

THE LEGAL FRAMEWORK OF VARIOUS INTERNATIONAL PARTNERSHIP MODELS USED IN INTERNATIONAL CONTRACTING SERVICES SECTOR

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Abstract

Today's cross-border business world uses various forms of partnerships beside mergers and acquisitions. Companies which undertake a certain project in these business partnerships also protect their legal independence. The links between entrepreneurs included in business partnership can be tight or loose. In International Trade Law, major types of business partnerships of the international construction industry are: Joint Venture, Consortium and the European Economic Interest Grouping (EEIG) in EU countries and other countries where their laws are adopted.

Keywords: Employer, Contractor, Business Partnership, Joint Venture, Consortium, EEIG.

INTRODUCTION

Turkey has become acquainted with the concepts of joint ventures and consortium for the first time in the biddings of the large-scale infrastructure investments awarded to foreigners during the contract process in foreign expansion period. As a result of development in international competition, the possibility that some works could be handled alone by the firms has disappeared and it has been understood that stand-alone undertaking a work method could not always provide the requested profitability degree, as well. Therefore, firms while preserving their own forces and independence, have found taking a joint venture risk more appropriate only in certain fixed-term works. Firm groupings are seen especially in the international construction industry and international investment areas. Generally these groupings are called "joint venture". These inter-enterprise groupings aim a certain work performance, relying entirely on contractual basis. Today's cross-border business world uses various forms of partnerships beside mergers and acquisitions. Companies which undertake a certain project in these business partnerships also protect their legal independence. The links between entrepreneurs included in business partnership can be tight or loose. In International Trade Law, major types of business partnerships of the international construction industry are: Joint Venture, Consortium and the European Economic Interest Grouping in EU countries and other countries where their laws are adopted.

After the 1960s, joint venture and consortium models started to be used and develop in Turkish construction sector, because especially investment projects have become a current issue, and, in parallel, Turkish construction sector has developed in terms of both technology, organization and finance and also Turkish contractors have taken place in the realization of these great construction projects. However, the legislation in Turkey which regulates the establishments of such partnerships and directing their operation is far away to meet today's needs. Giving country examples such as Russia, Azerbaijan, this article examines all the aspects of international business partnership models such as joint venture, consortium which are referred quite frequently to solve the problems of financing and make it easier to undertake a piece of work in the international contracting sector. Also in this context, construction projects abroad which are implemented by build-operate-transfer model is discussed in general terms after in regard to establishing a joint company with foreigners. The original descriptions are given on the basis sample countries such as Russia, Ukraine and Libya.

A. THE EUROPEAN ECONOMIC INTEREST GROUPING

European Union (EU) permits forming of the European Economic Interest Grouping as a new legal entity. The Council Regulation, which enables it, has been adopted on 25 July 1985.¹ This statute is based on Article 253 of the Treaty which has established the European Economic Community (EEC). European Economic Interest Grouping (EEIG) is the form of the French "Groupement d'intérêt économique" which is a type of business partnership model, which was tested and became highly successful in the past, adapted to the European level.²

¹ See Council Regulation No.213/85, O.J.1985, L.199, of July 31, 1985.

² See hereof Bott, Burchard and Rosener, Wolfrang: "The Groupement d'Intérêt Economique", [1970] J.B.L., p.313.

According to the Article 1 of the EU Regulation mentioned above, EEIG will be established by concluding a contract between the parties. According to the Article 6, EEIG official address should be recorded in the trade registry in the EU member country. Implementation of the subject EU Regulation in United Kingdom, which entered into force on 1st July 1989 and the EU Regulation, which was added as a program to the European Economic Interest Grouping, is carried out in accordance with this grouping regulations. According to these regulations, EEIG, whose official address is outside the United Kingdom and but which begins a business in this country, must be recorded to the appropriate companies registry.

EEIG is a corporate body; but not a company limited by shares. An EEIG can be formed only by residing individuals and companies in different EU member states. EEIG can draw up contract, bring an action and be sued. EU Regulation delegates power to member states, whether or not to give the status of legal entity to EEIGs which have official addresses in their own countries. According to the EEIG regulations in force in the UK, companies which have the official residence and are registered in the UK, EEIGs shall have legal entity under the British Law. For an EEIG, it is not necessary to have an initial capital such a company does and also it does not need to invite investment by the public. In the contract which forms EEIG, capital contribution of the members (shareholders) is required in cash or other kind.

Members (partners) of EEIG, shall have jointly and severally unlimited liability for the EEIG's debts. Creditors of the group must apply first in writing to the Group but, unless they can collect their claims, then they can start legal proceedings about the partners for the collection of their claims individually. EEIG aims to facilitate and improve business of the partners and increase the results of those works. EEIG's work should be related to their affairs and not be more than helpful to these affairs. EEIG objectives shall be defined within the framework of Regulation requirements in the contract which forms the EEIG. EEIG to be founded in international construction sector, the parties come together as a group to compete in the tender for a project exceeding power of their own firms and if they win the contract, they make task assignment and coordination and control of performance of these tasks. While an EEIG, which is created in this manner above, has similar objectives as the consortium has, but is different from the consortium as a legal form. Outside of the EU member states especially in large construction projects in countries such as of Algeria, Morocco, Tunisia, with the influence of the French Law, EEIG business partnership model has already been widely used; foreign companies seeking to undertake construction work in these countries form EEIG often with local companies through a notarial contract.

B. CONSORTIUM

Consortium is a business partnership organization formed by collaborating two or more companies to act as a single company and to achieve a specific and limited goal.³ Consortiums are formed by a country's construction companies abroad joining their forces in order to accomplish large-scale engineering projects such as nuclear power stations, iron and steel factories, rubber factories, oil refineries. Sometimes, international consortiums are created by companies, which were already founded in different countries. These kind of multi-national consortiums are convenient in terms of carrying out the programs particularly that sponsored by international development and financial institutions such as the World Bank and the European Development Fund.

In consortiums, in terms of liabilities of partners in the contract drawn up with the employer, joint liability of partners which participate in the consortium is removed. After all, if each partner promises to be responsible for performing all of the work, a consortium is not available in a technical sense. Management and administration authority is delegated to one of the partners in the consortium. This partner is called "the consortium leader". Under normal conditions, the leader represents all the partners of the consortium. The consortium is subject to the ordinary share (company) provisions in Turkish Law. Corporations are not tax payers. The definition of Consortium is not found in the law or communiqués and other Turkish Legislation. Consortium is an association of the contributions of two or more natural or legal persons, with the goal of each independently from other partners conducting a certain work, which requires special skill and technology. The consortium model is used in major construction and infrastructure projects such as bridges, airports, railways, building canal tunnels, in defense industry, research of oil fields which require advanced technology and serious financing. Financial structure, profit distribution and additional responsibility in consortiums should be considered specially.⁴ This additional responsibility term refers to the liabilities of the consortium as a whole, the governments of foreign countries and other parties to the contract.

³ Boulton, AH: "Construction Consortia-Their Formation and Management", [1959] J.B.L., p. 234, see also Boulton, AH: Business Consortia Sweet and Maxwell, 1961.

⁴ Boulton, AH: "Finance in the" Single Project "Consortium", [1961] J.B.L., p.368.

The problem here is how to distribute the responsibility among the consortium partners if additional costs arise because of, for example, mechanical design fault in an electric power plant construction work or because of a fault of one of the partners of the consortium, when a joint venture gets in difficulties. To avoid problems in such cases, the mutual rights and duties of the consortium partners should be determined in advance and be clearly stated in the consortium's founding documents.

Appointing an impartial chairman with appropriate personality, who is generally accepted among the partners, is a facilitating element in the elimination of internal view differences. People often confuse the consortium with joint venture. The basic difference is this: The joint venture is founded to perform a certain job or service and its partners jointly and severally liable for the debts of the joint venture against third parties. Liabilities of the partners in the consortium are limited only with the amount of work they undertake. Another difference is that, unlike joint venture, consortium does not require equity investment. As the consortium is created in order to realize a great project and commitments of the partners' are limited, it is considered as a business partnership non-based on capital. Numerous companies share the risks and the costs of the project. One other difference is that, unlike the joint venture, consortium does not need an organization. However, partners in a joint venture always need a joint organization to achieve a common goal.

A consortium, unlike a joint venture, is established for the realization of several commercial transactions, not for general commercial operating activities. In consortium, unlike joint venture, the merger of the enterprises is not required. According to a distinction in the doctrine, consortium has three main features. These are partnership, contract and common goal. Consortium is a contractual association in the nature of "ordinary partnership" formed by more than one enterprise, to perform a certain or a few commercial work for making a profit. Usually it does not need an organization and has a temporary partnership nature. Consortium has a contract of which validity does not depend on the form condition. According to this contract, business partners are liable for only a certain piece of the work.

In consortium there is a common economic goal. There are different types of consortiums such as emission, loan, voting, improvement and construction consortiums. In practice, sometimes joint venture and consortium are used with the same meaning; but actually these are two different concepts.⁵ Consortium partners are jointly liable for a piece of the work they undertake; while Joint Venture partners have joint and several liabilities. As a result, it may be said that consortium is associating the contributions of each of two or more natural or legal persons, under the condition of liability of fulfilling a piece of work independently from the other, for performing a certain jointly committed work.⁶

C. JOINT VENTURE

1. DESCRIPTION, ELEMENTS AND TYPES

Today, in increasingly intensing international trade and investment relations, the most preferred form of cross-border cooperation type is Joint Venture.⁷ Today, in the international tenders for very large scaled works to be undertaken in the construction industry in terms of great amounts of money and work load, in implementing and developing the project work, purchase of materials and equipment, during the construction and business financing phase, construction firms usually form joint ventures, which are based on the articles of incorporation among them.

