

POSSIBLE JOINT VENTURE ARRANGEMENT BETWEEN RECLAMATION SERVICES LIMITED (“RECLAMATION”) AND ABS LIMITED RELATING TO THE AVONMOUTH FACILITY INITIALLY TO BE CARRIED OUT BY A JOINT VENTURE VEHICLE (“JVCO”)

Corporate Structure

- Whilst it has been suggested that the vehicle will be a JVCO there are other options such as a contractual relationship or limited liability partnership. We would anticipate a joint vehicle corporate vehicle being the most appropriate structure and tax advice ought to be taken at an early stage.

Business of the Joint Venture

- What will be the nature of the activities carried on by JVCO?
- Is the purpose of JVCO to carry out a specific project or a continuing business?
- What are the parties objectives?
- What regulatory consents, approvals and licences will be required for the formation and business(es) of the joint venture?
- How have you ensured that there is a shared vision of what you are seeking to achieve, maybe having a development plan whereby both parties will not disagree with a route map provided it is in line with this initial plan – you will wish to avoid a situation whereby as a consequence of an unexpected event one party seeks to disengage themselves has a change of strategy.

Financing of the Joint Venture

- In what proportions will the parties themselves provide funding and how much will be provided from external sources, I understand that initially JVCO is to be funded by the partners contributions in kind by way of the provision of services or assets. The parties can subscribe for a small amount of equity and loan money to JVCO on commercial or soft terms. The funding obligations imposed on both parties need to be agreed at the outset.
- If third party funding is being sought, what security and/or recourse to the parties themselves will the lender(s) required this is by way of bank loans?
- Will the parties' initial investment be in cash or in kind?
- What arrangements will there be for funding, on a continuing basis:
 - working capital requirements;
 - losses incurred by the joint venture; and/or
 - development and expansion costs?
- Will each party be required (or entitled) to contribute to continuing calls for funding, pro rata to its original investment or otherwise? What happens if one of the parties defaults?
- An agreed mechanism needs to be put in place if further equity is raised as to the impact this has on the joint venture partners shareholdings. Furthermore an third party investor in my view will require the joint venture partners to have some “risk money” invested if they are being asked to fund it.
- On any third party equity investment being made the shareholdings of the parties will be diluted and new documentation will be signed and agreed.
- How are the initial start up costs to be funded feasibility costs, professional fees, development costs, is there a commitment from both parties.

Contribution of Assets to the Joint Venture

- Is there any specific tangible or intangible property to be contributed by any one or more of the parties such as premises, equipment or staff? If so how will this be paid for (eg. allotment of shares in the JV).

Competition and Restrictions on the Parties

- Will the parties be prohibited from competing with the joint venture? If so, what territorial or other limitations should apply?
- How will the business of the joint venture be defined for the purposes of such restrictions?

- Will the parties have obligations to refer business to the joint venture?
- Is there any potential conflict between the business as carried out by JVCO and that of each joint venture party?

Board of Directors

- What rights will each party have to appoint directors (and will the board or company in general meeting have rights to appoint any additional directors)?
- What quorum and notice requirements will apply for directors' meetings?
- Will particular matters be reserved for decision by the board itself (and be incapable of delegation) or to shareholders?
- Will particular voting arrangements apply to matters specifically reserved to the board and/or to any other matters?
- Will the directors have the power to authorise conflict, or potential conflict situations of a director or should such power be reserved for the shareholders?
- How is the JVCO to be controlled, one recommended option is to leave control to the board save for specifying certain matters which cannot be undertaken without both parties' consent (for example sale, issue of shares, change of share rights, granting third party security, buying selling assets?)

Shareholders

- How will ownership of the joint venture be divided and what voting rights will the parties have as shareholders?
- Will there be separate classes of shares?
- Will any special voting rights attach to any or all shares?
- What quorum and notice requirements will apply for shareholder meetings?

