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A global review of joint operating agreement disputes

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ABSTRACT

The article identifies and analyses disputes that frequently arise from Joint Operating Agreements (JOAs) in the upstream oil and gas (O&G) business from around the globe. The topics discussed in this article are:

- a brief introduction to JOAs, their use in the O&G industry, and their key principles and provisions
- the development and use of model JOAs and Accounting Procedures;
- customary industry practice regarding JOAs
- O&G law regarding JOAs;
- a review of reported court judgments and international arbitral awards that dealt with JOA disputes; and
- an analysis of the trends in JOA disputes and lessons that can be drawn from those sources.

1. INTRODUCTION

This article is based on an Association of International Petroleum Negotiators (AIPN) research paper that dealt with disputes arising from Joint Operating Agreements (JOAs). It identifies and analyses the kinds of disputes that frequently arise from JOAs in a number of developed hydrocarbon jurisdictions, in addition to those that occur in international operations where the case law has been less developed. Given the widespread use of model JOAs in the oil and gas (O&G) industry, this article also reviews the development of model JOAs in multiple jurisdictions and internationally, and their impact on customary industry practice, case law and the resolution of disputes that arise from contracts based on these model JOAs.

The materials that were collected and analysed for this research article included (i) several hundred court judgments on disputed domestic JOAs from the USA, Canada, England, Australia, New Zealand and

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Norway; and a number of arbitral awards on disputed international JOAs, which were recently published by the authors for the first time.[1] For the sake of brevity, this article only includes brief descriptions of the cases, in contrast to the AIPN research paper, which provides a more complete analysis.[2]

Given the breadth and depth of their analysis, this article and the AIPN research paper will be a valuable resource for those involved in negotiating, drafting, managing and advising on JOAs throughout their life cycle. Since it identifies the key risk areas in JOAs, and where and how they commonly generate disputes, it will be an extremely helpful reference work for counsel, advocates, judges and arbitrators who deal with JOA disputes. Finally, it will be of assistance to those responsible for drafting model JOAs who can use this research to hopefully avoid some of the problems and disputes frequently encountered in JOAs.

2. JOINT OPERATING AGREEMENTS IN THE OIL & GAS INDUSTRY

The exploration, development and production of hydrocarbons is a high-risk, high-reward business, with projects often running into the billions of dollars. Rather than take on such risks (which can include a combination of financial, political, technical and geological risks) on an individual basis, upstream oil and gas exploration and production companies (O&G Companies) typically allocate and manage this risk by forming a consortium of upstream companies who share that risk on a joint venture basis. Under this risk allocation model, no single company bears all the risks for one project on its own. When a company spreads itself across several projects at the same time, it can often achieve the same economies of scale with less risk.

There are two basic mechanisms that O&G Companies use to form a joint venture. The primary mechanism used in the upstream oil and gas business is the unincorporated joint venture, which is essentially a contractual joint venture using a joint operating agreement or JOA. This contract is sometimes called an 'Operating Procedure' or simply an 'Operating Agreement' within certain jurisdictions in the industry. This is the most common mechanism used in the industry since it is easier and faster to establish from a logistical, legal and tax perspective.

The other mechanism is a joint venture company (JVC) with limited liability. The JVC, rather than the individual shareholders, holds the oil & gas concession in its name. The relationship of the shareholders is governed by the incorporation documents and a shareholders' agreement, which often include similar principles as found in JOAs. These are typically bespoke documents that are drafted based upon the requirements of the jurisdiction of incorporation and the country of operation.

The JOA is the most significant contract used in the upstream business between O&G Companies. It sets out the fundamental and overarching relationship among joint venture parties from the initial exploration to the ultimate production of hydrocarbons. It appoints an operator to carry out the operations and designates the remaining companies as non-operators.

The basic purposes of a JOA are to:

i. provide a decision-making process amongst the joint venture companies;
ii. provide for the conduct and funding of joint operations to perform the obligations under the granting instrument;
iii. allocate benefits, costs and liabilities amongst the companies based on their respective interests in the joint venture consortium;
iv. designate an operator to manage the joint operations on behalf of the JOA parties; and
v. provide mechanisms to allow less than all parties to conduct operations.

1 Tim Martin, John Gilbert and Martin Gusy, 'Joint Operating Agreements in the International Oil & Gas Industry: ICC Arbitral Awards' (2019) 35 (3) ICC Dispute Resolution Bulletin <https://library.iccwbo.org/> accessed 9 July 2020. Note that in order to ensure the anonymity of the cases reviewed in the ICC article, the original ICC file numbers were redacted and replaced with a simple numbering system in that article, and therefore in this article (except for those ICC awards already published and in the public domain).

2 The AIPN research paper can be found at the AIPN website: <www.aipn.org> accessed 9 July 2020.

O&G Companies acquire petroleum rights from governments that issue them granting instruments such as production sharing contracts, risk service agreements, petroleum leases or licenses, or concession agreements. International JOAs tend to be more diverse and complex in their nature, which reflects the varying kinds of hydrocarbon granting instruments and the different standards and policy mandates of governments.[3]

In jurisdictions such as the USA and Canada, individuals and companies (in addition to federal and state/provincial governments) hold petroleum rights that they grant to O&G Companies through the issuance of petroleum leases. These leases tend to be smaller, limited to certain geological zones, shorter in duration and subject to ancillary property rights that are different from international concessions, which has resulted in some unique attributes to US and Canadian JOAs and their disputes:

> The oil and gas operating agreement has evolved as an industry-wide document over several decades. The widespread need for it in United States onshore operations has resulted in the development of a relatively uniform agreement for domestic activities. However, as the complexity and size of the operation increases, as in the case of offshore and international exploration and production, modifications in standard terms of the onshore agreement become necessary. Domestic offshore and international joint operating agreements (JOAs) are not only more detailed and significantly different from onshore counterparts but exhibit important variations from transaction to transaction.[4]

Governments, individuals and companies grant such petroleum rights on the basis that if it is to a consortium, the parties are jointly and severally liable to the grantor who can enforce the entirety of the concession terms and obligations against any one of them individually. JOAs are designed to manage this risk by reallocating and limiting the joint and several liability amongst the parties. It does this by providing that the parties' liabilities are apportioned amongst themselves according to their predetermined shares.[5] The JOA allocates the risk of third-party claims on a similar basis. This underlying principle means that each party must meet its share of obligations at all times for the JOA to effectively work. This primary obligation affects significant terms in a JOA, including how the consortium allocates liability, approves joint operations using work programmes and budgets (WP&Bs) or authorizations for expenditure (AFEs), manages cash calls, triggers defaults and determines transfer rights.

JOAs typically provide an express statement that the obligations and liabilities under the agreement are individual, not joint or collective, along with saying what the agreement is not, as illustrated in the AIPN Model JOA:

> The rights, duties, obligations, and liabilities of the Parties under this Agreement shall be individual, not joint or collective. It is not the intention of the Parties to create, nor shall this Agreement be deemed or construed to create, a mining or other partnership, joint venture or association or (except as explicitly provided in this Agreement) a trust. This Agreement shall not be deemed or construed to authorize any Party to act as an agent, servant or employee for any other Party for any purpose

3 Many jurisdictions require their NOC to be an equity partner in the concession and therefore a party to the JOA. Since many of these NOCs are non-paying carried parties, this sometimes requires two JOAs: one for the paying parties and another for everyone including the NOC. Some jurisdictions also require that their 'model JOA' is used by all the consortium parties, instead of a universally accepted model JOA, such as the one published by the AIPN. There are also jurisdictions, such as Brazil, that impose a 'consortium agreement' where the Brazilian regulatory authority serves as chair of an operating committee with half the members, but is not the operator and has no participating interest.

4 Bruce M Kramer and Gary B Conine, 'Joint Development and Operations' in Ernest E Smith and others (eds), *International Petroleum Transactions* (2nd edn, Rocky Mountain Mineral Law Foundation 2000), at 561.

5 That formula may change in international JOAs where host government NOCs may be carried. In such circumstances, the NOC's share of risk and liability may be apportioned amongst the paying JOA parties. That formula may also change in a farmout where the farmee is taking on a larger share of the costs to earn an interest in the granting instrument and JOA. This could impact its share of the liabilities, depending on what is agreed upon in the farmout agreement.

> whatsoever except as explicitly set forth in this Agreement. In their relations with each other under this Agreement, the Parties shall not be considered fiduciaries except as expressly provided in this Agreement.[6]

Industry players intentionally want to avoid the creation of a partnership, agency or fiduciary relationship under their JOAs. This is in line with the risk allocation model of a JOA that requires all liabilities to be individual and for all parties to pay their designated share at all times.

Under US law, a 'mining partnership' may exist whenever two or more parties who own or acquire a mining claim or oil/gas lease actually engage in joint work for the purpose of finding and extracting minerals from the claim or oil and gas from the lease.[7] If the operator is designated as an agent, then service contractors could hold non-operators (in addition to the operator) liable for their services if they do not get paid. However, as a counterbalance in many US states, service providers can attach statutory liens to the non-operator's property interests in the wellsite.

An express contractual denial of agency, partnership, or a joint venture relationship (depending on the governing law of the JOA and the arguments being made by the parties) may make it more difficult for courts and arbitral tribunals to impose a fiduciary obligation on the operator in its relations with the non-operators. Denial of those relationships may also shield the non-operators from joint and several liability to third parties with whom the operator deals in the process of operations. The corresponding disadvantage for non-operators is that such disclaimers limit their ability to sue and recover damages based upon relationship duties.[8]

Finally, a few observations on two distinct characteristics of JOAs: (i) they are often long term in duration, and (ii) they are meant to deal with uncertain events in the future. And then, a few comments about the expectations of industry parties around such contractual relationships.

The term of a JOA is invariably tied to the term of its underlying O&G concession, which may run as long as 20 or more years. And there is undoubtedly great uncertainty on a JOA's eventual outcome when the agreement is signed. Some parties may take the position that such a long-term arrangement results in what the common law refers to as a 'relational contract', or that its future uncertain outcome would make it an 'aleatory contract' under the civil law.

Based on such a position, an aggrieved party may argue that an 'implied duty of good faith' under the common law[9] or an 'objective good faith' test found in some civil law jurisdictions should apply to the operator and its behaviour', even if they override express terms in the JOA. Parties need to be cautious in applying such concepts to O&G industry JOAs since they do not necessarily reflect the contractual language the parties have agreed upon or what would be considered customary industry practice.

As to the view of English law on 'relational contracts':

> If a series of individual contracts is to be drawn within the category of 'long-term contracts', then it suggests that the duration of the contract is not the definitive characteristic of a 'long-term contract'. Rather, it is the nature and duration of the relationship between the parties which is the definitive feature.

6 art 14.1 of the 2012 AIPN Model JOA.

7 See eg *Blocker Exploration Co v Frontier Exploration, Inc*, 740 P.2d 983 (Colo 1987); *Meister v Farrow*, 92 P.2d 753 (Mont 1939); *Mud Control Laboratories v Covey*, 1269 P.2d 854 (Utah 1954).

8 See eg *Luling Oil & Gas Co v Humble Oil & Refining Co*, 144 Tex 475, 191 S.W.2d 716 (1943); *US Truck Lines v Texaco, Inc*, 337 S.W.2d 497 (Tex Civ App—Eastland 1960, writ ref'd).

9 According to Prof. Michael Bridge: '[i]n so far as good faith is concerned, English law does not have the same taste as certain civil law systems for expressly recognizing a principle of good faith in contract law (however that might be defined)'. Michael Bridge, 'Good Faith, the Common Law, and the CISG' (2017) 99 Uniform Law Review.

> . . . [A] long-term contract is 'an analogy to a partnership' and must be 'understood as consciously co-operative'. Long-term contracts, it is argued, differ from other contracts in the extent of the commitment which one party must make to the other; they invest so heavily in the relationship that they are effectively locked in to each other. This is in contrast to the traditional 'arms' length bargaining' which takes place in nonrelational contracts where the aim of the parties is to maximise their own wealth.
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> . . . English law would not be justified in taking the step of recognising the existence of a formal category of relational contracts. In the vast majority of cases parties can insert into their contracts provisions which will provide the flexibility necessary to enable them to adapt their contract to changing circumstances. There is, however, a need for the courts to recognise this need to preserve flexibility and to avoid being too astute in refusing to enforce contract terms which are drafted in vague, flexible terms.[10]

This perspective is reflected in industry literature[11] and in a House of Lords decision on a similar kind of long-term O&G contract:

> The central question is whether on a correct construction of a long term contract for the sale of gas it was discharged by reason of the non-occurrence of a condition. It is a contract of a type which is sometimes called a relational contract. But there are no special rules of interpretation applicable to such contracts. . . That is not to say that in an appropriate case a court may not take into account that, by reason of the changing conditions affecting such a contract, a flexible approach may best match the reasonable expectations of the parties. But, as in the case of all contracts, loyalty to the contractual text viewed against its relevant contextual background is the first principle of construction.[12]

In a recent decision of the English High Court,[13] it was acknowledged that a JOA is 'at least arguably' a relational contract. As a result, a duty of good faith (involving mutual trust, confidence and loyalty) might be implied into a JOA, but the usual test for implying terms into a contract would still apply. Consequently, the duty of good faith would not be implied automatically but only if the implication of the duty was, *inter alia*, 'necessary to give business efficacy to the contract' and did not 'contradict any express term of the contract'.[14]

Turning to the civil law, the main feature of an 'aleatory contract' is that it relates to a future event, the existence or realization of which is uncertain at the time of entering into the contract and which cannot be controlled by either party. The fulfilment of the contract is therefore subject to a future uncertain event, which is a risk that the parties accept at the time of executing their agreement. That is certainly the case for a JOA where, at the time of entering into the agreement, it is entirely uncertain whether oil or gas will be discovered and, if discovered, whether those commodities can be commercially produced. This means that the value of the investment made by each party in a JOA is uncertain at the outset, and could eventually be negative, rather than positive.

10 Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995).

11 Paul Griffin, 'English Law in the Global LNG Business: International LNG Sale and Purchase - A Relational Arrangement' (2019) 12 (3) Journal of World Energy Law & Business 216.

12 *Total Gas Marketing Limited v ARCO British Limited and others* [1998] 2 Lloyd's Reports 209.

13 *TAQA Bratani Limited and others v Rockrose* [2020] EWHC 58, which is discussed below in the subsection 'UK' on Removal of Operator. For a discussion on implied duties of good faith under Canadian law, see: Nigel Bankes, 'No Implied Duties When Voting to Discharge an Operator' (24 February 2020) < http://ablawg.ca/2020/02/24/> accessed 9 July 2020. Canadian cases that deal with long term contracts and duties of good faith include: *Bhasin v Hrynew and Can-Am*, 2014 SCC 71; and *Churchill Falls (Labrador) Corp v HydroQuébec*, 2018 SCC 46 (CanLII), [2018] 3 SCR 101, <http://canlii.ca/t/hvw0n> accessed 9 July 2020.

14 On the implication of terms in English law, see *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72.

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Before imposing the concepts of either an 'implied duty of good faith or objective good faith' to a JOA where the parties have not expressly agreed to them, one has to first consider another fundamental contract principle found in all legal systems, ie the principle of party autonomy, which 'has been characterized as "perhaps the most widely accepted private international rule of our time", a "fundamental right", and an "irresistible" principle that belongs to "the common core of the legal systems". Thus, in proverbial terms, party autonomy is like "motherhood and apple pie": virtually nobody is against it and most commentators enthusiastically endorse it'.[15]

In addition to that fundamental contract principle, there is also the basic contract principle of *pacta sunt servanda* (Latin for '*agreements must be kept*') that is universally accepted under the common law, civil law, *Shari'ah* law, canon law and international law. As a result, if a JOA party has clearly and expressly undertaken to meet a certain obligation, then the other parties should be within their rights to expect that party to keep that obligation. That is especially the case where the contract has been agreed upon by sophisticated parties who have relied upon detailed, sophisticated legal advice, and where there is symmetry in bargaining power.

Although JOAs may be considered to be 'relational' or 'aleatory' contracts, that does not automatically result in an 'implied duty of good faith' arising or the need to apply an 'objective good faith' test to the contract. Instead, one has to first take into account the express contract terms, which reveal the parties' intent and their legitimate expectations in respect of their agreement, customary O&G industry practice and the governing law of the contract. Industry players seek certainty and predictability in their JOAs, which is reflected in the terms they have incorporated into their agreements. If the parties cannot rely upon what they have agreed, then uncertainty enters into their long-term relationship, which is not what they bargained for. This dynamic is reflected in the cases and awards described in this article.

3. MODEL JOAS

The industry developed a series of contracts for its commercial transactions, including JOAs, since its origins in the late 1800s. Initially, companies negotiated and drafted their own set of bespoke contracts with each other. This took up significant time and resources. Sometimes, dominant players were successful in forcing other parties to use their form of contract. But more often, parties found that they engaged in a 'battle of the forms' over using a particular contractual format. This approach failed to establish industry wide contract standards.

The industry took an alternative approach starting in the early 1950s by working on a cooperative basis to develop various types of petroleum model contracts to gain the benefits of standardization and efficiency.[16] Commercial and legal personnel in the industry recognized that there were a multitude of benefits in cooperating to develop model contracts that were consistently and regularly used by all.[17]

The global petroleum industry developed model contracts, including model JOAs, through its various business organizations to standardise the most common transactions in the industry that reflected widely accepted industry practice. Such industry organizations consisted of commercial personnel and their legal

15 Symeon Symeonides, 'Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple' (2014) 39 (3) Brooklyn Journal of International Law 1123.

16 The narrative on model JOAs in this section is based on the following articles, which provide a detailed history of how model JOAs and other contracts were developed in the industry:

A Timothy Martin, 'Model Contracts: a Survey of the Global Petroleum Industry' (2004) 22 (3) Journal of Energy & National Resources Law 284, and A Timothy Martin and J Jay Park, 'Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger' (2010) 3 (1) Journal of World Energy Law & Business 6.

17 The trend towards model contracts is not unique to the petroleum industry. Legal organizations have produced models such as the American Bar Association's Model International Asset Purchase Agreement and Model Stock Purchase Agreement. The construction industry has developed a number of model contracts, as exemplified by the models of the International Federation of Consulting Engineers (FIDIC) and by some domestic civil engineering institutions. Various international agencies such as the IMO, World Bank, etc, have also supported standardization of commercial terms to encourage international trade and improve economic systems.

advisers that regularly handled a particular transaction and contract, which they were able to develop into a widely accepted and used model contract.

The first petroleum model contracts emerged in the 1950s in the USA led by a number of US industry organizations. The concept then spread to Canada in the early 1970s through similar Canadian organizations. They took hold in Europe in the late 1970s, primarily in the UK. The movement to international model contracts began in the late 1980s under the leadership of the AIPN.

These model contracts eliminated the need to draft a bespoke agreement every time parties negotiated a JOA, while providing assurance to the parties that they incorporated customary industry practice, or trade usage, into their agreement.

USA

The first model JOA in the USA was the American Association of Petroleum Landmen (AAPL) Model Form 610 Operating Agreement for onshore non-federal lands, which was published in 1956. The first version of this model JOA was sometimes called the Kraftbilt Form 610 because it was initially published by Kraftbilt Products in Tulsa, Oklahoma, rather than by the AAPL itself.[18] This model form was first revised in 1977. It was further updated and issued in 1982, 1989 and 2015. AAPL's Model Form 610 JOA is now the US industry standard for onshore activities.

As offshore operations grew, the AAPL developed model JOAs for the U.S. offshore business, in particular the Offshore Shelf Operating Agreement 710 and the Deepwater Operating Agreement 810. The 710 Model, which was published in 2002, was designed for shallow waters in the Gulf of Mexico. The 810 Model, which was originally published in 2007 and updated in 2015, is for the deepwater Gulf of Mexico.

The American Petroleum Institute (API) developed a model offshore operating agreement for state and federal lands within the Outer Continental Shelf of the Gulf of Mexico in 1984 with a second edition released in 1996. This model JOA was not considered suitable for deep water operations. The API did not develop a model JOA for the onshore industry since this niche was historically held by the AAPL 610 form.

The Rocky Mountain Mineral Law Foundation (RMMLF) developed its model JOA (Form 3) for joint venture operations in the US Rocky Mountain area where there is no field-wide federal unit involved. It was issued in 1968 and never revised.

Canada

The Canadian Association of Petroleum Landmen (CAPL) developed its operating procedure for the Western Canadian Sedimentary Basin, which was first published in 1971. It revised and published subsequent versions in 1974, 1981, 1990, 2007 and 2015. The CAPL also developed a Frontier Joint Operating Procedure in 1988 for the frontier regions of Canada, such as the Arctic, Beaufort Sea and the offshore East Coast. However, this model never took hold in the Canadian frontier industry.

Similar to other organisations that have made a significant commitment over many years to develop model JOAs, the CAPL views itself 'as the custodian of what is, in effect, a living industry document' and accepts that it has an ongoing obligation to revise and update the document 'in consultation with interested members of the oil and gas community'.[19]

UK

In the early developmental stages of some jurisdictions, there has been a dominant player who successfully established its contract as the industry standard. In the UK, there was at first a significant 'battle of the forms' problem during the first four offshore licensing rounds. When the UK Continental Shelf (UKCS) was

18 Schroedter and Mosburg, 'An Introduction to the AAPL Model Form Operating Agreement', The Oil and Gas Joint Operating Agreement, Paper No 1, 1–3 (Rocky Mt Min L Fdn, 1990).

19 James A MacLean, 'The 1990 CAPL Operating Procedure: An Overview of the Revisions' (1992) 30 (1) Alta L Rev 133 at 176–77.

opened up by the first licensing round in 1964, many bidders were from the USA who brought their JOA forms with them. This led to a lack of standardization in the industry's JOAs for Rounds 1 through 4 from 1964 to 1972.