Joint venture is a partnership formed by two or more persons to carry out one specific work only, in order to make a profit, and to share this profit.⁸ Joint Venture can be described as a partnership, which is formed by two or more legally and economically independent persons or companies which have legal entity, with or without legal personality, jointly established and managed to perform a specific purpose and to make profit.⁹ According to this definition, the following elements are must for the existence of joint venture.¹⁰

(1) a partnership with an independent organization which does not require legal entity (an element of the partnership),

⁵ See Tandoğan, Haluk: "Eser Sözleşmelerinde Müteahhidin İşi Yardımcı Kişilere, Alt Müteahhitlere Yaptırması, Başkasına Devretmesi, Müteahhitler Konsorsiyumu (Joint Venture)", BATIDER, Cilt XIII, Sayı:3-4, Aralık 1986, p.83-84.

⁶ Tekinalp, Gülören / Tekinalp, Ünal: "Joint Venture", Prof.Dr. Yaşar Karayalçın'a Armağan, Ankara 1989, p.162.

⁷ Schmitthoff, Clive M.: "Joint Ventures in Europe", Commercial Operations in Europe, Sijthoff, 1978, p.327.

⁸ Tekinalp/Tekinalp, op.cit., p.150; Dayınlarlı, Kemal: Joint Venture Sözleşmesi, Üçüncü Baskı, Dayınlarlı Hukuk Yayınları, p.15

⁹ Kaplan, İbrahim: İnşaat Sektöründe Müşterek İş Ortaklığı-Joint Venture-, 2.Basım, Seçkin Yayınları, Ankara, 2007,p.22.

¹⁰ Ibid.,p.23.

- (2) more than two or more partners, who are legally and economically independent from each other, to make an agreement to cooperate jointly (an element of the contract between the partners),
- (3) jointly promised to perform a specific job and the purpose of making profit,
- (4) jointly management basis.

Taking into account the above factors, joint venture in the construction sector can be defined as: It is a partnership model, with or without legal personality, formed on the basis of contract by two or more contractors or contracting companies or natural persons or legal entities or institutions, organizations or companies operating in the construction industry to perform a construction work and to make a profit jointly.¹¹ The reasons for establishing a joint venture among the firms include obtaining financial resources, source of raw materials or physical location or low-priced labor and market information or a patent, learning new technologies or modern management styles, overcoming market barriers, having a possibility of entering new markets, taking advantage of economies of scale, spreading risk, getting tax advantages and gaining competition power.

In the doctrine, joint venture is subject to a differentiation as contractual joint venture and equity joint venture. Both joint ventures are based on contract fundamentally.¹² However, in the equity joint venture, a separate company is established by and between the parties. The company to be established must have a legal entity. In fact, the master contractual agreement which will form a joint venture company is considered as a kind of ordinary partnership. In this sense, joint venture which is based on contract, is actually a company. A joint venture, which is established by and between the real and legal persons under the citizenship in different countries, is an international joint venture. If it is an international joint venture, all the partners can be foreign as well as only one partner's foreign citizenship is enough.

Joint venture is also defined as a co-operation, in common sense, which is created by foreign and local companies to share the risk of a common purpose. However, today with the same purposes, those two foreign companies have established partnerships in third countries are also described as joint ventures. This joint venture partnership is the least used type. While forming a joint venture, Joint Venture (JV) agreements have to be taken into account as well as the effects of more than one legal system as the the idea of continuation of the cooperation established between them, collecting states and multinational companies, persons and institutions, as contracting parties under the same umbrella.

Due to lack of legislation regulating partnership contracts, the JV and the consortium-type partnerships are subject to the provisions of ordinary companies settled in Article 520-541 of Obligations Act in Turkish Law. These type of rights due to lack of business entities and trusts, as well as the lack of act age and capacity, they can not be recorded in the trade registry. Thus, for example, a joint venture that had taken a construction work in Russia can not export material and equipment on behalf of the joint venture which are required for this work, from Turkey. In practice, the contractor parties of international construction contracts are mostly the JVs or consortiums. They are more preferred, because these business partnerships are established and liquidated easily, they are are lack of strict requirements of business life and they give needed flexibility. International organizations such as World Bank, the IMF, the World Trade Organization and MIGA (the Multilateral Investment Guarantee Agency) support joint ventures worldwide, especially in developing countries to become widespread.

2. LEGAL STRUCTURE OF JOINT VENTURES

Both capital participation JV and contractual based JV include a master agreement with satellite contracts. Sometimes the parties could sign preliminary corporation charter before the signing of master agreement. With this preliminary corporation charter, the parties agree to conclude a JV contract between them in the future. Sometimes the preliminary corporation charter, is made in the form of entry of master agreement.¹³ In future in case of fundamental contract is not signed for any reason, the preliminary corporation charter shall be invalid on its own motion.¹⁴

With master agreement, a JV relation is formed between the parties.¹⁵ In this master agreement; fundamental issues such as JV's purpose, allocation and management of profit, financing situation and duration and dispute settlement manners are settled. According to Turkish law, the legal nature of the master agreement was considered as ordinary company which has been mentioned above.

¹¹ Ibid.

¹² Tekinalp/Tekinalp,op.cit.,p.156.

¹³ Dayınlarlı, Joint Venture, p.81-82.

¹⁴ Öztürk, Pınar: Ortak Girişim (Joint Venture) ve Uygulanacak Hukuk, Beta, İstanbul, 2001, p.55.

¹⁵ Tekinalp/Tekinalp,op.cit.,p.167.

Many provisions of the master agreement is reflected in partnership agreement, which is to be established, or in the Articles of Association of joint-stock company which is to be founded.¹⁶ Master agreements such as satellite contracts around which various issues taking place are called satellite contracts or other agreements.¹⁷ Satellite contracts can be such as the contracts, know-how, agreements, license agreements, management-consulting contracts, trademark and patent license agreements.¹⁸ Satellite contracts and the master agreement shall be considered independently from each other, but the dispute shall be interpreted before the judge or arbitrator, taking into account also other agreements. Because, even consisting of a few contracts, the JV is established for a particular work performing, the parties shall be evaluated by taking into account all contracts, otherwise if only one of the satellite contracts discussed may be an imbalance in favor of one party.¹⁹

The master agreement has a framework characteristic, both in terms of the joint company and satellite contracts. Satellite contracts are independent from each other in legal respect, regulating the details of the issues provided for by the master agreement. Cancellation of master agreement shall be invalid if the basic satellite contracts.²⁰ Capital-participation JV partners commit to establish a company with the master agreement in the future. Partners can select a partnership type in accordance with the legislation of the subject country, (such as limited liability or joint-stock company according to the Turkish Commercial Law) and also they can only issue the elements such as, representative of the partnership, management and termination, without mentioning legal form of partnership to be established. In latter one, because the nature of the company shall be ordinary partnership, for example in Turkey, the provisions of the Law of Obligations on ordinary companies shall be applied.²¹ In capital-participation JV, the relationship of joint company with master agreement which takes into account the liabilities and the rights of both parties from the relationship are individual, these companies should be considered independently from each other. In this case, it should be accepted that the presence of both companies continues.²² In Joint Venture, parties regulate the legal rights and obligations arising from the relationship with master agreement in detail. However, in case of lacunae, provisions of ordinary company shall be applied. In Joint Venture, partners have the rights and liabilities such as investing capital payable, profit participation right and losses participation liability. In JV, main rule is the managing company with all partners. However, the shareholders can leave the company management to one or some of them or a person who is not a partner, with the articles of incorporation or later decisions.²³

Contractual JV shall be automatically terminated on its own motion by the completion of the work, because it is established usually for a single work. The parties can decide which cases will terminate the JV. JV can be terminated, as purpose of organization has realized or due to impossibility of performance and also the death or bankruptcy of one of the partners, also with the consent of the partners. In addition, due to expiry of assignment for the JV, unilateral cancellation of one partner or by court order, the JV can be terminated. Especially in developing countries, establishing JV with a local partner is highly preferred to facilitate foreign investment to enter. In fact, foreign investors are still given permission to invest into many developing countries, only on condition of establishing a JV with a local company.

3. JOINT VENTURE IN OVERSEAS CONSTRUCTION INDUSTRY

Today, international construction works, which requires large amounts of money in terms of material and equipment, and large volumes of labor are realized through build-operate-transfer model or contractual JV established between and by contracting companies just for this work. The construction industry is one of the activity areas in which JV contracts are widely used, for performance of public works, JV contracts on construction of large industrial facilities is a common contract type. Especially in cases such only one construction company is falling short in performance of major construction projects in terms of financial and technical capacity, the aspects such as to benefit from financial power of each partner companies and innovations in implemented technologies, with large work to reduce risk by distributing among the partners, carry out a rational division of labor or to have the privileges and conveniences that local partner has, play an important role in the creation of JV.²⁴

¹⁶ Ibid.

¹⁷ Yılmaz, Lerzan: "Çeşitli Hukuk Sistemlerinde Joint Venture Anlaşmalarının Yorumu ve Hukuki Düzenlemeye Kavuşturulması İhtiyacı", Belik'e Armağan, İstanbul, 1993, p.485.

¹⁸ Öztürk, op.cit.,p.28.

¹⁹ Dayınlarlı, op.cit.,p.115.

²⁰ Ibid.

²¹ Kaplan,op.cit.,p.30.

²² Öztürk,op.cit.,p.30-31; Dayınlarlı,op.cit., p.111-112.

²³ Öztürk, op.cit.,p.43.

²⁴ Dayınlarlı, op.cit., p.66-67.

