Establishment Assembly of Shareholders [*Asambleja Themeluese*] and one third of them are elected from the community of employees of the company³⁴.

The termination of their duty is decided in articles of incorporation. This termination is six years for members who are elected from Assembly of Shareholders (*Asambleja e Aksionereve*) and three years for members, which are decided in articles of incorporation³⁵.

2-4-2 Types of joint stock companies.

According to Commercial Company Law, there are two types of joint stock companies:

- a) With public offer (with shares officially registered in the vouchers stock exchange)
- b) Without public offer (all other joint stock companies)

In practice, most of joint stock companies are established as joint stock companies without public offer. Even if the intent of promoters is to establish a joint stock company with public offer, they adopt first type of company (joint stock company without public offer) because this form is non-complicated and, if the company enrich its capital up to the required capital for joint stock company with public offer, the company offer its shares for sale on the stock market or gives the right to sale its shares to a trust bank³⁶.

Another reason that I have to mention is that, in order to avoid the complicated procedures, even if the company posses the required sum of capital for joint stock company with public offer, the promoters establish first joint stock company without public offer and after that, the company offers its shares for sale in stock market. From the moment that the offer of company is performed this company will be transformed into joint stock company with public offer³⁷.

In recent times, Tirana Stock Exchange (which had been one of departments inside the Bank of Albania) has become an independent institution and this will serve on the future for a new growth of foreign investment. At

the same time, the Registration Centre of Shares received the license for carrying on its activity and is called "Registration of Shares of Joint Stock Companies"³⁸. These two important institutions will influence directly on the growth of stock market, and at the same time on the growth of the number of joint stock companies.

3. Selection of Proper Type of Joint Venture Company

Referring to the advantages and disadvantages of the above-mentioned four types of companies, which are subordinating under the Commercial Company Law, I have decided hypothetically to choose the form of Joint Stock Company. This kind of company provides a clear structure for the internal accounting and internal reporting and at the same time it is well-recognized entity with an established body of corporate laws and judicial precedents³⁹.

As I have prescribed shortly four types of companies, which are defined in Commercial Company Law, I will try to give some advantages and disadvantages of four types of companies and the reason why I choose Joint Stock Company.

Some of the advantages of Joint Stock Company towards three other forms are:

(1) Funding from stock market

Presently, the Albanian economy is growing rapidly and this happen because of foreign investment. Many foreign companies seem likely to invest in Albania because Albania offers raw material and labor power at a low price and at the same time the market needs contemporary goods and modern services. For this reason the competition between different companies in Albania is very severe. In regard to this competition only a company, which possess a big capital can withstand and carry on successfully the activities that will consist of construction and reconstruction of houses and apartments, roads and highway, various buildings etc. That because during the period 1990-2001, the construction industry in Albania has been the most profitable business sector. It is estimated that profitability increased one hundred fifty-three hundred percent (150-300%). This industry contributes up to eighteen percent to the total GDP of the country estimated in 2001⁴⁰. The reasons that construction sector experiences rapid development are:

- a) High demand for housing after 1990;
- b) Land reform and restitution of the land to the individual owners;
- c) Internal migration of the population from the rural areas to urban ones;
- d) Funding from the domestic projects and foreign assistance in housing, infrastructure, and

rehabilitation of water supply and agriculture irrigation system⁴¹.

Using stock market, only a joint venture company, which belongs to the form of Joint Stock Company with public offer, can acquire the necessary amount of capital, offering for sale its own shares through the stock market to the various physical person or legal entities. The other type of company cannot use the stock market and for this reasons these companies have few possibilities to acquire necessary capital. If the company is established as Joint Stock Company with public offer, the possibilities of this company to acquire a big capital are bigger than three other kinds of companies because of the sales of the shares on the Stock Market and offering these shares to a large number of buyers. This brings an increasing of capital of the company and at the same time the company can be at it's stronger and more powerful.

(2) Credibility

This type of company has a stronger identity for relations with third parties and for creating an internal management and employment structure. In respect to its own capital a joint stock company is more preferable and more selected by the partners in the circle of business⁴². At the same time this kind of company is more credible for the third person and for its shareholders. A joint stock company can own and hold assets in its own name and generally offer more financing possibilities than other three types of companies⁴³.

(3) Limited liability

The shareholders of a joint stock company enjoy the benefit of limited liability, since their liabilities as shareholders will be limited to any unpaid sums in regard of their share capital⁴⁴. It is clear that foreign investors do not like to hold unlimited liability for their investment. This kind of company may be the proper form for foreign investors.

