



Key Points in Negotiation of Joint Venture and Privatization Scheme

4 December 2023

Joint Venture

Factors to consider before entering into a JV

Goodwill and Co-operation

Identity of the JV Partner

- ❖ Financial / Accounting Records
- ❖ Technical Expertise
- ❖ Reputation/Track record
- ❖ Jurisdictional peculiarities

Role of the JV Partner

- ❖ Technology Provider
- ❖ Financial Investor

Important clauses to include in a JV Agreement

Conditions Precedent

- ❖ Extension of cut-off date: To include a maximum number of times the JV Agreement can be extended.
- ❖ Termination due to non-fulfilment of CPs:
 - To include that PKNS will not be in breach or be liable for any failure if the CPs are not fulfilled due to reasons which are not attributable to, within the control of or caused by PKNS.
 - To include that PKNS will be at liberty to explore or pursue other opportunities to proceed with the project either on its own or with any other third party, post termination of the JV Agreement.

Important clauses to include in a JV Agreement

Governance

- ❖ To state who would be running the day-to-day affairs of the JV Company (i.e. CEO, project committee, key managers etc) – extent of direction and supervision of the Board of Directors.
- ❖ Agreement and Implementation of a business plan, annual budget and dividend policy.
- ❖ Rights of shareholders' to access and inspect the books, accounts, financial and other records of the business and supply copies of the minutes of any Board meetings as any shareholder may request – Board independence, directors' duties and responsibilities, conflict of interests, confidentiality, etc.

Important clauses to include in a JV Agreement

Board Reserved Matters

- ❖ any acquisition, investment, purchase, commencement or undertaking of any new business or assets.
- ❖ any related party transactions.
- ❖ any increase, reduction or cancellation of the company's issued share capital, issuance or grant of any option.
- ❖ any borrowings or incurring of indebtedness or varying the terms or conditions of any borrowing facilities.
- ❖ any deviation to the approved business plan.

Important clauses to include in a JV Agreement

Shareholders' Reserved Matters

- ❖ Changes to the constitution of the JV Company.
- ❖ Any corporate restructuring, including any reconstruction, amalgamation or schemes of arrangements to be entered by the JV Company.
- ❖ A change in the general nature of the business of the JV Company.
- ❖ Any proposal in relation to the dissolution, the liquidation or winding up of the JV Company.

Important clauses to include in a JV Agreement

Deadlock

- ❖ To include a deadlock mechanism in the event a board resolution cannot be passed or there is a lack of quorum.
- ❖ The shareholders shall attempt in good faith to resolve the deadlock within a certain period.
- ❖ To consider including a put and call option if the shareholders fail to resolve such deadlock.

Important clauses to include in a JV Agreement

Transfer of Shares/Pre-emption Rights

- ❖ General pre-emption rights : ROFR v ROFO
- ❖ To include permitted transfer of shares i.e. transfers to related corporations or encumbrances that may be granted to financiers.
- ❖ To restrict transfer of shares to a competitor.
- ❖ Transfer of shares to third parties: must be with the written consent of the non-transferring party and such third party must be capable of bringing the same benefits to the JV and providing the same technology or expertise as the outgoing shareholder (if such outgoing shareholder is a technology provider).

Important clauses to include in a JV Agreement

Transfer of Shares

❖ As a minority shareholder:

- to include a tag along right to sell its shares to the same third party who is purchasing shares from the majority shareholder.
- to include a right of first offer where the majority shareholder gives non-transferring party the first opportunity to purchase its shares before offering it to third parties.

❖ As a majority shareholder;

- To include a drag along right to require the other party to sell its shares to the same third party.

Important clauses to include in a JV Agreement

Termination Events

- ❖ Material breach by a shareholder of the JV Agreement.
- ❖ Winding up or dissolution or liquidation of a shareholder
- ❖ Change in control of the JV Partner.
- ❖ Any termination event relevant to the circumstances/project.

Consequences of Termination

- ❖ Obligation to sell to non-defaulting party or obligation to purchase shares of non-defaulting party : call or put options
- ❖ Pricing for sale or purchase: non-defaulting party vs. defaulting party-sale at reduced value or purchase at higher value.

Important clauses to include in a JV Agreement

Exclusivity

- ❖ To include whether the collaboration is on an exclusive or non-exclusive basis and to specify the period of exclusivity.