Whether partners agree to participate together the results of the work or not, the subject of JV consists of executing only one work. Sometimes construction firms may transfer the work as main contractor to one of the partner companies as sub-contractor. In fact, the firm, which gets the work, may undertake as a pilot firm representing the group before the employer and also providing technical co-operation.²⁵ Construction contracts sometimes constitute very different creation of a JV type. This type of JV may be manifested as operation of the constructed facility with the employer and the contractor. Such a situation naturally requires the transfer of technology from the builder companies; also justifies holding a wide responsibility of the contractor to run the business, which has been established in accordance with its own technology.²⁶

In the great construction projects, where the employer wants to have more than one construction company for the construction of any building or facility, is able to request companies to undertake the work to participate in the tender by setting up a JV between them. In case of winning the tender, the construction contract shall be signed by and between the employer or the employer administration and all the partners who constitute the JV. During the execution of construction, one of the partners of JV is assigned as a pilot (leader) firm to represent contracting firms and the power is delegated to this company to represent and manage JV for the internal and external relationships.

In practice, after JV was founded and construction work is undertaken, especially in carrying out of the work phase, in case the work is completed unprofitably or with loss, some problems and disputes may arise between the contractor companies, which have the JV relationship. The most important of these disputes are usually the responsibility of the pilot firm, liquidation and termination of JV. It is possible to distinguish JVs in the construction industry, two different types as typical JV and atypical JV. In a typical JV, two or more independent construction companies undertake a concrete construction project with a sole construction contract jointly for the employer.²⁷

The shareholders that compound JV are superstructure or substructure construction companies. If JV is formed by the construction firms in different branches of construction sector, then it is obvious that there is a "project partnership". Project partnership is seen mostly in the construction of projects undertaken with "turn-key" procedure such as construction of hydroelectric power plant, waste incineration plant or iron and steel complex.²⁸ In Typical JVs, partners are known by third parties while having an ordinary company character without legal entity.²⁹ Atypical JV has four different types; notional construction consortium, joint venture manufacturing and concealed joint venture, venture with subparticipation.³⁰

In the notional construction consortium, two or more contractors, architects, engineering firms and construction technicians working in various areas create a group and aim as a common goal of a real estate acquisition, getting the planning permission multi-storey buildings and selling them on the basis of condominium apartments. In this type of cooperation between construction firms, it is aimed to generate employment by themselves and share earnings at the end of the work.

In joint venture manufacturing, more than one construction companies, establishing a partnership based on a contract between them could be possible for a wise allocation and use of the investments, manufacture and operation of one or more construction materials. This partnership of the plant, preparation of construction raw materials, construction elements are manufactured. For example, ready-mixed concrete plant, or sand-gravel plant or such work could be carried out with this kind of partnership. Shareholders could be obliged to purchase material jointly from the facility.

In concealed partnership, the concealed partners do not appear in the construction contract, which was signed with the employers. If a construction company does not want to perform the work alone, it subcontracts with other companies or sets up a concealed partnership with them. In the first case, between the main contractor and subcontractor "the sub-construction contract" is made. In the second case, between the contractor and other contractors "conceal partnership" is in question as an ordinary company nature in real. In both cases, the main contractor of the construction against the employer is responsible alone for the construction and delivery.

²⁵ Ibid., p.67-68.

²⁶ Ibid.,p.68.

²⁷ Kaplan, op.cit.,p.41.

²⁸ Ibid.,p.42.

²⁹ Ibid.

³⁰ Ibid.,p.42-44.

In sub-participational business partnership model, one of the partners forms a company with one or more third-persons for the realization of the goal of JV; second company with sub-participation is in question obviously. Any information on JV, formed by the employers with construction contractors group, who are the parties of the contract, is not available about the sub-participated company and its partners. In this case, the existing company with sub-participation has an "internal company" nature.

The purpose of JV establishment, which undertakes all responsibility of construction towards the employer, is to provide collaboration of individual performance of the construction acts. The task of providing this cooperation continues both in the phases of participation in tenders and drawing and making the projects approved, as well as the in the construction phase or covers general contracting and wholesale contracting and also two phases.³¹ "Management right in JVs in construction sector is often used jointly by all partners. Administrative body of JV is called "Construction Committee "; in this committee (the Board of Directors or Partners) in profit and loss participation rates, and accordingly with this by the voting right, each individual partner is represented. Except amending the articles of the association which requires consensus of all partners, if not assigned the authority by the Construction Committee, it shall be authorized to make decisions on the company's entire staff, financial, technical and administrative matters."³²

In practice, forms of organization of JVs in the construction sector, Construction Committee, never operates directly, only acts as a supervisory body by delegating the lower bodies. Thus, the actual management authority in JVs is shared and thus delegated between the pilot firms, technical and financial management units. Each unit is entitled in unlimited management authorization exclusively on its own area. of Covering norm of this type of management authorization is consisted by on one hand the articles of the association and fundamental rules and directives of the Construction Commission, on the other hand by the the customary rules and legal constraints in companies."³³ "Pilot firm, which are involved in the JV agreements, shall manage the company as being internal administration and having exterior authority to representation, in terms of the contract provisions and in accordance with the directives and the general policy decisions of construction committee. It can be said that a pilot company is both the real administrator and the representative partner of a JV."³⁴

The partner, undertaking joint technical management works in JV, generally without having the authority to represent, only shall perform the tasks such as planning and (designing) projects and certification of the construction in the internal relations, installation of water, electricity, gas and ventilation facilities of the construction, pricing of additional works, and arranging of the progress payments regarding work schedule stages and collections of these payments after approval of the employer. Where technical management authority does not exist, the pilot company shall carry out these tasks.³⁵ The partner, which has undertaken financial management in JV, without having the authority to represent on these issues, performs the duties such as keeping records and books of account, carrying out bank transactions, scheduling of the workers' holidays and off- days, checking accounts and making payments in the internal relations of partnership. If financial management authority does not exist in JV agreement, "the pilot company" shall be obliged to perform these tasks.³⁶

In some of JVs formed by two contractor firms, including power of representation, while technical management is assigned to one of the partners, financial management is assigned to other partner, thus in the contract there is not any pilot firm authority.³⁷

4. LEGAL REGULATIONS ON JOINT VENTURE IN TARGET COUNTRY MARKETS OF TURKISH INTERNATIONAL CONTRACTING COMPANIES

Regulations of joint ventures in different countries are dissimilar from each other due to internal and external factors. The statutes of legislation in some countries which are important are examined below for Turkish contracting sector abroad.

a. REGULATION OF JOINT VENTURES IN RUSSIA

International JVs operate in Russia; in an environment such as a weak legal infrastructure, an unstable business environment, constantly changing regulations, a cumbersome bureaucracy and corruptions.

³¹ Ibid.,p.45.

³² Ibid.,p.65.

³³ Ibid.,p.65-66.

³⁴ Ibid.,p.67.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

However, having over 148 million population, well-educated and cheap labor and rich natural resources, Russia offers great opportunities to foreign investors.³⁸ Because foreign investors are not permitted with 100 percent of direct investment, JV is still the most appropriate method direct for investment in Russia.³⁹ The relevant law on JV in Russia was adopted in January 13, 1987 and Jvs were regarded as legal ventures in time of the Soviet legislation. According to current legislation, JVs have their own names, contracts, rights, obligations, independent accounting and financial systems and activities.⁴⁰

The main purpose of permitting the creation of JVs in Russia is to encourage the joint ventures strategy and to enlarge the country's export sector with joint ventures instead of obtaining new technology, management expertise, and importing foreign equipment. According to Soviet legislation, the foreign partner's share of joint venture was 49 percent. Foreign partner could contribute cash or building, equipment, natural resources, the know-how in form of capital. Staff was necessary to consist of Soviet citizens. Even the Board of Directors was consisted of the foreign and local people; the board chairman and general manager were required to be Russian citizens. Joint ventures were tax-exempt in two years, since the starting date to make a profit and they were obliged to 30 percent tax in the following years.⁴¹ After the dissolution of the Soviet Union's in 1991, foreign investments were permitted with so many different strategies from opening subsidiary company in the country to creating a joint venture. In time of Gorbachev, in 1987 the registered number of the JVs, were while only 23, this number rose to 5000 in 1992. However, the number of operating JVs was 2000. During this period, most foreign companies that invested in Russia were from the United States and European countries.⁴²

Russian Foreign Investment Law came into force in 1991. According to this law, foreign investors are given the opportunity of duty-free imports for investment projects, and also low taxes are provided for. However, even today, the problems which are faced by the foreign investors in Russia are political uncertainty, uncertainty of economic policy, insufficiency of legal protection, concern of investors that they can not be transferred to capital gains to their countries, cumbersome bureaucracy which has tendency to corruption, lack of knowledge and staff with insufficient training. While foreign investor (partner) is bringing capital and know-how, international joint ventures in Russia have 92% failure rate. The main reasons for this failure are not finding the right partner, capital issues, bureaucratic problems, legal problems and the quashing of business negotiations. Widespread corruption and practice of high tax rates make business difficult. Assigning Russian Citizen as company's administrator and giving authority and responsibility to him/her, and forming JV with a %50-55 participation of Russian partners with majority share, gain importance to have successful joint ventures in Russia.⁴³

Law on improving to do business with foreign investors which came into force in 1993, foreign investment regime has been developed and inconsistencies have been reduced.⁴⁴ The main reasons for establishment of a joint venture in Russia today, are as follows:⁴⁵

- As government policy, benefiting from customs exemption and tax advantage.
- Very low exchange rate of Russian Rouble and high inflation in country are severe conditions for the Russians. Due to JVs earnings are more than Russian companies Russian citizens having the expert characteristic, were taken to JVs organized by foreign companies.
- With retention of assets in dollars, JVs were protected from the effects of inflation.
- The Western-type management style and facilities have provided advantages to JV activities. Russia's economy has developed rapidly thanks to JVs.