The Labour government, who came into power after that period, created the British National Oil Corporation (BNOC) in 1975. That government required BNOC to be a party to each license in the 5th and 6th rounds. Given that it had to be a party to each and every licence, BNOC was able to create and impose a standard model JOA on the industry.

When BNOC was wound up in 1985 and there was no longer a national oil company for the United Kingdom,[20] that particular model JOA continued to be used as the standard JOA in the UK North Sea.[21] The UK Offshore Operators Association (UKOOA),[22] which became known as Oil & Gas UK (OGUK) in 2007, has taken responsibility for maintaining and updating this model JOA. The main updates of the UK JOA since the demise of BNOC were in 2003 (for the 20th licensing round), and in 2009 to reflect the new model decommissioning security agreement (DSA).[23] OGUK has also published a guidance note in relation to operator's liability in 2011 and amendments to the antibribery clause in 2013.

Unlike the AIPN Model JOA described below, the UK model does not provide numerous 'options and alternatives'. Therefore, it is far simpler to use; though some choices are required on issues such as associated agreements, new areas and sole risk premiums. The main distinction between the UK model and the AIPN model JOA is that the OGUK model caters specifically for the UK licensing regime; whereas the AIPN model JOA is designed primarily for a production sharing agreement, which is the most common hydrocarbon granting instrument used around the world; though it can easily be adapted to a concession or license regime.

Norway

The Norwegian Petroleum Directorate (NPD) has issued its own model JOA (in Norwegian).[24] This Norwegian standard JOA is typically used with no variations at all. The NPD also has a prescribed form of accounting procedure. Similar to Norway, the governments of Denmark and Greenland have also their prescribed forms of model JOAs and accounting procedures.

Australia

The Australian Petroleum Production and Exploration Association (APPEA) produced a model JOA in 1984 for Australian onshore operations. This model has never been revised and its content is now considered dated in the Australian industry. More recently, the Australian Mining and Petroleum Law Association (AMPLA) published a Model Petroleum Joint Operating Agreement.

Many Australian O&G Companies developed their own pro formas, sometimes incorporating and revising clauses from the 1984 APPEA form and the AMPLA form. They are now being influenced by international model JOAs and are either adapting the AIPN model JOA in its entirety or incorporating some of its concepts into their own pro formas used in offshore operations. To assist them in that adaptation, the AIPN issued Guidance Notes in 2015 that provided instructions on how to amend its Model JOA to produce an Australian version to use in offshore Australian waters.

20 'Gone are the days of the shot-gun marriage to BNOC (and its successor the OPA)'. See Sandy Shaw, 'Joint Operating Agreements' in Martyn R David (ed), *Upstream Oil and Gas Agreements* (Sweet & Maxwell 1996) 13.

21 Michael P.G. Taylor and Sally M. Tyne,*Taylor and Winsoron Joint Operating Agreements* (FT Law & Tax, 1992).

22 The UK Offshore Operators Association Limited was incorporated in 1973, changed its name to the UK Offshore Oil and Gas Industry Association Limited in 2007, and to The UK Oil and Gas Industry Association Limited in 2012.

23 The current version of the OGUK model JOA is <https://oilandgasuk.co.uk/legalservices/> accessed 9 July 2020.

24 Unofficial translations of the two Norwegian standard JOA forms, with and without State participation, are available at: <https://www.regjeringen.no/en/find-document/dep/OED/Laws-and-rules-2/Rules/konsesjonsverk/id748087/> accessed 9 July 2020.

International

The most widely used and accepted JOA in the international petroleum industry is the one published by the AIPN.[25] The AIPN published its first Model JOA in 1990. As described by one of the Chairs of the first drafting committee, the International Model JOA was drafted with two main themes. First, it did not force parties to accept predetermined concepts and consequences. It used options and alternatives to allow the parties to structure their transaction to fit a wide variety of situations to meet various corporate philosophies and the underlying host government contract. Secondly, the model JOA encouraged exploration and development without forcing a party to participate in expensive, risky ventures and at the same time allowed a party to make independent proposals after not being able to meet the necessary pass-mark vote for a group decision.[26]

The AIPN published updated versions of its Model JOA in 1995, 2002, and 2012 and is presently engaged in updating its Model JOA once again, which will be published in a few years' time. A survey for the 1995 model JOA confirmed that few disputes had arisen under the AIPN's model JOA up to that point of time, and that English law was widely chosen (with Texas and New York law being chosen less often than once thought). In its efforts to make the 2002 model JOA a more global agreement, the AIPN JOA committee provided civil law guidance notes to use in connection with the drafting of JOAs in civil law jurisdictions.[27]

The AIPN is cognisant that all of its model contracts have been drafted in English by lawyers trained in the common law, yet its models are used in many countries where the first language is not English and the legal system is not based on the common law. Therefore, it has made available a number of translations of its models, in particular its model JOA, in Russian, Arabic, French and Spanish. It has also encouraged the participation of more lawyers trained in the civil law and *Shar'iah* law in the drafting process to ensure that its model contracts incorporate important concepts from those legal systems. This is part of the globalization process of model contracts in the international petroleum industry.

4. MODEL ACCOUNTING PROCEDURES

Attached to every JOA is an accounting procedure (AP) that sets out how the operator handles the books and records for the joint venture. These have become quite standardized throughout the industry and significant benefits have resulted from establishing model accounting procedures.

USA

The Council of Petroleum Accountants Society (COPAS) has issued several model accounting procedures for use with model JOAs in the US domestic industry. COPAS published onshore models in 1962, 1968, 1975, 1984, 1995, 1998 and 2005, and offshore models in 1976, 1986 and 2012.

Canada

In Canada, the Petroleum Accountants Society of Canada (PASC) has a model accounting procedure to attach to the CAPL model JOA and the Petroleum Joint Venture Association (PJVA) model construction, ownership and operating (CO&O) agreement.

25 See Peter Roberts, *Joint Operating Agreements: A Practical Guide* (3rd edn, Globe Business Publishing 2015) at 281. Andrew B Derman, Model Form International Operating Agreement: An Analysis and Interpretation of the 1995 Form, (ABA Section of Natural Resources, 'Energy, and Environmental Law, Monograph Series', 23 Number 23, 1997) at Introduction. Philip Weems and Michael Bolton, *Highlights of Key Revisions – 2.002 AIPN Model Form International Operating Agreement*, 'International Energy Law and Taxation Review' (Issue 6, June 2003) at Summary. Michael D Josephson, *Fundamentals of International Joint Operating Agreements* (53rd Oil & Gas Institute, 18, Matthew Bender) at para 1.01[3]. Kevin O'gorman and Mark Stadnyk, 'Arbitration and Joint Operating Agreements: An Overview' in James M Gaitis (ed),*The Leading Practitioners' Guide to International Oil & Gas Arbitration* (JURIS 2015) at 635 and 641.

26 ibid.

27 ibid at 172–73.

PASC published Western Canadian Accounting Procedures in 1953, 1962, 1969, 1976, 1983, 1988, 1996 and 2011.

UK

In the UK, the model JOA published by OGUK contains a short form Accounting Procedure as Schedule A. A long form Accounting Procedure is also available on OGUK's website. Both short and long forms were produced in association with the Oil Industry Finance Association. The latest version of the JOA and two forms of Accounting Procedure were published in January 2009. OGUK also publishes Standard Oil Accounting Procedures (SOAPs), which describe standard approaches on various subjects.

International

The AIPN publishes an international model accounting procedure that has been revised and updated several times. Similar to other model accounting procedures, the AIPN model accounting procedure was designed to attach to its model JOA. The AIPN produced the first model accounting procedure in 1992. Revised model was published in 2000, 2004 and 2012.

5. CUSTOMARY INDUSTRY PRACTICE

Model JOAs reflect common industry practice in how upstream industry players negotiate and agree upon the terms and conditions in their JOAs, and how they then manage their unincorporated joint ventures. This is confirmed by their wide acceptance and usage in the industry, and by the fact that key industry organizations (whose members negotiate these contracts) develop and publish these model JOAs. This is also reflected in the court cases and arbitral awards that cite these model JOAs as evidence of industry practice.

Even though model JOAs from various areas of the world deal with many similar issues and enshrine certain fundamental principles, their approach in handling the detail of these issues can be quite different. For instance, there is a marked difference in various model JOAs on how the relationship between the operator and non-operator(s) is addressed:

> Historically, the first model form operating agreements were drafted to address the drilling of onshore wells primarily in the United States, where individual autonomy is a prized tradition. These agreements were conceived to deal with relatively unsophisticated technology, low cost wells, high margin prices, and small lease areas held under a property ownership system that fosters unilateral initiative. Under the circumstances, it was not unreasonable for the parties to delegate broad authority to one of them to organize the drilling of an exploratory well and to develop the field.[28]

> In contrast to the broad discretion given to the operator in Canadian and US onshore JOAs, international JOAs provide for a management committee that exercises some degree of supervisory control over operations. Each participant has one representative on the committee with a vote weighted in accordance with the participant's interest in the project. The powers of the operating committee may be specifically listed or stated in general terms.[29]

Domestic US and Canadian onshore JOAs contain a limited number of elections, whereas the AIPN international model JOA has many. This reflects a less diverse and complicated operating environment in onshore North American operations. But it is also indicative of the philosophy of organizations such as the AAPL and

28 Andrew B Derman and James Barnes, 'Autonomy versus Alliance: An Examination of the Management and Control Provisions of Joint Operating Agreements' (Inst on Oil and Gas Agreements, Rocky Mt Min L Fdn, 1996), s 4.03 at 10.

29 Kramer and Conine (n 4) at 564.

the CAPL in favour of standardizing their model contracts as much as possible by using printed forms that only allow limited alternatives using a tick the box approach:

> [Model JOAs have] evolved to reflect the particular industry standards, customs, laws and regulations in effect in the jurisdictions in which they are most commonly used. Conventional operations in Western Canada tend to involve a relatively homogeneous group of players. In contrast, international operations often involve a variety of participants from disparate political, legal and economic systems. The various participants may include state-owned oil companies whose agendas and expectations may be very different from the profit-driven goals of North American exploration and production companies. International projects tend to be larger in scale than most domestic operations, and are often located in places where there may be very little infrastructure and where the cultural, political, legal and economic environments are very different from those with which we are familiar in Canada. Moreover, the petroleum rights held by the participants will usually be derived from legal sources which are quite unlike conventional Canadian petroleum and natural gas leases. A workable international joint operating agreement must address these many distinctions.[30]

Given the above, one would assume that domestic model JOAs would always handle the same issues in a similar manner in contrast to how an international JOA deals with the situation. However, that is not always the case. As an example, both the CAPL model JOA[31] and the AIPN model JOA[32] provide for the option of the removal of an operator without cause on the affirmative vote of a number of participants holding at least a certain percentage participating interest. In contrast, the AAPL 610 Form only permits the removal of an operator for good cause.

In effect, what has happened is a cross-fertilization of ideas and concepts. For instance, there appears to be a movement in the Canadian industry towards what some commentators call 'norm-based standards' as opposed to a 'pure' standardization approach in which few changes to the model form are expected to be negotiated by the parties. Norm-based standard documents have been described as model forms that reflect the most common standards and approaches but which are intended to be modified in appropriate circumstances to address the special requirements of specific transactions.[33] This is a bit like the more flexible (and hence complicated) approach displayed in the AIPN model international JOA, which have many options and alternatives to choose from. The AIPN model JOA has had a significant influence on a number of issues in the most recent CAPL model JOA revision. Likewise, concepts developed in the CAPL model have popped up in subsequent AIPN and AAPL models, and other model JOAs in other jurisdictions.

The North Sea environment stands apart from the mingling of JOA concepts seen in some other jurisdictions. UK regulators and companies operating in the UK have remained satisfied with the BNOC based model JOA, though there has been some cross fertilization in the process of the 2003 and 2009 updates mentioned in the subsection 'UK' above. Companies operating in the UK have never really taken to the AIPN model JOA[34] and have always rejected the North American style onshore JOAs:

> It quickly became apparent, however, that the simple model-forms used for U.S. onshore drilling, which basically allowed the operator to do whatever he wanted, were wholly inappropriate to the big-money,

30 Michael D Josephson, 'How Far Does the CAPL Travel? A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement' (2003) 41(1) Alta Law Review 1, 3.

31 CAPL Operating Procedure - 1990 Version: s 202(b)(i); 2015 Version: art 2.02(B). See the subsection 'Introduction' below.

32 AIPN Model Form International Operating Agreement- 2002 & 2012 Versions: s 4.10, Optional Provision (E). See the subsection 'Introduction' below.

33 Jim MacLean, 'CAPL Property Transfer Procedure Update' *CAPL Negotiator Newsletter* (June 2001).

34 ' . . . the International Model Form Operating Agreement . . . is not much used in the United Kingdom.' See Shaw (n 20) at 14.

high-risk environment of the North Sea, where inter-consortium wrangling was commonplace as operators in the early days consistently overran their budgets.[35]

The result is that common industry practice can vary from jurisdiction to jurisdiction, which is reflected in the model JOAs that are used in specific operating areas. This is determined by the amount of detail in these model JOAs, their complexity and the number of options and alternatives provided.

However, there are broad themes and practices that are widely and consistently used throughout the industry, which are incorporated into these model JOAs. One universal principle is the risk allocation model used in all JOAs that manages joint and several liability risk by reallocating and limiting it amongst the parties based upon their predetermined shares. As a result, all model JOAs require that each party must meet its share of obligations at all times for the JOA to effectively work. Failure of any party to do so has severe consequences for that defaulting party, including the possible risk of forfeiture of its interest, which allow the non-defaulting parties to carry on with the joint venture operations.

As can be seen, there are common issues and similar kinds of disputes in industry JOAs throughout the world. However, there is variation in how these disputes are addressed and resolved, which depends on a number of factors, including the legal instruments and remedies available in each jurisdiction and the customary industry practice in that area of operation.

6. OIL & GAS LAW

There are only a few jurisdictions, such as in the USA and Canada, that have a developed and sophisticated O&G jurisprudence, which is reflected in the large number of cases collected from those two jurisdictions in the AIPN research study. O&G cases from such hydrocarbon areas deal with JOAs that invariably select the local governing law in which they operate and the local courts for resolving their disputes. This has resulted in a rich O&G case law that reflects the contractual interpretation principles and customary industry practice that have developed in those jurisdictions. This O&G law is incorporated over time into updated and revised model JOAs used in those jurisdictions, and in return, these model JOAs influence and impact the case law, since they reflect common industry practice in that jurisdiction. It should therefore be noted in reading older cases that they deal with disputes arising from early versions of model JOAs in those jurisdictions, which do not reflect the language used in more recent versions of these same model JOAs that have been revised to address the problems experienced in the earlier cases.

There has been a slowly growing body of English case law on the rights of operators and non-operators under oil and gas JOAs. These cases have arisen against the background of new investors acquiring interests in mature oil and gas assets and infrastructure in the North Sea. As major oil companies leave the North Sea, long-term relations amongst operators and non-operators are changing, which will likely lead to further disputes around existing arrangements in order to maximize value in the short term for these new investors. This will likely have a significant impact on not only UK operations, but also international JOAs that incorporate English law as the governing law of the contract. Surveys conducted by the AIPN on the choice of governing law selected by its members in international JOAs show that English law is the default law of choice in those agreements.[36]

Most jurisdictions in which international O&G operations are conducted have no or very little such jurisprudence, even in sophisticated civil law jurisdictions in Europe and Latin America. Possible contributors to that phenomenon are that parties in international JOAs are able to select (and typically do select):

i. the governing law of their contract, which is often not the law of the country in which they operate their JOA. Instead, they often choose laws such as English, Texas, etc. from more developed and well known jurisdictions; and

35 David (n 20) vii.

36 Weems and Bolton (n 25).

ii. international arbitration as their dispute resolution mechanism with a neutral venue in another country and decisions that are confidential.

As a result, the arbitral awards reviewed provide for the first time an insight into how international tribunals have grappled with and determined issues that arise in international JOAs when they do not have a sophisticated oil & gas case law and jurisprudence directly relevant to their case to rely upon.

These arbitration awards show that these tribunals took into consideration the following factors in reaching their decisions on international JOA disputes:

i. Fact Matrix. As in any international arbitration, the tribunals first considered the facts surrounding the particular JOA in dispute.
ii. Terms of the Contract. Tribunals consistently referred to the particular provisions in the JOA under dispute. However, the parties repeatedly disputed the fact matrix and the meaning of the contract language, leaving tribunals short of a definitive conclusion based on these factors alone.
iii. Case Law. Some of the tribunals considered case law from the jurisdiction of the law governing the contract. However, those were only court cases relating to general principles of contract interpretation, rather than any domestic oil & gas case law. This may change in future arbitrations for agreements governed by English law, since English case law on oil and gas JOAs is starting to develop more, keeping in mind that both the model JOAs used and the relevant customary industry practice varies between the UK North Sea and international operations.
iv. Customary Industry Practice. The tribunals turned to customary industry practice (or *trade usage*) to determine how these JOAs were applied and interpreted. This approach is supported by the UNCITRAL *ad hoc* arbitration rules[37] and many of the well-known institutional rules.[38] The primary source of determining such business practices in the oil & gas industry that the tribunals relied upon was the industry's model contracts. In particular, the tribunals referenced the model contracts developed and published by the AIPN, which they considered the main source for confirming business practices in the international oil & gas business. This was the case even where the parties' JOA was not based upon the AIPN Model JOA.
v. Governing law. The tribunals' final consideration was the specific choice of law in the contract, its general principles of contract interpretation and any general requirements under such law, such as matters of public policy.

7. JOA DISPUTES

Given the significance of JOAs in the upstream business, a major source of commercial disputes in the industry concerns its JOAs. As shown by the number of JOA cases in jurisdictions such as the USA and Canada, there are a number of recurring issues that frequently appear in these disputes.

The same issues occur in international JOAs but are less frequently seen. This is for a number of reasons, including that there are fewer international JOAs compared to the numbers used in the US and Canada, and international arbitration is usually selected as the dispute resolution mechanism in the industry's international JOAs. The latter reason results in them not being published (until at least now) because of the confidentiality provisions in these international JOAs and arbitral procedural rules.

Having said that, the international energy sector, along with its associated construction projects, make up the largest portfolio of international commercial and investment disputes in the world, which are shown in

37 '*In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.*' art 35(3) of the UNCITRAL Arbitration Rules (as revised in 2010).

38 As eg art 21(2) of the Rules of Arbitration of the International Chamber of Commerce (In force as from 1 January 2012) states that: '*The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*'

the statistics of major arbitral institutions. In the years 2011–2018, between 12.5 and 19 per cent of the International Chamber of Commerce (ICC's) annual caseload derived from energy-related arbitrations.[39] At the International Centre for the Settlement of Investment Disputes (ICSID), the energy sector comprising oil, gas, mining, electric power and other energy accounted for a 41 per cent share of the ICSID Convention and Additional Facility Rules registered cases in 2018. Previous years' figures show similar numbers.[40] At the ICDR, energy disputes regularly rank as the highest in amount in dispute.[41]

Based on our review of court cases and arbitral awards, the most common issues disputed in the industry's JOAs were:

1. Approval of Joint Operations
2. Accounting Procedure
3. Default
4. Scope of Operator's Duties/Authority
5. Removal of Operator
6. Limitation of Liability and Indemnities
7. Non-Consent or Exclusive Operations
8. Transfer and Pre-emption Rights
9. Partition of Leases

US court cases deal with all of the above issues, with other jurisdictions' coverage dependent on the breadth of their O&G case law. The international arbitral awards deal with most of the listed issues. Disputes dealing with the last issue, partition of leases, are unique to the US onshore O&G industry, given the nature of their O&G leases.

The following analysis of JOA disputes first provides a description of the issue, followed by an account of the points addressed in each of the relevant court case or arbitral award by jurisdiction. Some of these cases and awards dealt with a number of the listed issues and as a result are discussed under several of the issue headings. Please note that, for the sake of brevity, the case summaries provided in this article are much shorter than what are provided in the AIPN research paper.

Approval of Joint Operations

Introduction

Before an operator can proceed with any work under a JOA, it must seek and obtain the written approval of the JOA parties at the pass mark level specified in the JOA for the different kinds of joint operations. There are basically two kinds of approval mechanisms for joint operations that are used in industry JOAs. One is an authorization for expenditure (AFE) and the other is a work programme and budget (WP&B). The operator would first prepare these documents and the non-operators (along with the operator) would then approve them. AFEs tend to be used for individual operations on a one-off basis, such as the drilling of a well or the building of an operational facility. In contrast, WP&Bs are used for larger, more complex operations over a longer period of time, typically approved on an annual basis. However, some JOAs may use a combination of both AFEs (either for information only or as an approval mechanism) and WP&Bs, depending on the circumstances.

AFEs are more commonly used in onshore operations in North America, whereas WP&Bs are used in international operations, the North Sea and sometimes for deepwater offshore operations in the US Gulf of

39 See ICC Statistical Reports (2012–2017) <http://library.iccwbo.org/dr-statisticalreports.htm The ICC Dispute Resolution Statistics are available at www.iccwbo.org/dr-stat2018> accessed 9 July 2020.

40 <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> accessed 9 July 2020.

41 <https://www.adr.org/sites/default/files/document_repository/180223_AAA_ICDR_Arbitration_Caseload_Data_Press_Release.pdf> accessed 9 July 2020.

Mexico. Onshore North American JOAs have historically used individual AFE approvals because of their flexibility to ramp up or slow down programmes, the parties' desire to be able to respond quickly to changing capital, pricing or other internal governance conditions and the simplicity of most North American onshore operational logistics relative to the international operating environment.