II Some Legal Issues of Joint Venture Company

1. Illustration of Projected Joint Venture Company

With the aim of studying legal issues of a Joint Venture Company, I will examine the joint venture company on the supposition on which it will be established. The name of the projected joint venture company is “FUTURE Construction Joint Stock Company”, (hereinafter as “*FUTURE*”), which is a Joint Venture Company between the Albanian “*Best Construction Building Sh.a*” (*BCB*) and Japanese “*Kasumi Construction Company*” (*KCC*).

BCB is a Joint Stock Company, which was established in 1996, and its activity includes construction and re-construction of roads, bridges and buildings. The principal place of business and registered head office are located in Tirana, Albania.

KCC is a Joint Stock Company established in 1985, and its activity includes building houses and apartments, construction of highways bridges and roads. The principal place of business and registered head office are located in Yamagata, Japan.

1-1 Structure

BCB and *KCC* are planning to establish a subsidiary Joint Stock Company and they agreed to invest in this Joint Venture Company with participation of 50:50, where the voting rights will be equal. A 50:50 joint venture company is apt to reach a deadlock⁴⁵. This problem will be discussed later (Refer to 3 & 4).

The duration is perpetual beginning from the day of registration in Commercial Register⁴⁶. After verifying and reviewing the result of operations, however, both parties may decide to shorten this period⁴⁷ at the General Meeting of Shareholders of every year.

1-2 Name

The name of the Joint Venture Company is “FUTURE Construction Joint Stock Company [*Future Construction. Sh.a*]”. In all acts and documents that the company will publish, its name must be prefixed or followed by the words “Joint Stock Company [*Sh.a*]” and by the publication of paid-in capital such as “Future Joint Stock Company Paid-in capital fifty million lek [*Future Sh.a Kapitali themeltar pesedhjete milion lek*]”

1-3 Business line

The main business line of *FUTURE* is construction and reconstruction of buildings such as apartments, bridges, roads and highways, and also any other financial, commercial and industrial operations, which are directly or indirectly related with the main business of the company.

1-4 Principal place of business and Registered Head Office

The principal place of business and registered head office are located in Tirana, Albania.

1-5 Funding

Funding of *FUTURE* will consist in two ways.

One way is paid-in capital, which is fifty million lek and is divided in five thousand shares, where the value of each share is ten thousand lek⁴⁸.

Within twenty days after the incorporation of *FUTURE*, each of the parties shall pay in cash the total purchase price of their respective shares of common stock.

Upon the establishment of the company, the investment in money is fifty million lek, which corresponds to the nominal value of shares from No.1 to No. five thousand and these shares are subscribed and purchased to the extent of their value by *BCB* (two thousand five hundred shares) and *KCC* (two thousand five hundred shares). The ownership of these shares becomes effective from the date of their registration by the name of each owner.

The shares of *FUTURE*, purchased from *BCB* and *KCC*, are not freely transferable and it is prohibited to have them be sold, hypothecated, encumbered or pledged.

The second way is funding from the stock market.

FUTURE intends to issue preferred shares without voting right up to twenty five million lek. To induce the investment of third parties the shares are given priority of the dividend. *FUTURE* will offer its shares for sale in the stock market after its registration in Commercial Register.

1-6 Budget and business plans

Within three months, after the end of the fiscal year, the Board of Directors may present, to the Supervisory Council, annual accounts and annual activity report for verification and control⁴⁹. After this verification and control, any objections for the report and annual accounts found by the Supervisory Council are presented to

the General Meeting of Shareholders. The General Meeting of Shareholders discusses and makes decisions for all financial operations of fiscal year and approves or refuses the budget and business plans for the successor year⁵⁰. To increase its activity, *FUTURE* may borrow money from the bank. Both parents, *BCB* and *KCC*, agree to stand guarantees for *FUTURE* borrowing up to twenty five million lek. The amount of money provided is determined every three months for various activities for example, money is set aside for: working capital for construction of different objects ordered by the Albanian government and foreigners institutions, and projects ordered by private sector.

2. The Process of Decision Making

FUTURE has three levels of decision-making. The first is General Meeting of Shareholders, which is the highest organ of *FUTURE*. The second is Supervisory Council, which controls Board of Directors of *FUTURE*, and the third is Board of Directors of *FUTURE*, which represents the company toward the third parties and is responsible for the day-to-day business of *FUTURE*.

