Cyprus

Elias Neocleous and Philippos Aristotelous
Andreas Neocleous & Co LLC
Limassol, Cyprus

Introduction

In Cyprus, as in other economies, joint ventures have become an increasingly common form of business organization, where two or more natural persons or business entities combine and pool their financial resources, specialized knowledge, and practical experience to implement a specific project or undertaking.

There is no definition of a joint venture in Cyprus law, but four forms of joint ventures can be identified in current practice: contractual joint ventures, partnership joint ventures (general or limited), corporate joint ventures, and European Economic Interest Groupings (EEIG).

Contractual Joint Venture

In General

A contractual joint venture is an unincorporated form of cooperation based on a contract between the interested parties. It does not involve the conduct of business in common, as in a partnership.[1] The parties to a contractual joint venture remain autonomous and retain distinct roles, rights, and obligations. Nevertheless, a contractual joint venture may acquire rights and liabilities as a single entity, and is capable of suing and being sued in its own name.[2]

Any permutation of individuals, partnerships, or companies may enter into a contractual joint venture. As contractual joint ventures normally involve a pooling of resources and knowledge without a separate legal personality, it is vital that comprehensive detailed contractual agreements are in place to regulate issues such as the respective contributions of the participants, their responsibilities, and their share in the income generated by the contractual joint venture.

In Cyprus, contractual joint ventures have proved popular for large construction projects, especially in the context of public tenders where both perceived costs and risks are high.

1 *Otis Elevators* vs. *Republic of Cyprus*, Supreme Court of Cyprus, Case 430/2000.
2 *Electromatic Ltd vs. Republic of Cyprus*, Supreme Court of Cyprus, Case 924/2003 and Case 1031/2003.

Advantages

The minimal formalities and costs involved in the formation, operation, and termination of a contractual joint venture make it more appealing. There is no special registration procedure for the establishment of a contractual joint venture, and no specific legislation other than contract law exists to govern its operations and termination.

Personal liability also is restricted in contractual joint ventures, and the concept of joint liability common to joint venture partnerships does not apply. A participant in a contractual joint venture is liable to third parties only for his own acts and omissions.

Furthermore, the absence of a separate legal entity ensures that each participant bears its own tax burden on its profits, pursuant to the tax legislation of the place where it is established. This allows independent tax planning and makes the best use of any losses incurred due to the operation of the joint venture.

Disadvantages

Potential disadvantages include the absence of a pre-existing specific legal framework to regulate the formation, operation, and termination of contractual joint ventures, which means that great care is necessary when drafting the relevant documentation to safeguard the smooth functioning of the resulting venture.

The lack of a separate legal identity for a contractual joint venture may prevent it from establishing a noticeable presence in the market, and prove cumbersome where contracts with third parties are concerned. The problem of joint liability may arise if a court rules that the contractual arrangements effectively constitute a partnership.

Business Assets and Intellectual Property Rights

The business assets and intellectual property rights vested in the contractual joint venture remain the property of the party that supplied them. Any intellectual property rights generated in the course of the joint venture's operations will be owned by the party whose employees or contractors created the rights.

The Copyright Law[3] and the Patents Law[4] govern intellectual property matters that may be relevant in a contractual joint venture. When ownership of intellectual property rights cannot be clearly established, the existence of the contractual joint venture will result in a deemed co-ownership.

Accounting Treatment and Taxation

Cyprus companies should account for their involvement with a contractual joint venture in accordance with International Financial Reporting Standards (IFRS).

3 Law Number 59 of 1976, as amended.
4 Law Number 16(1) of 1998, as amended.

Profits and losses incurred as a result of the contractual joint venture accrue to the participants, and are taxed only at the participant level.

Competition

Participants in a contractual joint venture should be aware that their agreement may be contrary to Section 3 of the Protection of Competition Law[5] if it is perceived to have as its object or effect the restriction of competition within Cyprus. Any agreements potentially covered by Section 3 should be notified to the Commission for the Protection of Competition (CPC), and an application should be made for either negative clearance or exemption.

The CPC will issue a negative clearance if it believes that the agreement will not have a significant anti-competitive impact on the relevant markets. Alternatively, an individual exemption from Section 3 of the Protection of Competition Law will be granted, provided that the criteria set out in Section 4 are met.

