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Development of Joint Operating Agreements in the Oil and Gas industry, and their Key Provisions: A Brief Analysis

Abdul Mukit Kabil[1]

[1]*Lecturer in Modern International History, Department of Islamic History and Culture, Shaikh Burhanuddin Postgraduate College, National University, Bangladesh.*

Email: abdulmukitkabil@yahoo.co.uk

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ABSTRACT

A joint operating agreement (JOA) is a common practice by which companies join to form a joint venture in their oil and gas exploration and production. JOA is required mainly to mitigate high operational risks, costs and liabilities and to ensure the success of companies shared vision. Although it is a general idea that JOA has evolved from the form 610, devised by the American Association of Petroleum Landmen, JOAs also can be seen as a descendant of Production Sharing Agreement (PSA), which had the same elements as JOAs. As an important contract in the commercial relationship between the parties, the JOA must perform its functions in accordance with certain provisions inserted by the parties based on the agreed terms. The main aim of this article is to discuss the concept and development of JOA and to analyze the key provisions of a typical JOA. This research is conducted through a review of relevant literature and my academic experience gained during the LLM program on Oil and Gas Law at the University of Aberdeen.

Keywords: Joint Bidding Agreement; Operator and non-operators; interests' clause; sole risk and non-consent clauses; default clauses, transfer of interests.

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INTRODUCTION

Joint Operating Agreement (JOA) is a form of agreement for a joint venture a contract based relationship, between parties who move towards a common goal to discover and develop an area for mineral and hydrocarbon reserves (Bean, 1995). Although JOAs are based upon consent and contract between interested parties, yet JOAs can be distinguished from normal contractual relationships (Shaw, 1996). It is purely a contractual agreement without the involvement of any legal entity (Sayer, 1999). A JOA comes into existence only when the state authority issues licenses to members of a successful joint tender agreement. The members of joint tender agreement then set out their relationship among themselves, "with a note of their respecting participating interests" (David, 1996). Many early JOAs were established in North American form, such as the American Association of Petroleum Landsmen (AAPL) which developed a model JOA known as Form 610-1956 in the 1950s, which was later adopted throughout the industry (Black, 1992).

Provisions developed in the context of JOA cover various matters in Canada, Australia and USA is substantially the same as JOAs in Britain. In American JOAS the operator has greater control and the operating committee has less direct control in the former. But under a UK JOA non-operators are much more active and involved in the decision making process. However, the structure of JOA in Canada, Australia and USA is substantially the same as JOAs in Britain.

History and development of JOAs in the oil and gas industry

Although the need for JOAs began to arise in the early-mid 1900s, the origins of the joint operating agreement can be traced back to the form 610, devised by the Ross Martin Company in 1956. Approximately ten years later in 1967, the American Association of Petroleum Landmen ("AAPL") made limited revisions to the 1956 Form and assumed control of the 1956 form, renaming it the "AAPL Model Form 610 JOA," (the "1956 Form"). Later on the AAPL has promulgated several revisions of the 1956 form in 1977 and 1982.The last major revision of the Form-610 was made in 1989 when oil prices sank, banks failed, and bankruptcies in the oil and gas business washed over upstream operations (Kulander, 2015 April). Despite the merits of the subsequent revisions and improvements, the industry was slow to accept and utilize the 1989 Form. However, in Texas, the most commonly used JOA form is the 1989 Form (Brister, 17 September 2014).

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By 2013, the combination of horizontal drilling and development of drilling equipments finally prompted the AAPL to revise its 1989 Form to address operational issues associated with horizontal drilling (Brister, 17 September 2014). A most recent revision of the 1989 Form was done in the autumn of 2015 and the new model form released in April 2016 (Curry, March 2021). This new version is being crafted by lawyers and landmen under the auspices of the AAPL. The new form includes the new provisions for horizontal drilling but also substantially revised the 1989 Form in light of case law and technological advances since publication of the 1989 Form.19 (Kulander, 2015). The 1989 and 2015 AAPL FORM JOAs use the more clearly defined terms "oil and gas leases" and oil and gas interests And added the requirements of more detailed information for both the proposed vertical and horizontal wells (Conine and Ritchie 2018).