An AFE would include an estimate of costs to be incurred shown in total with appropriate breakdowns, and often accompanied with a projected payout schedule or revenue forecast. The AFE would provide sufficient engineering detail to inform the JOA parties of the planned operations. The AFE would also typically include sufficient information about the geological target or project to enable a non-operator to make an informed investment decision. It should identify the target horizon and, for a vertical well, any secondary target. Given the increased frequency of horizontal drilling, the drilling AFE should also identify the anticipated trajectory and horizontal length of the well. For a very thick target horizon that is comprised of known members that are distinct, it is the better practice to identify the specific member in which the horizontal drilling is expected to be conducted.

As an example, an AFE for the drilling of a well would typically list estimated expenses for drilling the well to a specified depth, casing point or geological objective, and then either completing or abandoning the well. Such expenses would include excavation and surface site preparation, the daily rental rate of a drilling rig, costs of fuel, drill pipe, bits, casing, cement and logging, and coring and testing of the well. Stakeholder consultation and licensing costs are becoming increasingly significant in some jurisdictions, and would therefore be included in the AFE.

AFEs are essentially both (i) a budget for the project against which actual expenditures are compared and (ii) a joint venture approval form for evidencing agreement by the JOA parties to participate in the budgeted project. In practice, the actual information included in an AFE varies by operator and type of operation. Typically, the more costly the operation, the more detail is included.

International JOAs require the operator to present a WP&B for approval to an operating committee, which is comprised of representatives from each of the joint venture parties. This is typically done on an annual basis in international JOAs. WP&Bs detail the work to be undertaken for the period in question and the estimated cost of that work. JOAs set out details on the level of approval required to be achieved in the operating committee for the WP&Bs to be adopted. Different levels of approval may be specified for different types of activity. International JOAs may also require the operator to provide an AFE for individual operations to the non-operators, in addition to the annual WP&B. Those AFEs may be for information only, or they may require the approval of the JOA parties before the operator can proceed with that particular operation.

Unlike international operations, WP&Bs generally do not play a major role in North American JOAs. The AAPL 610 Form for onshore operations does not provide for WP&Bs at all. If they are included, they are usually for informational purposes only. That is the case for both the AAPL 810 Form for deepwater Gulf of Mexico operations and in the model CAPL Operating Procedure in Canada.

However, WP&Bs may be included on an increasing basis for Canadian JOAs that are expected to be capital intensive at some prescribed point in the evolution of the project where it shifts to a large scale development. While there will be fewer large scale projects in the US onshore industry because of the nature of the US mineral tenure system in those jurisdictions, it is quite possible that a Canadian agreement could govern a large area. The recently completed AIPN Unconventional Resource Operating Agreement, for example, is likely to be used for some of the very large shale projects in Canada.

Disputes tend to arise in relation to the levels of approval required for various items, whether the requisite approval was obtained, precisely what was approved, whether the amount of detail provided meets a required threshold level and the consequences of not achieving the requisite approval. This is something that may be more easily ascertained under an AFE approval (as opposed to a WP&B) since AFEs tend to be used for

specific, individual operational items; whereas, WP&Bs cover a much broader spectrum of operations, giving the operator more flexibility and leeway.

In addition to the approval of WP&Bs, international and offshore JOAs typically require that operators must also obtain the approval of the operating committee for the awarding of contracts to purchase equipment and carry out operations. Even though operators have a fair degree of discretion in carrying out their job under industry JOAs, the other parties to the JOA will insist on maintaining control over capital and operating expenditure decisions to protect their investment, manage their financial risk and to limit their liability. That includes control over the costs, timing and quality in contracts awarded for the acquisition of equipment and facilities for the joint account.

A number of disputes have arisen in the international O&G industry around the approval mechanism for the awarding of contracts and whether contracts that an operator has entered into for its own account to meet the need of its wider portfolio outside of a particular concession can be charged back to a specific joint account. Those arbitral awards have not been published at this time, though some details on them have been reported in the media.

The cases reviewed include some international arbitral awards and decisions from the courts of the USA, Canada, UK and Australia.

USA

As described above, onshore JOAs in the USA (to which the majority of the court judgments relate) do not require WP&Bs to be put in place. Instead, these JOAs use AFEs to obtain approval of joint operations. Offshore JOAs in the US sometimes use WP&Bs to approve joint operations, but typically use AFEs as their approval mechanisms. However, such offshore JOAs typically select arbitration (with its accompanying confidentiality), rather than the courts. Consequently, there are no reported US cases directly on the issue of WP&B approvals.

US courts have held that a non-operator that agrees to participate in an operation under a JOA is responsible for its share of cost overruns, and can successfully challenge them only if the operator has incurred them in bad faith or if they are clearly excessive, unreasonable, or unauthorized by the AFE.

In *M & T, Inc. v Fuel Res. Dev. Co.*,[42] actual costs of drilling a well were nearly twice what the AFE showed, but the non-operators remained liable, notwithstanding the cost overrun and the non-operators' attempt to 'non-consent' once the AFE was exceeded. The court concluded that, by signing the AFE, the non-operators had committed to paying their proportionate share of the necessary costs.

Caddo Oil Co. Inc v F.M. O'Brien[43] is a decision of the US Court of Appeals, Fifth Circuit. The Appeals Court upheld the District Court's decision that operating expenses for wells could not be charged by an operator to a non-operator that had not expressly consented to the wells.

In *Texstar North America Inc v Ladd Petroleum Corporation*,[44] the Texas Court of Appeals considered a dispute between an operator and a non-operator in which the operator contended that the non-operator was constrained in how it voted on the approval of a proposed well by an implied duty of mutual cooperation and a duty of good faith and fair dealing. The Court of Appeals rejected this argument on the basis that there was no such implied duty under Texas law.

Canada

There are a number of Canadian cases that are relevant to the approval of AFEs for joint operations and the disputes they generate.

42 518 F Supp 285 (DC Colo 1981). In another case, *Parejo Ltd 1981 v Getty Oil Co*, which deals with a farmout and JOA, an AFE of $4.4 million was followed by a well that cost at least $18 million. Nos. CV F-85-150, CV F-85-217, 1991 WL 260436 (ED Cal 28 May 1991).

43 908 F.2d 13 (5th Cir 1990).

44 809 SW 2d 672 (Tex App – Corpus Christi-Edinburg 1991, writ denied).

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In *Powermax Energy Inc v Argonauts Group Ltd*,[45] the Alberta Court of Queen's Bench decided on a dispute arising out of a significant overspend on a project by the operator, Argonauts. The 1981 CAPL Operating Procedure applied. Argonauts had issued AFE 70040 which totalled $820,585. In the end, the project cost $2,404,381. However, no supplemental AFE was submitted to or approved by Powermax for the excessive expenditure. Argonauts seized Powermax's production to pay for its purported share of the cost overrun.

The judge referred to *Morrison Petroleum Ltd v Phoenix Canada Oil Co.*[46] in which the judge had, in turn, considered the judgments in *Renaissance Resources Ltd v Metalore* (both in the Alberta Court of Queen's Bench and Court of Appeal),[47] *Passburg Petroleums Ltd v San Antonio Exploration Ltd*[48] and *Novalta Resources Ltd v Ortynsky Exploration*[49] and concluded that the words used in the 1981 CAPL Operating Procedure created 'a contractual obligation on the operator to issue a supplemental AFE to the joint-operators for any cost overruns with respect to an operation which exceed the original AFE cost estimate by 10%'. The judge in *Morrison v Phoenix* also stated that *Passburg v San Antonio*[50] was clear authority that the operator was required to obtain prior approval for cost overruns beyond 10 per cent for joint operators to be liable for those costs. Therefore, the judge concluded that the cost overruns fell to Argonauts to meet.

UK

In *Cieco Exploration and Production Limited v Dana Petroleum Limited*,[51] the Commercial Court in London granted an interim injunction to prevent Dana, the operator, from drilling a well, BP8, pending trial. The operator argued that drilling the well was a licence obligation and that it was included in the field development plan, which the non-operator had agreed. The judge issued the interim injunction on the basis that no WP&B or AFE had been agreed by which the non-operator had consented to the drilling of the well.

Spirit Energy Resources Limited v Marathon Oil U.K. LLC[52] is a decision of the Court of Appeal upholding a judgment at first instance.[53] The dispute arose between the operator and the non-operators regarding whether the operator could charge certain costs to the joint account under JOAs based on the UK Oil & Gas model.

The operator had engaged employees to undertake approved joint operations over a long period of time. One of the benefits given to those employees was a defined benefits pension scheme. Over time it became necessary to pay deficit reduction charges (DRCs) in respect of those pensions. The operator argued that it was entitled to require the non-operators to pay their share of the DRCs. The non-operators countered this by arguing that, on a proper construction of the JOAs, they were not liable for the DRCs because they had not approved the payment of the DRCs and that the operator should bear them 100 per cent. The operator was successful in the High Court and the non-operators appealed.

45 2003 ABQB 71 (CanLII).

46 1998 ABQB 624 (CanLII). This decision also concerns the 1981 CAPL Operating Procedure.

47 1984 CanLII 1160 (AB QB) and 1985 ABCA 58 (CanLII).

48 1987 CanLII 3238 (ABQB).

49 1994 CanLII 9248 (AB QB). See also the account of this case in the subsection 'Canada' on 'Accounting Procedure' below.

50 The Passburg case is helpful in understanding the linkage of the operator's authority to conduct the field operation to the operation that had been described in the approval document. In other words, a proposing party (ie the operator) is at risk if it crosses the boundary and moves into a change in scope relative to what had been originally proposed and approved in the AFE, without seeking the further approval of the other parties.

51 Unreported (28 February 2017), Case No CL-2017-000111.

52 *Spirit Energy Resources Limited (formerly Centrica Resources Limited), Taqa Bratani Limited, Taqa Bratani LNS Limited v Marathon Oil UK LLC* [2019] EWCA Civ 11. For a more in depth analysis of this case and its implications, See: Reg Fowler, 'The Blank Cheque and the Cliff Edge' (2019) 12 (6) Journal of World Energy Law and Business 513. Also, for a review of the case itself: Reg Fowler, 'Spirit Energy v Marathon' (2019) 12 (4) Journal of World Energy Law and Business 348.

53 *Marathon Oil UK LLC v Centrica Resources Limited, Taqa Bratani Limited, Taqa Bratani LNS Limited* [2018] EWHC 322 (Comm).

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In dismissing the appeal, Lord Justice Green's judgment analysed the relevant provisions of the JOAs and Accounting Procedures and reached the conclusion that the normal and ordinary meaning of the JOAs, 'including by reference to its purpose, compels the conclusion that the Participants must bear the DRC'.[54]

Australia

In *Baraka Energy & Resources Ltd v Statoil Australia Theta BV*,[55] the Supreme Court of Western Australia determined an application for interlocutory injunction which arose from a dispute over the validity of a WP&B and, consequently, whether Baraka was in default for failing to contribute its share of costs. The injunction application was brought to stop the defendants from acting on the assertion of default pending the substantive determination of the dispute. By the time the application was made, as a result of undertakings given, the only issue was whether the defendants should be restrained from refusing access to Baraka to 'any data or information relating to any operations under the [joint operating agreements]'. The application was not successful because Baraka did not succeed in persuading the court that it was necessary applying the balance of convenience test.

International

ICC Case No. 1 involved (i) whether due process had been applied in the approval of certain drilling work, and (ii) whether cash calls made by the operator exceeded the approved budget. The first issue arose when the operator wanted to conduct additional drilling work not covered by the original approved WP&B during the course of a drilling campaign. The JOA contained provisions allowing for a shorter approval mechanism (24 hours rather than 15 days) in circumstances where a drilling rig was on location. The tribunal determined that the 24 hour approval mechanism had been correctly applied, that the revised budget had been approved under the JOA and that the costs under that revised budget were chargeable to the joint account.

The issue of whether the operator was entitled to charge the other JOA parties cash calls that exceeded an approved budget is addressed in the next subsection 'Accounting Procedures' and the additional operator's claim that the non-operator had failed to pay its cash calls and was thus in default is addressed in the subsection 'Default' below.

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Conclusion

The two questions that have arisen most frequently in the cases that dealt with the approval of joint operations concern the consequences of: (i) non-operators refusing to approve certain costs being incurred, and (ii) the operator overspending the approved WP&B or AFE. These disputes have often given rise to applications for interim injunctions in which one of the parties has sought to protect its position.

In addition, parties frequently submit arguments that rely on terms being implied into the JOA or being imposed as a result of the nature of the relationship (such as fiduciary duties) to support their position. However, no universally accepted position on the imposition of such duties arises from the cases. Instead, the court or tribunal has typically approached the issue based on the facts and the express terms of the particular JOA in dispute.

54 para 41 of the Court of Appeal judgment.

55 [2014] WASC 198.

56 See Tullow Oil Press Releases of 3 July and 18 July 2018 and Kosmos Energy Press Release of 18 July 2018. See also: *Seadrill Ghana Operations Limited v Tullow Ghana Limited*, [2018] EWHC 1640 (Comm).

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Accounting Procedure

Introduction

The parties to a JOA share the costs of the work undertaken in exploring for and ultimately producing hydrocarbons from the joint area. Given the operator's role in managing the work, the costs of the work are handled by the operator with the other participants contributing their share of those costs under the accounting mechanisms of the JOA. The detailed provisions dealing with the types of cost that can be charged to the joint account, how it is to be shared by the participants, and how and when each of the participants will make its contributions to those costs through cash calls or invoices are set out in the accounting procedure (AP), which is typically an exhibit to the JOA.

Disputes can arise on a number of issues relating to the AP. They can be closely connected to other areas of dispute such as the approval of WP&Bs or AFEs, by which the costs to be shared may have been approved by the joint venture partners as discussed above, and the default of a JOA party and its various remedies, which as described in the subsection 'Default' below, are the potential consequences of a participant not paying its share.

USA

In *Exxon Corporation v Crosby-Mississippi Resources, Ltd*,[57] the court had to determine a dispute arising out of unpaid expenses for the operation of a well. Under the JOA, Exxon was operator and Crosby a non-operator. The JOA was based on the 1982 AAPL Model Form 610 Operating Agreement and the COPAS AP. Exxon issued monthly Joint Operation Statements to recoup Crosby's share of the expenses and also issued Status of Account Statements to Crosby. Crosby did not pay for its share of the expenses and so Exxon commenced proceedings.

Exxon successfully argued that Crosby could not now challenge the validity of the charge because Crosby had failed to take written exception to the Statements that had been issued to it within the specified 24 month period provided by the Accounting Procedure. The Statements were, therefore, presumed correct. It also relied on Paragraph I.5 which provided that a non-operator had a right to audit the operator's accounts and records within a 24-month period following the end of each calendar year, provided that undertaking an audit would not exceed the period in which a non-operator could take written exception to any account.

In *Calpetco v Marshall Exploration Co*,[58] the decision of the US Court of Appeals, Fifth Circuit emphasized the weight that would be given to the presumption of correctness in relation to billing statements under the COPAS AP, even where there were allegations of fraudulent concealment.

Paint Rock Operating LLC v Chisholm Exploration, Inc[59] is a decision of the Court of Appeals of Texas. It concerned a dispute arising from a JOA, which used the 1982 AAPL Model Form 610 and included a COPAS AP. The dispute concerned costs claimed by the operator and whether the non-operator had effectively taken exception to sums charged under the AP. A key issue in the dispute was whether the non-operator's exception had to take a particular form and the court found that it did not.

Windsor Energy Group LLC and Windsor Beaver Creek LLC v Noble Energy Inc[60] is a decision of the Wyoming Supreme Court in which the equitable doctrine of laches was found to apply to a claim for expenses contained in JIBs.

57 775 F Supp 969 (SD Miss 1991).
58 989 F 2d 1408.
59 339 SW 3d 771 (Tex App – Eastland 2011, no pet.).
60 2014 WY 96 (2014).

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Canada

In *Novalta Resources Ltd v Ortynsky Exploration Ltd*,[61] the Alberta Court of Queen's Bench dealt with a dispute that arose under a JOA that was based on the 1981 CAPL Operating Procedure and the 1983 Accounting Procedure of the Petroleum Accountant Society of Western Canada (1983 PASWC). A number of issues arose including where the burden of proof lay in relation to challenges by non-operators of costs claimed by operators. In this case, the court concluded that the burden lay on the non-operator to prove that the operator had not incurred the cost consistently with its obligations under the JOA.

Lateral Resources Ltd v Karon Resources Inc[62] is also a decision of the Alberta Court of Queen's Bench from 1994 which addresses disputes arising under the 1981 CAPL Operating Procedure and the 1983 PASWC, which were incorporated into a Participation Agreement. The court determined how a 'payout account' provided for by the Participation Agreement should be calculated.

UK

The English Court of Appeal's decision in *Spirit Energy Resources Limited v Marathon Oil U.K. LLC*[63] is described in the subsection 'UK' on Approval of WP&Bs above. It arose from the non-operators' refusal to pay their participating interest share of pension deficits or DRCs for employees engaged by the operator on joint operations. In addition to the provisions of the main body of the JOA, the court also addressed the AP and it was assisted in reaching its conclusions in particular by the obligation for the costs to be shared equitably and for all of the costs incurred in conducting Joint Operations to be charged to the Joint Account.

In *Apache North Sea Limited v Euroil Exploration Limited and Edison SpA*[64] the English High Court considered the construction of the terms of a farmout agreement under which Apache transferred a minority interest in two licence blocks in the UK Continental Shelf. The issue in dispute was whether the terms of the farmout agreement limited the share of costs that Euroil was required to pay in relation to a well. In determining the issue, it was necessary for the court to consider how the terms of the farmout agreement and JOA worked together and, in particular, whether the Accounting Procedure in the JOA applied to costs addressed in the farmout agreement.

Norway

ND-1991-429 was an *ad hoc* arbitration that dealt with a claim around the reimbursement of prior exploration costs incurred under a Norwegian production license after the NOC exercised its right to increase its interest in a JOA. Pursuant to the JOA, Statoil was entitled to increase its ownership share in the production license in the event the field showed to be commercially viable. Upon Statoil's exercise of such right, Esso claimed reimbursement from Statoil for exploration costs related to the part of their share that were transferred to Statoil and a dispute arose over whether those costs could be claimed and, if so, the value of the costs. The tribunal considered the relevant terms of the JOA in reaching a conclusion in favour of Statoil.

International

ICC Case No. 2 dealt with whether an operator could charge to the joint account profit-sharing expenses (PSEs). The arbitrator decided that the operator was not entitled to charge the PSEs to the joint account for a number of reasons, including that the JOA did not provide an express foundation for charging the PSEs.

61 1994 CanL II 9248 (AB QB). Similar to the Powermax case, the requirement for a supplementary AFE in this case was unique to the 1981 CAPL Operating Procedure. The provision for a supplementary AFE was subsequently revised to provide that it was for informational purposes only.

62 1984 CanL II 9017 (AB QB).

63 [2019] EWCA Civ 11.

64 [2019] EWHC 3241 (Comm).

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The tribunal in ICC Case No. 1 (described in the subsection 'International' above) considered whether the operator was entitled to charge the JOA parties cash calls that exceeded the budget for the extra well approved during the drilling campaign. The majority of the tribunal determined that the burden fell on the operator to prove that the sums claimed represented the actual costs of joint operations. Since the operator failed to discharge that burden, it could not claim for sums in excess of the approved WP&B.

The dissenting arbitrator's view was that the conclusion reached by the majority was not consistent with a number of provisions of the JOA because the effect was to impose a draconian 100 per cent liability on the operator for any cost overrun. He proposed that an award should be made on a provisional basis and that the non-operator should be given the opportunity to audit the costs claimed. That did not happen. The tribunal concluded that the cash calls were validly made pursuant to the JOA and that the non-operator was liable to the operator for its participating interest share of such portions of the cash calls that were part of the approved budget, but not the portions in excess of the approved budget.[65]

Conclusion

The reviewed cases show the variety of issues that have arisen in relation to the application of APs. The most frequent issues that arise from accounting procedure disputes deal with the consequences of expenses being incurred that exceed the approved WP&B or AFE and where the burden of proof lies in relation to expenses charged by the operator to the non-operators.

Where the AP imposes time limits, disputes often arise both in challenges to the validity of charges included in billings and the requirement on the operator to issue bills within a specified period. Ironically, the imposition of time limits on audits, which are intended to provide certainty to the parties and to ensure the efficient and early resolution of any differences, appears to have contributed to the increased complexity of accounting procedure disputes.

Default

Introduction

The parties' obligation to share in the costs of work agreed upon and undertaken on the joint area is considered fundamental in a JOA. It is important for the efficient implementation of the work that the required funds from the parties are available at all times. Consequently, JOAs contain powerful mechanisms to ensure that cash contributions are made by participants when requested. The failure of a party to comply with this payment request on time is considered a default under the agreement, which may lead to the implementation of a series of remedies. The purpose of the JOA default provision is to provide certainty and stability for the financial contributions that are required throughout the life of a petroleum project.

The default procedure provides for a notice to be given to a defaulting party and for sanctions to be applied if the defaulting party does not cure the default within the time period allowed. The initial (and often immediate) sanctions include being denied access to joint operation information, being deprived of its voting rights, and losing the right to receive its share of the hydrocarbons produced or the revenue obtained from that production.

Depending on the legal instruments and remedies available in the jurisdiction of operations, there are a number of further remedies that non-defaulting parties may pursue against defaulting parties. These include: (i) a lien or security against the defaulting party's interest to allow the taking of its share of production, (ii) a buyout or sale of the defaulting party's interest, (iii) a shrinking or withering interest based on the amount of

65 It is interesting that the tribunal could not reach a unanimous decision on the issue of how to resolve a situation where costs charged by an operator to the other parties either exceed the approved WP&B or have not been approved at all. The contrasting approaches to the issue by the majority and the dissenting arbitrator reflect the different positions often adopted by partners in JOAs confronted by similar circumstances, and which have been grappled with in different ways by the US, Canadian and English cases cited in this section of the report.

