

Joint venturing into a property project

by Desmond Hughes and Kris Limcharoen

The overused cliché that so many percent of joint ventures 'end in divorce' is overused. Unfortunately, not all joint ventures are planned in a way that manages expectations; reduces risk to a level acceptable to all parties; or deals with a projection of investment to exit, taking into account known fixed and variable influences over a property investment. This article is the first in a two part series that will set out the principle issues to be considered prior to becoming involved in acquisition and investment into property assets in Thailand. The second part, next month, will deal with the specifics of the investment and offer a key summary of legal points in the documentation.

Knowing the Parties

Prior to meeting with lawyers, there may be a period of time whereby the principal founder investor is seeking investment funds from different potential sources of capital. If such a founder investor has trusted counsel, it may be appropriate for counsel to attend the second or third meeting to provide a risk analysis of the party who the founder investor is proposing be part of the joint venture. Busy schedules should be cast aside for the crucial moment of 'getting to know each other', because after monies are committed it is often too late to realize that a business partner may be a habitual pedant on matters of *de minimis*, or a broad brush cavalier when such an approach is inappropriate to the type of proposed investment. Strengths and weaknesses can be assessed, and the correct mix of investors should be accumulated. If an investment is made on a 'who-has-the-money' basis as opposed to a 'who can invest and has adequate funds with a suitable input into the deal' investment, there can be a significant difference in outcome. In fact, the different style

of investors can be transposed into the documents in terms of 'sweat equity' to be injected into the mix.

Strengths & Weaknesses reflected in documentation

In addition to capital contributions, the input of investors should be documented in terms of expected contribution in the shareholders or joint-venture agreement, and further reflected in independent contracts. This serves a two-fold purpose. Profits can be distributed legitimately through fees under consultancy arrangements from the shareholders into the investment entity, thereby reducing the divi-

discounts, shared hidden commissions with discounts and to provide a fixed price list to avoid the sales arm materially impacting on the profits of all in order to increase commissions. In fact, the commission of an in-house sales position can be fixed with a fixed 'over-ride' on shared commissions.

Where an investor provides construction and project management services to a joint venture, regard should be given to the reporting procedures on the costs of those services, this to avoid artificial inflation and consequential reduction of profit to the other investors. This can be achieved through an arms-

should consider whether a 'devotion-of-time' to the business clause is necessary and to what extent it should regulate the entrepreneur. If the entrepreneur is also injecting more cash into the joint venture than the other parties, then it could legitimately insist on it being responsible for injecting less man hours than the other investors.

Planning Modalities of Returns

All investors should consider how and when they should like to receive a return on investment. Investors in Thailand may consider that they will be rolling their profits into a second project in Thailand, while others may wish to use the profits in an investment under a different jurisdiction. Advice should be sought from tax and accounting professionals, in line with the monies being injected into the joint venture and the 'sweat-equity' investments. This states how monies can be legitimately be sent after tax to the relevant investors either on or offshore.

Termination and Buy-Out

If an investor is simply to be bought out under normal circumstances, then there would generally be pre-emption provisions, whereby the existing investors may first have the opportunity to buy-out the exiting investor. Valuation provisions become important in such circumstances. If a particular investor has injected a large proportion of 'sweat equity' then how its input is measured can become complex. This can be avoided by a quantified assessment in monetary terms of input of the investor. Thirty hours of project management, less 30% discount to the investment entity may be quantified, but a promise to 'generally project-manage for 2 months' cannot. If 'sweat equity' is quantified, buy-out can be simplified in the future.

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dend and reducing tax liability, making the individual investors responsible for tax on their fees. The legal effect may be that the return through the contract with the investor can be terminated if the investor does not perform in its capacity as a supplier to the joint venture. This can trigger a 'buy-out' provision so that the other investors are protected if that investor fails in its capacity as supplier. There must also be protections to prevent a 'gang' of investors undermining a minority, and that is where the detail of the contracts and joint venture agreement becomes of paramount importance.

Examples in a property investment of terminable consultancy arrangements can be 'sales and marketing/brokerage' agreements, where the other investors must be careful to avoid deep

length construction and project management contract, which is terminable with normal commercial protections. Such agreements contain a right to inspect financial data (by the other investors) and a right of independent oversight of quality and construction. If such rights are insisted upon at the front-end of a deal, it is unlikely that they can be objected to later on with feigned 'don't-you-trust-me' surprise.