Although it is an general idea that descendants of the 1956 Form are now the most popular JOA forms in use in different countries of the world including UK, Australia, Canada and New Zealand, JOAS also can be seen as a descendant of Production Sharing Agreement (PSA), which had the same elements as JOAs. The discovery of petroleum resources in oil rich Afro-Asian countries, belonged to the third world, led many host countries to enter concessionary agreements to explore and exploit their oil resources. From 1960s, PSA, between host country's government and International Oil Company mainly for petroleum exploration and development, have received wide applications in many oil rich countries particularly countries with economies in transition. As oil and gas companies must comply with international and domestic regulations (Waqas, 7 March 2016). Judicial and academic concepts developed in the context of one JOA disputes on in the implementation of various provisions are increasingly viewed as generally applicable to all JOAs" (Smith, Summer 1994).

Common Provisions of a Typical JOA

Interests Clause

Joint operating agreement is laid out to regulate the rights and obligations of the parties in relation to a specific geographical area, referred to as the contract area of mutual interest. The most important clause in any JOA is the "interest" clause which fixes the parties' respective interests in any petroleum prospecting license and any property owned by the JOA. For example, cl.4 of the UKOOA 20th Round Draft JOA states that: "Subject as hereinafter provided, the Licence, all joint property, all joint petroleum and all costs and obligations

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incurred in the conduct of the joint operations shall be owned and borne by the participants in proportion to their respective percentage interests which at the date hereof are as follows" (Styles, 2007) The percentage interest rate clarifies each party's ownership and benefit rights and responsibilities for costs, expenses, and risks (David, 1996). Thus in a JOA each of the co-ventures is a tenant in common of the licence.

The co-venturers are also tenants in common of other assets in the project and these assets can be specifically identified because each co-venturer may sometimes have different proportional interests in the assets. This is different from a partnership co-venture where no partner has immediate rights over the assets of the joint venture. For tax reasons and to reduce members' liability to the JOA, all standard JOAs include a clause stating that no partnership shall be created. However, the court understands a somewhat "ambivalent attitude" towards these types of clauses (Styles, 2007). In the absence of case law and non-statutory principles it is not yet decided whether a JOA is a partnership and it is not possible to conclude with absolute certainty that it is not. Unfortunately there is no US case law that can help to solve this area of law.

Operator

Any traditional JOA has two classes of members: operators and non-operators. Typically one of the members is appointed as the operator to manage routine work, such as drilling the initial well, on behalf of the other members, who are simply designated as "non-operators". The operator usually set up the group of companies which enter into the Joint Bidding Agreement. The selection of operators is subject to government approval; for example, in the UK, JOA operators must be approved by the Secretary of State. Typically the operator is the party that has the most or least substantial interest in the block at the time of assignment, "although this is not an essential requirement" (David, 1996). As the 'the leader of the consortium,' the operator is in a 'dominant position to determine the future of the said consortium.' The greater power of the Operator to carry out the joint venture comes from the historical approach contained in the first standard form JOA in 1956, but it still exists in modern JOAs (Pereiral and Hall 2017).

As a manager of the project the operator does not receive any remuneration for its position but it has the right to be reimbursed for any expenditure incurred on behalf of the day-to-day operations. The operator is required to carry out all operations 'diligently in a good and workmanlike manner in accordance with good oil-field practice and in accordance with the

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Regulations' (Black and Dundas 1992). However, "the exact nature of what counts as good and prudent oil field practice will depend upon the circumstances and will also change as technology changes" (Styles, 2007). The JOAs also contain provisions for the possible resignation or removal of the operator on good cause, for example default or willful misconduct. But it is not a good practice to remove an operator before completion of the work. An operator will be liable for 'willful misconduct' or if he fails to maintain insurance required by law and desired by the JOA (Shaw, 1996). However, he will not be liable for an "honest mistake", a misjudgment or negligent act or omission (Styles, Scott 2007). He is also inevitably exempted exonerated from liability for consequential losses which is related to work in petroleum exploration or development generally (O'Regan and Taylor 1984).

However, in certain countries such as Norway, Nigeria, Angola, Iran, Brazil and even in the UK government party is allowed to participate in exploration and production of oil and gas resources, which are belong to the host country government. This participation could occur at an earlier or later stage (Pereiral and Hall 2017).