In the past, JVs, which were formed with foreign partners in Russia, the main reasons of the conclusion with a usual failure were a deficiency of mutual trust between the partners and cultural differences which have led to opportunistic behavior and disagreements.⁴⁶

³⁸ Ulaş, Dilber: Uluslararası Pazarlara Giriş Stratejisi Olarak Ortak Girişimler (Joint Venture) ve Türkiye Uygulamaları, Turhan Kitabevi, Ankara,2003,p.127.

³⁹ Ibid.; also see Fey, Carl F.: "Success Strategies for Russian Foreign Joint Ventures", Business Horizons, Nov/Dec.95,Vol: 38, Issue: 6, p.50.

⁴⁰ Ulaş,op.cit.,p.127; also see. Ivanov, Ivan/Hansen,Peter: Joint Ventures as a Form of International Economic Cooperation, Taylor and Francis, New York, 1989, p.33.

⁴¹ Ulaş,op.cit.,p.127; see also Ivanov/Hansen, op.cit.,p.33.

⁴² Ulaş,op.cit.,p.127; also see. Ramu, S.Shiva: International Joint Ventures, Wheeler Publishing, First Edition, New Delhi, November 1997, p.97.

⁴³ Ulaş,op.cit.,p.128; also see. Ramu, op.cit.,p.97.

⁴⁴ Ulaş,op.cit.,p.128.

⁴⁵ Ibid.

In some industries and some regions in Russia, foreign investment is prohibited. To have activities, joint ventures have to fulfill certain registration procedures depending on the business area and the permission required. There are restrictions on constituting JVs by foreign investors on manufacture and distribution of certain military products and in finance and banking sectors.⁴⁷

The legislation on foreign investors in the Russian Federation changes very often, Foreign Investment Law has been adopted by the Duma (Russian Federation Council) on July 25, 1999. In this law, dated 22.07.2005 and No. 117-F3, the amendment entered into force on January 1, 2006. This law regulates guarantees of the basic rights of foreign investors in the territory of Russia, the conditions of economic activities continuation and the profits from foreign investments. The said law is settled in order to provide benefit to Russia's economy with the purposes of using foreign investments, material and financial resources, advanced technology and equipment, management expertise, providing the stability of foreign investors conditions of economic activity, compliance with the norms of international rights and the purpose of compliance with implementation of international investment.⁴⁸

b. REGULATION OF JOINT VENTURES IN AZERBAIJAN

Today, Azerbaijan has become an investment area in terms of richness of underground sources and the need for the construction sector, which attracted the interest of especially Western investors. In Azerbaijan in sectors such as oil, telecommunications, banking, insurance, iron and steel, construction services, companies have been established with 100 percent of Turkish capital, these companies currently operate there.”⁴⁹ “The main laws in Azerbaijan, which are important for foreign investors, include: the Civil Canonical dated on 1999, Act on the Protection of Foreign Investments dated on 1992, Law on Activities of Investments dated on 1995, the Unfair Competition Act dated on 1995.⁵⁰

According to Article 3 of the Law on Protection of Foreign Investments, foreign investors may participate in a company already established in Azerbaijan, establish a new company with 100 percent foreign-owned or take over a pre-established company. In addition, tax laws allow those to open a representative office for a period of one month who want to invest in setting up a company. This representative office then can be converted to commercial company or JV. In addition, the parent company's subsidiaries such as branch and representative offices may operate in Azerbaijan. These organizations can open a bank account and may be given powers that the company has. Moreover, according to Article 4 of the said Law, a foreign investor in Azerbaijan may participate in privatization auctions.⁵¹ According to Article 16 of the above mentioned law, foreign investment companies can be established in the forms that are provided for by laws of Azerbaijan. JVs with the participation of foreign investors, wholly owned organizations of foreign investors and the assisting companies such as agencies, offices, representative offices and legal persons are among the foreign companies listed in the law. JVs and foreign companies are organizations with legal entity under the laws of Azerbaijan.⁵²

JV's mutual internal relations of the founders, the enterprise name, type, documents about the founders, company statutes, the amount of each founder's shares, liabilities, revenue distribution rules shall be regulated in JV agreement. This agreement must be in writing and approval of a notary public is a must in order to be recorded the state (to be registered).⁵³ For registration of JV, there are documents necessary such as, joint venture agreement, by applying to the Ministry of Justice, the company statutes, the document which is indicating that the payment of taxes and charges are made to the state and the document showing the mailing addresses of the founders. If the joint-stock company in Azerbaijan is being established, beside the above documents, other documents may be requested. For example, if a foreign investor is a legal entity, the company's official headquarters is located in the country; the trade registry records certified by Azerbaijan Consulate in that country shall be added. Translations of these documents in Azerbaijan or Russian language are accepted by the state offices. Registration is valid for two years and renewable at the end of this period. The company gains legal entity after the registration process and the company establishment procedures are completed.⁵⁴

⁴⁶ Ibid.,p.128-129; also see Ben Daniel, David J./Rosenbloom, Arthur H.: International M&A, Joint Ventures and Beyond, Doing the Deal, John Wiley&Sons, New York, 1998,p.303.

⁴⁷ Ulaş,op.cit., p.129.

⁴⁸ Dayınlarlı,op.cit., p.419.

⁴⁹ Ibid.,p.191.

⁵⁰ Ibid.,p.191-192.

⁵¹ Ibid.p.193; also see www.cis-legal-reform-org; <http://azer.com/aiweb>.

⁵² Dayınlarlı,op.cit., p.194.

⁵³ Ibid.

⁵⁴ Ibid.,p.195-196.

According to Article 42 of Law on the Protection of Foreign Investments, JV parties may decide that the contracts and disputes between them shall be settled through arbitration. In addition, according to the amendment made in 1992 in the aforementioned law, disputes about compensation of damages, within the limits of payment terms and payment procedures shall be resorted directly in Supreme Arbitration Court of the Republic of Azerbaijan. If the parties stated in the contract between that the Republic of Azerbaijan is a party or stated the same in international agreements, the courts of arbitration shall be authorized in settlement of these disputes.⁵⁵

c. REGULATION OF JOINT VENTURES IN CHINA

While Western investors perceive China as a complex investment environment with business classes each regulated by different laws, China is seen today as the world's most active joint venture market.⁵⁶ Capital is inadequate and labor is inexpensive in China. Because of government regulations, many foreign firms enter the Chinese market with joint-venture strategy. Low labor costs and tax exemptions, duty-free imports of raw materials and technology are available in free economic zones.⁵⁷ Because development plans are implemented in different parts in China, for foreign companies willing to make investment, they are not free to choose where they want to invest. With low risk for investors, but necessary rules are strict to make investment. To attract foreign investors and reduce the uncertainty and risk for the investors, a variety of laws were enacted the last fifteen years. In China the lands are state-owned, joint ventures can lease the place for location of the organization, but can not own it. Location, is provided by the Chinese partner.⁵⁸

Foreign Joint Venture Law enacted in 1979, allowed foreign firms to create a JV with Chinese firms. Contributions of the parties in JVs are the form of capital, equipment, materials, labor and other inputs. According to the above-mentioned law, foreign investors are expected to contribute with advanced technology and equipment, cash contribution and the Chinese partner is expected to contribute land, factory buildings, raw materials and cash. JVs are formed as limited companies; the liability of each partner of venture is limited with the share of capital. Each partner is responsible for the company's debts only according to the rate of his/her share rate of capital, and does not take on the responsibility of the investment rate of capital shares of the other party. Profit shares are distributed according to the contractual conditions and the Chinese government does not guarantee that profits would be gained. Foreign investor companies are able to transfer their profits to their home countries after paying the required taxes (33 per cent of total revenues).⁵⁹

If People's Republic of China, Ministry of International Economic Relations and Trade accepts the purpose of JV to be constituted, negotiates for the regulations about region where the JV shall be created.⁶⁰ The joint ventures in China not based on capital were more popular than the joint ventures with capital participation until 1980. However since 1980, the Chinese Government on one hand while maintaining control of the government, on the other hand by having encouraged the creation of joint ventures with capital participation in order to obtain technology transfer and management expertise, the number of joint ventures with capital participation has exceeded regular number of joint ventures. Multi-national foreign investors, after 1980, have begun to enter the Chinese market by opening subsidiaries.⁶¹

Usually motivations of the parties to create joint ventures in China are different. Western partners want to be able to get access to market and make long-term profit, the Chinese partner companies will to pay back their debts of investments and to make a profit in short term as soon as possible. Western partners use the new technology to enter the market as a means of competition, the Chinese partners want to develop local supply opportunities as very competent on this technology. Number of technical staff and management personnel in China is still insufficient. Market activities in China currently are tightly controlled by the government, a structure that has been going on in the economy is under the state domination. The government is able to control directly the foreign firms and their activities. Joint ventures with foreign partner in China are constituted by a large portion of the public enterprises. In this context, it can be said that in China a large number of the joint ventures are established under coordination of the government, government has entire impact on the joint venture activities.

⁵⁵ Ibid.,p.197.

⁵⁶ Ulaş,op.cit.,p.131-132; also see Si, Steven X./Bruton, Gerry D: "Knowledge Transfer in International Joint Ventures in Transitional Economies: The China Experience", Academy of Management Executive, Feb.99, Vol:13, Issue:1, p.84.

⁵⁷ Ulaş,op.cit.,p.132.

⁵⁸ Ibid.

⁵⁹ Ibid.,p.132-133; also see Baotai, Chu: Foreign Investment in China, A Question and Answer Guide, University Publisher&Printer, First Edition, HongKong,1987, p.86.

⁶⁰ Ulaş,op.cit.,p.133; also see, Baotai,op.cit., p.10.

⁶¹ Ulaş,op.cit.,p.133; also see Keun, Lee: Chinese Firms and the State in Transition: Property Rights and Agency Problems in the Reform Era, M.E.Sharpe, Newyork, 1991, p.109.

