Serbia

Karanovic & Nikolic Law Office
Bojana Jelisavac & Dr Slobodan Doklestic

A. DOMESTIC FAMILY OF COMPANIES

1. Are joint ventures expressly regulated in your jurisdiction?

Although the term JV has not been defined in Serbian law as such, the concept of a JV is regulated in several different laws.

To start with, in Serbia contractual relations are regulated in the Law on Contracts and Torts (Official Gazette of the SFRY, Nos.29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of the FRY, No.31/93 and Official Gazette of the Serbia and Montenegro, No.1/2003). This law regulates *inter alia* obligations arising out of or in relation to contracts and in its introductory provisions stipulates that the parties to contractual relations are free to arrange their relationships according to their own will, if they honour compulsory regulations, public policy and good customs. According to it, the parties are allowed to enter into a contract regulating their needs, in a manner that fulfils their wishes in its entirety (Slobodan Perovic *et al*., *Commentary on the Law on Contracts and Torts*, pp.5-10, Savremena administracija Beograd, 1995).

Additionally, the Company Law (Official Gazette of the Republic of Serbia Nos.36/2011 and 99/2011) regulates the legal status of companies, with a special focus on their establishment, management, status changes and other important issues. In its Article 549, the Company Law states that companies are allowed to connect by:

- equity investments or investments in partnerships (companies connected by way of capital); or
- contracts (companies connected by way of a contractual relationship).

In addition, it is also possible to have companies which are connected by way of both equity and contracts.

The limitation provided by the Company Law relates to the provision stating that connections between companies are forbidden if they are not in accordance with competition (antitrust) legislation (which is generally in line with EU legislation). However, it is usual in practice that horizontally connected companies are more restrictively controlled regarding the competition issues than the vertically connected companies (Mirko Vasiljevic, *Commentary on the Company Law*, pp.703-704, Sluzbeni glasnik, 2006).

Further, Article 550 provides for the form in which the companies may be connected, explicitly mentioning the following:

- a group of companies (concern);

- through a holding company; or
- companies with mutual ownership.

Both above-mentioned laws relate to a JV between two or more companies without state participation. However, when it comes to a JV that would include a state authority, body, organisation, etc. the Law on Public-Private Partnership and Concessions (Official Gazette of the Republic of Serbia No.88/2011) would be applicable. This is a new law which came into force on 2 December 2011 and which regulates any JV executed with state bodies (public JV) in detailed and in a thorough manner.

The Law on Public-Private Partnership and Concessions:

- regulates conditions and methods used to create, propose and approve public-private partnership projects;
- defines the bodies authorised to propose and realise public-private partnership projects;
- regulates rights and obligations of public and private partners;
- defines the form and contents of a public-private partnership contract with or without the elements of a concession (public contract) and legal protection in the procedure of awarding the public contract; and
- regulates conditions and methods of granting concessions, objects of concessions and bodies authorised to manage concession granting proceedings and termination of concessions, etc.

The Law on Public-Private Partnership and Concession defines in Article 7 public-private partnership (public JV) as: a long-term cooperation (contracted or institutional) between a public and a private partner with a view to providing finance, the construction, reconstruction, managing or maintenance of infrastructure and other objects of public importance and to provide services of public importance.

Finally, the Law on Public Procurement (Official Gazette of the Republic of Serbia No.116/2008) regulates the conditions, methods and process of purchasing goods and services and subcontracting work when the purchaser is a government body, organisation, institution or other legal entity subject to this law. The law also defines the method for maintaining records on contracts and other information about public purchases. This law is applicable in relation to the JV when it comes to public JV arrangements without concession elements.

2. Which kinds of JV are allowed in your jurisdiction: Contractual? Corporate? Others?

Under Serbian law, when it comes to private JV arrangements, all of the mentioned types of JV are allowed in accordance with the party autonomy rule. However, this principle is limited by the triad of compulsory regulations, public policy or good customs and any contract which would be contrary to any of these would be null and void (unless in a concrete case the law provides for some other sanction).

