EVERSHEDS

Pro-Tide Conference

Joint Investment Models

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PRO-TIDE

Eversheds Renewables Team

- Advised or over 30 GW of renewable energy projects globally
- Full service from planning, property, structuring, funding, construction, regulatory and commercial (PPA) specialists
- Over 130 specialist lawyers
- Marine; off-shore wind; onshore wind, biomass, solar and A.D.

Introduction

What we will cover

– Joint venture concept
– Forms of joint ventures:
  - contractual/unincorporated joint ventures
  - general partnerships
  - limited partnerships
  - limited companies/incorporated joint ventures
– Funding considerations

The Joint Venture Concept

The joint venture approach

two or more parties sharing their respective business skills and expertise come together in a business to benefit from increased profits and reduced risks

Why joint venture?

Key Questions

– Are you able to deliver what you want to deliver on your own?

– Can you maximise value by delivering on your own?

If the answer to either of the two questions is “no”…consider a joint venture

Joint Venture Approach

Attractive to public sector bodies for long term and large scale projects because it enables the public sector to sit in the vehicle on a “side by side” basis and take an active participation in the delivery by the vehicle and to share in the value derived from development over the long term

Two main options:

1. Co-Investment Joint Venture
2. Integrated Joint Venture

What will the joint venture do?

– Early identification of objectives is key. For example:
  - Co-ordination/facilitation/participation
  - Leverage of funding opportunities
  - Holding assets
  - Introduction of other partners/stakeholders
  - Development of project or concept

What do you need from your partner?

– Clarity on roles, responsibilities and expectations is crucial to the success of any JV.

– For example:
  - Resource/capacity
  - Sector expertise and skills
  - Funding – equity/debt?
  - Knowledge/skills transfer to in house team
  - Market position
  - Access to end users

Joint Venturing: Benefits

Benefits might include:

- Risk sharing/transfer
- Sharing in value capture
- Control and decision making
- Focussed delivery in joint venture
- Ensuring performance and delivery
- Separate and swift governance built into the joint venture

Forms of Joint Ventures

(A) Unincorporated joint ventures

Introduction

- A contractual arrangement between two separate commercial entities which contains the obligation to work together to achieve a common goal
- Also called co-operation agreement or collaboration agreement
- Governed by contract between parties
- Funding considerations.

Unincorporated joint ventures (2)

When are they used?

– Often used if parties co-operating on a project with a definite time scale

– An example:
  - A company has invited tenders for a specific piece of work
  - X and Y to submit joint tender to perform work
  - If tender successful, X and Y to perform the work

(B) General partnerships

Introduction

– Partnership Act 1890

– "the relation which subsists between persons carrying on a business in common with a view of profit" (section 1 Partnership Act 1890)

– If general partnership exists, Partnership Act sets out statutory provisions

– Some statutory provisions cannot be overridden

– Contractual partnership agreement

– A less common joint venture structure

(C) Limited partnerships

Brief overview:

- Limited Partnerships Act 1907
- "Subject to the provisions of [the Limited Partnership Act 1907], the Partnership Act 1890 .... shall apply to limited partnerships" (section 7 Limited Partnerships Act 1907)
- Consists of general partners and limited partners
- Limited partners have limited liability but no management role. General partner(s) manage business but unlimited liability
- Funding considerations

(D) Limited liability partnerships

Introduction

- Limited Liability Partnerships Act 2000 (“LLPA”)
- “a body corporate (with legal personality separate from that of its members)” (section 1(2) LLPA)
- Limited Liability Partnerships Regulations 2001
- Members’ agreement
- Default provisions in LLPA apply if no members’ agreement
- Funding considerations

(E) Limited companies / Incorporated joint ventures

Introduction

- Governed by Companies Act 2006 and other statutes
- Separate legal entity with limited liability
- Owned by shareholders and run by directors
- Articles of association
- Shareholders' agreement
- Most common joint venture structure

Limited companies/Incorporated joint ventures

Key characteristics (1)

– Limited liability for shareholders
  - yes in theory but in practice?

– Company has strong identity

– Financial flexibility
  - share allotments
  - different classes of share
  - loan notes
  - secured bank facilities
  - shareholder loans