The foreign partners, in joint venture investments, seek to protect their patents and trademarks. According to current legislation, chairman of the joint venture is the company's legal representative. Drawing up JV Agreement clearly and net and limiting the duties and powers of chairman of the board of directors shall have great importance, because this situation provides chairman of the board of directors on behalf of joint venture to make any decision on important matters such as financial, personnel, pricing matters.⁶² Joint ventures in China have some local problems such as insufficient foreign exchange, as due to the products can not be sold in foreign currency in the country for materials to be imported and equipment to be owned, and rents and materials are very high in some areas, difficulty in obtaining the necessary funds from local banks and bureaucratic problems. At the same time, offices and agencies are established by the Government for the purpose of help and support to foreign investors. Foreign companies may request the audit offices of Chinese government to be nominated as a candidate partner of JV. It is recommended foreign entrepreneurs, who want to create a joint venture in China, establish a local branch office by renting instead of buying, develop good relations with the government, distribute the risk by investing in Asian markets outside of China adjacent, research the characteristics of the Chinese market, establish liaison offices in wealthy regions and improve relations with local managers.⁶³

“Following major regulations, which permit foreign investment in China, have been entered into force: ⁶⁴

- Foreign Joint Venture Law, dated 1 July 1979,
- Law of the People's Republic of China on Wholly Foreign Owned Enterprises Law dated 12 April 1986,
- Law on Chinese-Foreign Contractual Joint Venture dated 31 January 2000.

Furthermore, since 1990s investment guides have been prepared to attract foreign capital within Chinese territory. These investment guidelines among Regulations on Foreign Investment Guidelines dated April 2002, Guide Catalogue of Industries of Foreign Investment dated on April 2002, Priority Industries for Foreign Investment in Central and Western regions dated on June 2002 are the most important ones. On November 11, 2001, after a membership of China to the World Trade Organization, the Chinese Government committed all domestic and foreign natural and legal persons to provide the right of trading and to remove all the limitations of some of the goods importation and exportation until 11 December, 2004 and has fulfilled this commitment.⁶⁵

Under the legislation of foreign capital in China mentioned above, foreign investment can be made in three different ways through setting up a company partnership, forming a contractual joint venture, and establishing a wholly foreign-owned enterprises.⁶⁶ Today, the legislation regulating foreign investments in China and according to guideline catalogue, encouraged, restricted and prohibited categories of permissible activities are as follows:⁶⁷

(1) Following activities are included in the encouraged activities category:

- Projects including basic developments in the new agricultural technology, agricultural development in a broad sense, energy, transportation and important raw materials,
- New projects containing new equipments or materials that can increase high, new, advanced and applicable technology or product quality efficiency or technological and economic efficiency of enterprises or the projects, which produce materials or equipment that are missing in China,
- Projects that meet the demand of market and raise product quality, open new markets or increase the international competitive capacity of products,
- Projects that save energy, raw materials and natural resource or contribute to prevention and control of environmental pollution and contain new technology and/or equipment,
- Projects that use the advantage of human and natural resources in Central and Western regions and are compatible with the state's industrial policies.

(2) Following activities are included in the restricted activities the category :-Projects

that contain old technology, Projects that do not contribute to the development of resource-saving and biological environment,-Projects that are subject to permission of the State or the searching and using of certain specific minerals,

-Other projects that are settled in laws and administrative regulations.

⁶² Ulaş,op.cit.,p.134; also see Gibbon, Russel: Joint Ventures in China: A Guide for the Foreign Investor, Mc Millan Education, HongKong, 1996, p.36.

⁶³ Ulaş,op.cit.,p.134.

⁶⁴ Dayınlarlı, op.cit., p.202.

⁶⁵ Ibid., p.203.

⁶⁶ Ibid.

⁶⁷ Ibid.,p.207-208.

(3) Prohibited activities which are included in the category are below:

- Projects that endanger national security or damage interests of public
- Projects that pollute or harm environment, damage natural resources or threat to human health,
- Projects that occupy large agricultural land and damage the protection and the development of land resources,
- Projects that endanger the safety and effective use of military bases,
- Other projects that are settled in laws and administrative regulations.

Recently, the construction and operation of telecommunication networks, urban water supply and sewerage works, gas and thermal energy supply areas were opened to foreign investment.⁶⁸ In accordance with Article 7 in Regulation of Implementing of the Law on Chinese-Foreign Joint Venture, in order to apply for JV establishment, foreign and Chinese partners shall jointly submit other required documents to the review and approval authority are:

- (1) Application form for the establishment of JV,
- (2) The feasibility working report prepared by the JV partners,
- (3) List of nominated president, vice president and manager who are designated by the JV partners.⁶⁹

According to Article 11 of the Law on Chinese-Foreign Joint Venture, net profit made after the foreign partners performing the liabilities provided for by laws, agreements and contracts and if the activities of the JV has suspension or termination, the amounts can be transferred abroad in accordance with the regulations of foreign exchange controls and currency provided for by the JV Agreement.⁷⁰ Any dispute arising between the JV partners and are not being able to be resolved through negotiation by the Board of Directors, as a priority shall be settled by concillation, if a result that can not be retrieved shall be settled by the local courts or an arbitration board through arbitration which is assigned by the Arbitration Committee of China or by the partners.⁷¹

5. THE ELEMENTS WHICH SHALL BE INCLUDED IN A SAMPLE JOINT VENTURE AGREEMENT

In Japan, JV Agreements are drawn up usually with a single page, while they are too much detailed in the United States of America. In general, the elements to be included in a sample JV Agreement are as follows:

- (1) Name and addresses of the partners
- (2) Name and address of the joint venture
- (3) The purpose of the joint venture, scope and scale of the activity (the subject of the contract and the purpose of the partnership),
- (4) The legal status of the venture (provisions to be implemented),
- (5) Meeting the financing needs (the parties' contributions to the registered capital and capital ownership, capital structure),
- (6) Share rates of the partners,
- (7) Duration of the agreement
- (8) Guarantees and warranties
- (9) Partnership management and responsible authorities (Board of Governors), Construction Committee, meeting place and time, and the Quorum, minutes of meetings and decisions of meetings, fees of members of the board of directors, organizations under the board of directors the Executive Committee and the Central Organization, the Pilot Company, Site Organization)
- (10) Paying and withdrawing money on behalf of partnership,
- (11) Center and branches of partnership
- (12) Joint consequential and individual responsibility,
- (13) Sub-contractors to be designated and satellite contracts,
- (14) Bookkeeping obligation,
- (15) Material procurement,
- (16) Remaining material and equipment division at the end of the work
- (17) Profit determination and division,
- (18) Cases of parties such as separation-bankruptcy-composition-sequestration,

⁶⁸ Ibid., p.208.

⁶⁹ Ibid.p.208-209.

⁷⁰ Ibid.,p.219.

⁷¹ Ibid., p.223.

- (19) Transfer of rights,
- (20) Providing machinery, equipment, materials and facilities to partnership by the parties,
- (21) Advertisement,
- (22) Obligations and responsibilities of the parties,
- (23) Paying travel, accommodation costs and salaries of the employees who work outside of their own countries,
- (24) Accounting,
- (25) Technical knowledge,
- (26) Protection of trade mark,
- (27) Insurance of the joint venture,
- (28) Procedures for opening up branches in the main country and abroad,
- (29) The termination conditions of the contract,
- (30) Restrictive provisions,
- (31) Resorting to arbitration,
- (32) Audit,
- (33) Effective Clause.

D. REALIZATION OF OVERSEAS CONSTRUCTION PROJECTS WITH BUILD-OPERATE-TRANSFER-MODEL

1. DESCRIPTION AND ELEMENTS OF BUILD-OPERATE-TRANSFER MODEL

All over the world together with the urbanization, needs such as water, purification, sewage, refuse, and urban transportation clearly grow rapidly. In parallel, the need for infrastructure investments increases. Such investments are usually are financed from public resources and the infrastructure facilities, maintenance and operating costs are an important part of current expenditures of the state. In such a situation the need for the remaining public investment in infrastructure, financing of sources has become difficult even impossible. These developments have led to search for new sources and methods of financing for infrastructure investments and private sector participation in this context have been developed to provide new investment models. Here is the most common one of these models, with build-operate-transfer model, increasing the share of private sector investments in infrastructure, easing the burden of public financing and increasing efficiency in service delivery are aimed.

Infrastructure, provide input to other production branches of the economy, but an area which is not provided input by them or is provided very few by them. For example, an infrastructure facility of the hydro-electric power plant provides input to almost all manufacturing branches, but input from them is rather less. A report of the World Bank's on infrastructure investments, the scope of the infrastructure investments is as follows:

- (1) This term is regarded infrastructure services mainly taken to house. Services such as electricity, telecommunications, water supply, sanitation and sewerage, solid waste collection and disposal, natural gas and air gas,
- (2) Public Works: Roads, irrigation and drainage channels,
- (3) Other Transportation Industries: Local and Intercity railways, Local transport, ports and maritime, airports.⁷²

Build-operate-transfer (BOT) model is a method that a public service or activity or business of public works is made and / or executed through private enterprise. However, this model is also applicable when two sides formed by private individuals or the administration constituted as a private individual. For example, a natural or a legal person or a municipality that has a hotel lot, may have a hotel built by a third party in the method of build-operate-transfer implementation, in order to be transferred itself at the end of a period of particular operation term.⁷³ According to Duran, "BOT model is an administrative regime that provides transfer and delivery of a facility and administration to the related public administration or government agency free of charge, with paying the costs the establishment of public service or public works business by private enterprise and operated for a certain time and after making profit and the depreciation of capital invested."⁷⁴ In a typical BOT infrastructure project, a private firm operates project for an enough period to recover the investment cost and then transfers it to the state.