Under the Company Law, as mentioned above, the provided forms

whereby companies may be connected are as follows:

- Group of companies (concern): a group exists when the controlling entity performs other activities, besides managing other entities within the group. A group comprises:
  - a controlling entity and one or more controlled entities governed by the controlling entity (factual group); or
  - a controlling entity and one or more controlled entities which signed a control and governance contract (contractual group); or
  - entities which are not connected through ownership, but which are governed in a unique manner (equal relationship group);
- Holding: a company that controls one or more entities and whose only activity is to govern and finance those entities; and
- Companies with mutual ownership: formed when each of the entities owns a significant share in the equity of the other entity.

However, apart from these divisions and widespread legal standards, the private JV is allowed and with no major limitations under the Serbian law.

On the other hand, contracting public JVs, which are especially attractive in certain industries such as energy, telecommunications or finance sector, do require more attention since the legal framework is more restrictive. Namely, the Law on Public-Private Partnership (PPP) and Concessions explicitly defines two types of JV and concession as a special type of contractual PPP:

A contracted PPP is a PPP where the relationships between the partners are defined in a public-private partnership contract. A public contract is a PPP contract with or without the elements of concession, concluded in writing between a public and a private partner (or between a public or private partner and a special purpose entity) which regulates rights and obligations of the parties with a view to realising a PPP project.

Institutional PPP is a PPP based on the relationship between a public and a private partner as founders (or owners) of a jointly-held company, which is intended to realise a PPP project.

In addition, a concession is deemed as special type of contractual PPP, and the Law on Public-Private Partnership and Concessions provides for a stricter regime for it then what is required for a 'regular' contractual public JV.

3. Are corporate JVs subject – *sic et simpliciter* – to your jurisdiction's corporate law?

Yes, corporate JVs are subject to the Company Law, which regulates the corporate life of companies performing their business activities in Serbia. In principle, the law allows the parties to contract the JV form which best fits its business needs and it does not require any specific conditions to be met in that regard. The parties' will and choice in contracting JV is limited only by compulsory regulations, public policy or good customs.

However, in the public sector, the Law on Public-Private Partnership and Concessions provides for special treatment when it comes to a JV with public body. Consequently, the parties' will is proportionally limited when entering into a JV with a state entity.

4. Is there any restriction in the use of foreign language in the founding documents of a JV (both contractual and corporate)?

In general, there are no restrictions stipulated in the relevant regulation with regard to foreign language being used in the founding documents of a JV. However, it should be noted that in practice JV founding documents involving foreign partners are regularly executed in bilingual versions. A private contractual JV does not have to be notarised before the relevant authority (the court or municipality administration), whereas a public sector requires the JV to be notarised and registered under defined conditions. Likewise, the founding act (memorandum of association) of a Serbian company must be notarised before the relevant authority.

5. Are public officers (eg, public notary) involved in the formation procedure of a JV?

In Serbia the official notarisation of the agreements and other documents (which require notarisation) is currently performed before courts or the municipality administration, as competent authorities. The institution of the public notary is not yet implemented in practice although the Law on Public Notaries (Official Gazette of the Republic of Serbia, No.31/2011) came into force on 17 May 2011. This law should apply in its entirety from 1 September 2012, currently only several provisions related to appointment of future public notaries are applicable. We are expecting this new institution to overtake part of current court and administration authorities, including the notarisation of certain agreements. However, under the Law on Public Notaries notarisation of a JV agreement is not requested.

The role of public officers, ie, courts and municipality authorities depends on the model of JV. In the event of a private contractual JV, in general there are no public officers involved. However, as mentioned above, in case of private corporate JVs, it is necessary to notarise the founding act (memorandum of association) of a Serbian company before the relevant authority, as well as to register the new company before the Business Registers Agency. Of course, in case that the parties wish to notarise their agreement voluntarily, for their own protection, they are free to do so before the competent authority.