Partnership Joint Venture

In General

A partnership is another form of unincorporated cooperation that subsists between not more than 100 natural or legal persons carrying on a business in common, with a view to profit. The creation, operation, and termination of partnerships are regulated by the Partnership and Business Names Law (the “Partnership Law”).[6]

The Partnership Law recognizes both general and limited partnerships. In a general partnership, each partner has unlimited liability with the other partners for all debts and obligations of the partnership incurred during its time as a partner.[7] Each partner is regarded as the agent of the others, with authority to enter into contracts in the ordinary course of business on behalf of the partnership as a whole.

In a limited partnership (which term includes a partnership limited by shares), the liability of some partners is limited to the amount of capital that they agree to invest at the outset. A limited partnership must include at least one general partner. A limited partner is not regarded as an agent of the partnership, and hence has no power to bind the firm or to take part in the running of the business. The penalty for disregarding these rules is loss of the benefit of limited liability.

Both general and limited partnerships are structures best suited for cases where two or more parties wish to conduct a business in close cooperation and on a lasting basis. In practice, the use of partnership joint ventures is common for professionals rather than for large-scale commercial operations.

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5 Law Number 13(I) of 2008, as amended by the Protection of Competition (Amendment) Law 2014 (Law Number 41(I) of 2014.

6 The Laws of Cyprus, Chapter 116, as amended.

7 Subject to the prior payment of personal debts, the estate of a deceased partner is liable for the debts and obligations of the partnership incurred during his time as a partner.

Advantages

The advantages of a partnership include minimal formalities and cost in its formation, operation, and termination. The procedure for formation and termination of a partnership is more complicated than a contractual joint venture, but is simpler and less formal than that which governs corporate joint ventures.

Any loss accumulated at the level of the partnership may be used by the partner company itself. Furthermore, partnerships are not required to disclose their constitutional documents or to submit annual returns.

Being able to operate under a registered business name and enter into contracts using this name gives a partnership a marketing advantage over a contractual joint venture, despite also not having a separate legal personality. It also may sue and be sued in its own name.[8]

The partners may exercise discretion when apportioning profits and losses of the business. In the absence of an agreement to the contrary, the partners are free to assign their participation share in the partnership joint venture. The assignment will generally entitle the assignee to receive only the share of profits and the share of partnership assets in case of dissolution to which the assignor would otherwise be entitled. It will not entitle the assignee to participate in management and decision-making.

Disadvantages

One of the disadvantages of a partnership joint venture is that it gives general partners considerable power. Every general partner acting within its authority can, in principle, bind the firm and its co-partners. This necessitates the careful drafting of decision-making rules within the partnership.

Unlimited liability towards third parties is another disadvantage. General partners have unlimited liability for all debts and obligations of the firm incurred during the time they were partners. This may be alleviated through the creation of a partnership between limited companies that are wholly owned by the participants. The option of a limited partner status would only be attractive to a participant that is willing to step away from control.

Moreover, tax transparency may be unwelcome when profits increase, as the attribution of such profits to the partners is automatic. This can potentially hinder effective tax planning and, in the case of partners who are natural persons, increase the effective rate at which such profits are taxed.

Partnership Business Assets and Intellectual Property Rights

Unless there is an agreement to the contrary, the rights and interests in business assets and intellectual property rights originally brought into the partnership,

8 *Andreas Ellinidis and Others vs. Karpi Kazantzian* 1 CLR 128 (1990).

acquired on account of the firm, or acquired for the purposes and in the course of the partnership business, are deemed to be partnership property.

They should be exercised exclusively for the purposes of the partnership, and in accordance with the partnership agreement. Unless a contrary intention appears, property bought out of the profits of the firm is deemed to have been bought on account of the firm.

Accounting Treatment and Taxation

A partnership is not required to publicly disclose audited accounts. However, it should keep proper accounting records and make them available for scrutiny by the partners and the relevant tax authorities.

Under the Assessment and Collection of Taxes Law,[9] partnerships are obliged to produce audited annual financial statements if the annual turnover per partner exceeds €70,000. Corporate partners also should comply with IFRS when accounting for their partnership activities. Individuals should include their activities as part of their annual tax returns.

A partnership is transparent for taxation purposes. Each individual partner is responsible for filing its own tax return dealing with its share of the profit.