⁷² Yılmaz, Osman: Yap-İşlet-Devret Modeli ve Türkiye Uygulaması, DPT Uzmanlık Tezleri, Yayın No: DPT-2493, Ankara, Nisan 1999, p.4-5.; see also World Bank: World Development Report- Infrastructure for Development, 1994.

⁷³ Yılmaz, op.cit.,p.9.

⁷⁴ Ibid.,p.10; also see Duran, Lütfi: "Yap-İşlet-Devret", SBF Dergisi: Profesör Muammer Aksoy'a Armağan, Cilt: VLVI, Ocak-Haziran 1991,p.150.

2. FEATURES AND ADVANTAGES OF BUILD-OPERATE-TRANSFER MODEL

The main features of BOT model are as follows:

- (1) The purpose of the model, due to shortage of public financing, is to get the work of a public investment made by private sector.
- (2) Model is carried out within a framework of a contract. Operation period and fee for goods or services, procedure shall be determined with this contract.
- (3) A party of the contract is a public agency. The other sides are usually consortiums that also formed by international organizations.
- (4) The sponsor companies to perform the investment establish the project company, whose field of activity is performing the related project, and a separate company, called a joint investment company. If wants, the public sector may be a partner with a limited share capital to the company to be established.
- (5) Model has been developed originally for realization of the infrastructure projects whose investment amounts reaching large amounts.
- (6) The model is applicable to new investments, also can be used in upgrading of existing facilities lagged in technology or in the completion of incomplete investments.
- (7) In case the recipient monopoly of the service produced is state, purchase or payment guarantee can be given. For instance, in a highway project, in case third party services are the buyers, in a certain number of customers (traffic density) can be guaranteed.
- (8) There is no restriction by the investor country in repayment of credit used in finance of the project.
- (9) Although since its first appearance until today the BOT model has been submitted as a method for an infrastructure project to be financed entirely by the private sector, in practice, there is no a large project without the contribution of the public even in a certain extent. This contribution could be made as the partnership of public to the company and also as providing credits or guarantees rather.⁷⁵

The main advantages of BOT model are creating new and additional financial resources, providing advanced technology transfer, ensuring increased activity, reducing the share of public financing of infrastructure investments, being an important step toward privatization. The main disadvantages of the BOT model are that the model requires a long process, the cost is high, model works under a complex structure.⁷⁶

3. THE PARTIES IN BUILD-OPERATE-TRANSFER MODEL

In BOT model an international consortium bidding for a specific project, to design the project, provide and ensure the necessary financing for the construction, to build and operate the project before the host country and for a specified period settled in the contract are in question. A BOT project contains a large number of parties and more than one contract regulating the relations between these parties. The parties involved in this model are:

- (1) The host country government (host government) is the government of the country where the project shall be realized.
- (2) Administration which is responsible for the project is the public agency signing implementation contract, which is about master agreement, with a joint investment company to perform project. In case the buyer is state for goods and services to be produced, the organization to purchase them shall be relevant administrative.
- (3) Joint investment company (project company) is a joint stock company which shall be established by the companies which want to realize investment and if required the project responsible administration or any other public administration that may be partner, and which shall be established under the laws of the host country.

Joint investment company designs construction project, provides the financing, builds the construction, operates and maintains the plant during the period specified in the contract, makes principal and interest payments of credits provided and delivers and transfers the plant as working and gratis at the end of operation to the public administration which is a project responsible.

- (4) Sponsor firms of joint investment companies are domestic or foreign companies of the private sector with a legal personality individual from each other, which set up joint investment company under the contract together.

⁷⁵ Yılmaz, op.cit.,p.13-14.

⁷⁶ Ibid.,p.15-16.

- (5) Investment banks provide financing for investment.
- (6) Gratuitous bailee bank is a bank which is determined by the investment banks except both the joint investment company and the host government and at which opened an account under the title of gratuitous bailee account. This bank is used for the payments of the funds required during the construction project according to deadline schedule in advance of a certain period to gratuitous bailee account; is used principal, interest, operation expenses and the payment of dividends in the period of operation.
- (7) Export credit banks and export insurance institutions,
- (8) Subcontractor firms,
- (9) Insurance Companies,
- (10) Consulting firms serve to investment banks, joint investment company or public administration which is project responsible,
- (11) Stand-by loan (credit support) banks,
- (12) Subordinated loans banks,
- (13) Trustee is a representative of creditors.
- (14) Legal consultancies,
- (15) Arbitrators and courts.⁷⁷

4. CONTRACTS IN THE SCOPE OF BUILD-OPERATE-TRANSFER MODEL

On condition that the number of contracts generally not less than fifteen depending on the nature of the project in BOT model, contracts, which are prepared to regulate the relations between the parties involved, are listed as follows:

- (1) Articles of association of the company regarding establishment of joint investment company,
- (2) Contract, which is signed between the joint investment company and domestic and foreign companies that provide raw material through, on supply of raw materials,
- (3) The construction contract signed between a joint investment company and public administration which is responsible of the project,
- (4) Commitment contract signed between joint investment company and subcontractor,
- (5) Implementation contract which is prime contract regarding the model signed between joint investment company and administration which is the project responsible,
- (6) Operations and maintenance contract between joint investment company and project implementer organization
- (7) Contract signed for purchase of the goods and / or service between joint investment company and administration which is the project responsible
- (8) Credit contract signed between banks and joint investment company
- (9) Stand-by loan contract signed between joint investment company and financing institution, which must be found by joint investment company,
- (10) Subordinated-loan contract signed between joint investment company and the financing institution to be found by Public administration, which shall be responsible of the project
- (11) Escrow account bank contract between Joint investment company and the Trustee that represent a bank of host country and creditors
- (12) Agent bank contract signed between joint investment company and agent bank,
- (13) Insurance contract signed between joint investment company and the insurance companies,
- (14) Consultancy contracts signed separately by joint investment company and administration which is the project responsible,
- (15) Guarantee contracts.⁷⁸

5. TENDER PROCEDURE OF BUILD-OPERATE-TRANSFER MODEL

Projects to be realized with BOT model are usually determined by the relevant authorities. However, companies have been allowed to bid for a project proposed by themselves.⁷⁹ In case public administration go out to tender to make a project realization with this model, a procedure subject to each country's own domestic law, shall be followed.⁸⁰ A similar procedure implemented in public works is applied in the BOT model. Administration which is responsible for project shall announce the basic parameters in a technical conditions of contract such as project-related specifications, if any, support type and size of the state,

⁷⁷ Ibid.,p.19-21.

⁷⁸ Ibid.,p.21-23.

⁷⁹ Ibid.,p.25.

⁸⁰ Ibid.

the method applied to the determination of tariff, the required minimum shareholders' equity / loan ratio, proposals features of companies sought. Usually a pre-qualification is made among the firms applied and a letter of intent can be given pre-selected winner companies. Then process is concluded through negotiations. Letter of intent is required, because it allows companies rely on a solid foundation in negotiations with project-related parties such as credit institutions, construction companies, host government.⁸¹

In a BOT project, there is usually a large-scale construction work. For Project realization in planned time and cost before the credit institutions, construction and equipment companies must have to trust, reliability, necessary experience and financial strength. For this purpose, usually construction companies form the consortium between them to undertake such a great construction work. Being the member firms of consortium from different countries, helps to support project by credit institutions of different countries also and distributes the risk size of a single organization which can not undertake the whole work. At this stage, domestic companies in a consortium is also recommended which have sufficient and strong experience. The domestic partner can provide labor force will be needed during the implementation of the project in the future, can help a better understanding of the conditions of the country, conducting better negotiations with the government or public administration which is responsible for the project and solving local problems more easily.⁸² The majority of BOT projects is financed by ownersshareholders' equity of joint investment company and loan given by banks and international financial institutions. Shareholders' equity ratio is usually at a level between 10-30 percent. The main loan provider prefers a shareholders' equity ratio or a bridge loan in nature to support its credit.⁸³

6. SUB-VERSIONS OF BUILD-OPERATE-TRANSFER MODEL

There are various sub-versions of the BOT model; these versions are called, taking into account any phase or feature in the realization of the project. The most important ones are following:⁸⁴

- BOT (Built-Operate-Transfer): (temel model),
- BOO (Built –Operate-Own),
- BOOT (Built-Own-Operate-Transfer) (differently, the company owns the facility during the operating period),
- BOTT (Built-Operate-Transfer-Train):(It provides for training of the civil servant regarding how to use the facility before transferring it),
- BOOST (Built-Own-Operate-Subsidize-Transfer):(differently, the state subsidize the project during the operation period)
- BRT/BLT (Built-Rent/Built-Lease-Transfer): (The company could lease the facility to another institution or the state),
- BBO (Buy-Built-Operate):(Devlet mevcut bir tesis, büyütmesi koçuluyla özel sektöre satmak suretiyle devretmektedir),
- ROT (Rehabilitate-Operate-Transfer): (the private company rehabilitates the existing facility instead of new investment),
- ROO (Rehabilitate-Operate-Own):
- DBOT/DBOOT (Design-Built-Own-Transfer/Design-Built-Own-Operate-Transfer): (Since designing of the project, the investor company works).

The BOT model has emerged today by the adaptation of concession method of public service. BOT contracts are recognized as concession contracts in Turkish Law.

E. ESTABLISHING JOINT COMPANY ABROAD FOR FOREIGN CONTRACTING SERVICES

1. PROCEDURE FOR ESTABLISHING COMPANY IN RUSSIA

In Russia which is the largest market of international contracting services, procedures to be followed to establish a joint limited or joint-stock company with domestic or foreign partners, the differences of these two type companies are examined below. Within the framework of the Article 87(1) of Russian Federation (RF), Civil Code (CC), partnerships established by one or several people and whose initial capital is divided into shares of the amount specified in the articles of association is considered as limited liability partnerships (LLP). The founders of a limited liability partnership have personal liabilities was born because of the partnership commitments and they bear risk of the losses in connection with the activities of the partnership within the amount of their shares' ratios which is equal to the amount of investment paid to initial capital.