Restrictive Covenants

- ❖ All design, information and documents related to the project are the proprietary property of the JV Company and cannot be utilized for any other project without written consent from PKNS.
- ❖ Non-solicitation of any person engaged or employed by the JV Company in a managerial, supervisory, technical, or sales capacity.
- ❖ Carry on or be engaged with any business which competes with the JV Company.

Ancillary Agreements - salient terms to be agreed upfront (term sheets or full agreements)

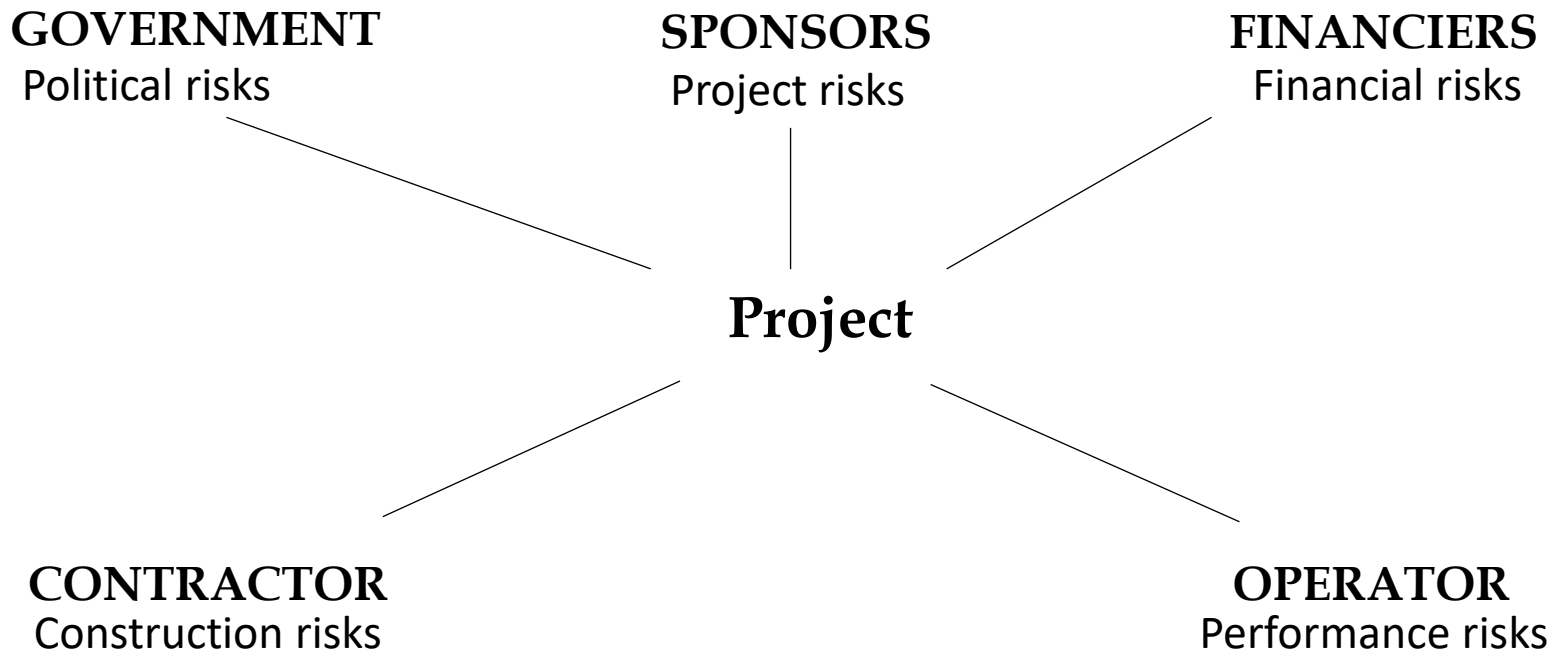
Privatization Agreement

Important matters to consider in a Privatisation Agreement

Scope of Privatization / Concession

- ❖ Whether it's build-own-operate-transfer or build-operate-transfer.
- ❖ Identify risks and allocation of risks (ability to mitigate and control the risk), risk management (project risk, political risk, financial risk, construction risk, performance risk)
- ❖ Parties to the Concession : Novation and Assignment
- ❖ Duration of concession.
- ❖ Financial costs – who would be responsible to obtain the necessary funding to carry out the project.