2-1 General Meeting of Shareholders

Based on Articles of Incorporation of *FUTURE*, a quorum for a Meeting of Shareholders shall require the presence, in a person or by proxy, of shareholders holding more than fifty one percent or more of the total issued and outstanding voting right shares of *FUTURE*. That means, if one party does not participate in the meeting, the quorum cannot be constituted.

Resolutions, including an amendment of the Articles of Incorporation, of meetings of the shareholders of *FUTURE* shall be adopted only by the affirmative vote of more than fifty one percent or more of the total issued and outstanding shares entitled to vote. That means both parties cannot make decision without the consent of the other party.

2-2 Supervisory Council

In conformity with the Commercial Company Law⁵¹, the Supervisory Council must be composed by two thirds members appointed from shareholders and one third elected from among the employees. As result, two members are appointed by *BCB*, two members are appointed by *KCC* and two members are elected from among the employees of *FUTURE*⁵².

Regarding the two members from the employees, *BCB* and *KCC* agreed from the outset in their Joint Venture Agreement that the top employees and engineers of *FUTURE* must be Japanese and other employees must be Albanian. As a result, one member of Supervisory Council from the employees should be Japanese and one other Albanian. This will help them to compose the Supervisory Council with three Albanian members and three Japanese members.

Members of the Supervisory Council elect among them one member as a Chairman and another one as a Vice-Chairman of the Council⁵³. Both *BCB* and *KCC* ensure that the Chairman of the Supervisory Council to be Japanese and the Vice-Chairman to be Albanian.

The term of office of members of the Supervisory Council appointed by the Assembly of Shareholders shall be four years with the right of re-election. The term of office for the members elected from the employees of *FUTURE* shall be two years with the right of re-election.

A quorum for a meeting of the Supervisory Council shall require the presence in a person, or by proxy, of more than fifty one percent of the members. That means four members are able to constitute the quorum.

Supervisory Council can pass a resolution with more than fifty one percent of votes⁵⁴ from its members, which means more than four out of six members must agree for making a resolution. Again a party cannot make decision without the consent of the other party.

Regarding a quorum and a resolution details will be discussed in 3-2.

The Supervisory Council of *FUTURE* has competences to decide for the personnel structure, its change and the human resources planning⁵⁵. The Supervisory Council carries on continuous control of the Board of Directors. Also, the Supervisory Council is entitled to propose to the General Meeting of Shareholders for approval of operations and objectives laid out in Articles of Incorporation. The Supervisory Council has the right to call the General Meeting of Shareholders if necessary⁵⁶.

If the Board of Directors fails to approve any plan or any part of this plan or, if the Board fails to arrange any contract, the Supervisory Council must discuss and find the proper solution.

Some of the operations, such as giving of guarantees, opening of new branches, and participation to the other companies, first need the preliminary permission of the Supervisory Council before the Board of Directors of *FUTURE* can perform them⁵⁷.

2-3 Board of Directors

BCB and *KCC* ensure that the Supervisory Council of *FUTURE* nominates six directors⁵⁸, three from *BCB*

and three from *KCC* and members of Supervisory Council agree that only a Director of *FUTURE* nominated by *BCB* may act as the Chairman of the Board of Directors, and one other member nominated by *KCC*, as the Vice-Chairman of *FUTURE*.

The term of office of Board of Directors is four years⁵⁹.

A quorum for the meeting of Board of Directors shall require more than fifty one percent of directors, which means four directors. So, if three directors whom either party nominates are not present, the quorum will not be achieved.

The Board of Directors of *FUTURE* can make a decision with more than fifty one percent of voting rights of its members as provided for in Articles of Incorporation. So, if four members do not agree the Board of Directors cannot pass a resolution.

In the case that the operation needs the approval of Board of Directors and the Board does not reach agreement, the Board of Directors is required to get approval of the Supervisory Council. If the Supervisory Council fails to approve the plan or any part of the plan for these operations that are presented by the Board of Directors, the board has the right to call the General Meeting of Shareholders⁶⁰.

3. Legal issues related to deadlock arising

Deadlock can arise in every level; however, I shall look more carefully into the above-mentioned three levels, as follows:

3-1 Board of Directors level

It is probable that a management deadlock can arise at Board of Director level where the directors appointed by both parties take opposing views in a 50:50 joint venture⁶¹.

There are two situations where the deadlock can arise. One is non-constitution of quorum and the other one is using equal voting rights to oppose the other party.

