

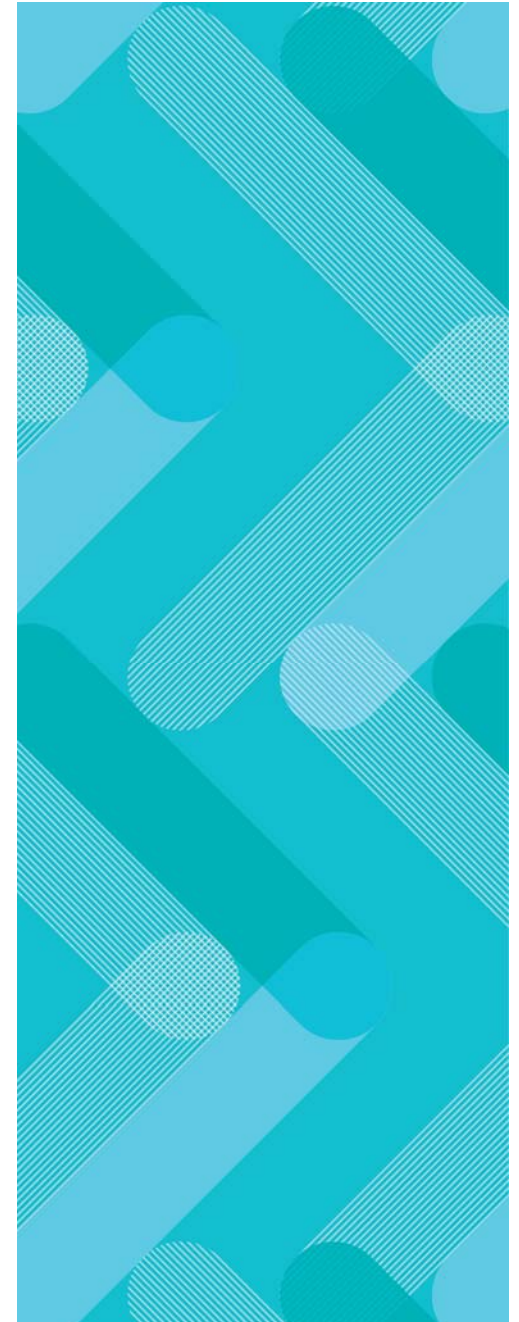


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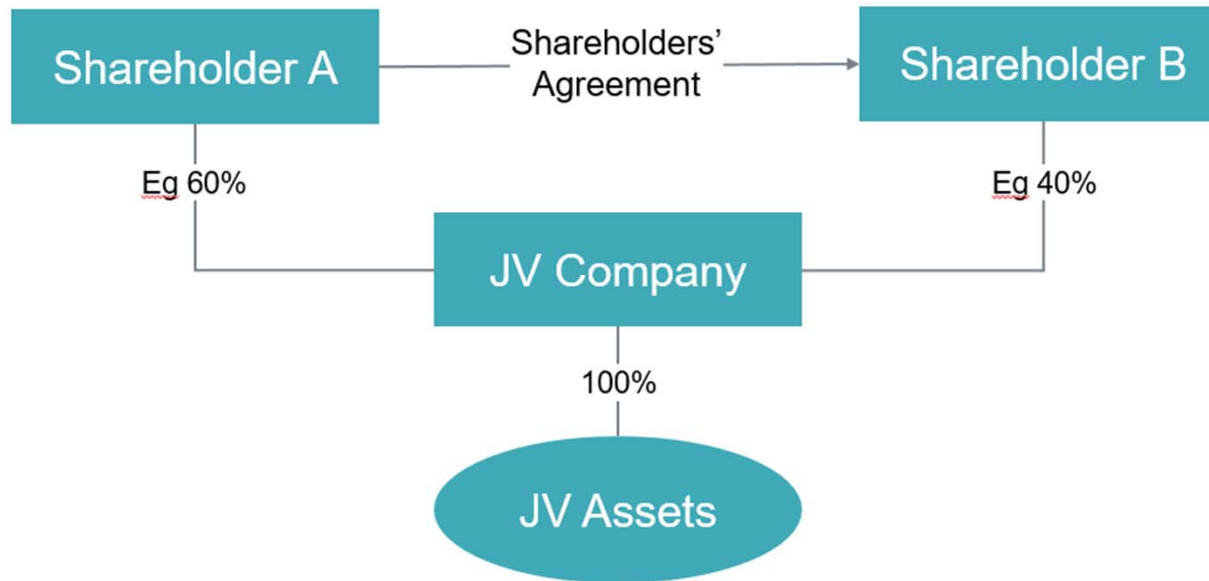
Shareholders' Agreements – Key Considerations for Developers