⁸¹ Ibid.,p.77.

⁸² Ibid.,p.29-30.

⁸³ Ibid.,p.30.

⁸⁴ Ibid.,p.44.

According to the Article 96 (1) of RFCC companies, whose a certain number of initial capital divided into a definite number of shares, are considered as joint-stock company (JSC). Limited Company's (LTD) initial capital consists of shares divided and the investment amount being made by the founders. Share amounts are equal to the amount of investment made by the founders and share amounts of the founders may be different. In Joint-stock company, initial capital is the amount of securities of company whose the nominal values designated and bought by shareholders and. In other words, initial capital of joint-stock company is prepared each of which shares as negotiable papers prepared and as divided into equal shares. In principle, the right of security issue is available only for the joint-stock companies.

The rights of the founders of joint-stock company by registration of securities and to registry the securities being issued is required, plus regular maintenance of company's share ledger is necessary. RFMK provides for to create a system for mandatory funding of the existence of the goods for limited liability partnerships (Limited Liability Companies). In joint stock companies, according to Article 35 of RFCC, legal reserve must be created at the rate of at least 15 percent of the initial capital provided for by the contract. According to the Article 89 (1) RFCC, for the establishment of LTD the required documents are the constituent agreement signed by the founders and the rules signed by the founders. According to the article of said law 98 (3), for the establishment of joint-stock company, the rules approved by the founders is the constituent document.

An agreement on the establishment of the Inc. between the founders is in the nature of joint activities in terms of legal nature and it is not a document of legal entity organization. The agreement between partners on Inc. establishment determines the realization type of a joint cooperation, it shall be abated from the date of registration of the partnership as a legal entity, ie, after the achievement of the goals it shall abate. However, the main foundation contract of LTD is valid as long as the partnership continues its activities. The documents of establishment are different from each other in terms information. According to Article 89 (2) of RFCC, constituent documents of LTD shall contain the size of shares and amount and term of capital of every partner, method of payment of share, their responsibilities when violating their commitments. This kind of information related to the Inc shall be contained in initial agreement, this document does have the nature of the establishment document of Inc. Inc. rules shall contain the information such as the company's type (open or closed), the amount of company shares, nominal value, category (ordinary-payable to holder), shareholder rights, the preparation of Inc General Board meeting and etc with respect to legal form and organization of the company, under the provisions Article 98 (3) of RFCC and "The Federal Law on Joint Stock Companies.

According to the Article 88 (1) of RFCC, the number of the LTD company's founders, shall not be more than provided for by Limited Liability Partnerships Act. LTD on this subject, similar to the closed joint-stock companies. According to the article 7 (3) of The Federal Law on Joint Stock Companies, the number of closed joint stock company shall not exceed 50. In Russian Law, consolidating the rights of shareholders shares (negotiable instruments) is only possible through the transfer of shares, that is transferring of their rights to third parties. Therefore, the company's founders, in case of retiring from the partnership, can not claim the right or share amount directly from the company. In this case, there is only one way to retire from the partnership: to sell, transfer, or to transfer a shareholder the existing stocks in any other way. In this case, except the shareholder, who is retiring, purchase its own shares, assets of INC. are not reduced under the provisions of Article 9 of the Federal Law on Joint Stock Companies. Thus, the shareholder can retire from INC, only through selling its shares to third parties or to the company.

Founder partner of the LTD is, accordance with Article 94 of RFCC, shall have the right to retire from the partnership at any time regardless of the consent of other partners and in this case, he shall be paid up the share of the company property, in other words, corresponding to the size of his share in the company's initial capital in the manner and within the term stipulated by the Law on LTD and by the partnership's constituent documents. Thus, withdrawing from the partnership, LTD partner do not depend on transferring his share to someone else or being whose share bought by the administration of the company. The partnership founder shall have the right to sell his own share within the framework of Article 93 of RFCC to third parties of the partnership, unless otherwise stipulated by the Company's Rules. In this case, LTD partners, buying the other founder partner's share, unless otherwise using this right in another manner provided for by LTD's Rules or the agreement between the founders, he shall have the preferential right at the rate of his own shares.

In case the company's founders do not avail themselves of their preferential right within one month's term from the date of notification or within the other term stipulated by the LTD 's Rules or by the agreement between its founders, the founder may sell his share to third person/s. If, the alienation of the founder's share to third persons is inadmissible, while its other founders give up to acquire it, the company shall be obliged to pay to the founder the actual cost the amount of shares to him.

In INCs, stipulated by the initial contract, the company shareholders can sell the shares third persons. However, in the closed joint-stock companies, shareholders, like partners of LTD, have priority to acquire shares being sold by another shareholder, at the price offered to other persons. According to Article 10 (2) of The Federal Law on Joint Stock Companies in Russia, which is still in force, joint-stock company can be established by a sole natural person, at the beginning, then all of the shares of INC. can also be acquired by a single real person.

According to Russian legislation, initially initial capital (authorized capital) shall not be less than 10,000 Rubles. This capital shall be in cash or goods. According to Russian legislation, Inc. must have three-mandatory body founders (shareholders), the General Assembly, the Board of Directors and Audit Board. For LTD the creation of the two organs is absolutely required; the General Assembly and the Executive body. In Russia, for the registration of a closed joint-stock partnership, the documents translated by sworn translator and whose notarized copies such as establishment documents, bank reference letter, registration certificate from chamber of commerce, certified (Apostille) powers of attorney, shall be submitted concerned authority. If a foreign investor will to be accepted as a partner in an INC. which was already established in Russia, he/she shall submit the above-mentioned documents to the relevant authorities. In Russia, for example in St. Petersburg, a total cost of establishing a closed joint-stock company is approximately U.S. \$ 1550 in cash. If payments are made via bank transfers, this figure shall become more than 20 percent.

2. PROCEDURE FOR ESTABLISHING COMPANY IN UKRAINE

Turkish contractors prefer Ukraine, after Russia, one of the most popular countries close northern neighbor, to establish and register a limited company in Ukraine, procedure to be followed is below:

- (1) Determination of limited company's name,
- (2) Submission of the credentials, identification documents of the company by the foreign partner,
- (3) Opening a bank account in Ukraine on behalf of the foreign investor,
- (4) Transferring a sum of money abroad to this account which foreign investors opened,
- (5) Identification and assessment of rates of the company's partners' capital contribution by the competent authorities,
- (6) Signing and having minutes of meeting of the company's founders and the company's status (the charter) approved by notary public,
- (7) Submission of the authorizing document (power of attorney) on persons authorized to act on behalf domestic and foreign partners,
- (8) For confirmation of the established company's official address (administrative center), submission of lease contract regarding this address,
- (9) Opening a bank account where the company's capital to be payed and submission of the bank receipts indicating domestic and foreign partners transferred their own capital shares to this account,
- (10) The state registration of the Company (the company's registration of trade) and the submission of registration certificate,
- (11) Registration to some public institutions of the company where administrative headquarters are located in (such as Bureau of Statistics, obtaining certificate of taxpayer from the Tax Office, the Social Insurance Institution, Employment Center),
- (12) Registration of foreign investment,
- (13) Obtaining a construction contractor scorecard by applying as a registered limited company.

3. PROCEDURE FOR ESTABLISHING COMPANY IN LIBYA

Due to the each passing day more and more shrinking public construction market in ongoing economic recession in Turkey currently, companies which are unable to get work in Turkey tends to foreign markets including Libya has a special place as the great total turnover in construction work already undertaken in this country and for the historical reasons. Because of chronic political crisis in Turkey parallel to the growing economic recession in 1970s, STFA Company, one of the contractors who have entrepreneurial spirit, has taken the first step in undertaking construction work in Libya in 1971 and this step has paved the way for other contractors. In a sense, Libya, for contractors who want to open up abroad, has become a good training center. Low-priced energy facilities in Libya, being a gateway to the African markets, aiming to open up outward to create a new market, are the main components that attract foreign investors. The importance of Libya, which is the first country that Turkish contractors opened abroad and for after the abolition of embargo and the termination of economic blockade of the deposits of this country in international financial institutions, has been increased again today. Especially for tourism sector in Libya, it is expected to realize U.S. \$ 30 billion infrastructure projects mainly in the next decade. Around 130 projects have been undertaken by the Turkish contractor companies in Libya so far and total investment amount is around U.S. \$ 21 billion.

The majority of companies doing business in Libya in the past have left a positive impression, even if unfortunately a small number of Turkish companies aborted the works that they undertook and escaped. The works undertaken in the last three years in Libya have exceeded the total turnover of U.S. \$ 8 billion. The investment thrust initiating has an important role in having such a large volume of business, in honor of 40th year of the Green Revolution (Gaddafi's coming to power) in September of 2009. Survivor circle Libya embargo, oil revenues are allocated to infrastructure investments, especially. In addition, the style of skyscraper hotels and business centers are asked to be created in the capital city of Tripoli, like the ones in Dubai. Currently, the TAV is building the Tripoli Airport, as well as MNG, GÜRİŞ, STFA, NUROL, YENİGÜN, YAŞAR ÖZKAN, ÖZTAŞ, YÜKSEL PROJE are among the contracting companies which have undertaken construction projects in Libya. In addition, nearly one hundred Turkish companies are also actively trying to get work in Libya.