Regarding quorum, in order to hold the meeting, four out of six members of the Board of Directors must attend the meeting otherwise the meeting can not be realized. The Chairman of Board of Directors, however, can call for a second meeting, based on his authority given by the Commercial Company Law. But, in a second meeting may be the required quorum cannot be realized, because either party can boycotts the meeting of Board of Directors. The remaining members cannot constitute the quorum, so they cannot make decisions

or arrange any agreement. To take an example about equal voting right, *FUTURE* needs to arrange a purchase contract with a building materials company. The Albanian side insists that the supplier must be an Albanian company but the Japanese side insists that the supplier must be foreign. Both sides having equal voting rights take opposing views and a contract cannot be executed. Consisting of six members, the Board of Directors of *FUTURE* needs a percentage of more than fifty one percent in order to get the approval. This means that more than four directors must agree on the arrangement of contract. But in case of *FUTURE*, both parties appoint three directors, so it may be difficult to agree. Even if the Board of Directors of *FUTURE* has the right to discuss in a second meeting the above-mentioned problem, they may be unable to find a proper solution. If a solution cannot be found, this problem passes for discussion to the Supervisory Council.

3-2 Supervisory Council level

In the Supervisory Council level where the number of members nominated by each party is equal and they take opposing view, it is probable for a deadlock to arise. Even in the Supervisory Council level there are two situations where a deadlock can arise. One is non-constitution of quorum because of the boycott of a meeting by one party and the second is using voting rights against the other party. Regarding quorum if Japanese or Albanian members boycott the meeting the remaining party cannot realize the required quorum. This situation must bring disagreement. Another situation is related to the fact that the meeting of Council can be realized, but each side, which has its own equal voting right, takes opposing views and they are unable to arrange the contract. The Supervisory Council is composed by three Albanian and three Japanese members and a percentage of more than fifty one percent is necessary to make decision, which means more than four members must agree. If three Albanian members insist on a domestic company and three Japanese members insist on a foreign one, they cannot conclude: as result the Council cannot make a decision.

If the Supervisory Council fails to find any solution for this problem, the problem should be passed for discussion to the General Meeting of Shareholders of *FUTURE*.

3-3 Shareholders level

The General Meeting of Shareholders is the highest organ of *FUTURE*. There are some matters, which cannot be treated by the Board of Directors and Supervisory Council, and must be dealt with by the General Meeting of Shareholders. Amendment of the Articles of Incorporation of *FUTURE*, appointment of two thirds of members of the Supervisory Council, and deciding the remuneration of members of Supervisory Council are

competences of shareholders only⁶². Also, shareholders decide for the disposal or capital investments, finance raising above agreed limits, new shares issues and annulment the harmful contracts. The Meeting has competences to decide for the matters, which the Board of Directors and Supervisory Council discussed but could not find any solution⁶³.

Similarly to the above-mentioned levels, a deadlock may arise in two situations. First situation is when the required quorum cannot be achieved because of the absence of a party, Japanese or Albanian.

Secondly, even if the quorum is constituted, the meeting cannot conclude because of the equal voting rights. So the problem mentioned above dealing with the contract with the building material company could not be finding a solution.

4. Measures to avoid deadlock arising

According to Ian Hewitt, author of *Joint Venture 2nd* edition, experience indicates that detailed deadlock provisions will rarely be used in practice. They will often merely serve as a backdrop against which the parties will seek to negotiate how a particular dispute should be resolved when it arises. If these provisions are included but not operated in full, such provisions may nevertheless be important as background in preparing a party's practical strategy in any dispute/deadlock situation⁶⁴.

4-1 Avoidance of deadlock in Board of Directors level

One way of dealing with deadlock is to try and avoid it in the first place⁶⁵. There are again two situations where the avoidance of deadlock arising will be treated.

The first situation is when a party boycotts the meeting. One preventative measure that can be taken to avoid the boycott of the meeting is that, if the first meeting is adjourned because of the absence of a quorum, the second meeting shall be constituted of the remaining members in quorum⁶⁶. Such provisions must be stipulated in Articles of Incorporation of *FUTURE*. In order to avoid this absence, the Chairman of the Board of Directors of *FUTURE* must have the right to call for a second meeting of the board. In this case, the remaining party can realize the meeting. So it is highly probable that the boycott party will attend the second meeting. Otherwise one-sided decision will be made.