Regarding the public JV, under the Law on Public-Private Partnership and Concessions there are two different procedures depending on the precise model of public JV. The concession type of JV has the following steps in its formation:

- feasibility study for granting concessions is prepared by expert team;
- proposal for the adoption of the Concession Act is prepared by state entity;
- proposal for the adoption of the Concession Act is submitted to the Commission for PPP in order for it to give its opinion on the Concession Act;
- consent of the Government of the Republic of Serbia, the Government of the Autonomous Province or local government assembly (depending on which state entity is involved in the concession JV) is obtained;

- public invitation is announced;
- decision on the best offer is made;
- consent to the draft of public contract (ie, JV agreement) is obtained from the government (or other competent authority);
- public contract is executed.

On the other hand, the procedure for public JV without the concession elements is somewhat less complex, and it consists of the following steps:

- state entity submits the proposal of the PPP project to the Commission for PPP to give its opinion on the project;
- consent of the Government of the Republic of Serbia, the Government of the Autonomous Province or local government assembly (depending on which state entity is involved in the concession JV) is obtained;
- public procurement procedure is commenced (ie, JV agreement is executed).

Additionally, if a public contract (JV agreement) contains provisions which in any way lead to the responsibilities of the Republic of Serbia, or have a direct impact on the budget of the Republic of Serbia, it is necessary to obtain the consent of the government. In case of not having obtained this consent, provisions of the agreement are null and void by operation of law. Furthermore, the Law on Public-Private Partnership and Concessions stipulates that the Regulations of Republic of Serbia shall apply on the issues relating to public contracts, which are not specifically regulated by this law.

6. Are JVs registered with any local registries? Are there public sector bodies' authorisations required for the establishment of a JV (eg, national regulatory or antitrust authorities)? If yes, subject to which conditions? Moreover, can this approval be avoided through a self-assessment carried out by the JV members? If yes, subject to which conditions?

There is no special local registry for private JVs, whereby as mentioned above companies incorporated under the corporate JVs have to be registered with the Companies' Register. Exceptionally, the JV agreements disposing with the real estate or shares of the JV company have to be notarised with the competent authorities – the court or municipal administration.

According to the Law on Public-Private Partnership and Concessions, public contracts are recorded in the Registry of Public Contracts kept by the Ministry for Finance as a unified electronic data base on public procurement. The registry is publicly available.

Furthermore, companies should always consider competition law issues at the outset when they structure JV arrangements. It is noteworthy that under the Law on Protection of Competition (Official Gazette of the Republic of Serbia, No.51/2009), JV arrangement may be considered as a concentration of the market participants which may trigger the obligation for the JV participants to report the market concentration to the Serbian Competition Commission in order to obtain a merger approval. For a detailed explanation of this institute, please refer to the answer to question A7 below. Under

Serbian law, this approval cannot be avoided through a self-assessment carried out by the JV members.

7. Are there any other formal requirements to comply with in order to validly constitute a JV (eg, filing JV's formation documents with antitrust authority)?

In addition to all the previously described requirements regarding the both private and public JV formation, application of the antitrust compliance regulation shall be possible in specific cases prescribed by the Law on Protection of Competition.

Namely, under the Law on Protection of Competition, a concentration of market participants shall arise in the case of:

(i) a merger or other status change involving a merger of market participants;
(ii) the acquisition of direct or indirect control by one or more market participant(s) over (an)other market participant(s); or
(iii) a JV by two or more market participants with a view to the creation of a new market participant which performs business activities on a long term basis and has all the functions of an independent market participant.

The Serbian Competition Commission (antitrust authority) has to be notified of the market concentration if any of the following two thresholds are met:

(i) the total annual turnover of all the parties to the concentration realised on the global market in the previous accounting year exceeds €100 million, whereby at least one of the parties to the concentration has an annual income exceeding €10 million on the market of the Republic of Serbia; or
(ii) the total annual turnover of at least two parties to the concentration realised in the market of the Republic of Serbia exceeds the amount of €20 million in the previous accounting year, whereby at least two parties to the concentration each have an income exceeding €1 million in the market of the Republic of Serbia in the same period.

If the realisation of the JV meets the mentioned conditions, the market concentration has to be reported to the Serbian Competition Commission in order to obtain the merger approval. Breach of this obligation may *inter alia* result in a fine up to 10 per cent of total annual turnover in the previous fiscal year.

8. Can the JV instrument be used in every field of the economy of your country? Are there restrictions to be considered and carefully assessed before investing?

