OGEL Energy Law Journal
www.ogel.org

ISSN : 1875-418X
Issue : Vol. 22 - issue 2
Published : June 2024

Book Review: Litigating Joint Ventures - Learnings from 270 Court Decisions and Arbitration Awards by E.G. Pereira and R. Fowler

About OGEL

The **OGEL** Energy Law Journal focuses on recent developments in the area of energy law, policies, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including energy geopolitics.

For full Terms & Conditions and subscription rates, please visit our website at www.ogel.org.

Open to all to read and to contribute

OGEL has become the hub of a global professional and academic network. Therefore we invite all those with an interest in energy law, policies and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact us at info@ogel.org if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

OGEL is linked to **OGELFORUM**, a place for discussion, sharing of insights and intelligence, of relevant issues related in a significant way to energy issues: Policy, Legislation, Contracting, Security Strategy, Energy Transition, and Climate Change related to energy.

Book Review: Litigating Joint Ventures - Learnings from 270 Court Decisions and Arbitration Awards

Eduardo G. Pereira[*] *and Reg Fowler*[**]

Joint ventures (JVs) are, in many respects, an excellent instrument of the modern energy industry, particularly in the petroleum sector. Energy and natural resource projects are long term, complex, capital intensive, and risky, often requiring several investors to join forces and share know-how and resources while dividing expenses and spreading risks. JVs and joint operating agreements (JOAs) based on model contracts, which express established industry usages, allow investors to respond to these challenges. The latest book "*Joint Venture Disputes in the Energy and Natural Resources Sector*" by A. Timothy Martin, John Gilbert and Peter Roberts,[1] examines the essential aspects of JVs within the dynamic realms of energy and natural resources. This book comprehensively deals with all the possible contractual questions arising from JVs and their agreements, as well as any possible cause of disputes amongst the parties, in multiple jurisdictions and internationally, in the petroleum and other energy and natural resources sectors.

This book is distinctive from other textbooks by its adequacy of its scope and command of analysis. Its scope covers the entire field of "*Joint Venture Disputes in the Energy and Natural Resources Sector*", such that one can correctly state that it has virtually covered the field. It comprises an analysis of more than 270 court cases and arbitration awards deciding issues pertinent to JV structures, petroleum projects and JOAs, model JOAs, and accounting procedures in the midstream and downstream petroleum sectors, natural resource sector and renewable energy sector.

The book contains a comprehensive analysis of the numerous methods and ways by which JV disputes in the petroleum and other energy and natural resources sectors arise, are addressed, and resolved, in multiple jurisdictions and internationally. Disputes can arise in the petroleum industry regarding the interpretation, application, and enforcement of JOAs, as well as alleged breaches. These disputes can relate to the performance of obligations, compliance with JOA terms, and application of force majeure. The authors deploy their familiarity with and experience with the petroleum industry's Model JOAs, reflecting common practices in negotiating and agreeing upon terms and conditions for upstream JVs play a significant role in addressing JVs disputes. Also, noted was the fact that model JOAs are not commonly used in the midstream and downstream sectors, except the Petroleum Joint Venture Association in Alberta, Canada, which has developed a unique construction, ownership, and operating agreement for co-ownership of processing facilities. Vitally, the model JOAs function to allocate risk, managing joint and several liability risks by reallocating and limiting it amongst the parties based on their predetermined shares. The book covers an examination of the latest model JOA, published in 2023 by the Association of International Energy Negotiators' which includes issues such as changes in economic sanctions, greenhouse gas emissions, human rights, decommissioning, anti-bribery provisions, limitation on operator liability, default,

[*] Faculty of Law, University of São Paulo, Brazil.
[**] Senior Energy Lawyer and Consultant.
[1] "*Joint Venture Disputes in the Energy and Natural Resource Sectors*"; A. Timothy Martin, John Gilbert, Peter Roberts. Oxford University Press September 2023, Hardcover, ISBN, 9780192859617, 448 pages. <https://global.oup.com/academic/product/joint-venture-disputes-in-the-energy-and-natural-resource-sectors-9780192859617>

exclusive operations, and force majeure. It points out that the mining industry has developed model JVAs in the US and Australia, but has not developed international models like the petroleum sector's Association of International Energy Negotiators' model JOAs to be used outside of their own jurisdictions.

JVs in the energy sector are a major source of commercial disputes, with recurring issues in jurisdictions like the US and Canada. Energy disputes are primarily resolved through arbitration-a method which the energy and mining companies prefer for reasons the authors discuss in Chapter 17. The 8 countries analyzed for this intention are divided between Africa (such as Nigeria), North America (such as Canada and USA), South America (such as Brazil), Europe (such as the United Kingdom and Norway), and Oceania (such as Australia and New Zealand). The methodology used by the book is furthermore an added benefit. The analysis of several reported judgments and awards of courts and tribunals in specific disputes give a broad, multi-dimensional understanding of a subject matter from its real-life perspective. The all-encompassing analysis of reported judgments and awards of courts and tribunals in specific disputes used in this book, highlights with strong emphasis, on the methods and means of addressing, managing, and resolving JV disputes in the petroleum and other energy and natural resources sectors within its factual context.

In broad terms, the book divides into three parts. The 1st part is introductory and sets JOA disputes in the factual context, giving readers a helpful understanding of the factors likely to influence judicial decision making. Section 2.4 lists these factors –

- The factual matrix
- The contract terms
- Case law
- Customary industry practise
- Governing law.