If one of the investors is an entrepreneur who puts the initial investment together, procures the coming together of the other types of investor and sets up with counsel the legal structure for the sales of the units in the project, the investment of time by that investor may be more intense at the outset than in the middle of the project. If that is the case then the other investors


Default notices may have to be different for different investors. A sales-arm investor, if failing to procure more than x no of sales of a period of y months may be held in breach, which could be entirely different from the project manager failing to maintain quality of building product.

Controlling Sub-Syndicates

Where parties enter into agreements through an offshore entity that can control who owns at any time that entity. On day one, an investor could be an offshore entity with one director and one shareholder, and on day ten, the same entity could have several sub-investors. This could complicate matters when that entity needs to vote or take action on a matter within the principal investment, as there may need to be several procedures effected before a proper decision can be made by the principal entity. This can be avoided by a 'change-of-control' restriction.

Summary

Joint Ventures have an embryonic period during which advisers, principals and the aims of the joint venture agreement may change. This process is likely to occur during the due diligence period of investors on each other and on the proposed investment. Often the question 'what does party x really bring to the table' is asked at a later stage, when the principal documents have been signed. Strong analysis of the parties' strengths and weaknesses should be discussed with counsel and applied to a pertinent joint-venture/shareholders agreement and set of supporting contractual documents. In this way, a true and accurate correlation between such documents and the actual investment is documented.

This article was co-written by Desmond Hughes (Partner) and Kris Limcharoen (Partner) based in the Phuket and Bangkok offices of Belmont Limcharoen respectively, and now with a new office in Koh Samui. www.belmontlimcharoen.com 

Offshore banking

By Richard Colburn

When it comes to offshore banking, if you believe that one bank is much the same as another, think again. Most offshore banks offer a broadly similar core of basic services and features, but they won't necessarily offer everything that you want and need.

The banking needs of expats, whose money is held outside the country where they live, are quite different from the needs of those back home. Here are some of the important aspects to help you with your choice.

Online banking

Accessing your money from far away is a key component of expat banking and is probably one feature that nobody would want to be without. You might be surprised at how many of the larger international banks do not offer this facility, unless you are holding, (in some cases), several hundred thousand US dollars on deposit with them. What is described as banking via the internet is sometimes limited to simply being able to view your statement online.

The best providers will enable you to transfer money securely via your computer to any bank account in the world, in multiple currencies.

Location

Location is probably as important in the world of offshore banking as it is in the property world. By selecting an international financial centre in a group 1 OECD country or territory you can enjoy the highest levels of financial security for your savings. But even here, there are important differences in how these international financial centres operate, particularly when it comes to confidentiality.

EU Savings Tax Directive

The effect of this piece of

legislation is to deduct tax from interest earned on bank deposits or to collect information about account holders. This law extends far beyond the member states of the European Union and has even reached the balmy shores of the Cayman Islands and the Turks and Caicos Islands. One of the best safeguards against the provisions of this law is to keep your money in a jurisdiction that falls outside its scope.

The personal portfolio bonds and other investment accounts offered by insurance based international financial institutions are specifically exempt from the savings tax directive as

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they are not classified as bank holdings.

'Relationship' balances

Many expats keep relatively small balances of cash in their bank accounts as their disposable incomes are often diverted to investment plans and perhaps mortgage payments. Pick a bank whose balance policy is in line with yours.

Being there

Some banks will allow you to open an account without actually having to visit their country. In many cases, this can be done more easily by taking advantage of the services of a professional financial consultancy. Those who employ qualified accountants, lawyers and notary publics may be able to save you the time and inconvenience of visit-

ing your Embassy, by certifying documents for you.

Offshore companies

Some working expats choose to operate under the structure of an IBC or offshore company. In some cases this is a legal requirement of the clients that they serve, particularly those working with governments and multinational corporations. Others are simply anticipating the inevitable day when they will need the support of professional full time staff.

But one of the world's best-kept secrets is that the EU Savings Tax Directive does NOT apply to companies, regardless of the place of incorporation of the company, or the nationality of the shareholders, officers and directors. Those choosing to operate their business in this way can have a wider choice when it comes to selecting a bank.

An offshore company may locate its bank accounts anywhere in the world but that doesn't necessarily mean that they are able to do so. For instance some Singapore banks will only accept applications for corporate accounts from Singapore companies.

The right choice

There is probably as much to consider in selecting an offshore bank as there is in selecting your investment plan. Professionally qualified financial advisers are often licensed intermediaries for brand name international banks and can save you considerable time and money in helping you select the right custodian for your spare cash.

It's your money and your peace of mind.

Richard Colburn is a UK qualified financial adviser with Sterling Assets. Questions to the author can be directed to 053 839 463 or contact@sterling-assets.com www.sterling-assets.com 