The JV is not *per se* forbidden in any field of the economy, under the Serbian law. However, there are certain restrictions to be considered when investing. Namely, in certain industries there may be industry specific requirements limiting the possibilities for foreign investments in Serbia. Such requirements exist, for example, with regard to production and trade with

weapons, or investments in the areas designated as forbidden zones. In these cases foreign investors may not alone or together with other foreign partners establish or acquire a company, except in cooperation with domestic partner, whereby foreign investors cannot in any case hold majority rights in the management of such a company. Moreover, investments in these areas are subject to the prior approval of the Ministry of Defence, which when deciding on the request will take into account quality, type and magnitude of the foreign investment.

9. Can a JV be established with any purpose, as to the contractual JV? Or corporate purpose, as to the corporate JV?

Generally, there are no restrictions in relation to the purpose of the contractual JV, except for universal limitations to party autonomy rule such as compulsory regulations, public policy and good customs. Similarly, corporate JVs can be formed for any purpose as long as it is a legal entity performing lawful and permitted business activities in the pursuit of profit (ie, a corporate purpose).

10. Which are the possible forms of participations to the share capital of a JV? What are the possible ways to contribute by a JV member (eg, cash, goods, assets, etc.)? Are there statutory limits to the possibility of contributions in kind?

According to the Company Law, the contribution in a company may be cash or in kind contribution (in goods and rights), both being expressed in local currency upon registration with the Serbian Business Registers Agency.

If the pecuniary contributions payment is made in foreign currency in accordance with the law governing foreign exchange transactions, then its counter value in Serbian dinars (RSD) is calculated at the average exchange rate of the National Bank of Serbia on payment day. In kind contributions may be in the form of assets (property) and rights, with certain exceptions provided in the Company Law.

11. Can the share capital of a corporate JV be indicated by making reference to a foreign currency?

The share capital of a corporate JV can be indicated by making reference to a foreign currency in the founding act of a JV, however, at the moment of registering the JV company in the Companies Register of the Business Registers Agency the RSD counter value of the amount indicated in foreign currency shall be registered as share capital of a JV, meaning that the share capital indicated by making reference to a foreign currency cannot be registered as such when establishing a company. The RSD amount shall be calculated at the average exchange rate of the National Bank of Serbia on the day that the transaction takes place.

12. Are there statutory limits as to the duration of a JV (eg, minimum and maximum periods)?

Generally, there are no limits to the duration of a JV since it is the free will

of the contracting parties which term of the JV shall be stipulated in the agreement(s). However, there is an exception to this general rule. Namely, the Law on Public-Private Partnership and Concessions (state body is involved, creating the public JV or concession type of JV) provides for a determined duration of the public contract.

Under this law, the period for which the a public contract is concluded shall be determined in a manner that does not restrict market competition more than is necessary to ensure the amortisation of investment by the private partners and a reasonable return on invested capital, taking into account the risk associated with commercial use of the subject of the contract. That time limit, however, shall not be less than five years nor more than 50 years from the day of signing the public contract, with the possibility that upon expiry of the period, the parties will execute a new contract. The period for which the public contract is concluded cannot be extended except in cases where the private partner, without any fault of their own was hindered in the performance of their contractual obligations.

In addition, duration of a JV in specific industries may be differently defined provided that the specific industries *lex specialis* is applied.

13. Are there statutory limits as to the number of members participating to a JV (eg, minimum and maximum)?

There are no statutory limits as to the number of members participating to a JV, regarding both contractual and corporate JV.

14. Is it possible for a public sector body to enter into a JV agreement? If yes, subject to which conditions? In particular, do PPP (public-private partnerships) laws and regulations – if any – apply?