Termination of Partnership

Unless otherwise agreed by the partners, a partnership is dissolved in the following cases:

- When entered into for a fixed term, by the expiration of that term;
- When entered into for a single venture or undertaking, by the termination of that venture or undertaking;
- When entered into for an undefined time, by any general partner giving notice to the others of his intention to dissolve the partnership;
- By the death or bankruptcy of any general partner;
- By the occurrence of any event that makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership; or
- By a court order, under specific circumstances, such as when a partner, other than the partner suing, becomes permanently incapable of performing its part of the partnership contract.

9 Law Number 4 of 1978, as amended.

Corporate Joint Venture

In General

A corporate joint venture is a contractual arrangement between two or more parties to cooperate by creating a corporation under a national legal system. Unlike a contractual joint venture, a corporate joint venture has a legal personality separate from that of its participants. In Cyprus, the establishment, operation, and termination of a corporate joint venture are regulated by the Companies Law.

A corporate joint venture is recognized as a legal entity once the Registrar of Companies is satisfied that all statutory registration requirements have been met. Specifically, the company should file a copy of its constitution (memorandum of association and articles of association) with the Registrar of Companies. These are public documents which, when registered, bind the company and its members to the same extent as if they had been signed and sealed by each member.

The memorandum of association details the activities that the company is authorized to carry on, while the articles of association contain rules that govern the internal management procedures of the company. When the articles of association are silent on a particular issue, the standard articles appended to the Companies Law are deemed to apply.

Additionally, the participants in a corporate joint venture will usually enter into a shareholders' agreement. The shareholders' agreement will frequently be supplemented with collateral agreements between the participants and the corporate joint venture.

Typical examples of collateral agreements include those on the use of intellectual property rights owned by the participants and the secondment of personnel. If any of the provisions of the shareholders' agreement amend or modify the articles of association, the shareholders' agreement also should be filed as a public document with the Registrar of Companies.

A corporate joint venture will usually take the form of a private limited company restricted to not more than 50 members, rather than a public company. However, certain ways of forming a European Public Company (*Societas Europaea*, SE), such as through the formation of a joint subsidiary or a holding SE, may be particularly useful to companies registered in different European Economic Area jurisdictions wishing to incorporate a joint venture vehicle with a pan-European brand.

Corporate joint ventures are ideal for joint ventures aiming to establish and conduct a new stand-alone business involving contractual interaction with third parties for profit-making purposes.

Advantages

A corporate joint venture may sue and be sued in its own name, own and hold assets in its own name, and enter into agreements directly with third parties.

It also reduces the risk to participants by offering them the benefit of limited liability. The exposure of individual shareholders is limited to the price paid for their shares plus any unpaid nominal value. The shareholders also appoint the directors of a company, and hence can influence its management.

Legal familiarity is an added advantage. Corporate joint ventures are regulated by a well-established legal framework familiar to both commercial operators and lawyers.

Cyprus tax laws and practice also provide ample scope for carefully structured tax optimization. Not only is the corporate income tax rate the lowest in the European Union (EU) at 12.5 per cent, but the tax base of resident businesses excludes almost all capital gains, and can often be reduced further by the judicious use of debt finance.

Cyprus does not have a specific thin-capitalization regime, although the deductibility of interest payments is conditional on the exclusive employment of the borrowed funds in the production of taxable income, and the company's finance arrangements should be demonstrated to be on arm's length terms to avoid triggering transfer-pricing rules.

Disadvantages

There is relative lack of flexibility in the formation, operation, and termination of a corporate joint venture. The existence of a detailed legal framework regulating its corporate life carries with it the burden of compliance and a greater degree of administrative complexity.

Operational costs also may be an issue. There is a higher degree of formality inherent in operating as a limited company. This may result in increased costs relative to other forms of organization.

There also is a danger that both the corporate joint venture profit and dividends returned to the participants will be taxed. This is not a problem for corporate shareholders (or non-resident individual shareholders), as Cyprus law generally exempts dividends received by such persons from taxation.

In practice, providers of finance will often grant facilities to a new corporate joint venture only if security is provided over the assets of the participants. It also is not unusual for shareholders to be contractually bound to provide further funding to ensure the solvency of the corporate joint venture.

