Commercial Terms and Legal Implications in Structuring Land JV Agreements

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Introduction

Definition of Joint Venture

“An association of 2 or more natural or legal person combining property and expertise to carry out a single business enterprise and having a joint proprietary interest, a joint right to control, sharing of profits and losses.”
The Need for Land JV

JV is commonly used in property development to:

- Access the expertise & capital of others
- Gain access to a project or asset that they would not otherwise have access to
- Share the risk of a project or asset with others
The Need for Land JV

- Land owner
  - lacks technical & financial ability to commence & complete the project;
  - wants to encash opportunity

- Developer
  - sky-rocketing land price
  - Real estate is normally the major component of project cost
Choosing the JV Structure

1. Incorporated JV / SPV

- A corporate entity which exists separately from its shareholders
- Limitation of liability
- JV parties hold shares of the joint venture corporation – direct participation
- Transfer the real estate on the book of the new corporate entity
- Documentation:
  - JV Agreement/ Shareholders’ Agreement to govern their corporate relationship
Choosing the JV Structure

Factors to consider (Incorporated JV)

- Simple framework
  - One single entity for ownership & development
- Limitation of liability
  - Shareholders separate legal entity
- Ease of dealings
  - Ease of dealings with buyers & other third parties
- Financing – legal structure
  - 1st party security
Choosing the JV Structure

Factors to consider (Incorporated JV)

- **Statutory/regulatory compliance**
  - Filing requirements
- **Running expenses**
  - Corporate secretarial & audit, remuneration etc
- **Tax**
  - RPGT, GST & stamp duty on transfer of land to SPV
- **Winding-up**
  - Complications and costs
Choosing the JV Structure

Incorporated JV

Co A 70%  Co B 30%

Land  JV Agreement  

JV Co

SPA (market value)

TAY & PARTNERS
Choosing the JV Structure

2. Unincorporated JV

- To co-operate without the use of any jointly owned or controlled corporate vehicle
- No separate legal entity
- The common form of JV used by developer
- Legal ownership of land remains with the landowner
- Documentation
  - Land Development Agreement
  - Power of Attorney
Choosing the JV Structure

Factors to consider (Unincorporated JV)

- Profit sharing flexibility
  - Contractual
- Tax
  - RPGT & GST on JV
  - Stamp duty saving – non-transfer of land
- Accounting separation
Choosing the JV Structure

Factors to consider (Unincorporated JV)

- Financing
  - 3rd party charge & owner’s liability to pay
- Complexity
  - 3rd party ownership and disputes
- Unlimited liability
  - If partnership, joint and several liability
- Unsecured Interest
  - Developer has no secured interest over land (e.g. further encumbrances, bankruptcy of land owner etc)
Choosing the JV Structure

Unincorporated JV

Co A

Land

Co B

Land Development Agreement
Choosing the JV Structure

Joint Development

- Land owner provides land
- Developer provides services
- Purchaser
- Transfer of legal title
- Sell the completed building
- Payment made to the developer
Getting Started – Key Pointers

- Confidentiality / Non Disclosure Agreement (NDA)
- Heads of Agreement / Memorandum of Understanding (MOU)
- Due Diligence
Getting Started – Confidentiality / NDA

- Negotiation stage

- Prior to public announcement - listed company

- Avoid unwanted situation – sensitive business information ended up with competitors or used by potential JV partners

- Restrict disclosure of information – limited person in corporation

- If negotiation fails – all documents and materials to be returned
Getting Started – Heads of Agreement/MOU

- Pre-contractual stage – before finalisation of the JV Agreement

- Set out fundamental objectives and understanding of parties

- To put in writing - the main agreed terms

- Binding or not binding?
Getting Started – Due Diligence

Due Diligence by Developer

- Land search
  - Verify ownership, special conditions and encumbrances
- Land acquisition
- Zoning and permitted use of land
- Company / bankruptcy / winding-up search
- Claims and litigations
Getting Started – Due Diligence

Due Diligence by Land Owner

- Credentials of the Developer
  - Past history and standing in the community?
  - Financial standing?