Yes, it is possible for a public sector body to enter into a JV agreement. As explained in more detail in the answers to several questions above, there is a set of special conditions that have to be met in order for the public entity to execute the JV. Here will be explained what is considered to be a 'state body' as defined by the Law on Public-Private Partnership and Concessions. Namely, a 'state body' is defined as the following:

- a government body, organisation, institution or other direct or indirect budget beneficiary in the context of the law regulating the budget system and budget, and organisation for mandatory social insurance;
- a public enterprise;
- a legal entity that carries out activities of general interest, if any one of the following requirements are fulfilled:
    - more than half of the members of the management of that legal entity is composed of representatives of the public body;
    - more than half the votes in the body of that legal entity are representatives of the public body;
    - a public body supervises the work of the legal entity;
    - a public body owns more than 50 per cent of the shares or interests in that legal entity;
    - more than 50 per cent is financed from a public body.

- a legal entity established by a public body which carries out activities of general interest and which meets at least one of the requirements referred to immediately above.

What is more, when a state body is entering into a public contract with the purpose of performing activities with a private investor, this contract is defined in detail by the Law on Public-Private Partnership and Concessions as: a contract on public-private partnership, with or without elements of the concession, concluded in writing between: (i) the public and private partners, or (ii) the public or private partner and a special purpose vehicle – which in order to realise a public-private partnership, regulates mutual rights and obligations of the parties. The law is very thorough in stipulating 28 different mandatory elements of a public contract.

15. Are there statutory constraints to the use of non-competition or antitrust clauses in a JV agreement? If yes, please specify your response particularly with respect to the validity and effectiveness of non-competition clauses regulating the relations between the JV members (i) during the period of effectiveness of the JV agreement, and (ii) following the termination of the JV agreement.

Under the Company Law *inter alia* the following persons (whereby the founding act may specify other persons as well) are the persons which shall have special duties toward the company:

- shareholders of a company who hold a significant interest in the registered capital of the company, or who are controlling shareholders of the company;
- directors, members of the supervisory board, representatives and procurators;
- liquidators.

Those persons may not (without obtaining the approval in line with the Company Law):

- have the status of parent/general partners/shareholders/stockholders/directors/members of the supervisory board/representatives/procurators/liquidators in another company which has the same or similar scope of business (the competing company);
- be an entrepreneur who has the same or similar scope of business;
- be employed in a competing company;
- be otherwise engaged in a competing company;
- be a shareholder/member or founder in another legal entity which has the same or similar scope of business.

This ban shall not refer to the sole shareholder/member of a company.

In addition to this regulation, it is noteworthy that according to the Interim Trade Agreement between the European Union (EU) and the Republic of Serbia, the rules of EU competition law (and instruments of their interpretation adopted by the institutions of the EU) shall apply in Serbia to the extent that anti-competitive conduct in question may affect trade between Serbia and EU member states.

Accordingly, various EU regulations may be relevant with regard to the

non-competition clauses regulating the relations between JV members, including for example the EU Commission Notice on restrictions directly related and necessary to concentrations (2005/C-56/03). Under this Notice a non-competition obligation between the parent undertakings and a JV may be considered directly related and necessary to the implementation of the concentration where such obligations correspond to the products, services and territories covered by the JV agreement or its bylaws. Such non-competition clauses reflect, *inter alia*, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the JVs assets or to enable the JV to assimilate know-how and goodwill provided by its parents; or the need to protect the parents' interests in the JV against competitive acts facilitated, *inter alia*, by the parents' privileged access to the know-how and goodwill transferred to or developed by the JV. Such non-competition obligations between the parent undertakings and a JV can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the JV.

Notably, this stance has been implemented in the several Commission Decisions such as Commission Decision of 15 January 1998 (IV/M.1042 – *Eastman Kodak/Sun Chemical*, paragraph 40), Commission Decision of 7 August 1996 (IV/M.727 – *BP/Mobil*, paragraph 51); Commission Decision of 3 July 1996 (IV/M.751 – *Bayer/Hüls*, paragraph 31) or Commission Decision of 6 April 2000 (COMP/M.1832 - *Ahold/ICA Förbundet/Canica*, paragraph 26).

Further, this Notice on restrictions directly related and necessary to concentrations specifies also that the geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the JV. That geographical scope can be extended to territories that the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move. Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the JV. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.