Even if each party attends the meeting, they may not agree, because each party having equal voting right takes opposing views. To prevent a deadlock from arising, one suggestion is to agree at the outset that one

party has clear voting and management control. For instance, one way is to give the Chairman of the Board of Directors of *FUTURE* a casting vote, which unlocks deadlock at this level⁶⁷. But, this gives one party an advantage, which negates the concept of joint control. In order to eliminate this concept and to retain some balance between each other, both parties, *BCB* and *KSM*, must agree to rotate the place of the Chairman of Board of Directors, perhaps on a yearly basis. These provisions must be specified in Articles of Incorporation of *FUTURE*.

The other way is to separate the zones of management⁶⁸. For instance, giving the authority of management control in the field of engineering, accounting and financing to the Japanese side may be a proper solution. The Japanese party, which has good experience in the field of management, may help *FUTURE* in its activity. The Albanian side will have the competence of management in the field of marketing, commerce and employment. The Albanian party can easily study the market and its demand, and can recruit good experienced employees. The function of each party and the separation of zones of management fulfill the intention of *FUTURE*. This separation must be stipulated in the Joint Venture Agreement.

After reviewing these two ideas, the better way to deal with avoiding a deadlock from arising is the separation of zones of management. Because it seems this suits the purpose of *FUTURE*. For example, the problem of selection of building material company is a problem, which belongs to the Albanian party, and Albanian party has the authority to decide for the building material company.

4-2 Avoidance of deadlock in Supervisory Council level

Even in Supervisory Council level there are two situations where the avoidance of deadlock arising will be treated.

The first situation is when a party, Japanese or Albanian, boycotts the meeting.

The Supervisory Council consists of three Albanian and three Japanese members. If Albanian or Japanese members do not attend the meeting and the required quorum cannot be constituted, a suggestion is that the Chairman of council must have the right to call for the second meeting. This provision must be stipulated in Articles of Incorporation.

If that is the case, the boycotting party would be better of attending the second meeting in order to pass resolutions which were proposed during their absence from the first meeting.

In the second meeting they may also find difficulty reaching an agreement. Because three members are Albanian and the other three are Japanese and each of the members have equal voting rights and equal

authority for making decision so they may take opposing views. In this situation, giving the Chairman of the Supervisory Council of *FUTURE* the right to a second vote is thought to be an appropriate solution. This can unlock the deadlock, which may arise in the Supervisory Council level but it causes negative effects to the other party and negates the concept of joint control⁶⁹. To eliminate these effects, one way is to alternate the appointment of the Chairman⁷⁰ (who has the right of a second vote) between both parties, *BCB* and *KCC*, perhaps on a yearly basis, or the Chairman appointed by *KCC* every year to rotate its place with the Vice-Chairman which is appointed by the *BCB*.

Again, a better suggestion is that, Supervisory Council may separate the zones of control as well as the Board of Directors. For instance, Japanese members will have competence to control the zones of engineering, financing and accounting. Albanian members will have competence to control the zones of marketing, employment and commerce. This separation seems to suit the purpose of *FUTURE* and may help the members of the Supervisory Council to find a commercial solution for the problems of *FUTURE*.

4-3 Avoidance of deadlock in Shareholders level

In the General Meeting of Shareholders as well there are two situations where the avoidance of deadlock arising will be treated.

The first situation is when either party boycotts the meeting and the remaining party cannot constitute the quorum. In this case, there are two ways to hold the meeting. One way is related to the fact that both parties, *BCB* and *KCC*, must agree to their Joint Venture Agreement complying Commercial Company Law⁷¹, that if one party is absent from the first meeting, within two months from the day of the first meeting, the remaining party must have the right to call again to hold the meeting of shareholders. Another way is related to the fact that a party based on the Commercial Company Law, can demand to the court to order the holding of another meeting⁷².

The second situation is related to the case where both shareholders, *BCB* and *KCC*, are attending the meeting but taking opposing views, so that they cannot reach any agreement. A suggestion is that joint venture parties sometimes provide for a deadlock, which arises in relation to the joint venture to be referred to an independent third party⁷³. If *BCB* and *KCC* could not find any solution, the last possibility is to ask for a third party. The third party is a representative of the Albanian Center of Arbitration and he/she should be an expert in the relevant or an arbitrator or could involve some form of alternative dispute resolution procedure. The third party must be acceptable to both *BCB* and *KCC*.

Presently in Albania, the Center of Arbitration has been established and is serving to solute the conflicts between companies by the way of mediation or arbitration⁷⁴.