Important matters to consider in a Privatisation Agreement



Important matters to consider in a Privatisation Agreement

Factors for successful privatization:

- Sound policy and comprehensive regulatory framework – legality and permissibility on the grant
- Strong Govt support
- Clarity of project formulation and documentation – Concession Agreement:
 - Clearly define the concession - scope, duration, restrictions/limitations of use
 - Determine payment terms – amount (fixed or revenue sharing or both), frequency, penalties for late payments
 - Identify responsibilities
 - Termination events, circumstances, consequences
 - Dispute resolution

Important matters to consider in a Privatisation Agreement

Change in Law

- ❖ To include measures such as to extend or shorten the concession period and to modify or vary the privatization agreement in the event of there being any changes or introduction of any law or guidelines which will:
 - prevent the concessionaire or the Government from substantially fulfilling its obligations; or
 - cause substantial prejudice to or adverse effect on the financial or business position of the concessionaire; or
 - cause any breach of any financial obligations and/or covenants given by the concessionaire.

Important matters to consider in a Privatisation Agreement

Expropriation

- ❖ In the event the concession is expropriated by the Government, the formula to calculate the compensation to be provided to the concessionaire by the Government should be included in the agreement.

Step-in Rights

- ❖ To include an acknowledgment from the Government that the step-in rights of the financier will have priority over the step-in rights of the Government.

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**KEY POINTS IN
NEGOTIATION OF JOINT
VENTURE AND
PRIVATISATION SCHEME -
MANAGING LITIGATION
RISKS**

Shearn Delamore & co.

ADVOCATES & SOLICITORS, NOTARY PUBLIC, REGISTERED PATENT AGENTS, TRADE MARK AGENTS AND INDUSTRIAL DESIGN AGENTS

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**JOINT VENTURE SCHEME –
MANAGING LITIGATION RISKS**

Typical material clauses for Joint Ventures (by way of Joint Venture Agreement/Shareholders Agreement):

- Responsibilities of the respective JV parties
 - ❖ Project financing
 - ❖ Regulatory/State approvals
 - ❖ Equity Injection?

- Responsibilities of the Management
- Composition and responsibilities of the Board of Directors
- Reserve matters for the Board of Directors?
- New Issuance of shares / Transfer of Shares & Restrictions on Transfer
- Declaration of Dividend?
- Events of Default & Termination
- Remedies upon occurrence of events of default
 - ❖ Call options? Formula for ascertainment of value
 - ❖ Winding up?

Matters to note when dealing with dispute:

- Minutes of Board of Directors' meeting
- Minutes of shareholders' meeting
- Retention of documents & communications : at least 6 years
- Out of Court settlement to be on a 'without prejudice' and 'without admission of liability' basis

**PRIVATISATION SCHEME – MANAGING
LITIGATION RISKS**

Material clauses for PKNS Privatisation Scheme:

- Validity of the Privatisation Agreement
 - ❖ Expiry of the Privatisation Agreement : typically 5 years
 - ❖ In the event PKNS is inclined to renew the Agreement, negotiations for renewal (PKNS position should be ascertained prior to the expiry)
 - Comprehensive review of existing Agreement
 - Review of operational reasons for non-completion and manner in which such reasons should be addressed(eg, time frame for Feasibility Reports, development plan, design and the like to the satisfaction of PKNS)
 - PKNS Entitlement and formula

- ❖ In the event PKNS is not inclined to renew the Agreement (PKNS position should be ascertained prior to the expiry)
 - Review of operational reasons for non-completion
 - Review of handover processes
 - Notice to confirm termination of Agreement on expiry
 - Cease dealings post expiry
- ❖ Conduct of the parties post expiry
 - In the event PKNS continues to deal with the contracting party post expiry as if the Agreement remains valid, could give rise to argument that the Agreement remains valid
 - Written communication?
 - Dealings with State continued?
 - Review of operational reasons for non-completion & grounds for termination