Liability to JOA Creditors

An operator, who acts as an agent for other parties, is "provided the exclusive right and duty to contract for material and services for the contract area and is generally exclusively liable for payment." So, if the operator fails to pay or become insolvent, the non-operators, who shares share in the risks and rewards of operation, are also responsible for paying back the debt (Kulander, 2015).

Third party liabilities

Although the parties to a JOA are generally only the joint **ventures**' themselves, there are many third parties with whom, the operator initiates transactions to carry on day to day operational activities (Mathews and Pereira 2017). The third party may include material supplier, service provider, insurers, and creditor. JOA provides exclusive right and duty to operator to make contract with those third parties. Generally, an operator is exclusively liable for payment to a third party on a contract but will have recourse against the non-operators for their respective share under the agreement. The BNOC proforma (and probably all current U.K. JOAs) provides that each participant indemnifies the others to the extent of their individual percentage interest share of any claim or from liability to any third party arising from joint operations (Black and Dundas 1992). To overcome this difficulty, the JOA

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imposes an obligation on the operator to use his best endeavors to include provisions in contracts to the effect that the operator is contracting as principal but nevertheless can recover losses of non-operators while at the same time precluding any action by the third party in contract/delict/tort against them. 72 In such cases, third party (Black and Dundas, 1992).

Insurance

The operator is obliged to acquire and maintain all appropriate insurances required by any legislation, by the license or by applicable law. Generally, legally required insurances apply only in relation to employee related insurances held by the operator and the cost of insurance is charged by the joint account. Pollution insurance is another compulsory insurance required by environmental agency of the host country. The operator will also take out any other insurance which the Joint Operating Committee thinks appropriate. The most common form of optional insurance to be carried out by the parties is Construction All Risk (CAR) insurance to cover the construction of the installation and any other joint developments works (David, 1996).

Dispute resolution clause

The operator is also required to notify the non-operators of any incidents which may give rise to resolve potential dispute. The operator is generally authorized to conduct any litigation, arbitration, or mediation arising out of the joint operations up to a pre-agreed limit but otherwise generally may only conduct litigation with the approval of the Joint Operating Committee (Styles, 2007). A clear, compressive dispute resolution clause in the JOA allow the parties flexibility to resolve contractual dispute quicker and easier, minimizing their impact allowing joint venture to get back to its operational activities.

Non-operators

Parties other than the operator are designated as 'non-operator(s)', more commonly referred to simply as participants. Each non-operator's share of both costs and production is generally based on their fractional interest in the JOA (Kulander, 2015). The most important duty of a person who is not an operator in JOA is to provide part of his funds when faced with a cash crunch. Non-operators are part of the Joint Operating Committee (JOC) and through the Joint Operating Committee they participate passively and indirectly in some activities. Representatives of participants who are not operators may sit on a joint operating committee to oversee some of the operator's activities (Mathews and Pereira 2017). If a co-venturer

DOI: 10.48165/sajssh.2024.6403

fails to pay its share, he will be considered in default (Styles, 2007). The defaulting party will have to pay interest on the outstanding amount and if the loan is ultimately not repaid, the other co-venturers can take over the defaulting party's joint venture interest and divide it among themselves (Wilkinson, 1997).

Operating Committee (OpCom)

An operating committee exercises overall control of joint activities at various stages of the project to 'protect the rights of other partners'. The OpCom is made up of members from each team and appoints subcommittees to address specific subject areas and address issues in more detail (David, 1996). The operating committee makes decisions through a voting process where a required pass mark is achieved. During the voting process, the sole risk and non-consent clauses that are strongly related to the pass mark given in the JOA come into play (Althiyabi, 2023). The degree of control of the operating committee over the operator represents a significant difference between UK and North American practice. In the UK, the JOA "places the operator firmly under the control and direction of the operating committee, whereas the American model forms give the operator wider discretion" (Black and Dundas, 1992).