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the default against the value of the defaulting party's interest, or (iv) a forfeiture of the defaulting party's interest in which it would lose its entire interest in the O&G concession for no compensation. JOAs typically provide a defaulting party a reasonable period of time to correct its default before these other remedies can be triggered and enforced.

Since the ongoing costs of operations must be met regardless of one party's unwillingness to pay its share, non-defaulting parties are required under the JOA to bear the defaulting party's share of costs on a pro-rata basis. Any failure by a non-defaulting party to meet the additional payment obligations, which have been generated by the notice of default, will constitute a separate default by that party.

Historically, the primary remedy for the continuing default of a party to not pay its share of costs in international JOAs has been the forfeiture of its entire interest in the JOA and granting instrument. This is reflected in the fact that the first version of the AIPN Model JOA in 1990 only provided for a defaulting party's forfeiture. This ultimate remedy of forfeiture has been considered a harsh, but necessary, remedy in the international industry to ensure the risk allocation provisions of the JOA work, while meeting the consortium's joint and several obligations to the government under the granting instrument. There have, however, been concerns about the validity of the forfeiture remedy, including whether a court or arbitral tribunal might consider it to be a penalty and potentially unenforceable by the non-defaulting parties against the defaulting party.

In response to such concerns, AIPN drafting committees included additional remedies in the default clause in the 1995, 2002 and 2012 versions of the AIPN Model JOA. These additional remedies were meant to reduce the risk of an adverse intervention by the courts or an arbitral tribunal by moderating or invalidating the potential impact of the forfeiture remedy.

The 1995 AIPN Model JOA added a security interest provision as a drafting alternative. The 2002 AIPN Model JOA added a buyout provision as a drafting alternative and changed the security interest provision to a drafting option. The 2012 version added a withering interest provision. While providing that additional alternative, the 2012 version kept all four choices (forfeiture, buyout, withering interest and security interest) in the default clause so that the non-defaulting parties could choose any one or all of them at the time of default. There are challenges with all of these alternative remedies.

The security interest or mortgage provision comes from the US O&G industry and reflects the usage of the land title system in that country to register mineral rights. It allows non-defaulting parties to register a mortgage against the defaulting party's interest and foreclose that mortgage at any time after the default period. The result of non-defaulting parties foreclosing such a mortgage is that they would acquire the defaulting party's interest in the concession. However, that is not the common practice in the international O&G industry since most countries do not have a land title system that allows registration of such a secured interest and, in any event, governments would not allow registered liens to restrict its ability to issue and administer its granting instruments. It is therefore difficult to register mortgages on granting instruments and foreclose on them in most countries in the world.

The biggest challenge in a buyout provision is to agree on a method to value the defaulting party's interest which is acceptable to all the parties. If the purchase price is not agreed upon by the parties, the formula adopted in the 2002 and 2012 AIPN Model JOAs is based on a fair market value of the defaulting interest, less the amount in default, less an agreed percentage of the fair market value. This remedy can be quite contentious amongst the parties.

The withering interest provision attempts to reduce the value of the assets forfeited to match the amount of the defaults (in other words a proportional rather than a total forfeiture). A withering interest clause is difficult to understand, complex to apply and in practice, does not work well.

Even though there have been concerns on whether a forfeiture provision was enforceable in some jurisdictions, the total forfeiture of the defaulting party's interest without compensation has historically been the primary international industry practice, and is still the case today. All four versions of the AIPN Model JOA

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contain a forfeiture provision, which has remained essentially the same throughout the redrafted versions. At no time was the forfeiture remedy replaced or eliminated in the AIPN Model JOA.

The authors are not aware of any cases that have tested the security interest, the buyout or the withering interest provisions of international JOAs based on the AIPN Model JOA. There are, however, published and unpublished international arbitral awards that have considered and decided that the forfeiture provisions in the disputed JOA, some of which were based on the AIPN Model JOA, were valid and enforceable, both when the governing law of the agreement was from a common law jurisdiction and from a civil law jurisdiction. There are also other cases, as illustrated by some of the cases cited in this report, that have determined that the forfeiture provision was invalid and replaced it with another remedy.

In order to ensure the continuity of operations, JOAs usually prohibit a party from offsetting any amounts that might be due to it from any of the other parties. This restriction typically also applies to claims that a defaulting party might have against another party, including the operator. This no offset provision is based on the frequently cited industry principle that a party must 'pay now, argue later'. As a result, JOAs usually contain a ' no right of set-off' clause, which is reflected in industry model JOAs. Despite these restrictions, defaulting parties often use such counterclaims against an operator to justify their non-payment of cash calls. As described in the subsection USA, courts have typically enforced these '*no* right of set-off' clauses.

Since the consequences of the default procedure can be potentially severe to a defaulting party, disputes arise when a defaulting party takes steps to avoid losing its participating interest (or production revenue) and being deprived of its other rights. The grounds on which these disputes arise frequently include challenges to whether the operator was entitled to seek the contribution requested and whether the correct procedures were followed in issuing the default notice. Relief is also sought by the defaulting party on legal grounds by seeking to argue that the default procedure is a penalty or disproportionately harsh and so is unenforceable under the governing law of the JOA or, where the JOA is governed by the law of certain common law countries, to seek the equitable remedy of relief from forfeiture.

JOAs used for onshore projects in North America often provide for liens, security interests or both over assets owned by each party, including its share of production, to secure that party's performance of its obligations. Each of the AAPL Model Form 610, the CAPL and the RMMLF model forms include such a lien. In some cases, the lien is granted only to the operator, given that it will frequently be the party that incurs costs or assumes obligations in connection with the operation of the project. However, in some instances, the model forms provide for a lien or security interest that can be exercised by any non-defaulting party. This is a feature of JOAs that do not permit non-defaulting parties to require a defaulting party to forfeit its participating interest share.

USA

In *MBank Abilene, N.A. v Westwood Energy, Inc*,[66] the Texas Court of Appeals considered the priority to be given to an operator's lien. The Court of Appeals concluded that, where a third party had constructive notice of the operator's lien under the JOA, it would take priority over a subsequent lien claimed by that third party.

In re Wilson[67] is a decision of the US Bankruptcy Court concerning the impact on the operator's lien of a Chapter 11 filing. The Court concluded that a line was required to be drawn on the date that the Chapter 11 petition was filed. The effect of the Chapter 11 proceedings was that post-petition operating expenses could be charged against post-petition production only. For the post-petition production, TXO was a 'Debtor-in-Possession' in the Chapter 11 proceedings. For the pre-petition production that it held, it was a pre-bankruptcy debtor. In addition, there was a difference between the relationship between parties as working interest owners and where a party held a royalty interest. Royalty was required to be paid before any distribution paid to working interest owners.

66 723 S.W.2d 246 (Tex App – Eastland 1986, no writ).

67 In *re William B Wilson v TXO Production Corp*, 69 BR 960 (1987).

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See also *Caddo v O'Brien* and *Reserve Oil v Dixon* described in previous sections above regarding the impact of operator liens in JOAs.

Canada

Similar to other model JOAs, prior issuance of a default notice is required before an operator can avail itself of most of the remedies in the CAPL model Operating Procedure. The CAPL Operating Procedure provides for an operator's lien, which is a floating charge that applies as of the date that the Operating Procedure is in place for the applicable interest, rather than the time that the applicable expenditures were made. Given that the operator is typically an unsecured creditor in most Canadian jurisdictions, this construction is designed to provide the operator with the opportunity to position itself optimally relative to other unsecured creditors.

Canadian JOAs take a slightly different approach in dealing with a defaulting party by using the remedy of 'seizure and sale'. The seizure and sale remedy was first included in the 1971 CAPL Operating Procedure and has been found in every version since, in particular paragraph 505(b)(vi) of that model JOA. It is considered an exceptional remedy in the Canadian industry that would only be used in extreme cases. This remedy provides the operator with the authority to seize the defaulting party's interest in the joint property and to dispose of it by public tender or by private sale on whatever terms it will arrange after having first given notice to the defaulting party of the time and place of that sale.

The CAPL Operating Procedure also includes the concept of a 'delinquent party'. It is meant for the very unusual situation in which a party ceases to exist or cannot be found. In practice, a party that is a delinquent party will probably also be a defaulting party. Delinquent parties will typically be a small subset of defaulting parties. The principle of this article is to mitigate the potential disruption on the management of the joint property in a situation in which a party disappears or ceases to communicate.

Problems have arisen in the Canadian industry when bankrupt or insolvent parties have defaulted in the payment of their obligations under the JOA. There are a number of Canadian cases which arose from attempts to remove an operator where the operator was insolvent or subject to insolvency proceedings. Those cases are described in the subsection 'Canada' below on Removal of Operator.

In *Novalta Resources Ltd v Ortynsky Exploration Ltd*,[68] referred to in the subsection 'Canada' above, the court was required to address an argument relating to the remedy of seizure and sale. The dispute concerned sums invoiced by Novalta to Ortynsky for Ortynsky's share of expenditure that arose under a JOA that was based on the 1981 CAPL Operating Procedure. Novalta purported to exercise an operator's lien in respect of the sums for which Ortynsky was indebted to it. The court found that, under the remedy of seizure and sale, Novalta was entitled to sell Ortynsky's interests in the land. The court held that this right was subject to Part 37 of the Alberta Rules of Court and it governed the procedure for sale. Consequently, the sale could only take place 60 days after judgment was entered if Ortynsky had failed to pay any sum, had to be by tender and the tenders submitted to the court for approval.

Following this case, modifications were made to the procedure for seizure and sale in the 2007 CAPL Operating Procedure.

Alberta Treasury Branches v COGI Limited Partnership[69] is a decision of the Court of Queen's Bench of Alberta. The dispute arose as a result of the insolvency of COGI (the operator). After Firenze replaced COGI as operator (following its insolvency), it issued abandonment notices in relation to a number of wells and sought abandonment costs from the Receiver of COGI. The Receiver refused to pay so Firenze issued a ' Notice to Revoke Take-in-Kind' under Articles 1901 and 1902 of the 1990 CAPL Operating Procedure.

The court had to consider whether Firenze was entitled: (i) to a contractual or equitable set off or both; and (ii) to issue the Abandonment Notice and the Notice to Revoke Take-in-Kind. On the first issue, the court held that Firenze was only entitled to set off sums that it had incurred as operator once it had become

68 1994 CanL II 9248 (AB QB).

69 2018 ABQB 356 (CanLII).

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operator in September 2016. On the second issue, the court concluded that the Abandonment Notice and the Notice to Revoke Take-in-Kind were subject to the stay of proceedings that arose under the applicable law when the Receiver was appointed. Consequently, they were invalid.

Australia

Default and forfeiture provisions have been considered by the Supreme Court of Western Australia, albeit obliquely.

Baraka Energy & Resources Ltd v Statoil Australia Theta BV[70] was an unsuccessful application for an interlocutory injunction to restrain the operator under two JOAs, which appear to be based on the AIPN Model JOA, from acting upon its assertions of default. The primary dispute between the parties was whether or not Baraka Energy had elected to contribute to the relevant WP&Bs or not and, therefore, whether it was in default as a result of non-payment of cash calls. The injunction application concerned whether the operator should be restrained from acting on the alleged default.

International

In published ICC Case No. 11663,[71] there were a number of related agreements including a Shared Management Agreement (SMA), which was essentially a JOA for the paying parties. The operator consistently failed to pay its share of cash calls. The tribunal found that it was a fundamental principle of the SMA that each party must pay its share of cost and expenses under such an agreement. It also found that the default and forfeiture provisions of the SMA were consistent with standard practice in the oil and gas industry, as demonstrated by the 1995 AIPN Model JOA.

The Tribunal concluded that the SMA provided that if a defaulting party remained in default for more than 60 days after receipt of the default notice it shall upon request of a non-defaulting party forfeit and assign its Participating Interest to that party. It also provided that, notwithstanding the forfeiture and assignment, the defaulting party remained liable for its proportionate share of all costs, expenses and penalties and remained obliged to perform certain defined acts. Finally, the tribunal declined to grant the equitable remedy of relief from forfeiture.

ICC Case No. 1 (described in the subsection 'International' above) dealt with a demand of payment of unpaid cash calls under the default provisions of a JOA. The majority of the tribunal rejected the operator's claim because these two cash calls were outside an approved budget, and found that any budget put forth by the operator at the time of drilling the remaining well was not subjected to the appropriate procedures required by the JOA. The default claim therefore disappeared.

ICC Case No. 7 concerned a dispute under a JOA based upon the AIPN Model JOA. The dispute related to the non-operator's failure to pay a cash call when it was due and whether it was in default, which would result in the operator being entitled to claim the forfeiture of the non-operator's participating interest. The tribunal found the following:

i. A bedrock principle of the JOA was that the operator shall neither gain nor suffer a loss as a result of being the operator in its conduct of joint operations.
ii. A fundamental purpose of the JOA was that each party was required to pay all amounts due as and when required.
iii. The JOA imposed a strict regime of sanctions to ensure timely payment of operating expenses incurred by the operator.

70 (2014) 100 ASCR 340.

71 ICC Case No 11663 of 2003, Final Award, in ICCA Yearbook on Commercial Arbitration 2007 – Volume XXXII.

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iv. All payments made to the operator under the JOA were without prejudice and that the non-operator was protected by detailed audit and refund procedures.
v. The non-operator had an unconditional obligation to timely pay all expenses incurred by the operator with full reservation of its rights of challenge. '*Pay now, complain later*' accurately described this procedure.

After a non-operating party failed to pay its cash calls in published ICC Case No. 6286,[72] the operator issued a default notice and informed it that its participating interest had been terminated. The Tribunal concluded that the default provisions were valid. However, the Tribunal then found that the forfeiture provision 'leads to consequences which are out of proportion with the objective sought; the excluded member is deprived of all the rights that were his without this appearing to be justified by the need to safeguard the interests of the other members'. The Tribunal therefore concluded that the forfeiture provision of the Operating Agreement was null and void. It went on to replace the clause with one which, in its opinion, 'best corresponds to the hypothetical will of the parties'.

Pan Petroleum AJE Limited v Yinka Folawiyo Petroleum Co Ltd and others[73] is a decision of the English High Court in support of an arbitration. It concerned whether the operator under a JOA was in contempt of court by virtue of holding an operating committee meeting in breach of the terms of an injunction. The injunction was granted on an interim basis following a without notice application on the condition that Pan Petroleum commence arbitration, pay the disputed cash call on a without prejudice basis and give a cross-undertaking in damages. The operator then called an operating committee meeting giving Pan Petroleum three minutes informal notice. Pan Petroleum claimed that the decisions made at the meeting were invalid on the basis that the operator had breached the terms of the injunction and so were in contempt of court. Both the High Court and the Court of Appeal decided in its favour.

Conclusion

The cases reviewed illustrate how parties rely on the default mechanisms that are available to them in their JOAs when one of the parties fails to pay its share of the joint costs. Given the impact of the default mechanism on the defaulting party, defaulting parties often seek to challenge them both in relation to the enforceability of the provisions under the governing law of the JOA and also in relation to whether they have been properly triggered. In the cases reviewed, attempts to challenge the enforceability of the provisions have not been successful under most governing laws, although it will of course be an issue that has to be considered on a case by case basis with a number of factors in mind, including the terms of the contract, the factual matrix and industry practice.

As noted at the start of this section, modern model JOAs often provide a number of alternate remedies for parties to select from. The remedy of forfeiture without compensation is unique to international JOAs. This issue does not arise in US and Canadian cases because it is not a remedy provided for in JOAs from those jurisdictions (or in their model JOAs), which is the case because non-defaulting parties in those jurisdictions have other effective remedies that allow them to get paid.

The effectiveness of the forfeiture remedy in international JOAs has been mixed, which is why the AIPN Model JOA now provides several alternate remedies. There are presently no published arbitration cases that have tested these alternate remedies, so their effectiveness is still unknown.

72 ICC Case No 6286, 28 August 1991, Partial Award, in Yearbook Commercial Arbitration 1994 – Volume XIX.
73 [2017] EWCA Civ 1525.

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Scope of Operator's Duties/Authority

Introduction

As the operator conducts the work on the parties' behalf, JOAs define the scope of the operator's duties and its authority to act and assume liabilities for them. North American JOAs provide the operator a great deal of discretion and flexibility to conduct the approved joint operations once an AFE has been approved. In contrast, international JOAs are designed to give more control and oversight to the operating committee over the steps taken by the operator, using the approval mechanisms of WP&Bs, AFEs (when used as an approval mechanism) and contract awarding procedures.

Disputes can arise in relation to the precise scope of what the operator is able to do without the approval of the JOA parties or operating committee and on what they have, in fact, approved. In some circumstances, disputes arise where there is a disagreement among the parties so that the requisite approval of the JOA parties or the operating committee cannot be obtained for certain work to be done and the operator or other parties are of the view that it is imperative that such work is undertaken. In these cases, the questions concern whether the operator has the authority to act notwithstanding the lack of formal approval.

Unsurprisingly, this is the issue that appeared most frequently in the cases reviewed. It is often a facet of cases that also address other issues. For the jurisdictions in which there were a large number of cases that involved this issue, the descriptions below focus on the most significant cases and, in particular, those which give an insight into how courts and tribunals have sought to define the scope of the operator's duties and authority. This section should be read, in particular, with the subsection 'Limitation of Liabilities and Indemnities' because there is significant cross-over with the issues discussed in the cases described in that section.

USA

US courts often find in favour of operators having the necessary approvals and authority, recognizing the difficulty of decision-making and implementation of petroleum operations in remote places.

Frankfort Oil Company v W.F. Snakard is a case from 1960 determined by the US Court of Appeals for the Tenth Circuit. One of the issues considered concerned Snakard's allegation that Frankfort (as operator) breached its contractual obligations by not drilling on the leases before they were terminated. Snakard argued that, having given notice that it intended to drill wells, Frankfort was obliged to drill them. Its argument was based on a provision of the operating agreement that stated:

> Operations for the drilling of any well under the provisions of this paragraph must be commenced within ninety (90) days after the initial notice is given, and not thereafter.

Snakard argued that the use of the word 'must' obliged the notifying party to drill the well whether or not the other party decided to participate. The court concluded that this was not the case.

U.S. Truck Lines v Texaco Inc[74] is a 1960 decision of the Texas Court of Civil Appeals. It concerns the authority of an operator to create liabilities to third parties binding on a non-operator. A third party, which could not recover a sum from the operator, sought to recover it from the non-operator. The Court held that the JOA did not authorize the operator to create any liability to third parties for the non-operator and so the third party's claim failed.

In *Reserve Oil, Inc v Dixon*[75] the US Court of Appeals for the Tenth Circuit considered issues arising in relation to two disputes against the same operator, Pengo, in relation to two different Oklahoma oil and gas wells. In particular, it considered the scope of the operator's rights to control the non-operators' share of

74 337 S.W.2d 497 (Tex App – Eastland 1960, writ ref'd).

75 711 F.2d 951 (10th Cir 1983).

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production. It found that the JOA created a 'trustee type relationship imposing a duty of fair dealing between the operator and the non-operator owners in the matter of distribution of shares among the owners'. Consequently, Pengo was not entitled to apply the proceeds of production in the way that it had.

Texas Oil & Gas Corporation v Hawkins Oil & Gas, Inc[76] is a decision of the Supreme Court of Arkansas on the nature of the fiduciary duties owed by an operator to non-operators. It concerned the acquisition of leases by Texas, which was the operator under a JOA between Hawkins and Texas. Texas had the opportunity to acquire the leases because of information provided to it by Hawkins in Texas' capacity as operator. The Arkansas Supreme Court held that there was a fiduciary relationship between the parties in this regard and that Texas owed a duty of fair dealing to Hawkins.

In *Lancaster v Petroleum Corp of Delaware*,[77] the Louisiana Court of Appeal considered an operator's resignation on less than the requisite period of notice and its threat to plug and abandon a well without the consent of the non-operators. Following a blowout, the operator gave notice that it was immediately resigning as operator (rather than on the requisite 90 days' notice) and that it intended to plug and abandon unless another party took over operation of the well. The non-operators found another operator that was prepared to take over as operator but only on the condition that one of the non-operators agree to turn over a substantial proportion of its interest. The Court found that the operator was not entitled to resign with immediate effect or to threaten to plug and abandon without the consent of the non-operators. The non-operator, which had been forced to give up part of its interest to secure a replacement operator, was entitled to damages.

Huggs Inc v LPC Energy Inc[78] is a decision of the US Court of Appeals for the Fifth Circuit that concerned the loss of leases by an operator. For each of the leases lost, the Court considered the conduct of the operator, whether it met the standards imposed by the JOA and relevant letter agreement and whether the operator was entitled to the protection of the exculpatory clause. It also considered the application of the terms of the letter agreement and whether the losses suffered were to be borne by all parties or just the operator.

Norman v Apache Corp[79] is a judgment of the US Court of Appeals for the Fifth Circuit. It concerns claims that Apache was in breach of contract and breach of fiduciary duty in relation to the loss of certain leases.

In July 1990, Apache decided to cease production from a well. In September 1990, Apache filed a notice of intention to plug and abandon the well with the Texas Railroad Commission. However, it was not until late December 1990 that Apache sent a letter to the other owners of the well stating that the well had become uneconomical to produce and so recommended that it be plugged and abandoned. The owners responded by requesting that Apache continue to operate the well but then found out that Apache had already ceased operations on the well and the lease had been lost.