Confidentiality may be an issue when the scope of the shareholders' agreement requires that it should be filed with the Registrar of Companies and be available for public inspection.

Potential Deadlocks

The manner in which a corporate joint venture's board of directors will be constituted is commonly stipulated in the articles of association, in the shareholders' agreement, or in both.

Generally, participants will be allocated a number of board seats in proportion to their financial input to the corporate joint venture. In some circumstances, this may result in a deadlock situation arising or, when financial input is uneven, an attempt to dominate the board and the corporate joint venture. Prudent participants will provide mechanisms to deal with such scenarios in either the articles of association or in the shareholders' agreement.

Minority shareholders may often seek to use a veto mechanism to protect their investment. This would normally require that issues such as amendments to the constitution or disposal of core assets require unanimity among the directors or the shareholders. The Companies Law also provides protection for minority shareholders.

Mechanisms for breaking a deadlock situation caused by a minority veto or by an even split of shareholders or the board will often include:

- Granting the chairman a casting vote;
- Engaging in third-party arbitration;
- Having direct recourse to the corporate joint venture participants; or
- Terminating the joint venture through winding up or the acquisition of a dissenting participant's shares.

The principal fiduciary duty of the directors is to the joint venture company and not to any group of shareholders. The participants should thus decide how much discretion and authority is delegated to the board and its members, and how much is reserved to shareholders' meetings.

In practice, it is common to exclude directors from the disposal of core assets or transactions above a pre-determined threshold.

Transfer of Shares

Generally, the articles of association or a separate agreement will grant existing shareholders, directors, and certain other third parties the right to prohibit or, at the very least, receive notice of a proposed transfer of shares.

Typically, participants in a corporate joint venture will be given preemption rights over shares that an existing shareholder intends to transfer.

When no such right exists, or when the participant chooses not to exercise it, any transfer of shares will often be conditional upon the new shareholder becoming a party to the shareholders' agreement.

Dividends

Unless otherwise agreed, there are very few limitations on the discretion of the corporate joint venture to distribute dividends. Dividends should be paid out of profits, and not out of capital.

Directors who are parties to the payment of dividends out of capital are *prima facie* liable to repay the amount, unless they have adhered to the procedure set out in the Companies Law.

Accounting Requirements and Taxation

Corporate joint ventures are required to prepare audited financial statements in accordance with IFRS. The year-end date for all companies is 31 December.

To establish tax residence in Cyprus, a corporate joint venture should demonstrate that it is managed and controlled in Cyprus. Resident companies are generally liable to tax on worldwide income, and Cyprus is a party to various double-taxation treaties. The current rate of corporate tax is 12.5 per cent, the lowest rate in the EU. The tax year is the calendar year.

Dividends payable by the corporate joint venture to resident shareholder companies are exempt from taxation, and are not included in the taxable income of the shareholder companies. Dividends payable by a resident corporate joint venture to a foreign shareholder are not subject to any withholding taxes in Cyprus.

Interest received in the course of the main business activity of a corporate joint venture or closely connected with it, less the costs of earning the interest, is subject to income tax at 12.5 per cent. All other interest received from any source is subject to special defense contribution tax (SDC tax) at 30 per cent on the whole amount of the interest received, with no deduction. SDC tax is deducted at source on interest paid in Cyprus, and SDC tax on interest received from abroad is paid under the self-assessment system.

Interest payable by a corporate joint venture to a non-resident shareholder is not subject to withholding tax. In general, interest expenses payable by a Cyprus corporate joint venture are fully deductible, provided that it can be shown that the respective loans are at arm's length. An excessive interest rate will be disallowed for tax deduction purposes.

In addition, interest incurred wholly for trading in securities, or otherwise investing in a manner not generally expected to generate a taxable profit for the corporate joint venture, may be disallowed.

Profits realized from the disposal of securities are exempt from taxation, unless they are gains from the sale of shares of a corporate joint venture that owns immovable property in Cyprus. These are subject to capital gains tax to the extent that they relate to the property.

The Income Tax Law, as amended, provides group relief by allowing Cyprus-resident companies to offset losses of fellow group members resident in the EU against their taxable profits. To qualify, one company should be at least a 75 per cent subsidiary of the other (or both should be at least 75 per cent subsidiaries of a third company) for the whole of the tax year in question.

