

1 NOVEMBER 2023

Corporate & Commercial ALERT

IN THIS ISSUE

Joint ventures: To incorporate or not?

Once business partners have agreed on a joint venture (JV) as a suitable business structure, one of the initial considerations is often whether or not the JV should be incorporated. Making this decision will depend on myriad factors ranging from formation, financing, ownership of assets, regulatory, taxes, commercial considerations to dissolution.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Joint ventures: To incorporate or not?

Once business partners have agreed on a joint venture (JV) as a suitable business structure, one of the initial considerations is often whether or not the JV should be incorporated. Making this decision will depend on myriad factors ranging from formation, financing, ownership of assets, regulatory, taxes, commercial considerations to dissolution.

This article sets out some of the key legal considerations in deciding whether or not to incorporate the JV. In making this decision, it is important to understand the pros and cons of an unincorporated joint venture (UJV) where the participants hold contractual “*participatory interests*” versus an incorporated joint venture (JV Company) where the participants hold shares in a company, vice versa.

Formation and administration

A UJV is established through an agreement between the participants. Therefore, the incorporation or registration with the Companies and Intellectual Property Commission (CIPC) is not required as it is for a JV Company. Although this may be appealing from an administrative perspective in that there will be no completion and lodging of forms and documents or filing annual returns with the CIPC, the main disadvantage is that the UJV has no separate legal personality unlike a JV Company. Therefore, the participants will become liable

to third parties jointly and severally, which does not ordinarily happen in a JV Company with the exception of piercing the corporate veil. Amongst the participants *inter se*, the participants are liable for the debts of the UJV in accordance with their participation interest.

Furthermore, in a UJV the participants will not enjoy the statutory rights and protections entrenched in the Companies Act 71 of 2008 (Companies Act) and its regulations. Therefore it is crucial for the joint venture agreement to clearly set out the parties’ rights and obligations and provide for any protections a party may require. While risks identified for a UJV can be mitigated through appropriate contractual provisions in the joint venture agreement, a contractual claim may be insufficient.

While a JV Company (depending on its public interest score) may be obliged to appoint a social and ethics committee and audit its financial statements in accordance



The graphic features a gold diagonal stripe across a grey background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Corporate, Commercial/M&A 2023 Rankings', 'Corporate & Commercial practice is ranked in Tier 1.', 'CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.', 'Leading Individuals: Willem Jacobs | David Pinnock', 'Recommended Lawyers: Vivien Chaplin | Peter Hesselting Justine Krige | Sammy Ndolo David Thompson | Roxanna Valayathum Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

Joint ventures: To incorporate or not?

CONTINUED

with the Companies Act, a UJV does not have this obligation unless it voluntarily chooses to do so. This provides greater flexibility between the participants to determine in the joint venture agreement how the UJV should be managed and administrated.

Asset Ownership

In relation to assets contributed to the UJV, such assets are jointly controlled and often jointly owned by the participants. However, in the case of the JV Company, assets are not owned by shareholders but the JV Company. Therefore, assets would need to be vended by the partners to the JV Company through one or other mechanisms (as subscription consideration or through a sale or donation).

The participants are not faced with statutory requirements in “*withdrawing*” assets contributed to the UJV – they can regulate these matters by agreement. On the other

hand, a JV Company has to comply with the provisions of section 46 of the Companies Act to make a distribution.

Regulatory considerations

The advantages and disadvantages will largely be influenced by the regulatory framework governing the respective participants to the joint venture and whether any regulatory approvals will be required in relation to establishing the UJV or JV Company.

Further, it must be determined whether licences and/or permits of the participants can be contributed to the UJV or transferred to the JV Company. If the licences and/or permits will continue to be held by the participant and not the JV, the parties should consider who would be responsible for complying with the terms and obligations thereunder and the apportionment of liabilities for non-compliance. It is advisable to request indemnification by the holder against any claims for historical liabilities.

Like any other corporate structuring, it is important for parties to take into account tax considerations including, but not limited to, (i) the treatment of the JV as a partnership vs a separate taxpayer; (ii) the tax implications upon the entry and exit of a participant; and (iii) the transfer of assets from the participants to the JV Company.

Although a UJV structure may appear more flexible than a JV Company, the major commercial downside of a UJV is that each participant’s balance sheet is exposed to the risk of the UJV business as a whole (due to each participant being jointly and severally liable to third parties for the debts of the UJV). Therefore, the decision whether or not to incorporate should be considered on a case-by-case basis as no cases are equal.

Thandiwe Nhlapho

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Ian Hayes

Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com



David Thompson

Deputy Practice Head & Director:
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Kate Anderson

Director:
Corporate & Commercial
T +27 (0)11 562 1105
M +27 (0)82 418 3784
E kate.anderson@cdhlegal.com

Tessa Brewis

Director:
Corporate & Commercial
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Vivien Chaplin

Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director:
Corporate & Commercial
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Johan de Lange

Deputy Practice Head:
Finance & Banking
Director: Projects & Infrastructure
T +27 (0)21 481 646
M +27 (0)78 642 5573
E johan.delange@cdhlegal.com

Andrew Giliam

Director:
Corporate & Commercial
T +27 (0)21 481 6363
M +27 (0)83 359 7069
E andrew.giliam@cdhlegal.com

John Gillmer

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Allan Hannie

Director:
Corporate & Commercial
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesselning

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselning@cdhlegal.com

Quintin Honey

Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Willem Jacobs

Director:
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

Brian Jennings

Director:
Corporate & Commercial
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly

Director:
Corporate & Commercial
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director:
Corporate & Commercial
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige

Director:
Corporate & Commercial
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Dane Kruger

Director:
Corporate & Commercial
T +27 (0)21 481 6362
M +27 (0)74 914 1402
E dane.kruger@cdhlegal.com

André de Lange

Sector Head: Agriculture, Aquaculture
& Fishing Sector
Director: Corporate & Commercial
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Jaco Meyer

Director:
Corporate & Commercial
T +27 (0)11 562 1749
M +27 (0)83 477 8352
E jaco.meyer@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Anita Moolman

Director:
Corporate & Commercial
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Wayne Murray

Director:
Corporate & Commercial
T +27 (0)21 405 6018
M +27 (0)79 691 0137
E wayne.murray@cdhlegal.com

Francis Newham

Executive Consultant:
Corporate & Commercial
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

David Pinnock

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Jess Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1128
M +27 (0)83 571 6987
E jess.reid@cdhlegal.com

Megan Rodgers

Sector Head: Oil & Gas
Director: Corporate & Commercial
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Director:
Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director:
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director:
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director:
Corporate & Commercial
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head: Projects & Infrastructure
Director: Corporate & Commercial
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Charl Williams

Director:
Corporate & Commercial
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Christelle Wood

Director:
Corporate & Commercial
T +27 (0)11 562 1372
M +27 (0)83 498 2850
E christelle.wood@cdhlegal.com

Emma Hewitt

Practice Development Director:
Corporate & Commercial
T +27 (0)11 562 1635
M +27 (0)82 896 1332
E emma.hewitt@cdhlegal.com

Alecia Pienaar

Counsel:
Environmental Law
T +27 (0)82 863 6279
M +27 (0)82 863 6272
E alecia.pienaar@cdhlegal.com



BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2023 12798/NOV