This method works well for legal disputes, but usually is inappropriate for business disputes because an independent third party does not always have sufficient knowledge of the business of joint venture⁷⁵.

4-4 Divorce measure

Divorce measures must be included in Joint Venture Agreement between *BCB* and *KCC*. They will act as a “nuclear deterrent”⁷⁶ and the threat of their implementation will assist to persuade *BCB* and *KCC* to agree a commercial solution. The key in practice is to allow sufficient breaks within the formal deadlock procedure before the strict provisions of the Joint Venture Agreement are finally implemented in order to allow *BCB* and *KCC* continuing opportunity to agree a solution.

The following are examples of some measures, which are sometimes used or considered. These measures, therefore, result in first refusal right of one party, put and call options and winding up⁷⁷ of *FUTURE*.

4-4-1 First refusal right

First refusal right is a voluntary divorce measure, which permits *BCB* or *KCC* to have the first refusal right.

As provided in the Joint Venture Agreement of *FUTURE*, a party (*BCB* or *KCC*) may sell all shares, which they own, to a single party⁷⁸. This sale may be performed if the third party satisfies the requirements that it agrees in writing with such sale to be fully bound by the terms and conditions of the Joint Venture Agreement between *BCB* and *KCC* and all other agreements between *BCB* and *KCC* and *FUTURE*. Another requirement is that the third party must not be engaged at the time of this sale, use or exploitation of any technology competitive with those carried out by *BCB* or *KCC*, unless *BCB* or *KCC* gives its written approval for such sale⁷⁹. Also, the third party must have the financial ability and resources necessary to discharge it obligation under the Joint Venture Agreement of *FUTURE* and all other agreements between the *BCB* and *KCC* and *FUTURE*.

BCB or *KCC* must first negotiate terms with a third party purchaser, but cannot complete without first giving the other shareholder *BCB* or *KCC* a right of first refusal on the same term including the price per share. If not taken up, the sale to the third party can proceed at the specified price⁸⁰. Within one hundred twenty days (120) after the date of receipt of offer, the third party purchaser may purchase the number of shares offered by *BCB* or *KCC*.

4-4-2 Put and call options

This is an involuntary divorce measure related to a potential unilateral transfer by *BCB* or *KCC* to a third party as a way of exit⁸¹.

A “put” option is a right, which entitles *BCB* (or *KCC*) to require *KCC* (or *BCB*) to purchase shares of *BCB* (or *KCC*) in *FUTURE*.

A “call” option is a right, which entitles *BCB* (or *KCC*) to require *KCC* (or *BCB*) to sell shares of *KCC* (or *BCB*) in *FUTURE*.

BCB and *KCC* must agree at the outset that one party should have a put or call option interest, when and if there is a triggering event such as deadlock, default, insolvency or change of control⁸².

The main disadvantage of put and call option is that one party (*BCB* or *KCC*) may be forced to buy or sell shares at a time it would otherwise not wish to do so.

4-4-3 Winding up

Winding up is a divorce measure⁸³, which consists on sale of all assets of *FUTURE*.

A deadlock may trigger a defined period of ninety days for final negotiations between *BCB* and *KCC*. If no solution were reached, this mechanism would then entitle either party to require *FUTURE* to be wound up. Liquidation would involve a sale of all assets of *FUTURE*, the proceeds of which would then be distributed to *BCB* and *KCC* according to their respective interests.

Conclusion

Deadlock is an intrinsic feature of most joint ventures⁸⁴. Indeed, many joint ventures will be structured as 50:50 deadlock companies. Establishment of *FUTURE* will be a challenge for its management team, Board of Directors, Supervisory Council and *BCB* and *KCC*. How *BCB* and *KCC* should deal with the risk of potential deadlock in the management of *FUTURE* is treated in this study. Included are some provisions to deal with deadlock. Also, *BCB* and *KCC*, in their Articles of Incorporation and their Joint Venture Agreement tried to establish a mechanism to avoid a deadlock, or to agree on ways in which it can be resolved if it arises so that the *FUTURE* might have a clear decision making process.

For the worst case the divorce measures are included in the Articles of Incorporation and in the Joint Venture Agreement of *FUTURE*. None of these measures is an ideal solution⁸⁵. In real circumstances, *BCB* and *KCC* must agree in their Joint Venture Agreement that a party has the first refusal right. In some other circumstances, it may be agreed at the outset of the Joint Venture Agreement that one party (*BCB* or *KCC*) should have a put or call option or a trigger of winding up, when and if there is a triggering event such as deadlock, default, insolvency or change of control.