Nevertheless, the principal focus of the analysis of JV under the competition rules would be to ascertain the degree to which the participants retain the freedom, ability, and incentive to compete with the JV and/or each other. Any exclusivity clauses affecting third parties would also deserve attention. Assuming that inter-party competition will be constrained in some way, the investigation may have to be broadened to include making a formal market definition, estimating concentration levels, and considering the significance of any barriers to entry (OECD, *Competition issues in joint ventures*, 2001).

16. Are there any conditions to be satisfied by the contractual JV in order to avoid to fall within the definition of '*de facto* company/partnership'?

Under Serbian law there is no concept of '*de facto company/partnership*' and

therefore contractual JVs should not be treated as companies.

17. Can a JV agreement provide that a JV member may participate to the venture without incurring in any risk? Loss? Or reward?

Under Serbian law there is no regulation specifically dealing with the JV member not incurring in any risk, loss or reward in the venture. Generally, according to the party autonomy principle, it should be possible to contract such provision in the JV agreement, although enforcement of any such clause could be uncertain if the discrepancy between the parties' rights and obligations would be grossly disproportional. Even though in practice JV arrangements involving disproportionate rights and obligations of the parties are not rare, parties should always be aware of the general principle of the Law on Contracts and Torts that in formation of contracts the starting point should always be the principle of equal value of mutual performances. Thus, special caution would always be warranted in case of any gross deviation from this principle.

With regard to the corporate JVs, the Company Law explicitly allows that in limited liability companies (which are most frequently used as a vehicle for contractual JVs) parties (ie, shareholders) are free to determine shareholders' rights (including voting right, participation in profit, etc.) in a manner which is not proportionate to the shareholding interests in the company.

18. Are there antitrust rules, guidelines and/or policies applicable to a JV agreement (eg, with respect to R&D JV)?

Under Serbian law, there is no regulation dealing with R&D JVs in particular. However, as explained above, in certain cases provisions of EU competition law may be relevant in Serbia, including those dealing with research and development agreements.

19. Are the parties of a JV entirely free to regulate the JV or are they subject to certain restrictions (eg, voting rights, veto, JV members' loans given to the JV, etc.)?

The parties are free to regulate their rights and obligations under the JV within the boundaries of the compulsory regulations, public policy and good customs. Of course, depending on the form of the vehicle for the corporate JV and/or sector of business activity of the JV certain specific restrictions may exist which limit the freedom of the JV members to regulate their mutual relations.

20. Are there limits or restrictions to the eligibility for an individual as a member of the board of directors/statutory auditors (eg, nationality)?

Generally, there are no specific limitations or restrictions in the context of JVs with regard to the eligibility for an individual as a member of the board of directors/statutory auditors. However, there are certain general conditions that must be fulfilled by a person who wishes to qualify as a statutory

auditor (eg, university education, certain professional experience, passed professional exam, non-conviction for criminal offences, etc.).

21. What is the legal regime applicable to the termination of a JV? Can a JV be terminated for just cause upon request of one party?

In general, the parties are free to agree on the termination procedure in accordance with their needs. In addition, the Law on Contracts and Torts contain provisions regulating termination of agreements (including JV agreements) – eg, termination due to non-performance or material breach of the other party, termination due to changed circumstances (*rebus sic stantibus*), termination due to anticipated material breach of the other party, termination in case of *force majeure*, etc.

With regard to corporate JVs based on agreements on management and control it is noteworthy that the Company Law provides that this kind of agreement (on management and control) concluded for an indefinite term may be terminated, unless otherwise agreed between the parties, only at the end of a business year or other agreed calculation period, with written notice to the other party (or parties) delivered at least 30 days prior to the expiry of the respective year or other agreed calculation period. Termination of the agreement on management and control must be registered and publicly announced in line with the law, whereby public announcement of the termination must also include notification to creditors on their right to request adequate security for collection of their claims towards the controlled company.