- Company Bankruptcy / winding-up search

MANAGE YOUR RISK!
Unincorporated JV – Commercial Terms

- **Purpose & Objectives**
  - Development, marketing & sales (e.g. service residence)

- **Conditions Precedent**
  - DO, plot ratio, shareholders’ approval, conversion of land use etc

- **Exclusive Development Rights**
  - To develop, manage, market, sell or lease
  - To engage advisers, consultants and contractors

- **Delivery of Vacant Possession**
  - Tenanted or vacant land
Unincorporated JV – Commercial Terms

- Building Plan Approvals etc
  - Discretion & timing
- Completion of Project
  - Expected commencement & completion date
  - What constitute completion? A period from BPA
  - Costs borne by Developer (part of development expenditure)
Unincorporated JV – Commercial Terms

- Land Owner’s Entitlements

  - Percentage of GDV / Development Profit and a minimum cash sum, whichever is higher
  - Deduction of development expenditure (all costs incurred for development, construction costs, land outgoings, marketing and sales costs, legal fees etc)
  - GDV= price of units sold and unsold units as at closing date (risk on developer if unsold within the closing period)
  - Exclusive of GST
  - Deposit – signing of agreement / unconditional date
Unincorporated JV – Commercial Terms

- Land Owner’s Entitlements

  - Cash sum payment schedule
    - Instalment in tranches
    - Stages of construction – payment from receipt of proceeds of sale
  
  - Payment of balance portion above cash sum
    - Final account of payment as at closing
    - Amount paid and due to be paid
    - Owner / Developer’s discretion as to payment in cash or units
Unincorporated JV – Commercial Terms

• Land Owner’s Entitlements (cont’d)

➢ Setting off payment in units
  o Owner / Developer’s choice of units
  o Entry of SPA
  o Developer’s payment of legal fees and stamp duties including GST
Unincorporated JV – Commercial Terms

- Developer’s Entitlement
  - All remaining GDV, income and profits less Land Owner’s Entitlement
  - Land Owner’s continuing obligations to transfer unsold units to Developer or nominees
Unincorporated JV – Commercial Terms

- Funding of Development
  - Developer’s obligation to procure funding
  - Owner’s duty to charge land to lenders
  - Owner’s liability to lenders on payment of loans
  - Foreclosure by bank
Unincorporated JV – Commercial Terms

- Land Owner’s Covenants
  - No interference on development
  - No sale, encumbrances or dealing with land
  - Assist in any applications for approvals and subdivision etc
  - Execute SPA and transfer titles to end buyers
  - Indemnity
Unincorporated JV – Commercial Terms

- Developer’s Covenants
  - Development and management of project at its own costs and funding
  - Engagement of consultants and contractors etc
  - Marketing & sale of units
  - Comply with all laws
  - Indemnify owner of claims and losses (e.g. LAD etc)
  - Progress report
Unincorporated JV – Commercial Terms

• Events of Default
  ➢ Material breach, winding up / bankruptcy, arrangement with creditors etc
  ➢ Time to rectify
  ➢ Specific performance
  ➢ Termination
    o Damages, costs and expenses
    o Cessation of development works and return of possession
    o Take over of rights and discharge of liabilities
    o Completion of construction of buildings
Unincorporated JV – Commercial Terms

- Force Majeure
  - Obligation suspended for the duration the force majeure continues (e.g. Acts of God, delay by authority to grant approval, stop work order etc)
  - Discussion in good faith to resolve and continue with project
Incorporated JV – Commercial Terms

- Business Objectives
  - Acquire land, develop, market & sell units
- Agreed Proportion
- Class of Shares
  - OS & RPS
- Initial Capital Contribution
  - Cover initial payment of acquisition of land
- Subsequent Capital Contribution
  - Acquisition & development of land
  - Business Plan
  - SPV issues call notice for further subscription / loans
Choice of Funding

Factors

- Tax consideration
- Parties' resources to be contributed as equity or debt
- Types of development
- Whether external funding will be required
- Objectives of the JV parties
Security for Financing

- Facility agreement
- First or third party legal charge
- Subordination Agreement
- Assignment and charge over the HDA
- Corporate guarantee
- Debenture & power of attorney

TAY & PARTNERS
Incorporated JV – Commercial Terms

• Sale of Shares
  ➢ Moratorium Period
  ➢ First right of refusal
  ➢ Tag along rights

• Management and control – voting rights, meetings, quorum, board seats

• Reserved matters – change in business plan, incurrence of liability outside business plan, RPT etc
Incorporated JV – Commercial Terms

• Deadlock
  ➢ Limit triggers to deadlocks on significant issues

• Provision on default of parties
  ➢ Material breach, winding up, a Change in Control etc
  ➢ Sell out/ Buy out.

• Dispute resolution
  ➢ Good faith discussion
  ➢ Arbitration or mediation

• Non-competition
• IP rights/Confidentiality
• Winding Up
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