A subsidiary incorporated (but not one that is acquired) during a tax year and retained throughout the year is treated as a member of the group for the whole of the year.

Management and Control

The respective decision-making powers of the shareholders and the board of directors may be set out in the articles of association of the corporate joint venture, in a shareholders' agreement, or in the joint venture agreement.

It is generally inadvisable to reserve to the shareholders any decision that is normally the directors' prerogative. First, the directors have a fiduciary duty to act in the best interests of the corporate joint venture rather than the shareholders. Thus, the responsibility for making decisions based on the financial position of the corporation (*i.e*., declaring dividends, borrowing or lending monies), for approving the strategic plan or the yearly budget of the corporation, or for making strategic decisions in respect of business operations should not be removed from the directors.

Second, for the corporate joint venture to be able to establish and maintain a Cyprus tax residence, its management and control should be exercised in Cyprus. In determining the locus of management and control, the tax authorities will consider the overall facts and circumstances, including the economic substance of the business.

If the directors are stripped of their fundamental responsibilities, duties, and powers, it will be harder to argue successfully that the corporate joint venture is managed and controlled by its board of directors in Cyprus, and the economic substance of the business will be reduced. Nevertheless, the fiduciary duties of the directors still apply, irrespective of the locus of management and control.

Property and Intellectual Property Rights

A corporate joint venture is capable of directly acquiring legal and beneficial ownership over any assets contributed to it by the joint venture parties.

It also is the owner of any assets bought out of its profits, and of any intellectual property rights created by its employees or contractors in the course of their employment or contractual relationship with the corporate joint venture.

Competition

A corporate joint venture may constitute a concentration, subject to notification to the European Commission (EC), according to the provisions of the Control of Concentrations between Undertakings Law of 2014 (the "Concentration of Undertakings Law").[10] This situation arises if the corporate joint venture permanently carries out all the functions of an autonomous economic entity and all the following conditions are met:

10 Law Number 83(I) of 2014.

- The individual aggregate turnover of at least two of the participating undertakings exceeds €3.5 million;
- At least two of the participating undertakings generate turnover in Cyprus; and
- At least €3.5 million of the aggregate turnover of all the participating undertakings is generated in Cyprus.

A concentrative joint venture may be declared as not falling within the ambit of the Concentration of Undertakings Law, as falling within its ambit but nevertheless compatible with the demands of a competitive market, or as incompatible with the competitive market and thus prohibited.

Concentrative joint ventures with a European Economic Community (EEC) dimension, as defined in Council Regulation (EC) Number 139/2004, fall within the exclusive competence of the EC. The Protection of Competition Law may apply to non-concentrative corporate joint ventures as in the case of contractual joint ventures and partnership joint ventures.

Termination

Termination Events

The shareholders' agreement commonly provides for a number of scenarios that will result in the termination of the corporate joint venture, such as:

- Attainment of the corporate joint venture's objectives;
- Expiry of a predetermined time limit;
- Insolvency of a participant;
- Change of control of one of the joint venture parties;
- Breach by a participant of the terms of the joint venture agreement;
- Deadlock;
- Unforeseen capital requirements; and
- Developments that are unattractive in terms of risk or cost.

Methods of Termination

There are four ways in which a corporate joint venture may be terminated. The first is by sale of the entire share capital to a third party.

The second way is by transfer of shares among the participants in the corporate joint venture according to a predetermined procedure. The procedure will generally form part of the original joint venture agreement.

The third way is sale by one participant of its shares to a third party. Transfers to third parties are usually subject to certain restrictions, pertaining either to the transferability of the shares or the suitability of the third party. The articles of association may provide for preemption rights,[11] drag-along rights,[12] or tag-along rights.[13]

The fourth way in which a corporate joint venture may be terminated is by liquidation. A corporate joint venture can be liquidated pursuant to the general rules set out in the Companies Law.

Consequences of Termination

The typical consequences of the termination of a corporate joint venture, except in the case of liquidation, are the following:

- Confidentiality undertakings pertaining to the operation of the corporate joint venture and the business of the participants will remain in effect, and will continue to bind the outgoing party;
- Non-compete undertakings will usually continue to be in force for a specified period of time;
- Loans made to the corporate joint venture by the outgoing party may be repayable by the corporate joint venture, or be assigned to the continuing parties or the incoming party; and
- The outgoing party will normally be released from any guarantees it has given in the course of its participation in the corporate joint venture.