Finally, under the Law on Public-Private Partnership and Concessions, there are specific cases in which public/private partners can unilaterally terminate the public contract. To be precise, the public partner can unilaterally terminate a public contract in the following cases:

- if the private partner in the case of concessions did not pay the concession fee of more than two consecutive terms or continuously pays the concession fee disorderly;
- if the private partner fails to perform public works or does not provide public services according to quality standards for such work or services in the manner agreed upon by public contract;
- if the private partner does not take measures and actions necessary to protect property in public use or public goods, to protect natural and cultural resources;
- if the private partner gave false and misleading information that was crucial for the assessment of their qualifications in selecting the most advantageous offer;
- if the private partner does not begin with the execution of a public contract within the agreed period, because of their own fault;
- if the private partner performs other actions or fails to perform the necessary actions that are contrary to the public contract;
- if the private partner transferred their rights under the public contract to a third party without prior approval of the public partner;
- in other cases, in accordance with the provisions of public contracts and

general rules of contract law and accepted legal rules for the particular type of contract.

The criteria by which the public partner shall determine the existence of reasons for the termination of a public contract shall be defined in the public contract. Before the unilateral termination of a public contract, the public partner has to warn the private partner in writing of its intention and has to determine a reasonable time for the removal of the termination causes and statement of the public partner regarding the grounds for termination. In the event of the unilateral termination of a public contract by the public partner, a public partner is entitled to compensation of damage caused to him by the private partner in accordance with the general rules of contract law.

On the other hand, the private partner can unilaterally terminate a public contract in accordance with the law, public contract and the general rules of contract law, in case the public partner acts in a manner that leads to the unsustainability of the contractual relationship, or that completely disrupt the private partner in executing the public contract. The reasons for the termination are defined by the public contract, but the law specifies that the failures of the public partner may be the following:

- expropriation, confiscation or seizure of property or shares of the private partner by the public partner;
- failure of the public partner regarding the paying of the matured payments to the private partner;
- breach of public contracts by the public partner that substantially disrupt the private partner in performing the contractual obligations from public contract.

22. Are there constraints to the choice of the law and the jurisdiction applicable to the JV?

When speaking of private JV, the parties are generally free to contract the law and jurisdiction applicable to the JV. It is noteworthy that the Law on Foreign Investments (Official Gazette of FRY, Nos.3/2002 and 5/2003 and Official Gazette of Serbia and Montenegro, No.1/2003 – Constitutional Charter) provides that Serbian law shall be applicable to foreign investments made on the territory of the Republic of Serbia. The law is however unclear whether this reference to Serbian law also includes its conflict of laws norms or not. Practically, from this provision of the law it is not clear whether or not (and if yes, to what extent) the parties may choose a foreign law to govern their foreign investment in Serbia. Of course, should an international or bilateral investment treaty, whose signatories are both the country of a foreign investor and the Republic of Serbia, provide more favourable treatment for the foreign investor as compared with treatment provided by the Law on Foreign Investments, such preferential treatment shall be applied. In addition, under this law disputes related to foreign investments in Serbia may be resolved either by a Serbian court or domestic or international arbitration (practically, this results in inability of the parties to agree on competence of a court of foreign country to resolve a dispute related to a foreign investment in Serbia).

Finally, in the case of public JVs, for disputes between the parties arising under a public contract, the parties may agree on the arbitral resolution of disputes by a domestic or foreign arbitration. Arbitration based abroad cannot be contracted when the private partner is a domestic legal or natural person or a consortium composed exclusively of domestic legal and natural persons. If the parties have not agreed on arbitration dispute settlement, courts of the Republic of Serbia have exclusive jurisdiction. Furthermore, for all disputes arising out of or in relation to the public contracts the applicable law is the law of the Republic of Serbia.

23. Is the termination of a JV agreement subject to any public sector body's approval?

Generally, there are no specific public sector body's approvals in regard to the termination of JV agreements.

B. FOREIGN COMPANY AS A MEMBER OF THE JV

1. If one or more members of the JV is incorporated under or governed by the laws of a foreign country, does that change your answers to any of the questions set forth under 'A' above?

In principle, the answers would not be changed. However, it should be noted that foreign investors in Serbia enjoy rights and special protection conferred upon them by the Law on Foreign Investments. Namely, this law defines a foreign investment in the Republic of Serbia as:

- an investment in a Serbian company by which a foreign investor acquires shares in capital of that company; or
- the acquisition of any other property right by a foreign investor through which he/she realises business interests in the Republic of Serbia.