Fiduciary duties

Although there is 'some judicial support for the existence of fiduciary duty in the United States, Australia, New Zealand, and Canada, there is no case law to support this argument in English or Scots law'. The concept of fiduciary responsibility is unlikely to be very applicable to UK JOAs given the existence of a strong operating committee (Styles, 2007). However, the existence of an operating committee is not enough to indicate that the relationship is not fiduciary. As collaborative initiatives, JOAs require cooperation, so a horizontal fiduciary relationship exists (Bean, 1995). When operators "hold property in trust for parties or act as their agents, they are generally subject to fiduciary obligations" (Black and Dundas 1992). But it is also true that a joint venture relationship does not automatically create a fiduciary relationship 'between the parties, especially where the parties create a trust and corporate trustee' to manage the joint venture. When drafting a joint venture agreement, it is important to carefully consider the scope of the associated responsibilities and obligations as demonstrated in the case of *Brady Queen Private Limited v. Ostome Developments Private Limited and Others* (2021) where it was stated that the situation in a

DOI: 10.48165/sajssh.2024.6403

joint venture "relationship may indicate a lack of loyalty, reliance, vulnerability and other indicia" of a trusting relationship (Kelly; Beers and Un, March 2021).

Sole Risk and Non-consent Clauses

Some modern JOAs provide for sole-risk and non-consent clauses to eliminate the problem of the number of passes in the Joint Operating Committee in the event of differing opinions about the proposed project.The operator is most likely to operate a sole-risk project due to the nature of its interests (Marshall, 2016). A project would be "sole-risk" when it was proposed to the Operating Committee but failed to reach the required pass numbers to become a joint venture, and where fewer than all parties elected to proceed (Black and Dundas1992). The purpose of the sole risk provision is to allow some teams, usually large teams, to manage some projects that fail to achieve the required pass mark and become joint operations (Marshall, 2016). However, it is a general principle that the sole risk program must be initiated within a specific timeframe (Ryan, 1983).

The sole risk clauses apply to four distinct phases of activity: seismic, drilling, testing, and petroleum project development. The effect of this provision is that a sole risk taker will bear all the costs of the specific project and also enjoy the benefits (Althiyabi, 2023). A JOA may also include a provision for a non-sole risk taker to participate in the JOA after the sole risk taker has paid a premium or penalty. Therefore, various aspects should be considered when drafting a sole risk clause (David, 1996).

Non-consent Clauses

A petroleum project will be considered "non-consent" when it receives approval from the Operating Committee but a party or parties remain outside the specific project already approved by OpCom. Although a non-consent clause is essentially similar to a sole-risk clause, there are some differences between them. The difference between the two categories mainly depends on how much support a project proposal receives in the JOC (Shaw, 1996). Non-consent clauses do not always apply to compulsory work under a licensing arrangement because all parties to the JOA have implicitly agreed to pay their share of the compulsory work to keep the license in place (David, 1996). The use of non-consent clauses is less common in UK and Australian JOAs, although they are more popular in American JOAs. The reason for not including it was to encourage participation by all parties in jointly approved work (Marshall, 2016).

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Default clause and forfeiture clause

It is an important clause that outlines the consequences of a party failing to meet their contractual obligations. Such clauses are now commonly inserted into joint operating agreements, particularly in the petroleum industry around the world (Jensen and Faila, January 2013). A default clause is used to refer to a consequence where a party fails to meet its required obligations to the JOA, such as non-payment of a cash call. Therefore, the 'main purpose of the default provision is to provide certainty and stability' for the required financial contributions throughout the duration of the JOA (Pereira, 2019). A party's default under the JOA may result in the loss of its percentage of interest in the JOA (Roberts 2008; Aldersey-Williams et al. 2016).

The default clause typically gives the non-defaulting parties a number of remedies including forfeiture and suing for unpaid cash calls. In the UK, 'the current position' in most JOAs is that 'courts prefer forfeiture or interest rate' reduction clauses to penalty clauses (Styles 2012). Default remedies should be reasonable as it reduces the threat of complete foreclosure after a large amount of investment or commercial value has been created (Pereira, 2012).The default clause is so important in modern JOAS that in the event of a discharge, a defaulting party remains liable and will fulfill its decommissioning obligations through the distribution of the defaulting parties' participating interests. If defaults occur in the early stages of production, it may be possible to cover decommissioning costs from production revenues (Pereira and Pappa 2019). Therefore, parties to the JOA should take extra care to ensure financial security arrangements in the event of liability claims arising after the expiry of the oil and gas field.