The amount remaining from the past credits of Turkish contractors from Libya is around U.S. \$ 65 million, the committee which was formed to solve this problem completely continues its works. This figure also does not correspond to a net remuneration and the real problem here is tax offices and customs offices in Libya demand money from creditor Turkish companies. Negotiations for signing a Free Trade Agreement between Turkey and Libya is almost at the final stage. When the current legislation concerning Contractors in Libya is examined, mainly the following legal regulations should be mentioned. "No. 2006 / 89 (23.02.2006) Decision of the General People's Committee Secretariat on permissions to open representative office for foreign companies in Libya Arab Socialist Jamahiriya", provides for the procedure to be followed in order to open representative office in Libya and documents to be submitted. According to Article 3 of the Council of Ministers Decree mentioned above, a construction company wishing to open a representative office in Libya must submit the following documents:

- 1) The decision of the Board of Directors for the opening of the representative office(branch) in the Libya,
- 2) Articles of Association,
- 3) The name of the manager of the representative office, either in the decision of the Board of Directors to open the representative office in the Libyan Jamahiriya or in a separate decision (while observing that the manager of the representative office must have the same nationality as the company has or Libyan citizenship),
- 4) A certificate of commercial registration in the Chamber of Commerce where the company is recorded (Approved by the Department of Foreign Trade).

The above-mentioned documents, which are required to open a representative office in Libya, must be translated by a sworn translator and notarized. Arabic translations of the documents shall be submitted together with the originals in Turkish. For some documents, approval of the Libyan Consulate and the certification of Ministry of Foreign Affairs must be obtained. In addition to the above-mentioned regulations, the legal formalities, such as some of the secondary legislation and administrative regulations, also in order to operate in Libya, foreign companies must complete the following procedures and submit the required documents below also:

- The purpose of the company to do business in Libya, limitation of the the business nature, in other words, field of the activity to be operated must be permissible in Libya (and must have no commercial activity in Libya),
- Activity Certificate approved by the Department of Foreign Trade in Chamber of Commerce in which the company is registered,
- The amount allocated for the Libya Representative Office(branch), which should not be less than 150.000 Libyan Dinars,
- The last three years balance sheets certified by certified public accountant indicating the company's current financial (profit and loss) status of and Financial Report prepared by Financial Consultant,
- Bank reference letters from the banks that the company is working with in Turkey indicating the credit limits in the subject banks,
- The commitment indicating that the company shall submit the accounts of profit and loss every year prepared on regular basis to the registered tax office through certified financial consultant,
- Board of Directors' commitment letter indicating that the Company shall not involve in politics affairs in Libya,
- Filling and submitting the questionnaire prepared by the Office of Boycotting Israel,
- Document committing that the company had no business relationship with Israel before and in the future there shall be no such relation.

- Work completion certificates indicating the last seven-year-experience in the company's fields of activity to be performed in Libya,
- The company's equipment pool tables and a list of the company's technical staff,
- Signature circulars of company authorities,
- The signature circular of Company's Branch Director in Libya,
- Noticing the company's Branch address in Libya, and submitting a photocopy of passport of the Branch Director,
- Power of attorney given the person to carry out registration of company or setting up partnership processes in Libya,
- Filling out and submitting the form, which is for permitting foreign companies to open branches, to Ministry of Economy and Trade, Directorate General for Companies and Registries,
- Company Branch shall be registered in Chamber of Industry and Commerce of the city, where opened in Libya (Registration fee is 700 Libyan Dinar. According to the official current exchange rate, 1 U.S. dollar = 1.25 Libyan Dinar).

Permission of foreign investment in Libya is given by the Foreign Investment Committee. The main legal regulations related to foreign capital are "Foreign Capital Encouragement Act" numbered 5, dated 1997 and "Administrative Regulation" of this Act no 21 and dated 2002. Not stated explicitly in the mentioned laws, the Government of Libya supports partnerships with Libyans rather than 100 percent foreign-owned companies. In October 2006, as a result of this policy the Government of Libya put into effect a new regulation brought with Decree of the Council of Ministers, according to the Council of Ministers regarding major projects in Libya, except special permissions, foreign construction companies could not make registration alone to undertake a work general contracting business sector. According to the current regulation, foreign companies wishing to undertake work in general contracting sector in Libya, must set up a joint stock company with domestic persons and / or companies with at least 35 per cent shares of the company. In notary, the parties must determine the company's establishment as capital of at least 1.000.000 Libyan Dinar during the establishment of joint-stock company and must pay at least one-fifth of this amount (200.000 Libyan Dinar) during the establishment and must complete the gradual payment of the remaining part within the next five years. In this case, in order to establish a joint-stock company with a local partner in Libya, the foreign contractor shall transfer initially 130,000 Dinar Libyan corresponding to his shares as a capital maximum which must be 65 percent to Libya.

Libya's existing tender system for construction works is not like Turkey's general competitive tender application. Currently, in practice other than the central government organization, the ministries refer the tender of construction works to organizations founded private law corporation status such as ODAC (The Organization for Development of Administrative Centers), HIB (Housing & Infrastructure Board), GMMRA (Great Man-Made River Project Administration), Highways and Bridges Authority, Railways Administration. These organizations distribute construction works in their scope of responsibilities portfolio of their works to companies applying, generally in a way similar to bargaining without realising competitive tenders. Gaddafi has appointed former ministers or his relatives (such as Ebuzejd Durda, Ali Duveyva) as the Chairmans of Board of Directors of these organizations. HIB (Housing and Infrastructure Board) for Infrastructure works, ODAC for pavement and the city scape works, GMMRA (The Great Man- Made River Project) for irrigation and energy works, Highways and Bridges Administration for road works, Railways Administration for railway construction, examine the files of contractors applying them and make an interview for the technical pre-qualification, after making decision according to technical and financial strength, work is offered to the applicant company.

Accepting the work offered, the company shall sign a contract with the Administration. Then previously submitting performance bonds and advance payment guarantees to the administration Rakaba (Court of Accounts) are mandatory for the implementation of this contract which is registered and making an advance payment, ie the delivery of place to company. Otherwise, if letters of guarantee aren't submitted within certain time after registration, contract of the company shall be annulled by the administration and bid bond shall be recorded as a revenue to the treasury. Directly applied to the above-mentioned related administrations, if foreign partners have sufficient financial and technical terms and because joint-stock company with foreign partnership established under the laws of Libya and the Administration signed the construction contract, in this case this company has the main contractor status. Whereas there are other ways for getting the work for a joint-stock company with foreign partner, like working as a subcontractor of the subsidiaries such as Al-Nahar Company LITCO, NESCO of the above-mentioned authorities from which by taking over the construction work as a main contractor.

But because of the problems such as lower profit margins and difficulties in collecting remuneration from the subject intermediary companies, to undertake work directly from the concerned administrations as a general contractor is more appropriate. In construction works in Libya, profit margin is usually at the level of 20-25 percentages. Diesel and electricity as well as being very low-priced labor is relatively lower-priced. Because the minimum wage is already at the level of Turkey's half, construction workers is easily obtained as uninsured people, who are willing to work as a monthly wage of U.S. \$ 100-150, from usually neighboring countries such as Egypt, Chad and Sudan. In Libya, the income tax is maximum 40 percent and an additional Jihad Tax at 4 percent is collected from each kind of commercial earning depending on the amount reported. In Libya authorities claim from Contractors bind bond at the amount of 0,5 -1 percent of the project price (the contract price), for contractors, who undertake the work, are required performance bond at the amount of 2 per cent. Also a letter of guarantee at the amount of 15 percent of the project price is required in return for business advance provided (15 percent of project price).

Because dealing with all types of trade is prohibited to non-citizens of Libya, if a contractor needs, for example, to open a stone quarry in order to provide stone and stone chips to the construction site, he must have license taken out for a Libyan citizen for this quarry. In this case, apparently legally a citizen of Libya having 100 percent of the shares, in order to have no loss for the contractor and to be guaranteed, he must draw up a internal contract notarized with Libyan partners. In addition, carefully selecting the Libyan business partners without having rush at the beginning of drawing up partnership and brokerage (the commission) contracts shall have great benefits to avoid loss later in this country. Our advice is in this matter to firms, which want to undertake business in this country, because the legal system is very different from Turkey, having legal aid in establishment and the contracts under concluding processes, for prevention of disputes likely to arise in the future.

CONCLUSION

Today's cross-border business world uses various forms of partnerships beside mergers and acquisitions. Companies which undertake a certain project in these business partnerships also protect their legal independence. The links between entrepreneurs included in business partnership can be tight or loose. In International Trade Law, major types of business partnerships of the international construction industry are: Joint Venture, Consortium and the European Economic Interest Grouping (EEIG) in EU countries and other countries where their laws are adopted. Turkey has become acquainted with the concepts of joint ventures and consortium for the first time in the biddings of the large-scale infrastructure investments awarded to foreigners during the contract process in foreign expansion period. As a result of development in international competition, the possibility that some works could be handled alone by the firms has disappeared and it has been understood that stand-alone undertaking a work method could not always provide the requested profitability degree, as well. Therefore, firms while preserving their own forces and independence, have found taking a joint venture risk more appropriate only in certain fixed-term works. Firm groupings are seen especially in the international construction industry and international investment areas. Generally these groupings are called "joint venture". These inter-enterprise groupings aim a certain work performance, relying entirely on contractual basis. Today's cross-border business world uses various forms of partnerships beside mergers and acquisitions. Companies which undertake a certain project in these business partnerships also protect their legal independence. The links between entrepreneurs included in business partnership can be tight or loose. In International Trade Law, major types of business partnerships of the international construction industry are: Joint Venture, Consortium and the European Economic Interest Grouping in EU countries and other countries where their laws are adopted.

After the 1960s, joint venture and consortium models started to be used and develop in Turkish construction sector, because especially investment projects have become a current issue, and, in parallel, Turkish construction sector has devoleped in terms of both technology, organization and finance and also Turkish contractors have taken place in the realization of these great construction projects. However, the legislation in Turkey which regulates the establishments of such partnerships and directing their operation is far away to meet today's needs. In accession period of EU membership Turkey is expected to harmonise its relevant legislation regarding JV and consortium with EU legislation.

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