The owners contending that Apache had breached its contractual and fiduciary duties under the JOA to operate the well, to give them advance notice of the decision to abandon the well, to take reasonable actions to prevent the lapse of the leases, to notify them of the ceasing of production and to refrain from falsely representing that it continued to operate the well after July 1990. The Court of Appeals found that: (i) Texas law did not of itself imply a fiduciary duty on the operator; (ii) Apache had abandoned the well, not shut it in and the JOA did not require advance notice of abandonment to be given; and (iii) the obligation to work in a good and workmanlike manner applied not just to the affirmative obligations in the JOA and that Apache's failure to take steps to prevent the loss of the leases could amount to a breach of that standard.

In *ENI v Samson Inv. Co*,[80] the Supreme Court of Oklahoma considered whether Samson, the unit operator under an agreement based on the AAPL Model Form 610, committed fraud against ENI, a working interest owner, thereby breaching a fiduciary duty to notify ENI that the government had solicited bids for

76 668 S.W.2d 16 (Ark 1984).
77 491 So 2d 768 (La Ct App 1986).
78 889 F.2d 649 (5th Cir 1989).
79 19 F.3d 1017 (5th Cir 1994).
80 977 P.2d 1086 (1999).

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the lease of a future estate mineral interest. The court concluded that Samson did not commit a fraud and did not owe a fiduciary duty to ENI in this regard, although it accepted that the operator owed fiduciary duties to non-operators but that they were not without boundaries.

In *Basic Energy Service v D-S-B Properties*,[81] the Texas Court of Appeals had to decide whether an operator, which no longer owned a working interest in a well, had standing and capacity to pursue proceedings against a contractor that was hired to repair a well. The Court of Appeals concluded that DSB, as operator, had standing to bring proceedings on behalf of the working interest owner.

Canada

An important early Canadian case on this issue is *Erehwon Exploration Limited v Northstar Energy Corporation*,[82] which is also referred to in the subsection 'Canada' below on 'Limitation of Liabilities and Indemnities'. With regards to the scope of an operator's authority, the Court recognized that the non-operator in a JOA using the CAPL Operating Procedure was vulnerable to the operator because the operator held discretion or power. Consequently, the operator was acting as a fiduciary in relation to the non-operator, although it was important that the fiduciary obligations owed by the operator to the non-operator had to be understood in the context of the contact that the parties had signed.

Prairie Pacific Energy Corp v Scurry-Rainbow Oil Ltd[83] is a decision of the Alberta Court of Queen's Bench in relation to a dispute arising from unauthorized well perforations during the recompletion of a well, which came shortly after *Erehwon v Northstar*.

Scurry was the operator. It did not inform Prairie of the unauthorized perforations until after they had been made. In fact, 'through various ruses' it sought to obtain the consent of Prairie after the fact. However, Prairie did not give approval and made clear that it held Scurry responsible for any loss of deliverability of gas as a result. Only water was produced from the unauthorized perforations and eventually the well was abandoned.

The court addressed two issues: (i) whether Scurry owed a fiduciary duty as operator to Prairie and, if so, what was the scope of that duty, and (ii) whether the unauthorized perforations were in breach of a duty and caused or contributed to the flooding of the well?

The judge stated that, based on the terms of the JOA, 'speaking generally, . . . a court should be loath to extend the fiduciary relationship in the area of drilling operations decisions'. However, on the facts, Scurry changed the nature of the project fundamentally from one of recompletion to exploration and the recompletion became a secondary object. This materially altered the risks. Scurry was, therefore, in breach of its contractual and fiduciary duty to keep Prairie informed. In addition, Scurry was obliged to adhere to instructions and it did not do so because it incurred unauthorized expenditure. Furthermore, it proceeded with the project without regard for the interests of Prairie, in particular demonstrated by the attempts to avoid having to inform Prairie of what had been done.

In *Sorrel 1985 Limited Partnership v Sorrel Resources Ltd*,[84] the Court of Appeal of Alberta considered the treatment of funds provided by a participant to the operator in response to cash calls in relation to the drilling of a well before the anticipated expenditure to which the cash calls related had been made. The appeal related to a decision at first instance that the president and treasurer of the operator were not liable for a breach of trust by the operator.

The funds provided in response to cash calls were placed in an account that was used to pay the operator's own expenses, rather than just the costs of the well to be drilled. The operator then became insolvent.

81 367 S.W.3d 254 (Tex App — Tyler 2011, no pet.).
82 1993 CanLII 7238 (AB QB).
83 1994 CanL II 9132 (AB QB).
84 2000 ABCA 256 (CanLII).

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In *Bank of Nova Scotia v Société Générale (Canada)*,[85] the court decided that a trust relationship existed between the non-operators and Sorrel, the operator. In that case, the court reviewed the terms of CAPL and concluded that 'the agreement reflects confidence of the non-operators in Sorrel as operator and expressly provides that Sorrel keep them informed, account to them and in general act for their benefit'. The court found that the commingling of Sorrel's funds and the money received from the non-operators did not negate the finding of a trust but that Sorrel could not use the funds for its own purposes.

The Court of Appeal overturned the decision at first instance which had found that commingling of funds following a cash call was accepted industry practice and so the actions taken had not been fraudulent, dishonest or morally reprehensible. It found that, even if there were an accepted industry practice of commingling funds, there was not an accepted practice of using funds in breach of trust. The president and treasurer were reckless and wilfully blind to the risks to the cash called funds and therefore were liable for the losses.

In *Adeco Exploration Company Ltd v Hunt Oil Company of Canada, Inc*[86] the Court of Appeal of Alberta, considered whether Hunt was liable to the non-operators for failing to continue oil and gas leases, which were held in joint interest. The trial judge found that Hunt breached its obligation under section 309 of the CAPL Operating Procedure to maintain title documents. He also found that Hunt owed a fiduciary duty to the non-operators, which it had breached despite the fact that it had not gained but rather had suffered a loss. He concluded that Hunt's failure to renew or continue the leases was negligent. The Court of Appeal considered the exclusions and limitations of liability in the 1990 CAPL Operating Procedure.[87] It concluded that, under Clause 401, Hunt would need to have been grossly negligent to be liable and that it had been. However, it rejected the trial judge's finding that there had been a breach of fiduciary duty on the basis that the failure had resulted from human error.

Trident Exploration Corp (Re)[88] is a decision of the Alberta Court of Queen's Bench. Trident was appointed the operator under a pooling agreement that incorporated the 1990 CAPL Operating Procedure. The dispute concerned the reaction to a Gas Offset Notice received from Alberta Energy and, in particular, whether Trident was negligent in its role as operator in relation to it.

After receipt of the Gas Offset Notice, Trident sent a letter that the court decided the other partners could reasonably have concluded indicated that it would take care of responding to the offset notice. However, in response to this, one of the partners (Bearspaw) informed Trident that it did not want Trident to respond on its behalf and that each partner should look after its own lease. After this, Trident failed to inform the other partners that there had been a change of plan. The result was that one of the partners (Mutiny) lost its lease and the lease was acquired by Bearspaw.

The court found that Trident's failure to inform the other partners of the need for them to respond to the notice was negligent. Applying *Adeco Exploration v Hunt Oil*,[89] the court held that it was grossly negligent.

UK

In *Venture North Sea Gas Limited v Nuon Exploration & Production UK Limited*,[90] the English High Court had to consider whether two JOAs were substantially in the form of the UKOOA model. The focus of the dispute turned on the authority granted to the operator in the JOAs and the model in relation to dealing with the government and the levels of approval required for the operator to carry out work, which highlights the importance placed on those provisions by parties to JOAs.

85 1988 CanLII 166 (AB CA). It should be noted that the provision in the CAPL Operating Procedure that was disputed in the Bank of Nova Scotia case, Clause 507, was modified significantly afterwards in the 1990 CAPL Operating Procedure. It was updated further in the 2007 version.

86 2008 ABCA 214 (CanLII).

87 It should be noted that the liability and indemnification provisions were materially modified in the 2007 CAPL Operating Procedure.

88 2012 ABQB 242 (CanLII).

89 2008 ABCA 214 (CanLII).

90 [2010] EWHC 204 (Comm)

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Cieco Exploration and Production Limited v Dana Petroleum Limited[91] is described in the subsection 'UK' above on 'Approval of Joint Operations'. It is also relevant to a consideration of the Scope of the Operator's Duties/Authority. In that case, the operator indicated that it intended to drill a well, which had been included in a field development plan but for which there was no approved WP&B or AFE. The non-operator obtained an interim injunction to prevent it from drilling the well.

Australia

Apache Oil Australia PTY Ltd v Santos Offshore PTY Ltd[92] is a decision of the Supreme Court of Western Australia in relation to a dispute between Apache, as operator, and Santos, as a non-operating participant, under the Spar JOA. Apache, through three different companies, had a 55 per cent participating interest and Santos the remaining 45 per cent. The dispute related to whether Apache had committed a material breach of the JOA by taking steps in the development of a project without prior approval from Santos that would entitle Santos to remove it as operator. The court found that Apache had committed material breaches, which it had failed to cure, and Santos was entitled to remove it as operator.

The decision at first instance was appealed and in *Apache Oil Australia PTY Ltd v Santos Offshore PTY Ltd*,[93] the Western Australian Court of Appeal reversed the trial court's decision. Apache successfully argued that the JOA did not prohibit from taking steps to develop the project because it was entitled to include work already undertaken in a WP&B and for that to be approved. The Court of Appeal found that Santos had only been denied the opportunity to give input on a list of proposed contractors and that, in the absence of evidence of the harm caused to Santos as a result, it could not conclude that this was a material breach. Consequently, Santos could not remove Apache as operator.

New Zealand

Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd[94] is a decision of the Court of Appeal of New Zealand. It concerned the replacement of the operator, Shell Todd Oil Services (STOS), with a Shell-owned company. An interim injunction had been obtained by Todd Petroleum Mining (Todd) to stop the directors of STOS from voting on the resolution and the appeal was brought by Shell to overturn the injunction. The Court of Appeal maintained the injunction to allow a substantive hearing to take place, which reinforced the right of the non-operators to participate in decision-making regarding the structure for operations.

Similar parties found themselves before the Court of Appeal of New Zealand again in 2015 in relation to the Pohokura Field in *Todd Pohokura Limited v Shell Exploration NZ Limited and OMV New Zealand Limited*.[95] The dispute arose under a Joint Venture Operating Agreement (JVOA) based on the 1995 AIPN Model JOA. The operating committee under the JVOA purported to make a resolution to adopt, be bound by and direct the operator to implement 'offtake rules' governing the production of gas. Todd's representative on the operating committee voted against the adoption of the rules. It alleged that the rules and associated nomination protocols had not been validly adopted and breached its rights as they deprived Todd of its proper entitlement to gas under the JVOA. The Court of Appeal concluded that the adoption of the rules was necessary, within the scope of the operating committee's authority and did not require unanimous approval. Consequently, Todd's challenge failed.

See also *Greymouth Petroleum v Ngatoro Energy* in the subsection 'New Zealand' below on similar points.

91 Unreported (28 February 2017), Case No CL-2017-000111.

92 [2015] WASC 318.

93 [2016] WASCA 213. Apache Oil Australia PTY Ltd is now known as Quadrant Oil Australia PTY Ltd.

94 *Shell (Petroleum Mining) Co Ltd and Others v Energy Infrastructure Ltd and Others*, CA 70/05 3 August 2005. There were 7 appellants and 4 respondents.

95 [2015] NZCA 71. For a more in depth analysis of this case, See: Sean Rush, 'Production and Offtake Rights in Joint Operating Agreements: Lessons from Pohokura' (2015) 8 (5) Journal of World Energy Law and Business 439.

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International

In ICC Case No. 4, the parties had agreed to carry a NOC's share of the costs of financing exploration and exploitation activities (*Petroleum Costs*) and for those costs to be reimbursed from the NOC's future share of production. A non-operator contended that it was entitled to recover all the Petroleum Costs that it had advanced for itself and for the NOC through an Advance Account and, consequently, it was entitled to its own share of Cost Oil under the PSA as well as a proportion of the NOC's Cost Oil. As a result of the operator's failure to reimburse the Petroleum Costs in that order of priority, the non-operator claimed that the operator had acted in breach of contract or its duty as agent and fiduciary and that, as a result, it had suffered loss and damage. None of the non-operator's similar claims in a parallel JOA arbitration succeeded and it withdrew its remaining claims in this arbitration that dealt with the assignment of the non-operator's interest.

In ICC Case No. 5 a dispute arose under a JOA that was based on the AIPN Model JOA. The dispute concerned steps taken by the operator in relation to the award and management of a contract for the construction of a gas pipeline to bring gas onshore. The non-operator claimed through a number of allegations that the operator, in breach of its obligations under the JOA, had not properly awarded the pipeline contract. All of the non-operator's claims failed on the facts. The tribunal concluded that the operator had followed the bidding process required by the JOA and that the non-operator had been fully aware of, participated in and approved the decisions relating to the steps taken in relation to the contractors. In reaching its conclusions, the tribunal considered a number of other issues, including the limitation of liability of the operator, the 24 month time bar under the Accounting Procedure, and whether the operator owed a special duty of care.

ICC Case No. 6 dealt with an operator that allegedly failed to perform its obligations to manage the work programme and contribute its share of costs. These included allegations of (i) a lack of cooperation; (ii) a failure to maintain the concession rights; (iii) a refusal to accept technical advice; and (iv) a failure to achieve drilling targets. The tribunal determined that (i) the scope of the obligation was only to limit the use of the funds and did not extend to impose a standard on the efficient use of the funds; (ii) there was a breach in the failure to register a pledge of subsoil rights; (iii) there was no usurpation of management control; and (iv) there was no binding obligation to share additional costs equally.

In ICC Case No. 6286,[96] the claimant, one of the non-operators, had refused to pay various costs and a notice of default was served on it. Following the notice of default, the claimant purported to revoke the operator's management powers, alleging illegal conduct by the operator in concluding certain consultancy agreements. The claimant sought to dissolve the consortium but paid the sums required to avoid forfeiting its interest.

In applying the governing law of the JOA, which was Swiss law, the tribunal found that the operator had the power of an agent and that its powers could only be revoked if there were valid reasons, which included a gross violation by the agent of its duties or if it could no longer manage properly. The tribunal concluded that the claimant neither had good reasons for concluding that the agreements were illegal nor could it rely on those reasons in any event having not acted on them for three years after discovering the facts.

The tribunal concluded that the mechanism under the Operating Agreement permitted the defendants to exclude the claimant from the consortium, so long as it was indemnified so that it was in the position as if it had not taken part in the operations conducted while it was excluded. The tribunal found that the claimant could not bring about the dissolution of the consortium under Swiss law in the circumstances and that none of the damages claims were made out on the facts.

ICDR Emergency Arbitrator Order[97] was an order granted by an emergency arbitrator on an application for interim measures in a dispute arising under a JOA based on the 2002 AIPN model. The governing law of

96 *Partner v 4 Partners*, ICC Case No 6286, 28 August 1991 reported in ICCA Yearbook Commercial Arbitration 1994 – Volume XIX.

97 Order of Emergency Arbitrator provided to the authors with the names of the parties, arbitrator and dates of the relevant agreements redacted.

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the JOA was that of a US state. The JOA provided for arbitration under the ICDR Rules. The PSC provided for deadlines for the drilling of two exploration wells which, if not met, would give rise to penalties. The claimant commenced arbitration asserting breaches of the JOA and seeking mandatory injunctive relief, declaratory relief and damages to ensure that the well was drilled or that it was compensated for the respondents' alleged breaches of contract.

During the proceedings, the claimant had also commenced parallel court proceedings seeking expedited discovery and other relief. The emergency arbitrator ordered all parties to refrain from pursuing such proceedings. The emergency arbitrator concluded that neither of the two conditions specified in Article 18.2(D)(10) of the 2002 AIPN model allowing a party to seek court-ordered interim measures had been met in this case. He noted that in cases such as *Reeder v Wood Country Energy LLC*,[98] it had been accepted that 'in interpreting model form contract provisions such as the AIPN model form, it is appropriate to refer to, and rely on, the evolving history of such model forms and the apparent intent of the drafters of such forms'.

The emergency arbitrator also denied the claimant the substantive interim measures sought. The emergency arbitrator briefly considered the merits of the claim to determine whether the claimant had a chance of prevailing. The emergency arbitrator found that the claimant had failed to demonstrate that it was likely or probable that it would succeed on the merits for a number of reasons. It is understood that the dispute did not progress to an award in a full arbitration.

EurOil Limited v Cameroon Offshore Petroleum SARL[99] is a decision of the London Commercial Court in support of an arbitration. The dispute concerned the operator's right to be the sole or lead representative of the joint venture in communications with the government. A court order restraining Cameron Offshore (CAMOP) from communicating with Société Nationale des Hydrocarbures (SNH), the Cameroonian NOC, or the Cameroonian authorities was made under section 44(3) of the Arbitration Act 1996 to protect EurOil's right to be the sole representative of the parties in written communications and the lead representative in communications at meetings. CAMOP made a statement at the start of the next meeting with SNH that the court order prevented it from doing anything more than observing the meeting. This position was unacceptable to SNH who indicated that the purpose of the meeting was to resolve the misunderstanding between EurOil and CAMOP and that it was not acceptable that CAMOP should be prevented by contract or court order from speaking to the government.

The question for the court was whether it should take steps to preserve an asset the existence and scope of which was in dispute. Given what had happened at the meeting and that SNH was aware of the dispute between the parties, the judge formed the view that the injunction had very little purpose and set it aside. The judge stated that the question of whether CAMOP's previous communications with the government represented a breach of the JOA was a matter for the arbitral tribunal to decide.

Conclusion

As noted at the start of this section, the cases in which the scope of the operator's duty and its authority have been tested are diverse and cover a broad range of circumstances. However, two themes seem to emerge from them:

i. the courts and tribunals reiterate the importance of the express terms of the JOAs in determining the operator's duty and authority; and
ii. it is often argued that there is a fiduciary relationship between the operator and the non-operators.

98 See the subsection 'USA' below. The arbitrator's reference to the Reeder case was to general principles on how model form contract provisions should be interpreted, since the Reeder case interpreted the AAPL Model 610 Form, rather than the AIPN Model JOA.

99 [2014] EWHC 52 (Comm).

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On the question of the fiduciary relationship between the operator and the non-operator, the cases indicate that arguments based on such a relationship arise where the express terms of the JOA do not directly or clearly provide an answer to the issue in dispute. The approach to imposing a fiduciary relationship and the scope of the duties under such a relationship where one is imposed vary considerably between the jurisdictions. In addition, it is clear that they have changed over time as courts have considered them in more detail, and that courts and tribunals have stressed the importance of defining the fiduciary relationship by reference to the express terms of the JOAs.

Removal of Operator

Introduction

Industry JOAs typically provide for a change of operator either through the operator's resignation or removal, and then for a selection of a new operator. Removing an operator under a JOA is a difficult exercise, and as a result, does not frequently happen. If it did occur where there was no right to remove without cause, this could result in a dispute.

Model JOAs provide for a range of events that could trigger the right of non-operators to remove an operator, including: (i) insolvency; (ii) liquidation or dissolution of the operator; (iii) a vote of the parties with cause, which would include a defined breach of the JOA or an act of gross negligence or wilful misconduct; (iv) a vote of the parties without cause; or (v) the failure of the operator to own a minimum percentage interest in the JOA and the underlying granting instrument. Mechanisms include not only removal, but what is often called 'deemed resignation' of the operator.

The AIPN Model JOA has the widest range of situations that could trigger the removal of the operator, which reflects the greater diversity and complexity of operations in foreign jurisdictions, including such unique circumstances as the breach of bribery laws.

Sometimes a JOA may include a right of the non-operators to remove the operator without cause. This may work in jurisdictions such as the USA (even though it is not provided in the AAPL model JOA) and Canada, where the appointment and replacement of an operator is a simple contractual matter within the scope of the JOA. However, enforcing such a provision in international operations could be impractical since (i) a change of operator invariably requires the consent of the relevant government authorities; and (ii) the incumbent operator may be the only JOA partner that has the necessary in-country technical expertise and resources to manage the joint operations.

USA

In *Cross Timbers Oil Co. v. Exxon Corp.*,[100] the Texas Court of Appeals affirmed a summary judgment issued by the lower court. Cross Timbers had sought to replace Exxon as the operator under a Unit Agreement and Operating Agreement. Cross Timbers relied, *inter alia*, on provisions of the Operating Agreement allowing the working interest owners to 'exercise overall supervision and control of all matters pertaining to the Unit Operations pursuant to this agreement and the Unit Agreement'. The Court of Appeals rejected Cross Timbers argument that these provisions allowed it to replace Exxon as operator.

Lancaster v. Petroleum Corp. of Delaware,[101] concerned a blowout at a high pressure well in South Louisiana. One aspect of the case concerned whether Petcorp had properly resigned as operator. In contravention of the provision in the operating agreement requiring 90 days' notice of resignation, Petcorp gave notice of its immediate resignation and said that it would plug and abandon the well if no replacement operator stepped forward by the end of the day. The Court of Appeal held that Petcorp had not effectively resigned as operator and did not have the consent of the non-operating parties to plug and abandon the well.

100 22 S.W.3d 24 (Tex App – Amarillo 2000, no pet.).

101 491 So 2d 768.

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In *Tri-Star Petroleum Co. v Tipperary Corp.*[102] the Texas Court of Appeals heard an accelerated, interlocutory appeal against a temporary injunction order that required Tri-Star to relinquish operations and cease acting as operator under a JOA, (which appears to be a modified version of the 1989 AAPL Model Form 610 JOA). Following a dispute over Tri-Star's performance as operator, a majority of the non-operators (including Tipperary) voted to remove Tri-Star as operator and appoint Tipperary as its successor. Tri-Star refused to step down and Tipperary applied for, and was granted, a temporary injunction requiring that Tri-Star relinquish operations. Tri-Star appealed. The Court of Appeal upheld the injunction.