Further, the law allows a foreign investor to independently or in association with other foreign or domestic investors (such as JV arrangement) invest, ie, to establish the following basic forms of foreign investment:

- found a new company;
- purchase stocks or shares in an existing company.

A foreign investor may be granted a license (concession) for the utilisation of natural resources, property in the public domain or for conducting activities of general interest, in accordance with the laws regulating these kind of arrangements (for example the Law on Public-Private Partnership and Concessions). Also, a foreign investor may be granted permission to build, operate and transfer (BOT) a specific facility, installation or plant, as well as infrastructure and communications facilities, upon meeting additional requirements.

2. Are JVs with foreign parties allowed in your jurisdiction? And if so, is there a minimum/maximum number of parties who have to be local? Is there any special authorisation required?

Yes, a JV with foreign parties is allowed in Serbia and, in general, there is no minimum/maximum number of parties who have to be local. However,

the Law on Foreign Investment restricts the possibilities for foreign investments in Serbia with regard to production and trade with weapons, or investments in the areas designated as forbidden zones. As mentioned above, in these cases a foreign investor may not alone or together with other foreign partners establish or acquire a company, except in cooperation with a domestic partner, whereby a foreign investor cannot in any case hold majority rights in the management of such a company. Moreover, investments in these areas are subject to the prior approval of the Ministry of Defence, which when deciding on the request will take into account quality, type and magnitude of the foreign investment.

3. Are there economic or financial incentives for foreign direct investments in a JV?

The Law on Foreign Investments provides for several guaranteed rights of foreign investors which basically represent the incentives, both economic and financial. These include the following:

- National Treatment. Foreign investors shall enjoy, in respect of their investment, the same status and rights, and shall have same duties, as domestic natural persons and legal entities. A company with foreign owned capital shall enjoy the same legal status and shall conduct business under equal terms and in an equal manner as Serbian companies without a foreign capital.
- Legal Certainty. Rights of foreign investors acquired at the moment of registration of the foreign investment in the court register shall not be subject to restriction by subsequent amendment of laws and other regulations. The business share of foreign investors and assets of a company with foreign capital may not be subject to expropriation or other acts of state of equal effect, unless where public interest is established by law or on legal grounds, and with payment of compensation.
- Currency Conversion and Freedom of Payments. Foreign investors may, in respect of any payment related to the foreign investment, freely convert domestic currency into foreign convertible currency. A company with foreign investment may freely effect payments in its international business dealings. A company with foreign investment may keep foreign currency in a foreign currency account with an authorised bank and may freely dispose with such funds.
- Right to Transfer of Profits and Property. Foreign investors may freely and without delay transfer abroad in a convertible currency all financial and other assets relating to the foreign investments, and particularly:
    - return realised on the ground of foreign investment (profits, dividends, etc.);
    - property belonging to him/her upon dissolution of the company with foreign investment, and/or upon termination of the investment agreement;
    - amounts received from the sale of stocks or business share with a foreign investment;

  - amounts acquired on the ground of decrease of capital stock of an company with foreign investment;
  - make-up payments, etc.
- Preferential Treatment. Serbian law shall be applied to foreign investments made on the territory of the Republic of Serbia. Should an international or bilateral treaty, whose signatories are both the country of a foreign investor and the Republic of Serbia, provide more favourable treatment for foreign investors as compared to treatment provided by the Law on Foreign Investments, such preferential treatment shall be applied.

Additionally, there are special incentives guaranteed to foreign investors:

- Unrestricted Imports. Import of goods that represent the investment share of foreign investors shall be unrestricted, providing such goods comply with environmental protection laws.
- Tax and Customs Benefits. Foreign investors and companies with foreign investment shall enjoy certain tax and customs benefits.
- Customs Exemptions. Import of equipment representing the share capital contribution of a foreign investors, with the exception of motor vehicles, amusement and game of chance machines, shall be exempt from customs and other import duties.

4. Are there mandatory minimum equity investment and/or contributions in kind thresholds required for a foreign JV member?

No, there are no general minimum equity investment and/or contributions in kind thresholds required for foreign JV members.