

NORTH WALES ICE BUSINESS BREAKFAST

JOINT VENTURES

JOINED AT THE HIP OR ONE NIGHT STAND?

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INTRODUCTION

What is a joint venture?

- No specific meaning **in law**
- Also referred to as a **consortium**
- Can take a number of **different forms**
- Commercial arrangement between **two or more** independent legal entities
- JV is a **single** entity
- Can be for **one specific** project or a **continuing** business relationship

Advantages

- Enable **growth** without having to borrow from third parties
- Only cover what you want, thus **limiting** the commitment
- Access to **greater resources**
- **Increase capacity** and, therefore, productivity
- **Share risks** and costs
- Generate **greater profits**
- Can have a **limited life span**, thereby limiting long term exposure

Disadvantages

- Takes time and effort to **build relationship**
- **Sacrifice** of control
- Required to be **more flexible**
- Exposure to **tensions**

CONSIDERATIONS BEFORE FORMING A JOINT VENTURE

- Objectives of the JV
 - ◆ Commercial
 - ◆ Financial
- Structure that will achieve those objectives
 - ◆ Whether the JV should be a separate legal entity
 - ◆ Degree of integration and level of commitment
 - ◆ Risks to each party
- Location of the JV
- Length of time JV will operate
- Who will be involved in the JV

POSSIBLE VEHICLES

- **Four** basic legal forms
 - ◆ Limited liability company
 - ◆ Limited liability partnership (LLP)
 - ◆ A partnership
 - ◆ Contractual JV
 - Non-integrated
 - Integrated

POSSIBLE VEHICLES

- Alternatives provide **varying degrees of integration**:
 - ◆ **Limited liability company** entails vesting all trading activities, assets and liabilities in a single company
 - ◆ **Contractual JV** may be set up such that there is:
 - no pooling of assets
 - no sharing of costs and revenue
 - ◆ **Partnership** alternatives
 - parties jointly and severally liable for each others' acts and omissions
- In the context of **major construction projects**, the realistic options are:
 - ◆ Limited liability company, and
 - ◆ Contractual JV

LIMITED LIABILITY COMPANY

- **Separate** legal entity:
 - ◆ Independent
 - ◆ Clear identity
 - ◆ Permanence
 - ◆ Can contract in its own right
 - ◆ Can own and dispose of assets
 - ◆ Can sue and be sued

LIMITED LIABILITY COMPANY

- Advantages:
 - ◆ Veil of incorporation gives participants/shareholders the ability to **limit their liability**
 - Participants' liabilities limited to contribution to share capital
 - however, unless the JV is independently financially viable, the shareholders will probably be required to provide **guarantees**
 - ◆ Corporate structure provides **flexibility** when it comes to:
 - **raising finance** and
 - **tax** planning
 - ◆ Companies Act stands as a **pre-existing legal framework** within which the affairs of the JV company regulated e.g. directors' duties

LIMITED LIABILITY COMPANY

- Disadvantages:
 - ◆ Formality – not really a disadvantage in itself, but compliance with regulations can be expensive
 - ◆ JV company is an independent tax entity
 - ◆ Publicity

CONTRACTUAL JOINT VENTURES

- Co-operation on a simple contractual basis:
 - ◆ Participants are **independent** contractors, **not shareholders** (or legal partners)
 - ◆ Commonly referred to as “consortium agreement”, “collaboration agreement” or “co-operation agreement”

CONTRACTUAL JOINT VENTURES

- ◆ JV agreement should specify (as a minimum):
 - **Purpose** of the joint venture;
 - **Duration** of the legal relationship;
 - **Rights and duties** of participants as between themselves and third parties;
 - How the **JV income** will be shared amongst the participants
 - A statement of intention **not to create a partnership** - helpful but not conclusive as each situation will turn on its own facts
 - ◆ Relevant factors include profit/loss sharing and common commercial purpose
 - ◆ Not being partners in the legal sense, the participants have no statutory responsibilities or liabilities for acts and omissions of co-participants

CONTRACTUAL JOINT VENTURES

- ◆ A participant's **responsibilities and liabilities** for the acts and omissions of its co-participant(s) will depend upon the authority given to the co-participant(s) and the indemnities given within the JV agreement
- ◆ That does not affect the position under the construction contract
- ◆ Assets used continue to be owned by the participant introducing them
- ◆ That **each participant acts for itself as principal** and has no authority to bind the other co-participants
 - A JV agreement for a major construction project will have **specified exceptions**