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Incorporated Joint Venture



Features

- JV assets / business owned by JV Company (not shareholders)
- Managed by directors of JV Company
- Limited liability for shareholders
- Shared profits (ie dividends)
- Simple structure

Shareholders' Agreements: Considerations for Developers

Role and importance of governance

- Shareholder risk allocation reflected in governance provisions
- Conflicts of interest and conflict management at board level
- Inclusion of standard lender-friendly governance provisions

Developers' rights and obligations

- Future-proofed developer obligations to ensure continued project viability, shareholder continuity and to maximise asset value. Key provisions include:
 - Capital contributions / Contributions in kind / Cost Overruns
 - Deadlock
 - Pre-emption rights, non-compete and exit provisions

Bankability

- Good governance and appropriate risk allocation
- No barriers to the taking and enforcement of security
- Assets held within the ProjectCo

Governance: Board Level

Board composition / voting

- Composition / voting rights should mirror shareholder risk allocation:
 - How many nominees each?
 - Voting - one director one vote?
 - Voting thresholds – issues requiring (>50% approval)?
 - Chairperson – responsibility for appointment / casting vote
 - Quorum considerations – lack of quorum should not freeze JV
 - Local content considerations

Directors' conflicts of interest

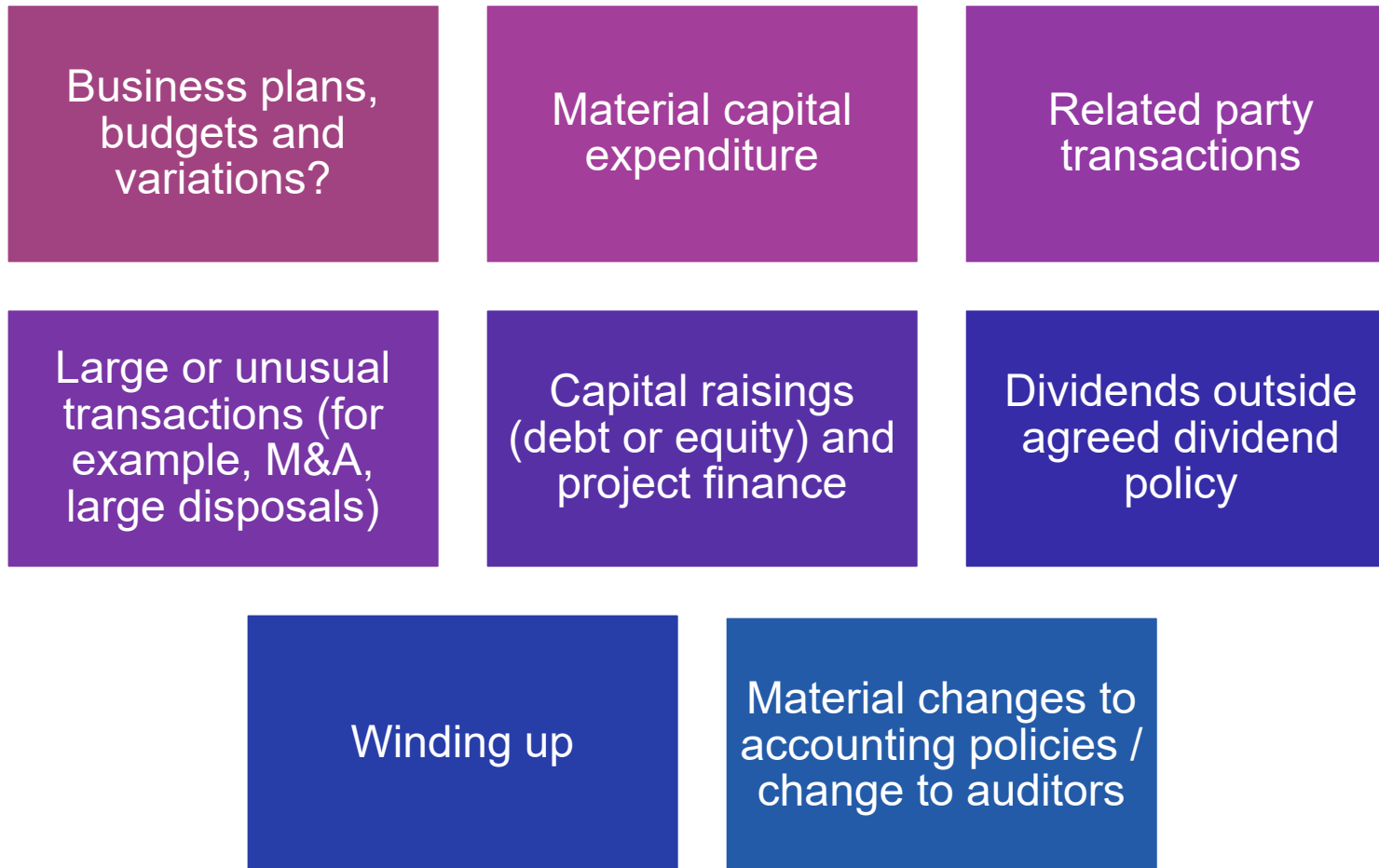
- Common for ProjectCo to contract with shareholder (eg EPC contractor)
- Other shareholders / lenders will require that the contracting shareholder (and nominee directors) are excluded from decisions relating to that contract