In *Stable Energy, L.P. v. Kachina Oil & Gas, Inc.*,[103] the Texas Court of Appeals, considered an appeal against a finding that a non-operator had failed to remove the incumbent operator under a JOA and to appoint itself the successor. The appeal was unsuccessful because the Court of Appeals found that the non-operator did not have the required majority to remove the operator.

Canada

In *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd*,[104] the Alberta Court of Queen's Bench addressed the replacement of an operator on its insolvency in connection with JOAs that used the 1974 and 1981 CAPL Operating Procedures. Clause 2.02 of both relevant versions allowed the operator to be replaced in certain circumstances and, under clause 2.06, another appointed. One of the circumstances in which clause 2.02 allowed the operator to be replaced was if it became 'bankrupt or insolvent or commits or suffers an act of bankruptcy or insolvency'. The operator was the subject of insolvency proceedings but the Court refused to allow it to be immediately replaced, relying on the stay under the Companies Creditors Arrangement Act (CCAA).

Diaz Resources Ltd v Penn West Petroleum Ltd[105] is a decision of the Alberta Court of Queen's Bench on the operation of Challenge Notices under the 1990 CAPL Operating Procedure by which one of the participants can seek to replace the existing operator. Penn West was the operator under three agreements and Diaz was the other participant. Diaz issued Challenge Notices under Clause 203 of the CAPL Operating Procedure. The dispute concerned whether the Challenge Notices were deficient because: (i) they did not provide sufficient detail to evaluate whether the terms offered by Diaz would be more favourable; and (ii) there was no information or discussion on Diaz's abilities to conduct operations in a safe, compliant, good and workmanlike manner. The court held that the notices did not contain enough information to allow Penn West 'to make an informed decision on whether the proposed changes would result in more favourable terms and conditions in the operation of the properties'. It stated that the notices must be able to stand on their own and that they were not sufficient in this case. Having decided that the Challenge Notices were not sufficient, the court did not go on to decide whether Diaz had the ability to act as operator.

Bank of Montreal v Bumper Development Corporation Ltd[106] is another decision of the Alberta Court of Queen's Bench. It concerned an attempt by Eagle Energy Inc to enforce the terms of a JOA which used the 2007 CAPL Operating Procedure in the context of the insolvency of Bumper. Eagle sought to rely on clause 2.02 and clauses 3.03 and 3.04 of the CAPL Operating Procedure to remove Bumper as operator following the appointment of a receiver and to replace Bumper in that role as the next largest working interest owner. It applied to the court to recognize its right to become operator.

The court held that Eagle's right to be operator arose under a contract that pre-dated the receivership and that there was no reason to interfere with its rights under the JOA. *Norcen v Oakwood* was distinguished on the basis that the CCAA gave very broad powers to the court designed to rescue insolvent companies. The CCAA did not apply in this case. The Court distinguished the *Norcen* case by noting that the objective in this

102 101 S.W.3d 583 (Tex App – El Paso 2003, pet. denied).
103 52 S.W.3d 327 (Tex App – Austin 2001, no pet.).
104 1988 CanLII 3560 (AB QB).
105 2010 ABQB 153 (CanLII).
106 2016 ABQB 363 (CanLII).

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case was not to facilitate Bumper's survival, but to realize on its assets. Eagle's application for its right to become operator was therefore granted.[107]

In *Firenze Energy Ltd v Scollard Energy Ltd*,[108] the Court of Queen's Bench of Alberta followed the decision in *Bank of Montreal v Bumper*. Scollard was the operator under a JOA which incorporated the 2007 CAPL Operating Procedure. Firenze was the other working interest owner.

An order was made by the court appointing a receiver over Scollard, which stayed the exercise of all rights and remedies against it. The receiver marketed Scollard's assets for sales and received a number of bids. The highest bid was premised on the operatorship being transferred with the interest in the relevant areas. Firenze applied to the court to permit it to serve a notice under clause 2.02 A of the CAPL Operating Procedure in order that it could take over the operatorship. The court lifted the stay to allow Firenze to serve the notice and to assume operatorship in relation to the wells in which it held a working interest of more than 40 per cent.

In *Alberta Energy Regulator v Lexin Resources Ltd*,[109] the court determined a similar application regarding the lifting of a stay to allow a party to assume operatorship, this time in relation to a joint venture that owned three gas compression and gathering systems (Facilities). The Construction, Ownership and Operation Agreements (CO&O) that were used adopted the Petroleum Joint Venture Association 1999 model CO&O Agreement.

Lexin was the operator and a receiver was appointed over it by court order. The order included a stay of proceedings. Midstream Canada Limited was one of the other interest owners. The court refused to lift the stay in order for Midstream to serve notice to assume the operatorship of the Facilities. The court found that lifting the stay would prejudice the sale process of Lexin's interests in the Facilities. It distinguished *Firenze v Scollard* on the basis that it addressed different contractual provisions and, in this case, the evidence was that it was more likely than not that Midstream would not be in a position to assume ownership on a sale.

UK

TAQA Bratani Limited and others v Rockrose[110] is a decision of the English High Court that deals with the removal of an operator, but in doing so, addresses whether express contractual powers contained in a JOA are impliedly qualified by an obligation of good faith and also an obligation not to act capriciously, arbitrarily or irrationally. Following Rockrose's acquisition of the shares in the operator entity under the JOAs, the non-operators exercised their express contractual right to remove Rockrose as operator. Rockrose argued that this right was qualified by duties of good faith. The Court rejected this argument and determined that, on the facts of this case, it was not necessary to imply such a duty.

It should be noted that the current model JOA of Oil & Gas UK does not include a right to remove the operator at will. However, earlier model JOAs used for UKCS joint operations did include such a provision, including the 1977 model JOA used by the British National Oil Corporation, which was likely the basis for the Brae Fields JOAs.

International

ICC Case No. 11663,[111] which is described in the 'Default' subsection 'International' above, dealt with the issue of removal of the operator, in addition to the issue of the operator defaulting on paying its share of cash

107 See Jim MacLean, 'Default and Delinquent Parties' in *CAPL Negotiator Newsletter* (January 2020 at 7), in which he noted that the approach of the receiver in *Bank of Montreal v Bumper* differed from that of the receiver in *Norcen v Oakwood*. In Bumper, the receiver's goal was to sell the underlying assets rather than to maintain the operator as a going concern. The Bumper case ultimately turned on the fact that it was clear that there was no intention to save the company as a going concern. The outcome was basically a liquidation process.

108 2018 ABQB 126 (CanLII).

109 2019 ABQB 23 (CanLII).

110 [2020] EWHC 58.

111 Above n 72.

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calls. The tribunal found that the management committee had the right to remove the operator and replace it with another party, since the operator was a non-paying party and had forfeited its entire interest in the JOA through its default.

Conclusion

The removal of an operator is not a regular occurrence under industry JOAs, given the difficulty of doing so and its negative impact on operations and profitability. Industry practice on the grounds for removal of an operator can vary from one jurisdiction to another, as shown in the model JOAs from different jurisdictions.

When it does occur, disputes arise around the adequacy of the notice and the justification for removal. It is more likely to successfully occur when the operator is bankrupt or insolvent. Courts and tribunals do not automatically assume duties of good faith on the part of operators, and instead pay close attention to the express terms of the JOA, which have been agreed upon by sophisticated players in the industry. It is those express terms, along with the factual matrix, that will ultimately determine the validity of any attempt to remove an operator.

Limitation of Liability and Indemnities

Introduction

An adjunct issue to the scope of an operator's authority is the contractual limitation that JOAs typically provide to an operator with regards to its liability in carrying out its role and the indemnities that non-operators provide to the operator.

It is common industry practice to limit the operator's liability in JOAs. A key expectation of any operator is that it will not be exposed to an open-ended legal liability when it acts in the capacity of an operator. This principle is usually justified by an operator to its non-operators as being consistent with the principle that an operator will neither lose nor gain while carrying out its responsibilities as an operator.

There are typically two components to such a provision in a JOA. The first is a statement that the operator will not be responsible for any loss or liability (except for its share) resulting from the operator performing (or failing to perform) its duties and functions as an operator under the JOA. This protection is often broadly drafted and is extended to losses or liabilities caused by the fault or negligence (and sometimes the gross negligence) of the operator. This is often referred to as an exculpatory or exemption clause.

At a minimum, the exculpatory clause will relieve the operator and its affiliates[112] of any disproportionate liability related to its conduct of operations. However, depending on the specific wording of the clause and the governing law that is applied, the exculpatory clause may or may not relieve the operator of liability for breach of contract.

The second component is a clause where the parties (including the operator) undertake to indemnify the operator for any such loss or liability for which the operator might otherwise be responsible. This combination of disclaimed responsibility and indemnity coverage protects the operator from full exposure to catastrophic liabilities that sometime arise in O&G operations, which results in it only being liable for its share or participating interest in the JOA.

There are sound commercial reasons for JOA parties to provide such protection to an operator. These clauses are designed to protect an operator from being solely exposed to potential large-scale liabilities that may arise from carrying out its operational responsibilities. Otherwise, it would be difficult to attract the most qualified operator, who is not in principle allowed to profit from its operatorship.

It is customary in the O&G industry for operator liability provisions to establish a high threshold that must be met before the operator is solely liable for the consequences of its activities performed (or not

112 The UK model JOA had an amendment issued in 2011 to clarify that the indemnity also covers affiliates within the 'Operator Group'. Similar provisions are found in other model JOAs.

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performed) in its capacity as operator. Hence, the standard of gross negligence or wilful misconduct is often applied in such clauses. If the protection is extended to cover the gross negligence of the operator, there is typically a carve-out on what operations will fall inside or outside this exception. Also, where it is included, such conduct is often restricted to senior supervisory personnel (which can be defined differently) of the operator.

There are other limitations on the extent of operator protection that reasonable commercial parties expect such clauses to contractually provide. The first limitation is the kinds of parties that are covered in the indemnity. It is commonly accepted in the industry that exculpatory clauses are meant to limit the liability of the operator to the other JOA parties in relation to claims made by third parties.

The second limitation is whether this clause is intended to shield an operator from a breach of its duties owed to non-operators under the JOA. Operators sometimes use this clause as a blanket defence when things go wrong and its actions (or lack of) are disputed. In contrast, non-operators typically take the position that such a clause is not intended to allow an operator to carry out its administrative, planning, budgeting, contracting or accounting obligations in breach of the contract or in a negligent or grossly negligent manner.

The third limitation is the kind of operations covered. An exculpatory/indemnity clause is meant to cover approved joint operations for that particular JOA. The question then becomes whether a particular activity or expenditure was properly approved as a joint operation under the JOA. This could involve examining the fact matrix to determine such matters as: (i) what operations were formally approved; (ii) whether certain expenditures were contemplated, expected or justifiably incurred by the operator; (iii) whether the non-operators were aware of and condoned such expenditures; or (iv) whether the operator properly responded to unplanned events or accidents.

The cases reviewed include: (i) a number of US cases arising from disputes under JOAs based on various versions of the AAPL Model 610 Form Operating Agreement; (ii) a number of Alberta (Canada) court cases on different versions of the CAPL Operating Procedure; and (iii) an ICC Award in which the JOA was based on the AIPN Model and that was governed by the law of a country with a civil code.

USA

An area of focus in the US cases on this issue has been whether the limitation of liability provisions (often referred to as the exculpatory clause in the US cases) in JOAs apply to breaches by the operator of the express terms of the JOA. Many of the cases address this issue, in particular in how it is to be resolved under various versions of the AAPL 610 Form of JOA.

In very general terms, the cases demonstrate an approach to the issue over time which has moved from a broad reading of the limitation of liability so that it applied to anything done under the JOA, to a more restrictive view with a focus on the express requirements of the JOA (in particular, restricting the operator's limitation of liability to operational matters), then returning to a broader view, and finally, a clarification on when to apply a narrow versus a broad interpretation of the provision.

This development in the US case law was the result of the different wording used in the liability provisions of the JOAs in question, which reflected the changes in the wording of the particular version of the AAPL 610 Form used by the parties.

US cases in the 1990s interpreted the exculpatory clause to broadly apply to anything that occurred under a JOA. The leading case from that time period was *Stine v Marathon Oil Co*,[113] where the court held that an operator that plugged a dry hole instead of turning it over to the non-operator for further operations as required by the agreement could not be held liable unless it was grossly negligent. The exculpatory clause protected the operator for any act taken in its capacity as operator (except for gross negligence or wilful misconduct).

113 976 F.2d 254 (5th Cir 1992).

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Other cases that similarly supported this interpretation of the exculpatory clause were *Caddo Oil v. O'Brien*,[114] which held that administrative functions of the operator under a JOA were covered by the exculpatory clause, and *Grace-Cajun Oil Co. No. Two v Damson Oil Corp*.[115] that held that the exculpatory clause applied to all the obligations of an operator under a JOA.

Starting in 2000, a series of US cases applied a narrower interpretation of the operator exculpatory clause. These cases held that exculpatory clauses only limited the liability of the operator with regards to (i) the actual conduct of operations or (ii) the breach of the 'reasonably prudent operator' standard:

i. *Abraxas Petroleum Corp. v Hornburg*[116] found that the application of the exculpatory clause was limited to claims that the operator failed to act as a reasonably prudent operator.
ii. *Cone v Fagadau Energy Corp*.[117] held that a non-operator was not obligated to show gross negligence or wilful misconduct in order to sustain a claim for a breach of contract when the operator conducted waterflood operations without requesting the consent of the non-operators.
iii. *Shell Rocky Mountain Prod. LLC v Ultra Res. Inc*.[118] stated that 'It is difficult to perceive why the parties would include explicit and detailed directions on administrative matters that are supplemental to "operations" if they did not intend the operator to be liable for breach of those matters. This is particularly true because the performance of those administrative duties does not generally involve the extraordinary risks against which the operator should be protected'.
iv. *R & R Res. Corp. v Echelon Oil & Gas LLC*[119] found that a suit for breach of accounting procedures, including late payments to vendors, excessive operating charges, and improper charges did not require a showing of gross negligence or wilful misconduct.
v. *Forest Oil Corp. v Union Oil Co. of Am.*[120] held that a showing of gross negligence or wilful misconduct was not required where the operator breached the accounting procedure by charging the non-operators for disposal of Naturally Occurring Radioactive Material on a different basis than what was required by the JOA.

This trend to narrow the scope of exculpatory clauses was reversed in 2012 with the *Reeder v Wood County Energy LLC*[121] case. Reeder was the operator of the Harris Sand Unit in the Forest Hill Field in Texas. Wood County was a limited partnership through which Reeder and his two partners (Wade and Scherbach) held their interests in the Unit. There was a dispute over whether Reeder had breached his duty as operator 'by failing to maintain production in paying quantities or other operations in the Forest Hill Field'. At first instance, the jury found that Reeder had breached his duty. The case ultimately went to the Texas Supreme Court.

The relevant provisions of the exculpatory clause in dispute (which was based on the 1989 AAPL 610 Form) stated:

> Operator shall conduct its *activities* under this agreement as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and in accordance with good oilfield practice, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.

114 908 F.2d 13, 17 (5th Cir 1990).
115 897 F.2d 1364 (5th Cir 1990).
116 20 S.W.3d 741 (Tex App – El Paso 2000, no pet.).
117 68 S.W.3d 147 (Tex App – Eastland 2001, pet. denied).
118 415 F.3d 1158 (10th Cir 2005).
119 No 03-05-00479-CV, 2006 WL 66458 (Tex App – Austin 2006, no pet.).
120 2006 US Dist LEXIS 101568 (D Alaska 2006).
121 395 SW 3d 789 (Tex 2012).

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In relation to the exculpatory clause in question, the Texas Supreme Court concluded that a broader approach should be adopted so that the exculpatory clause applied to all activities conducted by the operator, as operator. The evidence did not establish that Reeder had been grossly negligent or acted with wilful misconduct so he was not liable.

In another decision in 2012 (before *Reeder v Wood County Energy* was decided), the US District Court for the Southern District of Texas, Houston Division applied the Fifth Circuit's reasoning in *Stine v Marathon Oil Co*, rather than the subsequent Texas cases which adopted a narrower construction of the application of the exculpatory clause. The case in question was *Chesapeake Operating Inc. v Sanchez Oil & Gas Corporation*.[122] It concerned a JOA governed by Louisiana law. Chesapeake was the operator and it pursued a claim against Sanchez for unpaid costs. Sanchez defended the claim and counterclaimed alleging breaches of the JOA by Chesapeake and negligence.

In determining a motion for partial summary judgment, the Court had to construe the exculpatory clause. The clause used followed the 1977 and 1982 AAPL form (rather than the 1989 form in *Reeder v Wood County Energy*). The Court noted that it was referred to no authorities under Louisiana law which addressed the proper construction of the exculpatory clause and so it looked to the authorities under Texas law. It applied *Stine v Marathon Oil Co* because the subsequent intermediary appellate court decisions did not 'constitute a majority of Texas appellate courts'.[123] Consequently, it decided that Chesapeake was protected by the exculpatory clause in relation to the alleged breaches of contract because Sanchez had not asserted that the breaches resulted from gross negligence or wilful misconduct.

A return to a narrower interpretation of the exculpatory clause was subsequently taken by the US District Court for the Southern District of Texas in *MDU Barnett Limited Partnership v Chesapeake Exploration Limited Partnership*.[124] The issue in that case was whether accounting errors on joint-interest billing statements and underpayment for 'look-back' elections to participate in additional wells constituted gross negligence or wilful misconduct so as to override the exculpatory clause in the JOA.

That court cited the *Reeder* case but concluded that the clause in question was similar to the earlier 1977 and 1982 AAPL Model forms because they all specified that the operator 'shall conduct all such operations in a good and workmanlike manner'. Applying [and distinguishing from] the *Reeder* case, the district court found that ' '[i]n 1989, the [AAPL] Model Form Operating Agreement's exculpatory clause dropped the reference to 'all such operations' and substituted the phrase "activities under this agreement"' and as a result, found that the exculpatory clause in this JOA was limited to 'defendants' conduct as the well operator' and did not protect the operator against ' 'accounting breaches'. The court therefore applied a narrower interpretation of the exculpatory clause based on the wording from an earlier AAPL model JOA.

A similar approach was adopted in *Shell Offshore Inc v Eni Petroleum US LLC*[125] in a decision of the US District Court for the Eastern District of Louisiana. It concerned a claim against an operator under a Unit Operating Agreement which contained similar wording to the 1977 and 1982 AAPL Model forms. The subject matter of the claim concerned accounting and billing. The court concluded that the exculpatory clause did not apply to those activities.

One of the most significant tests in recent years of the application of an exculpatory clause in a JOA came from the Macondo incident, offshore Louisiana in the Gulf of Mexico in April 2010. The JOA was between BP (the operator), Anadarko and MOEX (a subsidiary of Mitsui), which was based on the 2007 AAPL Model 810. Under that version of the AAPL model JOA, an operator would be solely responsible if it were grossly negligent. Settlements were reached between BP, Anadarko and MOEX, in which Anadarko and MOEX paid less than their participating interest in the JOA. There are no judgments or arbitral awards that

122 Civ A No H-11-1890, 2012 WL 2133554 (SD Tex 12 June 2012).

123 ibid at 10.

124 No Civ H-12-2528, 2014 WL 585740 (SD Tex 14 February 2014).

125 No CV 16-15537, 2017 WL 4226154 (ED La 21 September 2017).

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discuss the application of the exculpatory clause in that JOA under those circumstances. It should be noted that there was a subsequent Louisiana civil case[126] brought by the US federal government, several states and numerous private individuals and entities against BP and its major service providers that dealt with liabilities under the Clean Water Act, 33USC section 1321(b)(7)(D) arising from the Macondo incident.

A working group was subsequently set up to review that AAPL model JOA in light of the experience of applying its terms following the Macondo incident. The review carried out by the working group resulted in a new version of the AAPL Model 810 being issued in 2015. Among the changes made was to Article 22.5 to make clear that liability for costs and claims is based on the parties' participating interest shares irrespective of fault. The new version also clarified that non-operators would be liable to reimburse the operator for losses, damages, claims and costs even if they allege gross negligence or wilful misconduct on the part of the operator. This would be the case until a final, non-appealable judgment or arbitral award had determined whether there had been gross negligence or wilful misconduct.[127]

Canada

In reviewing the Canadian cases, it should be noted that the limitation of liability and indemnification clauses in the CAPL Operating Procedure varied over time and that the 1981 version of the model JOA is quite different than the 1990 version, which in turn is different from the 2007 and 2015 versions.

An early leading Canadian case was *Erehwon Exploration Limited v Northstar Energy Corporation*,[128] which interpreted the indemnity clause (Article IV) in the 1981 CAPL Operating Procedure. Erehwon claimed that Northstar had acted inappropriately as operator by levying excessive charges for well-operating fees, well-drilling fees, the cost of installing and removing coiled tubing in a well, and for royalty overpayments. The court rejected the suggestion that Article IV was meant to relate to the standard of care applicable to the relations between the JOA parties, and in particular to the operator's duty to the non-operators in carrying out joint operations. Instead, the court took the position that Article IV was primarily intended to deal with third party losses.

The indemnity clause (Article IV) was also addressed in the *Morrison Petroleum Ltd. v Phoenix Canada Oil Co*.[129] case, whose JOA was also based on the CAPL Operating Procedure. The operator, Morrison, estimated the cost of a well to be $2.1 million, which the parties approved. The final cost was $3.2 million. The court eventually limited the non-operators' liability to 10 per cent of the cost estimate, based on the application of Clause 301 of the CAPL operating procedure.