Forfeiture

The forfeiture clause is a default remedy for non-defaulting parties to the Joint Operating Agreement. The effect of these types of clauses is that it forces a defaulting party to forfeit a defaulting party's participating interest in the project, such as a failure to pay cash call (Howard and Charles, 1961). The Association of International Petroleum Negotiators (AIEN), formerly known as the Association of International Petroleum Negotiators (AIPN), provides guidance on the application of the forfeiture clause- "if a defaulting party fails to fully remedy all its defaults by the 30th day (this period may vary in practice) of the default period, then, without prejudice to any other rights available to each non-defaulting party to recover its portion of the total amount in default, at any time afterwards until the defaulting

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party has cured its defaults, any non-defaulting party shall have the option, exercisable in its discretion at any time, to require that the defaulting party offer to completely withdraw from the agreement and assign all of its participating interest free of costs" (Oil and Gas Alert, 11 January 2016). The AIPN guidance shows that the forfeiture provisions must express themselves clearly and unambiguously and their terms must be strictly observed (Conine, 2018). The clause should not be used in a manner that will defeat the main purpose of joint venture interests. Besides, the clause should not be considered overly a penalty, although forfeiture and penalty are closely related.

Decommissioning

Decommissioning, an important clause of petroleum JOA, deals with the costs and responsibilities of well breakage, abandonment, platform removal and associated facilities. Typically the most expensive decommissioning tasks come at the end of a petroleum project. The cost and scope of decommissioning operations are very high especially in the case of heavy structures in deep water. The decommissioning clause should be included at the drafting stage to reduce future joint liability of the proposed JOA. For the purpose of an effective application of decommissioning clause "operators can play a part in helping draft regulations, particularly those that already have extensive experience in offshore asset retirement" (Jia; Yun; Ming; Kai; and Jiexin 2019).

Transfer of interests or rights provision

During the term of the JOA, one or more parties to the agreement may wish to transfer their participatory interests in the joint venture to a third party for various reasons. Therefore, parties to a JOA need to ensure that their agreement contains clauses that govern the transfer of interests, 'such as government approval, exercise of pre-emption rights, right of first refusal, etc., consent of the remaining parties, and approval of the identity of the transferor' (Polkinghorne, Michael 2017). The transfer of interests in a JOA can be restricted by pre-emption clauses. But these clauses create problems for parties wishing to transfer their assets and for those who do not wish to exercise pre-emption. For these reasons in new JOAs rights of pre-emption provisions are likely to be omitted (David, 1996).

Withdrawal from JOA

The withdrawal provision allows a party to withdraw from the JOA in certain circumstances, particularly when a party realizes that it no longer has the same benefits or interests in

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remaining in the petroleum project. But withdrawing from oil and gas projects is not an easy matter because withdrawal is linked to abandoned liability clauses and most JOAs contain provisions that hold the withdrawing party liable for its share of costs and liabilities, especially those that were approved prior to withdrawal. Furthermore, any withdrawal could result in the termination of the JOA unless everyone decides to implement it (Pereira and Pappa 2019). For this reason, the inclusion of such a provision in the JOA should be carefully considered (Roberts, 2020). Where parties wish to include such a right, parties should consider adding some conditions regarding when the right can and cannot be exercised. The following conditions may be added for implementation of withdrawal option (Pereira and Pappa 2019).

1. Withdrawals can be initiated after giving notice.
2. Withdrawal is possible with "the consent of the state authorities".
3. The party that wishes to withdraw must complete the work or budget portion at the time of notice.
4. Withdrawals are prohibited during certain periods that are important to the project.

CONCLUSION

In conclusion it is suffice to say that JOA is a 'more flexible' and 'well established' forms of contract widely used in the petroleum industry between two or more parties across different continents. Although JOAs are complex legal documents, it provides a great opportunity to its co-ventures to complete their oil and gas project successfully without taking any joint liability to fellow joint ventures and these advantages influence the oil companies to come together to form JOA (Ellison; Dechert; Davis and Levin, 1997). However, drafting and negotiating a joint venture agreement is a difficult task to ensure the success of the partnership. In each JOA, as the 'manager' of the JV, the operator seeks more power to manage the joint activities. On the other hand, as participants in the JV, the non-operators seek more control over the management of the joint activities (Pereira1 and Hall 2017). Therefore, the rights and duties of the parties concerned should be clearly divided in the JOA, otherwise it may cause disputes for the parties. A standard JOA should contain balanced and reasonable terms that reflect the concerns of all parties involved: the operator and the non-operator.

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