Lender requirements

- Directors should not be able to refuse to register a share transfer in an enforcement scenario

Governance: Board Level

Increasing voting thresholds at board level (>50%) provides minority protection



Developer Rights and Obligations: Funding

Lenders will require robust funding mechanisms reflecting business plan requirements

- **Capital contributions**
 - Lenders may allow certain shareholders to make their required capital contributions on a phased basis, pro rata with utilisations of debt or even as ‘back-ended equity’ injected towards the end of the construction phase
 - Shareholders should consider each other’s creditworthiness, and mitigate risk of non-payment (ie through Letters of Credit)
 - Contributions in kind – developer must illustrate credible valuation process
- **Ongoing obligations to fund (ie to meet business plan or construction budget)**
 - Developers will seek to avoid open-ended, uncapped funding obligations
 - Lender interest in robust cash call mechanism / ensuring no director veto
 - Futureproofing: important for developer to consider how the shareholders’ agreement implements developer business plan

Developer Rights and Obligations: Failure to Fund

Clear fall-back provisions required in case one party fails to meet funding obligations

- **Obligation for other shareholders to meet cash call?**
- **Remedies**
 - Economic / equity dilution
 - Loss of voting rights
 - Buy-out (eg call option)

Developer Rights and Obligations: Deadlock and Exit

How can deadlocks arise?

- Dispute of board/ shareholders over key decision (veto)
- Gaming risk around manufactured deadlocks

Lenders will want to see robust deadlock, dispute resolution and exit provisions to ensure:

- Clear conflict-management procedures tailored to project demands
- Project continuity
- Preservation of asset value

Role of deadlock / exit provisions

- Contractual fall-back – often a starting point for negotiations in deadlock / exit scenario
- Developers should ensure provisions reflect importance of the parties relative to the project

Developer Rights and Obligations: Deadlock

Expert determination (technical matters)

Arbitration / courts (legal matters)

Commercial disputes

- **Casting vote**
 - Majority shareholder can exercise casting vote in exchange for a premium
- **Put / call option**
 - Allows one party to force the other party to buy its / sell its own shares
 - Useful when there is a natural buyer / party fundamental to the project
 - But valuation issues
- **Russian roulette**
 - Can be more useful in 50-50 scenarios
 - Generally leads to more realistic market valuation
- **Auction / Trade Sale**

Developer rights and obligations: Exit

Exit triggers

- Material / persistent breach / failure to fund
- Change in control
- Insolvency
- Earnings triggers i.e. unprofitable venture
- Deadlock

Developer rights and obligations: Exit

- **Standstill / “lock-in” period?**
 - Lenders often require a share retention mechanism to ensure certain shareholders remain in ProjectCo for certain period of time
- **Pre - emption**
 - Parties may still wish to protect private nature of JV through pre-emption rights
 - Options: first refusal / first offer / last refusal / veto right
 - First rights make it easier to sell
- **Drag / tag rights where majority / minority party**
 - Drag right attractive for majority party (as allows sale of whole company)
 - Tag right attractive for minority party (as avoids being trapped in JV with new majority party)
- **Put / call options after agreed period or agreed events**

Developer Rights and Obligations: Non-Compete

An agreement by each party not to undertake any activity in competition with the JV may be required.

- **Non-compete**
 - Typically operates to prevent JV parties from engaging in business in competition with ProjectCo, for a specified period and within a specified geographical area
- **Non-solicit**
 - Restrains JV participants from poaching each other's employees. May be of particular concern for JV where key personnel are engaged
- **Non-compete clauses must be reasonable in in terms of scope, territory and duration to be enforceable**
- **Consider whether carve outs are required (eg incidental business)**

Bankability

Key bankability issues

All of the above AND

- **No barriers to the taking and enforcement of security**
- **Assets held within the ProjectCo**
- **Development costs**
 - Parties to consider how pre-incorporation development costs are to be shared. Lenders may be unwilling to allow shareholders to recoup these costs in the construction phase.
- **Dividend policy**
 - Lenders will want to see restrictions on the ProjectCo's ability to pay dividends, especially in the construction phase.

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