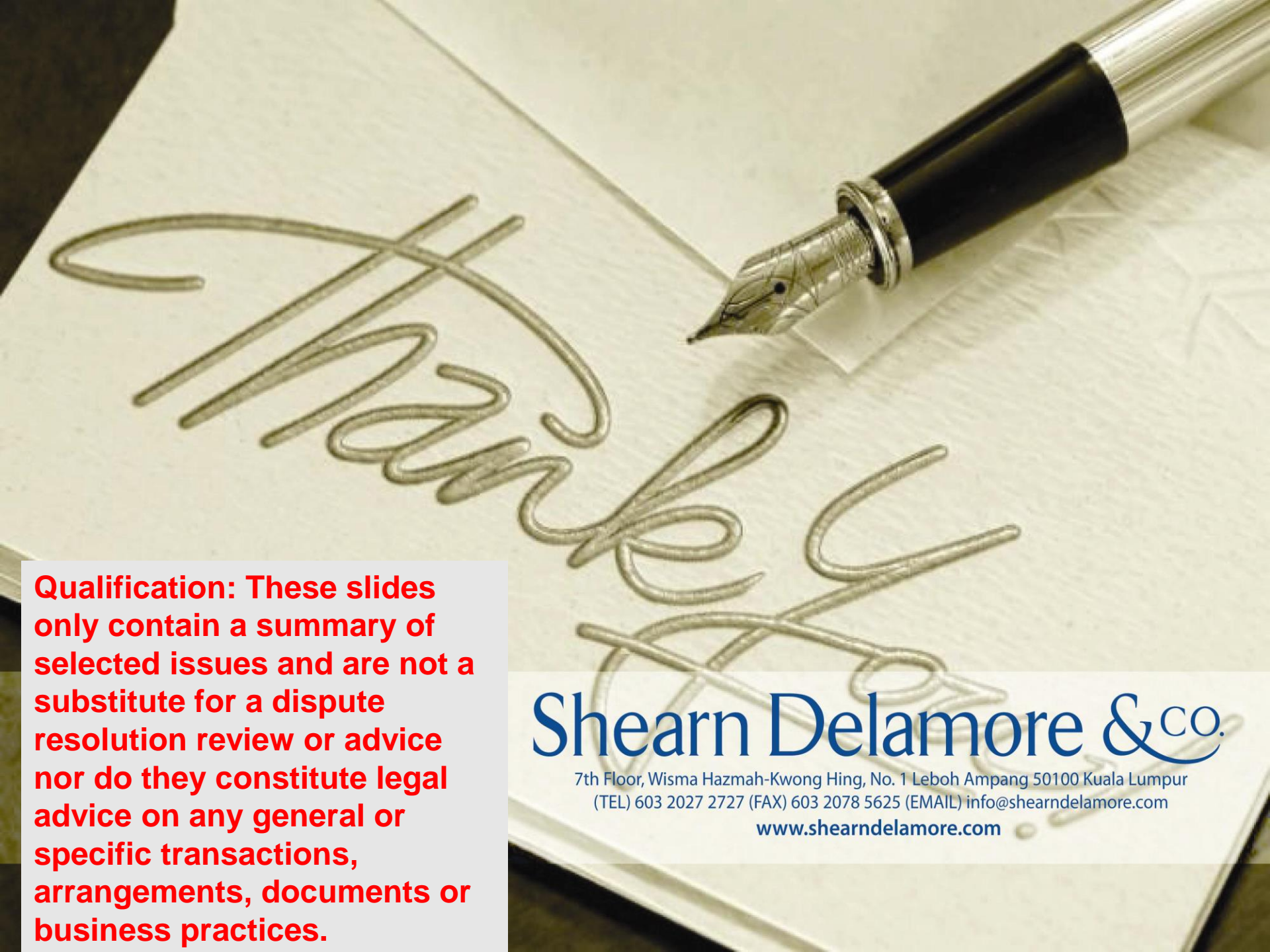
- Grounds for termination
- ❖ No mutual termination clause?
- ❖ Termination on default – grounds for termination & evidence?
- ❖ State approval (for example, Planning Permission, Development Plan)
 - PKNS will need to show it acted reasonably and diligently in applying the State approvals
 - If there is a delay, force majeure clause?
 - If impossible to get approvals, the Agreement has been frustrated
 - These reasons need to be raised at the first available opportunity
- Notice requirement for termination : timeline and service of notice

Matters to note when dealing with dispute:

- Privatisation projects involving land development:
 - ❖ Lodgement of private caveat on the land; effect on dealings with third parties
 - ❖ Injunction to restrain dealings with the land
 - ❖ Dealings with third parties and implications : disclosure of potential dispute?
 - ❖ Court proceedings for possession of land

Matters to note when dealing with dispute:

- Financially distressed developer / developer in liquidation
 - ❖ Whether this is a ground for termination
 - ❖ Impact on the land – unauthorised charge on the land
 - ❖ Liquidation : to deal with Liquidator / Insolvency Department
- Retention of documents & communications : at least 6 years
- Out of Court settlement to be on a ‘without prejudice’ and ‘without admission of liability’ basis



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