Transfers of Shares

- To what extent is it necessary or desirable that participation in the joint venture should be transferable or should the joint venture be wound up if any one party wants to sell out?
- If transfers are permitted, should other parties have pre-emption rights (rights of first refusal) before any sale to a third party takes place?
- Will any new shareholder be required to become a party to the joint venture agreement?
- What will happen to any arrangements between a leaving shareholder and the joint venture (such as intra-group loans, intellectual property licences, supply agreements, management services, and so on)?
- Does particular provision need to be made in relation to the continuing use by the joint venture of assets contributed or licensed by an outgoing participant or any monies owed by the joint venture to that participant (or vice versa)?
- What (if any) arrangements will apply for requiring or enabling the transfer of shares held by a party which suffers a change of control or becomes insolvent or is in breach of the joint venture agreement, and how far will other provisions on transfer (including those on pricing) be applicable in these circumstances? Often a change of control or insolvency triggers a deemed transfer of shares whereby the other joint venture partner can acquire those shares.

Intellectual Property

- What intellectual property rights are to be contributed to the joint venture? Should they be licensed or transferred?
- Are any intellectual property rights to be conferred on the other joint venture party?
- Who will own the intellectual property rights developed by the joint venture and (if any) by the joint venture parties?

Employees

- Will the joint venture need employees and, if so, how will it get them?
- Will the employees be seconded from any of the joint venture parties ?
- If the employees are to be transferred from any of the joint venture parties, will TUPE apply (BPE can advise)?

- Will any of the joint venture parties have to make redundancies as a result of the creation of the joint venture? If so, how will the cost be borne by the parties?

Continuing business involvement of the parties

- Will any of the parties be responsible for providing the joint venture with office or other accommodation, support services or facilities, or training for staff?
- Will there be continuing trading arrangements between any of the parties and the joint venture (for example, distributorship agreements or agreements for the supply of goods, materials or services)? If so, will these be independently audited?
- How do continuing arrangements between the joint venture and any of the parties impact on:
 - the entitlement of each of the parties to the profits of the joint venture, or responsibility for its losses?
 - the business risks and legal liabilities assumed by each of the parties in relation to the joint venture?
 - the rights of the joint venture and/or the parties to assets or revenues over which any one party maintains direct control or ownership?
- What will be the procedure for the flow of information and for reporting from the joint venture to the parties?

Administration

- Who will be the joint venture's lending bankers?
- Who will be the joint venture's auditors?
- What other professional advisers will be appointed, and by whom?
- What will be the dividend policy? How much will be distributed to the parties, when and who will make decisions on this?

Insurance

- Ensure the joint venture maintains any insurance policies required by law. For example, employer's liability insurance is compulsory.
- Consider what other commercial insurance policies the joint venture needs, and whether it needs to maintain its own policies or whether the parties' existing policies already extend, or may be extended, to the joint venture.
- If the parties offer their own policies to cover the joint venture's risks or liabilities, do they expressly cover the activities of the joint venture? Are there any obvious gaps between policies?

Deadlock

- Will a deadlock be capable of arising on:
 - all issues;
 - issues determined as deadlock issues by the parties on the establishment of the joint venture;
 - issues designated as deadlock issues by any one or more parties at the time they arise or when disagreement becomes apparent?
- Will deadlock issues be resolved by:
 - the chairman of the board's casting vote;
 - reference to independent non-executive directors;
 - reference to an external expert or arbitrator;
 - reference to chairmen or chief executives of the parties to the joint venture?
- Will any "cooling off" period apply?
- What rights will any party have on a deadlock to require:
 - the termination (or winding up) of the joint venture; or
 - other parties to purchase its shares (perhaps under "shotgun" provisions, by which any party requesting the others to purchase its shares may buy the others out if they refuse)?
 - This will become less relevant once third party equity investors have invested in the JVCO

Termination

- Is the joint venture for a fixed term or indefinite in duration?

- Are there any circumstances in which the joint venture will automatically terminate, for example:
 - the loss of any regulatory approval;
 - the loss or destruction of a particular asset;
 - the insolvency of any party; or
 - the transfer of any party's shares?
- Are there any circumstances in which any party will be entitled to terminate the joint venture, for example:
 - a change of control of any other party;
 - a material breach of the joint venture agreement by another party;
 - by notice of termination given after the expiry of a minimum fixed term?
- What arrangements will apply on termination for:
 - the distribution of the assets, including intellectual property and know-how of the joint venture;
 - the discharge of outstanding contracts of the joint venture; and
 - the assumption or discharge of any other liabilities of the joint venture?

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