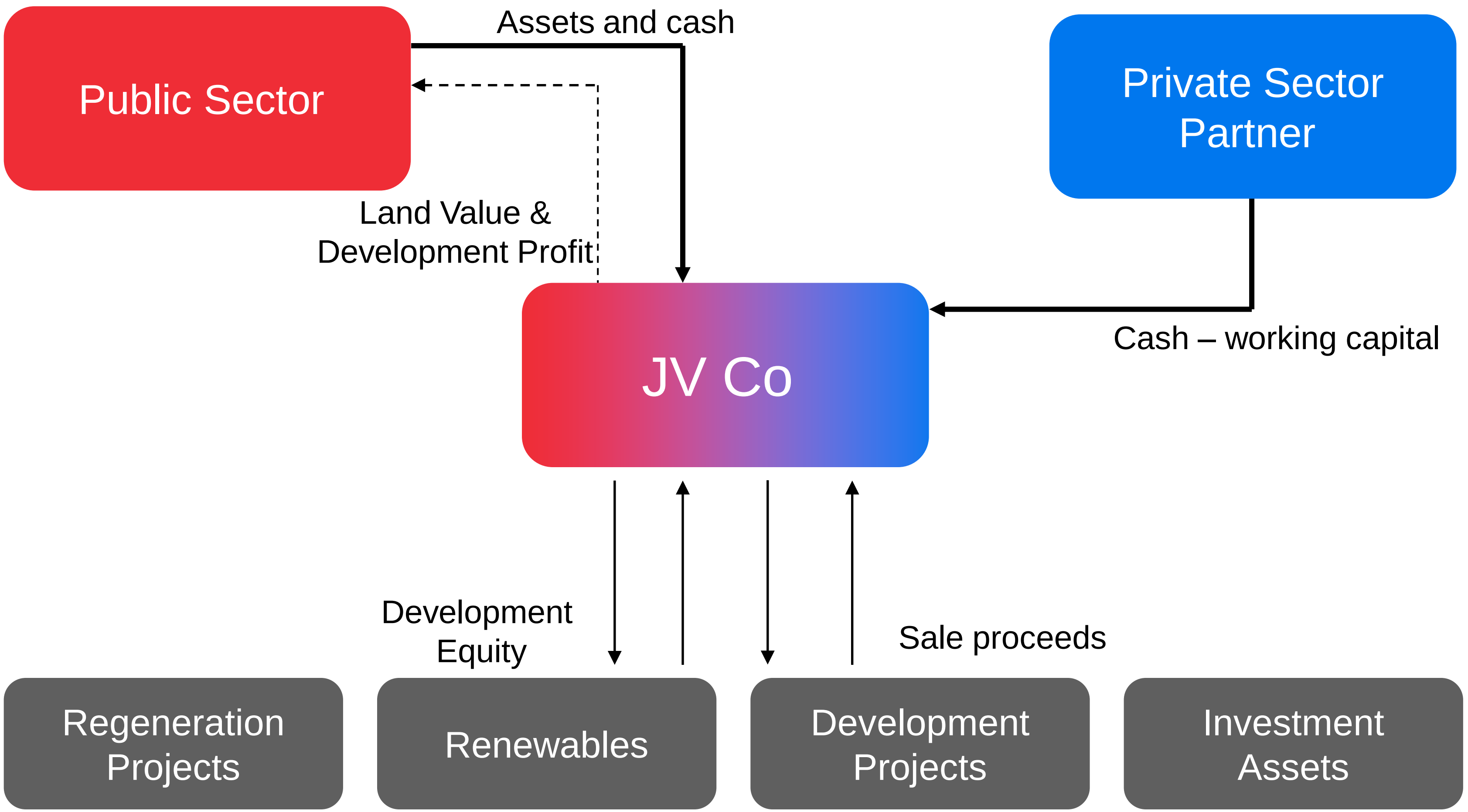
Public Sector Joint Ventures (1)

- Corporate joint venture. The form of vehicle is driven by tax efficiency and robust governance provisions
- Independent stand alone investment /development vehicle to take forward identified and future projects
- Public sector assets utilised to leverage private sector investment
- Private sector investment – financing and expertise/capability
- Shared control between the partners - typically 50/50 joint decision making
- Underpinned by Business Plan(s) which clearly identify the milestones/outputs required

Public Sector Joint Ventures (2)

- Able to utilise equity and debt financing to facilitate regeneration, development and re-investment
- Flexible risk profile, duration and membership
- Open and transparent joint venture with clear reporting mechanisms
- The JV itself can develop or can pass developments to the market
- The public sector and its private sector partner share in the returns across a range of projects
- Ability to cross subsidise between projects

JV Structure



Regulatory and Local Government Issues

- Public procurement
- State Aid
- Vires
- Audit

Common provisions in an incorporated entity JVA (1)

Clause heading

1. Interpretation
2. Conditions
3. Consideration
4. Completion
5. Objects / business of the Company
6. Finance / funding and development
7. Conduct of the Company’s affairs
8. Directors and board meetings
9. Voting rights / reserved matters
10. Accounting matters, business plans and dividend policy
11. Consortium relief
12. Transfer pricing
13. Value Added Tax
14. Restrictive Covenants
15. Promotion of the Company’s business
16. Transfer and allotment of shares
17. Consequences of breach
18. Termination
19. Deadlock
20. Confidentiality and announcements

Common provisions in an incorporated entity JVA (2)

Clause headings

21. **Warranties**
22. **No partnership or agency**
23. **Force majeure**
24. **Waiver**
25. **Variation**
26. **Conflict with articles.**
27. **Claims by or against shareholders**
28. **Notices**
29. **Fairness clause**
30. **Unlawful fetter on the Company's statutory powers.**
31. **Costs**
32. **Severability**
33. **Exercise of Powers**
34. **Entire agreement**
35. **Assignment**
36. **Contracts (Rights of Third Parties) Act**
37. **Further assistance**
38. **Counterparts**
39. **Agreement survives completion**
40. **Governing law and jurisdiction**

Funding (1)

It's all about the money ....

Working capital funding needs

What happens if it needs more money?

How do we share profits and how do we take them out?

Who puts what in at the start?

Funding (2)

Initial Funding

- who puts in what and how?
  - capital from JV Partners or 3rd parties
  - debt or equity?
- in what proportion are the parties' contributions?
- One example:
  - one party contributes IP
  - an asset of the joint venture or licensed and value retained outside the joint venture?
  - what happens on termination?
  - all need to be discussed irrespective of chosen structure
- assets to be returned on termination of the joint venture?

Funding (3)

Funding Considerations – what is being funded?

- Project deployment/significant scale demonstration
  - Normal Lender requirements
- Early stage funding
  - “value” of the company
  - identifiable assets?
  - very high risk
  - exit?
- Equity or debt?

Funding (4)

Sources of Funding

- The theory:
  - Banks – adequate security?
  - venture capital – investment cycle?
  - grants – matched funding requirements?
  - crowd funding
  - High Net Worths – is EIS available?
  - Family/friends/supporters

Funding (5)

Sources of Funding - ctd

- In practice:
  - ETI
  - ORE Catapult
  - Technology Strategy Board
  - DECC
  - NER 400/Horizon 2020
  - Scottish Government

Any questions?

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