Indeed, many consider that the built-in potential deadlock of a 50:50 joint venture company in itself provides the strongest structure for encouraging the parties to reach a commercially solution. The severe commercial consequences to the business of the joint venture company of an insoluble deadlock generally ensure that a sensible compromise will eventually be agreed between the parties.

Stipulation of divorce measures in Joint Venture Agreement may help *BCB* and *KCC* to try and find a proper commercially reasonable solution. These measures will help decision-making levels of *FUTURE* to agree for important matters and to avoid deadlock.

After analyzing how to prevent a deadlock from arising I have concluded that a 50:50 joint venture company may not be the proper solution. Rather, I feel that a joint venture company with the majority party making decision is a much better choice.

Endnotes

1 “Collectivization” means the concentration of agriculture land, livestock and private property on the hand of the state and creation of state enterprises based to the Soviet model called “Kooperativa Bujqesore” which means “Agricultural Cooperative”.

- 2 Hormoz Aghdaey, *Albanian Financial Project*, the World Bank Report, 2001, p.1.
- 3 *NATIONAL TREATMENT OF INTERNATIONAL INVESTMENT IN SOUTH EAST EUROPEAN COUNTRIES*, Albania, p.51-OECD 2003.
- 4 *Ibid.*
- 5 Pyramid scheme is a property distribution scheme in which a participant pays for the chance to receive compensation for introducing new persons to the scheme, as well as for when those new persons themselves introduce participants (*Black's Law Dictionary, 7th Edition*). In Albania, so-called "investment banks" promised a high rate of return. Their activity was only borrowing money from depositors, and not carrying on any other businesses. The phenomenon of pyramid schemes appeared in Albania at the beginning of 1993 and had its peak in 1996. The government actually encouraged the population to participate by putting their money in such pyramid schemes. Hundreds of thousands of ordinary Albanians did not realize that they lost their life savings until the pyramid operators were unable to payback their depositors. (Hormoz Aghdaey, *Albanian Financial Project*, the World Bank Report 2001,p.2)
- 6 Hormoz Aghdaey, *Albanian Financial Project*, the World Bank Report 2001, p.1.
- 7 *Ibid.*
- 8 <http://www.aeda.gov.al/2002.11.18>
- 9 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p.86.
- 10 BAKI BERBERI. *Doktor I Shkencave. Zberthime dhe komente te ligjit "Per Shoqerite Tregetare" dhe te legjislacionit tjeter qe ka te beje me kete shoqeri*.p.19. *Libri I Trete. Tirane 1996.*
- 11 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p.242.
- 12 Refer to 1-2, a), b), c) for the definition of foreign investment.
- 13 *NATIONAL TREATMENT OFINTERNATIONAL INVESTMENT IN SOUTH EAST EUROPEAN COUNTRIES*, Albania, p.51-OECD 2003.
- 14 *KUSHTETUTA E REPUBLIKES SE SHQIPERISE.*
- 15 *NATIONAL TREATMENT OFINTERNATIONAL INVESTMENT IN SOUTH EAST EUROPEAN COUNTRIES*, Albania, p.54-OECD 2003.
- 16 *Ibid*.p.55.
- 17 *Ibid*.p.56.
- 18 Article 13 of Commercial Company Law.
- 19 Article 14 of Commercial Company Law.
- 20 Article 24 and Article 25 of Commercial Company Law.
- 21 Article 26 of Commercial Company Law.
- 22 The basic capital [*kapitali themeltar*] is the cash amount or description value of initial and subsequent contribution by each partner, which cannot be represented by securities and the parts of capital are not freely transferable to the third party (Article 23 and 26 of Commercial Company Law).
- 23 Article 36 of Commercial Company Law.
- 24 Article 37 of Commercial Company Law.
- 25 Second paragraph of Article 38 of Commercial Company Law.
- 26 Article 38 of Commercial Company Law.
- 27 Article 47 of Commercial Company Law.
- 28 Article 71 of Commercial Company Law.
- 29 Article 74 of Commercial Company Law gives general definitions for joint sock company.
- 30 Lek is Albanian money. 1US\$=102,54Lek. (Bank of Albania, 2004/09/13)
- 31 Article 96 of Commercial Company Law gives the definition for the constitution of Board of Directors. Referring to this Article, the joint stock company is directed from a Board of Directors.
- 32 Article 97, second paragraph of Commercial Company Law.
- 33 Article 101 of Commercial Company Law.
- 34 Article 105, first paragraph and Article 109, first paragraph of Commercial Company Law.
- 35 Article 105, second paragraph of Commercial Company Law.
- 36 BAKI BERBERI. *Doktor I Shkencave. Zberthime dhe komente te ligjit "Per Shoqerite Tregetare" dhe te legjislacionit tjeter qe ka te beje me kete shoqeri*, p.54. *Libri I Trete. Tirane 1996.*
- 37 According to Article 75 of Commercial Company Law, for the joint stock companies without public offer the required minimum value of basic capital is two million lek (2,000,000 lek), where the minimum value of basic capital required for joint stock companies with public offer is ten million lek (10,000,000 lek).
- 38 <http://www.korrieri.com/arshive/2002.11.08>
- 39 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p.87.
- 40 <http://www-wds.worldbank.org/servlet..2002.11.25>
- 41 *Ibid.*
- 42 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001,p.87.
- 43 *Ibid.*
- 44 *Ibid.*
- 45 Deadlock is a complete failure to reach agreement or settle a dispute (*OXFORD, 现代英英辞典*).