PARTICULAR TYPES OF CONTRACTUAL JOINT VENTURES

- Non-integrated
- Integrated

NON-INTEGRATED JOINT VENTURES

- Nature
 - ◆ Each JV participant responsible for:
 - specific work apportioned to him
 - resources to perform its work
 - ◆ No sharing of profit and losses
 - Each JV participant takes the benefit of the profit and carries the burden of the losses in respect of that part of the Works apportioned to him
 - ◆ JV participants are jointly and severally liable to the Employer under the construction contract

NON-INTEGRATED JOINT VENTURES

- Points to be considered:
 - ◆ The constitution of the **executive committee** and its powers
 - Executive committee responsible for the strategic management of the JV activities
 - ◆ Arrangements for preparation and submission of the **JV tender**
 - ◆ **How the works are to be divided** between the joint venture participants
 - ◆ How, and by whom, the overall works will be **supervised**
 - ◆ **Shared facilities** e.g. preliminaries, temporary works and mechanical plant
 - ◆ **Apportionment of payments** received by the JV
 - ◆ Banking
 - ◆ Insurances, bonds, guarantees and indemnities
 - ◆ Termination
 - ◆ Dispute resolution

NON-INTEGRATED JOINT VENTURES

- Advantages:
 - ◆ Participants' skill sets **complement each other**
 - ◆ Participants enjoy **relative freedom to plan and organise** their work, subject to interfacing with the works of the other JV participants
 - ◆ Participants **masters of their own fortune**
 - Liabilities under the construction contract allocated to the guilty participant
- Disadvantages:
 - ◆ Some participants may put in more effort than others
 - ◆ Potential for creating an **"us and them"** environment - could lead to conflict:
 - Potential for disputes concerning **interfacing, co-ordination of the works, access, shared facilities** etc
 - **Apportionment of liabilities** under the construction contract

INTEGRATED JOINT VENTURES

- Nature
 - ◆ “All for one and one for all”
 - Participants agree to provide resources, experience skills and know-how towards fulfilment of the JV’s objectives
 - Participants jointly and severally liable under the construction contract
 - Participants commit to discharging obligations, duties and liabilities of the JV
 - ◆ Participants share liabilities, profits and losses in proportion to their predetermined financial interests, e.g. 30/70, 40/60

INTEGRATED JOINT VENTURES

- Advantages
 - ◆ Different parties bring **different skills** to the table
- Disadvantages
 - ◆ **Lack of clarity** about how closely the two sides intend to work could lead to conflict
 - ◆ **Decision making** can be slower

INTEGRATED JOINT VENTURES

- Points to be considered
 - ◆ **Constitution of the Management Board** and its powers
 - Management Board responsible for strategic management of the JV's activities
 - ◆ **Who will lead** the JV
 - specifying the **Leader's Services**
 - ◆ Arrangements for **preparation and submission of the JV tender**
 - ◆ **How the value generated by the JV will be distributed** between the Participants
 - **Pre-determination** of the Participants' respective financial interests

INTEGRATED JOINT VENTURES

- ◆ Banking
- ◆ How, and by whom, the overall works will be supervised
- ◆ Provision of working capital
- ◆ Provision of parent company guarantees
- ◆ Whether JV is sufficiently resourced to complete the Works
- ◆ Whether insurances cover joint venture and joint venture participants?
- ◆ What would happen in the event of a participant becoming insolvent?
- ◆ Bonds, guarantees and indemnities
- ◆ Termination
- ◆ Dispute resolution

EMPLOYER'S PERSPECTIVE

- The Employer will not be a party to the JV agreement, but he will have a keen interest in its **robustness**
- Does the JV agreement clearly and adequately specify the JV **participants' respective rights and obligations**
 - ◆ The Employer would not wish the JV participants to be distracted by **domestic squabbles**
- **How is liability apportioned** as between the JV participants?
 - ◆ The Employer will expect the JV partners to have a **joint and several liability**
 - ◆ The Employer will be interested to see how the innocent participant will be compensated by the culpable participant

EMPLOYER'S PERSPECTIVE

- Which participant will provide what **performance security**?
 - ◆ e.g. bonds and parent company guarantees
- How will the participant' respective insurance policies operate?
 - ◆ What is the position when **both policies cover the same risk**?
 - ◆ Will the policy indemnify Party A against loss caused by Party B?
- What happens upon **the insolvency** of one of the JV participant?
 - ◆ Would the **surviving participant** be capable of completing all of the outstanding work?

A copy of the full Joint Ventures presentation can be downloaded from our website using the following link:

<http://www.kerrigans.net/home/resources.asp>
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Alternatively, please visit the 'Resources' section of our website, www.kerrigans.net