

Joint venturing into a property project – Part 2

One glove doesn't fit all in terms of drafting the legal documents to deal with joint venture investments into real estate. This is due to the normal commercial influences that result in assets being held in a variety of corporate vehicles, but also because of the Thailand specific influences on how real estate investments are secured. In Part 2, following on from the general planning overview in Part 1, a sample of specific types of joint venture real estate deals are covered with a summary of the legal documents which might be appropriate to those cases.

by Desmond Hughes and Kris Limcharoen

Pre-Investment Stage

Unfortunately for lawyers, joint ventures do not necessarily materialize in the most organized fashion allowing a perfect seamless stream of documents to be formed. However, there is a positive way to deal with such situations. A joint venture may commence with a preliminary understanding by the parties that one party will invest x amount of monies immediately as a cash flow or real estate asset, purchase assistance investment, which will be subject to certain conditions and be followed by further investments of y and z. This means that a lawyer may typically be asked to cover the position where monies have been or are about to be immediately invested into a real estate venture, but perhaps the finer details have not yet been agreed. The parties may ask for a 'memorandum of understanding' or 'letter of intention'. It is at this point that the 'heading' of a legal document should be reviewed closely in conjunction with the effect of the contents. The optimum method a lawyer can use to mitigate risk at the 'letter of intent' stage, is to choose through consultation with the parties some form of immediate security with a value proportionate to (ideally above) the value of the investment.

A typical example would be where a real estate developer is seeking additional finance, has already commenced perhaps certain works, but has a land bank. A joint venture agreement setting out returns on investment after sales of units, covering all eventualities, might not be appropriate when one party has agreed to assist the other speedily and the aim of the assistance is to prevent demobilization of

the construction team. In such circumstances, a memorandum of understanding coupled with a registered lease or mortgage over one of the land assets could be appropriate security if it is not appropriate to actually transfer land as 'collateral' against the pre-joint venture investment.

It is important, if the investor is injecting into an operational real estate venture, that consideration is applied to ensuring that the business is not 'choked' by the method of placing security over the investment. Buyers in a highly geared project will want to know what the developer has used the leveraged funds for, and may check if the value of any registered loans is commensurate with construction and other costs of the project. On the other hand, taking too little security will simply convert any injection into an 'unsecured' loan, which might not be the intention of the investor. There is a fine balance to be struck between the extremes of absolute protection and virtually no protection.

Crystallizing the Terms of a Joint-Venture

For corporate and real estate lawyers, there are two fundamental pieces in the jigsaw puzzle of an investment to understand prior to drafting substantive documents. (1) The first, most important overriding matter is the actual commercial business of the investment and what it entails. Physical inspection of the real estate may be of huge value and an understanding of the aims of the project, whether it be resort operation, apartment sales or luxury villa rentals. (2) The second matter to understand is the corporate structure of the target or project, which is the subject of the invest-

ment. That way any type of shareholding envisaged, and any type of security contemplated, can be calculated with the full knowledge of how the real estate venture technically works. The added complication of the restrictions of foreign shareholdings are also to be taken into account and the armory of lawyers' tricks should include being able to alter the articles of association of target companies of investment, and create flexible shareholder agreements. It's also essential to work with tax and accounting advisers so as to ensure that return on investment and tax minimization is thought of at the time of the investment, and not as an afterthought when structuring is no longer an option.

Clever thinking

A real estate project has a myriad of possibilities in terms of how investments can be returned. For example, an investor could receive in return for its investment into a real estate development: 'commissions' on sales. Alternatively, units registered in the name of an offshore company could be 'flipped' or turned over to new buyers at the investors discretion. There could also be a secured project construction management contract with a percentage 'management' fee payable to the investor. Meanwhile, management rights, brand rights, the lease of the common areas such as clubhouse, restaurant and revenue generating facilities is also an option. Each of these possibilities of return would result in a different set of supporting legal documents being necessary. These would flow out of a shareholders' agreement, which would 'umbrella' the supporting documents. In an in-

tegrated joint venture, it should be possible to weave together completely separate entities into one project: a real estate agency as the sales arm; a construction project management team, the contractor; the brand 'manager', the estate management company and the principal financial investors. The full set of legal documents should be drafted to cope with 'changes along the way' and of course, it is important for the draftsman to have an insight into the mechanics of a real estate project to be able to draft commercially appropriate supporting documentation.

Summary

Joint Ventures in real estate transactions are not simply a case of 'monies-in' and 'monies-out'. The corporate legal structures that must be used in Thailand by developers and investors in real estate lend themselves to clever thinking. This should be applied with consideration of how to protect preliminary investments, and the staged injection of funds and profit return through a variety of methods of return. One master shareholders agreement can be used as the pivot for documenting additional activities, or for ensuring that any supporting documents reflect the original intent of the joint-venturers. It is important to reflect that intent as accurately as possible at the outset to set the stage for a positive and productive joint venture relationship.

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