- 46 Referring to Albanian Commercial Code, Commercial Register is the official register kept by the court.
- 47 The Extraordinary General Meeting of Shareholders according to Commercial Company Law Article 128, first paragraph, must make the decision.
- 48 In case of the increase of paid-in capital, the decision must be made by the Extraordinary General Meeting of Shareholders based on the report of Board of Directors (Commercial Company Law Article 150~163). In order for a decision to be made, at least twenty five percent of the shareholders must be present at the first meeting. If this is obtained, there are no requirements of participation at the second meeting.
- 49 Article 103 of Commercial Company Law.
- 50 Article 130 of Commercial Company Law.
- 51 Two thirds of members of Supervisory Council must be appointed by shareholders (Article 105), and one third of them must be elected from among employees (Article 109) at the First Organizational Meeting of Shareholders.
- 52 If there are two places for members elected among employees, engineers or top employees, have at least one place in this Supervisory Council(Article 109, second paragraph).
- 53 Article 117, first paragraph of Commercial Company Law.
- 54 Article 118, second paragraph defines that a resolution is made by the Supervisory Council with a simple majority of votes of members or their representatives, except when a higher percentage is required for decision making, which can be implemented by the shareholders in articles of incorporation.
- 55 Article 103 gives the competences of Supervisory Council.
- 56 Article 132 of Commercial Company Law.
- 57 Article 101 of Commercial Company Law.
- 58 Article 97 of Commercial Company Law defines that Supervisory Council has competences to nominate members of the Board of Directors and to elect among them a member as a chief of this board.
- 59 Based on the Commercial Company Law the term of office of Board of Directors may be provided in Articles of Incorporation and varies from two to six years.
- 60 Article 132 of Commercial Company Law.
- 61 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p.242.
- 62 Article 129 of Commercial Company Law.
- 63 Article 130 of Commercial Company Law.
- 64 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p. 243.
- 65 *Ibid.*
- 66 *Ibid.*
- 67 *Ibid.*p.242.
- 68 *Ibid.*p.243.
- 69 *Ibid.*p.244.
- 70 *Ibid.*p.245.
- 71 Article 128, second paragraph defines that: if in the first meeting the required quorum has not been constituted, the second meeting can be decided any other day within two months from the call of the first meeting.
- 72 Article 132, among others defines that shareholder who holds at least one tenth of shares of paid-in capital can demand to the court to order the meeting.
- 73 Ian Hewitt, *Joint Venture* 2nd ed. Sweet and Maxwell, 2001, p. 245.
- 74 <http://www.korrieri.com/arshive/2003.07.06>
- 75 Ian Hewitt, *Joint Venture* 2nd ed, Sweet and Maxwell, 2001, p. 246.
- 76 *Ibid.*p.246.
- 77 *Ibid.*
- 78 *Ibid.*p.260.
- 79 Japanese Joint Venture, (社)国際商事仲裁協会 『ジャパニーズ・ジョイントベンチャー』日本貿易振興会(1994年)178～202頁。
- 80 *Ibid.*
- 81 Ian Hewitt, *Joint Venture* 2nd ed, Sweet and Maxwell, 2001, p.267.
- 82 *Ibid.*p.268.
- 83 *Ibid.*pp.246-247.
- 84 *Ibid.*p.242.
- 85 *Ibid.*p.251.

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