Clause 304 of the CAPL Operating Procedure provided that the operator was required to conduct its drilling operations 'in accordance with good oilfield practices'. The court considered whether that standard of care determined whether the operator's liability was based on gross negligence or by ordinary negligence. The court concluded that it was hard to accept that the parties intended Article IV of the CAPL operating procedure to exclude liability for negligence on the part of the operator.[130] In other words, Article IV of the CAPL Operating Procedure limited the operator's liability to cases of gross negligence by the operator in relation to third party losses only.

These early Canadian cases followed the same reasoning as the subsequent US cases in the early 2000's that held that exculpatory clauses only limited the liability of the operator with regards to (i) the actual conduct of operations or (ii) the breach of the ' reasonably prudent operator' standard.

126 *United States of America v BP Exploration & Production Inc et al*, Civ Action No 2:10-cv-04536.[16]:70.

127 See <https://ocsadvisoryboard.org/assets/storage/uploads/2015%20Deepwater%20Model%20changes.pdf> accessed 9 July 2020.

128 *Erehwon Exploration Limited v Northstar Energy Corporation* 1993 CanLII 7238 (AB QB).

129 *Morrison Petroleums Ltd v Phoenix Canada Oil Co* 1998 ABQB 624 (CanLII).

130 ibid at 107. It should be noted that the Alberta courts' conclusions in this and earlier decisions were based on earlier versions of the CAPL Operating Procedure. The 2007 and 2015 versions of the CAPL Operating Procedure incorporated significant changes to the liability and indemnification provisions.

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In a more recent case, *Bernum Petroleum Ltd v Birch Lake Energy Inc*,[131] the Court of Queen's Bench in Alberta considered the application of the provisions of the 2007 CAPL JOA in relation to the limitations of liability and indemnities granted to operators. Bernum was the operator and Birch Lake refused to pay certain drilling costs on the basis that Bernum's drilling of the well in question was 'grossly negligent'.

The Court determined that Birch Lake had not established that Bernum had been grossly negligent in relation to the drilling of the well. In reaching this determination, it noted that the determination of gross negligence and wilful misconduct is 'not only fact, but context-specific'.[132] It also noted that 'the protection afforded an operator has expanded under various versions of CAPL' and that '[n]o doubt, there are sound policy reasons for doing so as the operator shoulders the majority of the financial risk in drilling operations'.[133] Importantly, the Court also referred to the second part of the liability exclusion for operators in the JOA which excluded acts or omissions approved by the parties. Birch Lake had knowledge of and participated in the drilling operation plan and had not raised any issue with the operation of the wells until Bernum pursued a claim for the unpaid drilling costs.

UK

There are no cases on this issue in the English courts that arise out of JOAs. However, in proceedings relating to a large explosion of a tank at the Buncefield oil storage depot in England, issues arose as to the liability of one of the parties, which had a role similar to that of an operator in a JOA. The first instance decision in the Commercial Court is *Colour Quest Ltd & Others v Total UK Limited & Others*.[134] The Court of Appeal's second decision in the proceedings is *Shell U.K. Limited & Others and Total UK Limited & Another v Total UK Limited and Chevron Limited*.[135]

At the time of the explosion, Total and Chevron were owners of a joint venture company, HOSL. The tank that exploded was owned by HOSL. Although HOSL owned the plant, Total was the operator of the plant. Total and HOSL admitted that either one of them was vicariously liable for the negligence of the supervisor on duty at the plant at the time of the explosion. The supervisor of the plant was employed by Total but seconded to HOSL.

In the trial court of first instance, among other issues, it was determined that it was Total that was vicariously liable for the negligence of the supervisor because it was in control of the staff at the site. It was also responsible for its head office staff's failure to promulgate an adequate system to prevent the overfilling of the tank. Total was not entitled to a contractual indemnity against Chevron or HOSL because the relevant clauses were not intended to indemnify a party in respect of its own negligence.

Total appealed. The Court of Appeal found that none of the relevant provisions provided an indemnity to Total for its own negligence in its role as operator. Consequently, it upheld the trial court's decision on the issue.

International

ICC Case No. 5 (described in the subsection 'International' above) dealt with the interpretation of an exculpatory/indemnity clause in a JOA that was based on Article 4.6 of the AIPN Model JOA. The operator raised the exculpatory/indemnity clause as a blanket defence and argued that, in the absence of fraud or gross negligence (which were excluded by the applicable civil code), it was only responsible for its share of costs and was not liable to the other parties for any other costs whatsoever, including for its breach of contract.

131 2014 ABQB 652 (CanLII).
132 *Bernum v Birch Lake* at para 46.
133 ibid at para 47.
134 [2009] EWHC 540 (Comm).
135 [2010] EWCA Civ 180.

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The tribunal held that Article 4.6 in that JOA only applied to third party claims, that it was not designed or intended to exclude liability for breach of contract as between the parties and that therefore the Respondent's limitation of liability defence based upon Article 4.6 failed.

Conclusion

Disputes have arisen under each of the AIPN, CAPL and AAPL Model JOAs on the limitation of liability for the operator. The key point in the cases reviewed has been the extent of the application of the limitation of liability in relation to claims alleging breaches of the JOA or negligence made against the operator by non-operators or similar allegations made by non-operators in defending claims from the operator for the payment of operating costs. In each of the cases, the issue has turned on the proper construction of the relevant provisions of the JOA.

These cases show that courts and tribunals have applied and enforced the exculpatory and indemnity provisions of JOAs as agreed upon by sophisticated industry parties. However, in doing so, many courts and tribunals have tended to limit or narrow the scope of such exculpatory/indemnity clauses, unless there is clear language that expressly provides for broad coverage to the operator.

A growing issue in Texas courts and the US Fifth Circuit court is the level of information that the operator has to provide to trigger the exculpatory clause and the two-year audit limitation. On the latter point, arguments that sound like the 'discovery rule' arise where non-operators contend that they did not receive sufficient information with an AFE to put them on notice of something they later found objectionable. Those arguments are often dismissed based upon the audit rights provided in the JOA.

The trend in drafting JOAs is to provide broader protection for the operator. This has been achieved by extending the scope of the limitation of liability or by reducing the grounds on which it may be argued that there has been gross negligence or wilful misconduct, such as by limiting the operator's responsibility to acts/omissions of senior supervisory personnel.

In applying exculpatory/indemnity clauses, one must therefore take into consideration the impact of the governing law, the fact matrix and, in particular, the wording of the disputed liability clause (whether verbatim from a model JOA or where it uses bespoke language) on the final outcome of any such case.

Non-Consent or Exclusive Operations

Introduction

JOAs include provisions that deal with the situation where all the parties are not able to agree jointly on every operation by allowing those in favour of conducting a programme to be able to carry it out. The first situation is an 'exclusive' or 'sole risk' operation that provides a party or parties who have proposed a certain programme, which has been overruled by the majority, the opportunity to proceed with such programme. The second situation is where a dissenting party does not wish to participate in a programme approved by the majority. This is referred to as a 'non-consent' operation. In some jurisdictions, such as Canada, JOAs do not distinguish between non-consent and exclusive operations. Instead, they use the term 'independent operations' for all operations with less than all parties, which is the term used in the CAPL Model JOA.

Effectively, a sole risk programme redefines the scope of the interests involved in a field project and often results in a sub-venture. Those participating share the risks, costs and rewards of the operations between themselves in proportion to their interest in the sole risk venture. Non-consenting parties are deemed to have relinquished to the consenting parties.[136]

136 The AIPN Model JOA has traditionally tied the relinquishment of rights or non-participation in further operations '*on any Discovery made or appraised in the course of such exclusive operations*'. A confidential arbitration turning on what constitutes the '*appraisal*' of a discovery led to the inclusion of the definition in the 2012 AIPN Model JOA.

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On occasion, when such sub-ventures are successful, the non-participating parties are allowed to rejoin upon paying a substantial premium. JOAs may even allow for a late participation possibility with or without the payment of premium.

The cases reviewed in this section deal with disputes arising from operations where less than all the parties participated, ie a non-consent operation. All of them are from the courts of the USA, Canada, UK and New Zealand.

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USA

There are a significant number of US cases in which issues relating to operations conducted by fewer than all of the participants arise. The leading cases described below focus on the application of non-consent provisions.

In *Hamilton v. Texas Oil & Gas Corp.*,[137] a non-operator argued that the clause in their JOA, based on the AAPL 610 Form, that allows an operator to collect a multiple of a non-consenting party's share of costs from that party's share of production was an unenforceable penalty. This argument was rejected.

In *Bonn Operating Co v Devon Energy Production Co*,[138] the US Court of Appeals, Fifth Circuit addressed two issues relating to a well drilled by Devon, the operator, under a JOA which used the 1956 version of the AAPL Model Form 610. Devon gave notice of operations or intent to drill to Bonn after the well had already been drilled and Bonn elected to go non-consent with regards to drilling of the well. The two issues that arose in this case were: (i) the scope of the costs to which the contractual penalty for non-consent applied; and (ii) whether any contractual penalty should be applied given that the notice was sent after the well had already been drilled.

On the first issue, Bonn argued that Devon had improperly included costs incurred before drilling and after completion of the well. Its position was that the only costs to be included were those from the period from spudding of the well to completion or commencement of production. Referring to *Dorsett v Valence Operating Co*,[139] the judgment stated that case law was clear that 'commencement of operations' for the drilling of a well occurs before the well is spudded. As to when the costs on which the penalty could be charged should end, the court found that payout was defined in the JOA as 'the time when the proceeds from the well equal 100% of the non-consenting party's share of certain costs and 300% of the non-consenting party's share of drilling costs'. Consequently, payout was determined by the accounting records for the well, not tied to any operational milestone.

On the second issue, Bonn argued that no contractual penalty should be payable because the notice of operations of intent to drill was not sent by Devon until after the well was complete and under the JOA it was permitted 30 days in which to consider such notice and elect to participate. The court followed the Texas Supreme Court's decision in *Valence Operating Co. v Dorsett*[140] in which it was held that this language did not prevent the operator from commencing work before the end of the 30-day period. The court recognized that, unlike in *Valence v Dorsett*, in this case the operations were completed before the notice was sent. However, this improved the position for Bonn because it reduced the risk for it. Furthermore, the court found that Bonn waived any rights in relation to late notice when it elected to go non-consent with full knowledge of the costs of the well and its successful completion.

In *Valence v Dorsett*, it was also argued by Dorsett that the non-consent penalty was unenforceable under Texas law. The Texas Supreme Court rejected this argument for two reasons: (i) 'the non-consenting party is not being punished for breaching a contract; she simply agreed not to participate in a return on an

137 648 S.W.2d 316 (Tex App 1982).

138 613 F.3d 532 (2010).

139 111 S.W. 3d 224, 230 (Tex App – Texarkana 2003), *rev'd on other grounds*, 164 S.W.3d 656 (Tex 2005).

140 ibid.

investment she did not make', and (ii) the non-consent penalty could not be characterised as a penalty or liquidated damages because it was not triggered by a breach of contract by any party.

XTO Energy Inc v Smith Production Inc[141] is a case in which the Texas Court of Appeals had to consider the question of whether a party that received notice of a proposed drilling operation could change its election from non-consent to consent within the 30 -day period following notice in a JOA based on the 1982 version of the AAPL Model Form 610.

The court held that the language of the JOA was unambiguous and it prevented a party from changing its election once made. It referred to the Texas Supreme Court's decision in *Valence v Dorsett* noting that it had found the language in the Article VI provision, which was substantially similar language, to be unambiguous and that it did not refer to any right to change an election once made. The Court also referred to the New Mexico Court of Appeal's decision in *Nearburg v Yates Petroleum Corp*[142] on the same parts of Article VI in the 1977 AAPL Model Form 610. In that case, a party sought to change its election more than 30 days after receiving notice based on 'alleged inadvertance in not timely responding'. The court refused to allow a change, even where the election had been caused by inadvertence.

Canada

This issue has received the greatest amount of attention in the various updates of the CAPL Operating Procedure. It has evolved from just under four pages in the 1974 version to more than 17 pages in the most recent 2015 update. One of the foundation principles of the CAPL Operating Procedure is the attempt to balance the rights of an individual owner with those of the owners in the collective sense. This is of particular importance to the independent operations article, as it is the area that is the most likely to see misalignment between the parties over time.

The updates have been designed to include process controls that balance the respective expectations of the proposing party and those parties receiving notice of the proposed independent operation, with a high level of specificity relative to the corresponding content used in agreements in other jurisdictions. The consequences of non-participation have also been designed in an attempt to balance risk and reward, whether as a production penalty/cost recovery for the more typical independent operation or a forfeiture of certain mineral rights for well activities required to preserve the mineral rights late in the life of the applicable tenure.

While the independent operations provisions were used quite infrequently until the early 1990s, independent operations have become increasingly common in the Canadian industry with thousands of them now conducted each year. The learnings from industry's experiences with the provisions have shaped the major updates to the post 1990 documents.

Notwithstanding that independent operations have become increasingly common and that the CAPL Operating Procedure has been addressing the topic in greater detail with each update (and thereby increasing significantly the number of topics of potential disagreement), there have been very few recent disputes about independent operations (compared to the number conducted) that have escalated to the degree to which they have gone to the courts.

APL Oil & Gas Ltd v Amoco Canada Resources Ltd[143] is a decision of the Alberta Court of Queen's Bench on whether a gas well was a 'well required to preserve title' under the JOA. The answer to the question determined whether APL was entitled to its participating interest share in the well, which had turned out to be extraordinarily productive. Under the 1974 CAPL Operating Procedure, if a well is required to preserve title and a party elects not to participate in it, then it is required to assign its interest in the lease on which the well is drilled. If it is not such a well, a party that does not initially participate is entitled to the benefit of the well once those who participated have recovered 300 per cent of the costs of the well.

141 282 S.W. 3d 672 (Tex App – Houston [14th Dist.] 2009, pet. dism'd).
142 123 N.M. 526, 943 P.2d 560 (Ct.App 1997).
143 1993 CanLII 7245 (AB QB).

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The judge held that the issue was more a question of fact than a question of law depending on the evidence as to the intention of the parties at the time the well was drilled. The judge concluded that, in light of that evidence, the well was not a well required to preserve title and so the non-participating party was entitled to its share of production once 300 per cent of the drilling and completion costs of the well had been received by the participating parties in the well.

UK

In *Ithaca Energy (UK) Limited v North Sea Energy (UK) Limited*,[144] the Commercial Court in London had to determine whether a well (Well J03) constituted a joint operation under a JOA for which North Sea Energy (NSE) was obliged to contribute its share of the costs. NSE had purported to opt out of the obligation to pay the costs on the basis that Well J03 was an appraisal well, to which it contended it could adopt a 'non-consent' position under the JOA.

The question turned on whether Well J03 could properly be described as an appraisal well under the JOA. The judge held that to reach a conclusion on this issue it was necessary to determine the purpose for which the well was to be drilled in order to determine whether NSE could 'non-consent' to it. The judge concluded that there were several factors that pointed to Well J03 not being an appraisal well for a number of reasons Consequently, he concluded that NSE was not entitled to non-consent to the drilling of the well.

New Zealand

Greymouth Petroleum Acquisition Company Limited and Southern Petroleum (Ohanga) Limited v Ngatoro Energy Limited[145] is a decision of the High Court of New Zealand. It arose out of a Joint Venture Operating Agreement (JVOA) and concerned a sole risk operation in relation to the Goldie-1 well in the Ngatoro field, offshore Taranaki, New Zealand.

Goldie was drilled as a sole risk operation by Ngatoro and it resulted in a commercial discovery of oil and gas. Greymouth and Southern (together 'Greymouth') exercised their right to back into the Goldie operation. In the meantime, Ngatoro had put Goldie into production, pumping the oil and flaring the gas. Greymouth objected to this on the basis that Ngatoro had not formulated or provided for its approval any development plan for Goldie.

The dispute between the parties covered a range of issues relating to the sole risk operation, including the scope of Greymouth's interest in Goldie, the entitlement to revenues from Goldie and whether there had been a material breach of the JVOA; or wilful misconduct or a breach of fiduciary duty or both by Ngatoro as operator. Addressing the court's finding on each is beyond the scope of this article. The most significant finding in the context of non-consent or exclusive operations is that, once Greymouth had backed into the operation, a sub joint venture was formed governed by its own sub joint venture operating committee.

Conclusion

Non-consent or exclusive/sole risk provisions are often some of the most complex and lengthy in JOAs. As such, they have the potential to give rise to differences and disputes as parties try to navigate the complexity of the provisions. It should be noted that there were no published international arbitral awards that dealt with disputes that arose from non-consent or exclusive operations, which is a bit ironic, given that this particular provision in the AIPN Model JOA has grown increasingly longer and more complex with each version of this model JOA.

It is noteworthy that the cases reviewed focus on the mechanism for non-consenting to proposed drilling, rather than exclusive operations. This includes the *Ithaca v NSE* case, which concerns a field in the UK

144 [2012] EWHC 1823 (Comm).

145 Unreported, High Court of New Zealand, Wellington Registry, 30 May 2003.

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Continental Shelf. It is noteworthy because JOAs outside of the USA tend to either not include a non-consent provision, or if they do, they are rarely used. Although it is clear that there is the potential for disputes to arise in relation to the issue of non-consent, it is surprising that disputes relating to other aspects of exclusive or sole risk provisions have not led to more reported decisions.

Transfer and Pre-Emption Rights

Introduction

JOAs typically provide that a party can freely transfer its interest to another party, subject to restrictions under the governing law of the JOA and the approval of the government, which may be required under the granting instrument for the concession in many international jurisdictions.

Industry JOAs often place additional contractual restrictions on a party's ability to transfer its interest in the JOA. Typical transfer restrictions that are widely accepted in the industry address issues such as: (i) the qualifications of the transferee; (ii) minimum interest thresholds; and (iii) the process for obtaining government approval, where applicable.

Pre-emption rights are additional to these standard restrictions and can be grounds for a dispute amongst the parties. Pre-emption rights typically only apply if the parties have agreed upon such express language in the JOA.

The basic concept behind a pre-emption right is that a transferor must first offer the interest being transferred to the non-transferring parties in the JOA before it can transfer its interest in the JOA to a third party. This kind of pre-emptive right may occasionally apply to transfers to existing JOA parties, if the contract language provides for it. If the other JOA parties do not exercise their pre-emptive right to take up the transferor's interests on the same terms being offered by the third party within a specified time, the transferor can then proceed with its sale and transfer its interest to that third party.

There are essentially two kinds of pre-emption mechanisms. The first is a preferential right, or what is sometimes called a matching right. The second mechanism is a right of first refusal (ROFR), or what is sometimes called a right of first negotiation. The basic difference between these two mechanisms is the timing when the transferor must offer the pre-emptive right to the non-transferring parties and the process for setting the price and terms.

In a preferential right, the transferor notifies the non-transferring parties in the JOA of the commercial terms it has finalized with a transferee. The non-transferring parties then have a specified time to match those terms. If the non-transferring parties elect to do so, they have a priority right to step into the proposed sale of the transferor's interest instead of the original transferee.

Under a right of first refusal, a transferor starts the pre-emptive process before it seeks out a third-party buyer by giving notice to the other parties of its intention to sell its interest. The non-transferring parties then have an exclusive right to negotiate the purchase of the transferor's interests for a defined period of time. If they are unable to agree upon terms, the transferor is then free to seek a transferee outside the JOA parties, subject to a typical proviso that the commercial terms between the transferor and any third-party transferee cannot materially differ from the terms of the transferor's original offer to the other parties.

In addition to one of the above pre-emption mechanisms, JOA parties need to also agree upon whether their pre-emption rights apply to an asset transfer or a share transfer (ie a change of control) or both. An asset transfer is when a JOA party transfers its direct ownership interest (or participating interest) in a JOA and its accompanying interest in the granting instrument. A change in control is the direct or indirect change in the ownership of the voting rights of a JOA party, typically through the sale of its shares or its parent company's shares.

The cases identified and reviewed were decided in a broad range of fora, including arbitration under the ICC Rules and the Indian Arbitration and Conciliation Act; and the courts of Australia, Canada, New Zealand, Norway, the UK and the USA.

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USA

There are a number of US cases that deal with transfer and pre-emption rights. They frequently address issues relating to the requirements regarding the contents of the notices given in relation to the proposed transaction and when a binding contract is formed obliging the party exercising the pre-emption right to acquire the participating interest. In addition, questions relating to overriding royalty interests arise. The most recent, leading cases are described below.

In *Tenneco, Inc. v Enterprise Products Co.*,[146] the Texas Supreme Court found that a two-step process, often called the 'Texas Two-Step', after a country dance ubiquitous in Texas dance halls, did not trigger a preferential right to purchase, and as a result, did not apply to a sale of stock as it only restricted the right to transfer the ownership interest itself.

The Louisiana Court of Appeal reached a similar conclusion in *Fina Oil & Chemical Corp. v Amoco Production Co.*[147]

The Wyoming Supreme Court reached a contrary result in *Williams Gas Processing-Wamsutter Co. v Union Pacific Resources Co.*,[148] rejecting 'a highly tortured and technical reading of the contract terms'. It should be noted that the contracts in question were not JOAs but rather ownership and operation agreements relating to a gas processing plant and gathering system.

In *Samson Resources Co v Amerada Hess Corp*,[149] the Oklahoma Court of Civil Appeals considered a case in which Samson sought specific performance under the preferential right clauses of three JOAs.

Amerada entered into a contract to sell its interests in hundreds of leases to a third party company called DLB for a total sum. This was to be allocated among the assets in accordance with the fair market value of those assets as set out in an attachment to the contract. Amerada sent Samson a number of notices regarding the sale of its interests in the various relevant wells. In response, Samson sent letters indicating that, in one instance, it elected to purchase all of the wells listed and, in others, it elected only to purchase some of the wells. Amerada rejected one of these letters on the basis that Samson had elected to purchase only one of the wells. It then went ahead with the sale to DLB.