European Economic Interest Grouping

In General

The EEIG concept was introduced by Council Regulation Number 2137/1985.[14] Since 1 July 1989, it has provided a mechanism for natural persons, companies, firms, and other legal entities to cooperate effectively across intra-EEC borders.

The EEIG represents a very specific type of joint venture arrangement, as its objective should always be to promote the economic activities of its members. The EEIG activity should be linked to and be ancillary to these economic activities.

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11 A participant who wishes to sell its shares to a third party is obliged to offer its shares to the other existing participants in proportion to their capital contribution. Only after the existing shareholders decline to buy can the seller proceed with the transfer to the outside party.

12 Drag-along rights enable a majority shareholder to force a minority shareholder to join in the sale of a company at the same price and on the same terms and conditions as other sellers.

13 Tag-along rights give the minority shareholder the right to join in the sale at the same price and on the same terms and conditions as other sellers.

14 Council Regulation (EEC) 2137/1985 on the European Economic Interest Grouping (EEIG), OJ 1986 L 199/1-9.

A duly registered EEIG has the capacity to acquire, in its own name, rights and obligations of all kinds, to conclude contracts, and to sue and be sued. However, it may not have assets and liabilities separate from those of its members, unless it is vested with legal personality. This issue is left to the discretion of the member state where the EEIG is registered.

The management of an EEIG is delegated to one or more natural or legal persons who are appointed in the formation contract or appointed by the members. Each of the managers is entitled to represent the grouping, and to bind it in respect of dealings with third parties when he acts on its behalf.

Use of the EEIG has not yet become widespread, although it can be a cost-effective option for smaller-scale specialized sector companies and professionals to generate a larger international market profile than their individual size would merit.

Advantages

The formation, operation, or termination of an EEIG is less formal and less costly than a corporate joint venture. The specific formalities for establishing the EEIG are less onerous than those imposed by the Companies Law.

Another advantage is that the EEIG promotes the activities of its participants, and may create the impression of a larger business than is actually the case.

Taxation transparency is yet another advantage. The profits of an EEIG are considered to be those of its members, and are distributed among them in accordance with the provisions of the EEIG contract or, in the absence of any such provisions, in equal shares. Losses are similarly dealt with.

Disadvantages

Liability risk is one of the disadvantages of an EEIG. The members of the EEIG are jointly liable for its debts and for other liabilities of every kind, in an unlimited amount. The liability of one or more of the members with respect to a particular debt or other liability may only be restricted or excluded by means of a specific agreement between the grouping and the respective creditor.

Additionally, the actions of a manager *vis-à-vis* third parties are binding, even if his acts fall outside the objects of the grouping, unless it is proved that the third party was aware or could not have been unaware of the facts of the matter. Another disadvantage is that participation in an EEIG is restricted to:

- Companies or firms within the meaning of the second paragraph of article 54 of the Treaty on the functioning of the European Union (*ex* article 48 TEC);
- Other legal bodies that have been formed in accordance with the law of a member state, and that have their registered or statutory office and central administration in the EEC; and

- Natural persons who carry on any industrial, commercial, craft, or agricultural activity, or who provide professional or other services in the EEC.

Taxation

Profits resulting from the activities of an EEIG are taxable only in the hands of its members. Similarly, any losses are treated as attributable to its members to report on their individual tax returns. National laws regulate substantive issues, such as the precise tax rate and the applicable tax procedures.

Conclusion

Cyprus became a member of the EU in 2004. Since then, joint ventures have become widespread in Cyprus as the preferred structure for the execution of a number of infrastructure projects.

Simultaneously, local entrepreneurs have entered into joint venture arrangements with other European companies in telecommunications, retailing, and other sectors, as a means of bringing the benefit of their know-how and distribution channels to the Cyprus market. The introduction of the euro at the beginning of 2008 appears to have accelerated what was already a strong trend.

To date, the Cyprus experience of joint ventures has been good, with little practical experience of disharmony between the partners resulting in court action. Despite this, or perhaps because of it, joint ventures are set to be an important topic in Cyprus law in the foreseeable future, particularly if current oil exploration activities yield a positive result.