The issue that went to the Court of Appeal was whether Samson was entitled to elect to purchase only some of the wells under each JOA. The court held that Amerada's offer to DLB, which became its offer to Samson, was to sell its entire interest in all of the leases covered by each JOA. To accept that offer, Samson was required to accept that condition and purchase Amerada's entire interest under each JOA.

In *Seagull Energy E&P, Inc., v Eland Energy, Inc.*,[150] a non-operator in a US outer-continental shelf lease assigned its rights and liabilities subject to a JOA. The assignee then defaulted on payments due under the JOA for operating costs. Applying the general Texas and common law rule that one can assign contract rights but not contract obligations (unless all of the other parties agree to the assignment), the court held that the assignor remained liable under the JOA.

Coral Production Corporation v Central Resources Inc[151] is a case decided by the Nebraska Supreme Court. Coral and Central were parties to a JOA, with Central being the operator. The dispute arose when Central put all of its oil and gas assets up for sale. Coral claimed it had a preferential right to purchase Central's Nebraska assets. Central denied this and sold 70 per cent of its assets, including the Nebraska assets, to EXCO without offering Coral the right to buy them. Shortly before the sale to EXCO, Coral had already disposed of its other assets.

146 925 S.W.2d 640 (Tex 1996).
147 673 So.2d 668 (La App 1st Cir).
148 25 P.3d 1064 (Wyo 2001).
149 41 P.3d 1055 (Okla Civ App 2001).
150 207 S.W.3d 342 (Tex 2006).
151 730 N.W.2d 357 (Neb 2007).

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The JOA was based on the 1977 AAPL Model Form 610. It provided a preferential purchase right, with exceptions to that right where 'substantially all of the assets and/or stock of the selling party is sold to a non-affiliated third party . . . '. Central argued that Coral did not have a preferential right to purchase because the sale to EXCO fell within the exception added by the parties, ie it was a sale of substantially all of its assets to a non-affiliated third party. Coral argued that the sale did not fall within the exception because the exception did not include the sale to more than one non-affiliated third party, which was the case here as there had been two sales.

The court concluded that Central was seeking to exit the oil and gas business. It offered all of its assets for sale and it had no remaining assets following the two sales agreements. Consequently, it fell within the exception to the preferential rights agreed by the parties.

Navasota Resources, L.P. v First Source Texas, Inc[152] is a 2008 decision of the Texas Court of Appeals in relation to preferential rights under the 1989 version of the AAPL Model Form 610. Navasota owned a 55 per cent participating interest and First Source owned the remaining 45 per cent under a JOA for a property referred to as the 'Hilltop Prospect'.

In September 2005, Gastar (First Source's parent company) signed a letter of intent with Chesapeake under which Chesapeake would: (i) purchase 19.9 per cent of Gastar's shares; (ii) purchase 33.3 per cent of First Source's working interest in the Hilltop Prospect; and (iii) enter into an area of mutual interest comprising 13 counties in East Texas. First Source notified Navasota of the proposed transaction. It sent one notice setting out the terms that Navasota had to meet to exercise its preferential right. Then, after Navasota notified First Source of its intent to exercise its preferential right, First Source purported to withdraw the first notice and issued a revised one. The second notice required Navasota to comply with every aspect of the letter of intent with Chesapeake (including the agreement to buy other assets beyond First Source's working interest in the Hilltop Prospect) in order to exercise its preferential right.

The court held that Navasota could only be required to purchase the share of First Source's working interest in the Hilltop Prospect. The acquisition of shares in Gastar and entering into the area of mutual interest were not assets covered by the JOA and so they could not be requirements imposed on Navasota in order to exercise its preferential rights. It also held that a binding contract for sale was created when Navasota notified First Source of its acceptance of the terms and conditions in the first notice for the acquisition of 33 per cent of First Source's working interest in the Hilltop Prospect.

MRC Permian Company v Three Rivers Operating Company[153] is another decision of the Texas Court of Appeals, in this case applying the law of New Mexico. Three Rivers, MRC and Joe Foran (MRC's president) were parties to a JOA that related to certain properties in Lea County, New Mexico and which appears to have been based on the 1990 AAPL Model Form 610. In May 2012, Three Rivers entered into an agreement to sell various properties to a third party company, COG, including the Lea County properties. The agreement allocated a purchase price of $14.2 million to the Lea County properties.

On 21 May 2012, Three Rivers notified MRC and Mr Foran of the proposed sale to COG. The notice limited its offer to MRC and to Mr Foran to five properties in which they respectively already held interests for $6.9 million. It required MRC and Mr Foran to return the notice with the appropriate boxes checked to indicate their election. MRC and Mr Foran replied on 5 June 2012 exercising their preferential rights in relation to those properties and providing the notice with the appropriate boxes checked. However, they also stated that they wished to elect to purchase 'all of Three Rivers' interest in the Contract Area created by the subject JOA . . . even if the interest is not specifically listed in Exhibit A to the letter notices'. There were subsequent exchanges between Three Rivers, MRC and Mr Foran in which a broader transaction was discussed and a dispute arose between them as to whether this resulted in a binding agreement to enter into the broader transaction. Following a similar approach to that in *Navasota v First Source*, the Court of Appeals

152 249 S.W.3d 526 (Tex App – Waco 2008, pet. denied).

153 2015 Tex App LEXIS 8203 (Tex App – Dallas 2015, no pet.).

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concluded that the first notice was effective to exercise the preferential rights and that it led to a binding agreement to purchase the five properties.

Canada

The pre-emptive, or right of first refusal, provisions of Canadian JOAs reflect the operating, business and legal environments that have evolved over time in the Canadian industry, and which have been incorporated into the various versions of the CAPL Operating Procedure, in particular:

i. The nature of Canadian land tenure is that the areal extent of O&G leases is quite small relative to outside of North America. It is very common for a company to have many hundreds (if not thousands) of JOAs applicable to its holdings in Western Canada. In contrast, companies in international operations may have only one or two JOAs covering large acreage holdings in a particular country. The large number of mineral rights agreements has coloured the handling of a number of issues in the applicable provisions of the CAPL Operating Procedure, such as the construction of the exceptions to the right of first refusal obligation and the choice to ignore a change of control.
ii. The use of ROFRs (rather than the consent not to be unreasonably withheld alternate) has lessened significantly over time. The changes in the construction of the provision and industry's ongoing asset rationalization programs reinforced the point that only parties serious about this type of encumbrance on their interest should include a ROFR in their agreement.
iii. The changes in the 1990 and subsequent versions of the document in the construction of the right of first refusal alternate and the related exceptions to the ROFR obligation reflect a conscious choice of industry to decrease the likelihood that the ROFR obligation under a particular land agreement could interfere with the ability of a party to effect a larger regional transaction.

There were two key aspects of this shift. One was to introduce a negotiated time limitation on the duration of a ROFR as of the 2007 CAPL Operating Procedure. The other was an evolving modification to the exceptions to the ROFR obligation over time to reduce the potential application of ROFRs to larger scale regional transactions.

Given that there are a significant number of Canadian cases, the following account focuses on the most recent, relevant cases. The issue arises under various versions of the CAPL Operating Procedure that contain a ROFR. In particular, the cited cases concern the ROFR provisions in the 1974 and 1990 versions of the CAPL Operating Procedure. Under the Alberta Law of Property Act, a ROFR is deemed to be an equitable interest that runs with the land, which is reflected in the relevant Clauses 2401 and 2402 in both of those versions of the CAPL Operating Procedure.

In *Best Pacific Resources Ltd v Eravista Energy Corp*[154] the Court of Appeal of Alberta considered the interpretation and application of ROFR rights under Clause 2401 of the 1974 CAPL Operating Procedure. The particular questions concerned the rights of the holder of a ROFR when the lands to which the right attaches are offered for sale as part of a package deal that includes other lands.

The dispute arose following the insolvency of one of the parties to a farmout agreement that incorporated the 1974 CAPL Operating Procedure. The receiver sought to sell parcels of land and one of those parcels included land over which Best Pacific sought to exercise a ROFR. The issue that had to be resolved was the approach to valuing the ROFR lands when they were part of a broader transaction. Best Pacific argued that the estimate of the value of the ROFR lands was not a bona fide estimate. The Court of Appeal concluded that Best Pacific had not made out any basis for such an argument.

154 2002 ABCA 286 (CanLII).

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Calcrude Oils Limited v Langevin Resources[155] is a decision of the Court of Queen's Bench of Alberta that concerned the 1974 CAPL Operating Procedure. The dispute also arose under a farmout agreement under which the 1974 CAPL Operating Procedure would govern the relationship between the parties.

The plaintiffs in the case argued that the defendant had failed to provide proper ROFR notices in relation to a number of transactions and, as a result, they had lost the opportunity to exercise their ROFR rights to acquire further interests. Consequently, the plaintiffs contended that they had suffered damages. In summarizing its conclusions, the court stated that this was a situation in which the plaintiffs had made a 'sound business decision about a risky business opportunity that turned out to be quite successful' and, with the benefit of hindsight, they were 'advancing a claim for technical breaches to seek to obtain their lost money back'.[156] It is with this perspective that the court reached its conclusions in rejecting the claims or concluded that no loss had been suffered.

In *Canadian Natural Resources v Encana Oil*[157] the Court of Appeal of Alberta had to deal with an appeal in relation to the application of the ROFR in the 1990 CAPL Operating Procedure to a farmout agreement. The dispute between the parties was whether a farmout agreement itself triggered the ROFR or whether a disposition of the working interest was not triggered until later. The case came before the court on a summary procedure and it expressed the view that ROFR provisions were ambiguous and should not be resolved by summary procedure. Rather a proper resolution of the issues required extrinsic evidence 'including expert evidence of industry practice. . ..to assist in the interpretation of the ROFR contained within the CAPL Operating Procedure, and in particular Clause 2401 Alternate B'. There is no record of whether the dispute returned to court for full trial.

In *IFP Technologies (Canada) v Encana Midstream and Marketing*[158] the Court of Queen's Bench of Alberta had to consider whether the ROFR under the 1990 CAPL Operation Procedure was triggered and, if so, whether IFP acted unreasonably in not consenting to a proposed disposition.[159] The court concluded that the ROFR was triggered and that IFP had acted unreasonably in refusing to consent to the proposed disposition.

IFP appealed the decision at first instance to the Court of Appeal and, in a majority decision in *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing,*[160] the Court of Appeal overturned the first instance decision and concluded that the trial judge's interpretation of the contract was flawed.

The key difference between the conclusions reached at first instance and on appeal was that the trial judge decided that IFP's interest was limited to the oil and gas produced only from thermal and other enhanced recovery methods but the Court of Appeal concluded that this was not the case. The judge's decision that IFP had acted unreasonably in refusing to consent to the disposition was based on this conclusion. Having decided that this was wrong, the Court of Appeal also concluded that IFP acted reasonably in refusing to consent to PCR's disposition to Wiser. Wiser was not interested in pursuing thermal production and its intended approach would have an impact on the viability of thermal production which IFP wished to pursue.

In *Northrock Resources v ExxonMobil Canada Energy,*[161] the Court of Appeal for Saskatchewan considered an approach to the exercise of a ROFR described as a 'busted-butterfly-structured transaction'. This had the same effect as the 'Texas two-step' described in the subsection 'USA' above, as interests are assigned within a group to an affiliate and then the shares in that affiliate are sold.

ExxonMobil had used a busted-butterfly structure to dispose of certain of its oil and gas interests in Saskatchewan. Northrock claimed that its ROFR was triggered by the disposition and that ExxonMobil had

155 2003 ABQB 1051 (CanLII).
156 ibid at para 109.
157 2008 ABCA 267 (CanLII).
158 2014 ABQB 470 (CanLII).
159 The Court of Queen's Bench's decision has been appealed and overturned (see below).
160 2017 ABCA 157 (CanLII).
161 2017 SKCA 60 (CanLII).

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breached the JOA by failing to give Northrock its ROFR. In addition, it claimed that ExxonMobil and others had breached their duty of good faith to it.

The claim failed at first instance and before the Court of Appeal. The Court of Appeal emphasized that the provisions that defined the ROFR had been agreed by the parties and should be given effect. They did not grant Northrock a ROFR in relation to ExxonMobil's disposition of its interests.[162] The Court of Appeal also found the judge had adopted the right approach in considering first whether the transaction triggered the ROFR and second whether ExxonMobil had breached its duty of good faith by 'structuring the transaction to purposefully avoid the ROFRs' was the correct approach.

UK

In *Texas Eastern Corporation v Enterprise Oil PLC*[163] the English Court of Appeal considered issues relating to the application of pre-emption rights in a JOA and Memorandum of Agreement relating to licence blocks in the UK North Sea. A dispute arose over the proposed sale to Enterprise of the entire share capital in a Texas Eastern company (referred to as TENSI), which was the owner of Texas Eastern's interests in the licence area. The dispute concerned whether the exercise of pre-emption rights could be effective where it was uncertain precisely what percentage participating interest each of the pre-empting parties would acquire.

At first instance, it was held that the uncertainty as to how the percentages should be determined and the requirement for the participants to reach a further agreement, meant that the provision was too uncertain to be enforceable. The Court of Appeal disagreed. It found that there was an underlying commitment by the participants to a reasonable solution. The court's judgment was that as between the parties which exercised pre-emption rights and Texas Eastern, there was a joint and several obligations on the parties exercising the right to purchase all of the shares in TENSI at the price offered by Enterprise to Texas Eastern. The question of percentages was only an issue between the three acquiring parties. If they could not reach an agreement, then the shares could be split equally.

Australia

In *Santos Offshore PTY Ltd v Apache Oil Australia PTY Ltd*,[164] the Supreme Court of Western Australia considered the validity of notices given by Apache to Santos under the Spar JOA concerning a proposed transaction, which gave rise to pre-emption rights. Santos argued that the notices given by Apache did not comply with the requirements of the JOA. Consequently, Santos contended that the notices were invalid in whole or in part.

The court found that the notices were invalid on the basis that they required Santos to meet terms included in the proposed transaction, which were appropriate in an agreement for the sale of all of the shares in the relevant Apache companies that held the participating interests, but which could not be effectively matched in an asset sale and did not meet the requirements of the pre-emption provisions in the JOA. This included a mechanism for price adjustment on completion, warranties and indemnities.

Norway

ND-1991-445 is a public judgment from the Court of Appeal, published in the journal '*Nordiske Domme i Sjøfartsanliggende*' (translation: ' Nordic Decisions in Maritime Matters'). The case concerned a dispute

162 The relevant provisions of the JOA are set out at para 38.

163 *Texas Eastern Corporation (Delaware), Texas Eastern International Energy Inc (Delaware), Texas Eastern Transmission Corporation (Delaware) v Enterprise Oil PLC, Enterprise (E&P) Limited, Amerada Hess Corporation (Delaware), Amerada Hess Limited, British Gas PLC, Gas Council (Exploration) Limited* (unreported), 21 July 1989 (Court of Appeal).

164 *Santos Offshore PTY Ltd v Apache Oil Australia PTY Ltd, Apache East Spar PTY Ltd and Apache Kersail PTY Ltd* [2015] WASC 242. This case is presently pending appeal.

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regarding the exercise of pre-emptive rights under a JOA to a share in a production license on the Troll-field on the Norwegian continental shelf, and shares in the associated pipeline, Zeepipe.

International

ICC Case No. 3 concerned a dispute that arose where two parties to a JOA each alleged that a change in control in relation to the other party triggered a pre-emption right and, because in each case the procedure set down by the JOA had not been followed, a breach of the JOA. Both parties sought declarations from the tribunal and an order for specific performance requiring the participating interest of the other party to be transferred to it.

The pre-emption clause in this JOA was identical to the clause in the 1990 AIPN Model JOA, which read: 'Any transfer of all or a portion of a Participating Interest whether directly, or indirectly by assignment, merger, consolidation, or sale of stock, or other conveyance, other than with or to an Affiliate, shall be subject to the following procedure . . . '. Both parties agreed that this pre-emption clause applied to a change of control (ie a share transfer). However, they disagreed on how far up the corporate chain the pre-emptive right extended.

The tribunal concluded that the pre-emption clause was intended to allow consensual comfort among the parties to a JOA concerning the key characteristics they each bring to the venture. Consequently, it would come into play when a participating interest was being transferred in a way that varied the qualitative identity, if not the nominal identity, of the venturers who have staked their enterprise on one another. As a result, the tribunal found that the pre-emption clause applied to both transactions. However, for other reasons, it concluded that both company's counterclaims failed.

In *Assam Company India Ltd v Canoro Resources Ltd*,[165] the Supreme Court of British Columbia recognized and enforced an arbitral award issued in India. The JOA provided that, if one party sought to sell, transfer or assign its participating interest, the other party had a right of first refusal. The right extended to 'any sale or assignment of the stock of a Party other than to an Affiliate hereto where the principal or sole asset of such party at the time of such sale is its Participating Interest under the Contract'.

The tribunal found that Canoro had breached the JOA by selling its shares to Mass Financial Corp. It awarded damages to Assam and directed Canoro to transfer all of the shares to Assam that had been sold to Mass. The BC court granted recognition and enforcement of the award except in relation to the direction to transfer the shares, because Canoro had been dissolved by the BC Registrar of Companies for failure to file annual reports.

FAR Limited (Australia) v Woodside Energy Sengal is an unpublished ICC case on the interpretation of a pre-emption clause in a JOA that has been reported in the media and disclosed by the parties.[166] FAR claimed that the pre-emptive rights notice issued under the JOA by ConocoPhillips (the previous owner) advising of its sale of shares in its subsidiary that held an interest in the JOA to Woodside was unsatisfactory, that access to requested information was refused, and that its pre-emption rights over ConocoPhillips' interest had been incorrectly overridden.

The tribunal determined that the JOA between the parties did not grant pre-emption rights over a transaction involving a sale of shares in a JOA party. The tribunal also decided it did not have authority to determine the consequences of a letter sent to FAR by ConocoPhillips advising FAR of its pre-emption right over such sale of shares.

165 2014 BCSC 370; Supreme Court of British Columbia, Docket S127853, 7 March 2014, summarized in ICCA Yearbook of Commercial Arbitration 2014 – Volume XXXIX.

166 See, eg Angela Macdonald-Smith, 'FAR Loses Arbitration over Woodside Senegal Oil Project' Australian Financial Review (14 February 2020). Jack Ballantyne, 'ICC Panel Decides Australian Battle over Senegal Oilfield' Global Arbitration Review (14 February 2020). Woodside Petroleum Ltd and FAR Limited Press Releases dated 14 February 2020. Sonali Paul, 'Woodside Faces Delay on Senegal Oil Project Over Ownership Row' (2 June and 4 December 2017).

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Conclusion

The exercise (or attempted exercise) of pre-emption rights has led to disputes under various versions of JOAs and under many governing laws. This is unsurprising given the importance placed on pre-emption rights in JOAs throughout the industry, and the fact that they are often exercised under pressured circumstances with commercial risks running high for the parties.

The common theme is that the more complex the circumstances and the proposed transaction, the more likely it is that a dispute may arise. It is particularly challenging for pre-emption provisions to operate effectively if they are unclear whether the assets in the proposed transaction are covered by the pre-emption clause and whether such an option may be exercised.

Given these challenges, it is notable that the some of the Canadian cases reflect that a duty of good faith may be implied in relation to the exercise of a ROFR. From the cases reviewed, this has not been mirrored in other jurisdictions.

Partition of Leases

Introduction

In the US onshore industry, issues can sometimes arise in connection with the partition of interests in oil and gas interests in property.[167] Addressing this in detail is beyond the scope of this article. However, in summary, where there are concurrent owners of undivided interests, those owners will hold their interests as co-tenants. Each co-tenant may possess all parts of the jointly owned property and is entitled to receive a share of sums received relating to the property. In some circumstances, the jointly owned interests are partitioned between the co-tenants so that they can each use and take profits from their part of the property separately.

Cases have arisen where the issue of partition has led to disputes, especially where partition may be prevented by an express or implied term in the JOA, which may give rise to an argument that the parties agreed not to partition.

USA

There are a number of decisions of the Texas Court of Appeals cited as *Dimock v Kadane* which address this issue in connection with different leases for which there were various forms of JOA in place. In each case, Dimock sought partition through sale and the Kadane defendants counterclaimed for a declaration that, under prior agreements, the right to partition had been waived.

Each of the 4 cases[168] concerned oil and gas leases in Palo Pinto County, Texas. The Operating Agreement was the AAPL Model Form 610, 1956 version. At first instance, the trial court found that the parties impliedly waived the right to a compulsory partition and so Dimock could not compel partition. The Court of Appeals upheld the first instance decisions.

8. CONCLUDING REMARKS

As shown in this review, the courts of the USA and Canada have developed a sophisticated O&G jurisprudence, followed by England, Australia and New Zealand, which is a reflection of the size of the industry within their respective jurisdictions and the resulting number of cases they generate. As a result, the courts in those jurisdictions are able to consider prior decisions made within their jurisprudence that deal with similar

167 It should be noted that most US JOAs waive rights of partition, so this issue does not arise frequently in US courts. It should also be noted that this issue does not arise at all in other jurisdictions. As eg in Canada, the CAPL Model Operating Procedure provides for a no partition clause. Clause 25.02 of the 2015 CAPL Operating Procedure includes a no partition clause that precludes any party from applying for any partition of the joint lands, joint property, etc.

168 *Dimock v Kadane* 100 S.W.3d 602 (Tex App – Eastland 2003, pet. denied), 100 S.W.3d 608 (Tex App – Eastland 2003, pet. denied), 100 S.W.3d 615 (Tex App – Eastland 2003, pet. denied) and 100 S.W.3d 622 (Tex App – Eastland 2003, pet. denied).

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