The second part reviews in more detail the development of Model JOAs, particularly domestic US and Canadian examples and the international model JOA provided by the AIEN. This part also helpfully introduces the reader to the different traditions in joint venture structuring which distinguish North American JOAs from the European and international equivalents. Both these parts are key to appreciating. The analysis of decided cases which follow in the third part. This part takes a thematic approach, organising the decisions it analyses into 12 subsections, each dealing with disputes relevant to a particular subject matter as follows-

- Scope of joint venture
- Size of share of joint venture
- Approval of joint venture operations
- Joint venture operations by fewer than all of the parties
- Allocation of costs
- Accounting procedure
- Default
- Scope of Operator’s duties/authority
- Limitation of liability and Indemnities
- Removal of the operator
- Transfer of rights
- Termination of the joint venture

- Miscellaneous disputes.

The authors do their best to identify cases that span several such themes and provide helpful cross references. The authors apply their expertise with the model JOAs and their familiarity with the different industry traditions from which their experience is drawn to explain the decisions in terms of the five factors listed in section 2.4 and mentioned above. Understandably, they place considerable emphasis on customary industry practice, as illustrated by the model JOAs each industry tradition uses.

The book addresses, albeit indirectly, the question to what extent will courts and tribunals rely upon the language of model agreements as evidence of industry practice, or even some form of "*Lex petrolea*" in the place of, and sometimes overriding, other principles of law? Taking the above example, could a party contend that the exclusion of the Operator's fiduciary duties or any duty of good faith is reflected consistently in model JOAs to the extent that such principle should be recognised as industry practice, even in the event that the drafting of the relevant JOA may be ambiguous or capable a narrow interpretation, allowing such a duty to be implied?

Reading this book, one reaches the conclusion that English law would probably take a formalistic approach, perhaps unconvinced that the industry's model agreements are sufficiently consistent on this point to disclose a unique industry position, whereas US courts might take a different view.

Several issues addressed by the book would lead the reader to the conclusion that there is no industry practice as disclosed by JOA model agreements which is sufficiently consistent across region and time to help a court or tribunal interpret a JOA. That conclusion follows naturally from the analysis of Chapters 6 and 11 which deal from different perspectives with the same issue – what are the limits of the Operator's authority, and what are the consequences when such authority is exceeded? Naturally, the parties are free to choose and define for themselves the mechanism by which the Operator is authorised and the scope of operations is agreed. The analysis of the model agreements in Part I of the book is particularly convincing in explaining how different regional and business practices have been reflected in different model agreement traditions. So, the US models are consistent with an industry that relies upon wide Operator discretion, fixed well by well, by the terms of a proposed "Authorisation for Expenditure" which each Non-Operator can elect to participate in or not. By contrast, Canadian models come closer to international and European models, constraining the Operator within the scope of annual work programs and budgets, possibly supplemented by authorisations for expenditure as well. In each case, it is the scale of the project and exposure to uncontrolled cost that has driven the regional industry to adapt their models accordingly.

There may be no one industry practice which a court can discern on these issues, but it is clear from the decisions discussed in the book that the relevant courts and tribunals have been sensitive to regional traditions. Accordingly, Chapter 6 discusses the US decisions in cases such as *M & T Inc v Fuel Res Dev Co* (discussed on page 89) where the Operator has been given a wide discretion to exceed the costs estimated in its authorisation for expenditure, even twofold. As the authors point out, the Authorisation for Expenditure ("AFE") as used in the Americas is not only a budget, but an offer of participation in a specifically described project – so the Operator may be free to overspend the authorised amount, but runs a risk of not recovering its costs if its implementation of the project differs significantly from the scope of work it proposed in the AFE. This is the lesson in the Alberta case of *Prairie Pacific Energy*

Corp v Scurry-Rainbow Oil Ltd (discussed on page 234), where the Operator perforated the well on completion in the wrong horizon.

By contrast, international JOAs often rely upon the Operating Committee and its decisions to describe the Operator's authority, and to update that authority according to circumstances. However, the work programs and budgets which such JOAs require the Operator to propose annually for approval are often short of detail, precisely because they try to address a year or several years of expenditure across a multiphase project or activity – with the result that they are often less specific and less reliable as a mandate than an Authorisation for Expenditure, which is project specific. This is ironic because many of the international JOAs expressly limit the Operator's authority to spend in excess of the approved budget, often requiring the Operator to present the Operating Committee with an amended budget before any further cost overrun can be incurred. In other words, the consequences for the Operator of losing control of its budget are potentially much more severe, though the authors have identified only a few cases where the Operator has been unable to recover its costs from Non-Operators to the extent the budgeted amount has been exceeded. And what is remarkable in many such cases discussed by the authors is that the court resorted to reliance upon implied duties of fair dealing precisely because a party was found to have breached the JOA deliberately and/or to have acted dishonestly.[2]

This is a vitally important point because often the Operator's exculpatory clause, requiring the Non-Operators to indemnify the Operator for costs and liabilities incurred absent its wilful misconduct and/or gross negligence is often limited to approved petroleum operations – in other words, that scope of activity approximately identified in work programs and budgets. This is logical because the Non-Operators should only accept liability for the Operator's activities to the extent they have been discussed and approved by the Operating Committee. This logic is often repeated in JOA provisions which require a withdrawing party to remain liable for activities that were approved by the Operating Committee when it was still a party, but were actually performed after its departure. However, this leaves plenty of room for dispute when things go wrong. Indeed, courts are not averse to imposing fiduciary duties upon the Operator precisely when it acts outside of its authority, and therefore outside of the protections provided for it under the JOA – including the express exclusion of any duty of good faith or honest dealing. It also seems to be the case from the decisions the authors analyse that courts more regularly draw upon principles of fair dealing and good faith where the issue at stake is connected with joint operations under the JOA, but not expressly covered by the JOA's governance procedures. This seems to apply to cases such as *Texas Oil & Gas Corporation v. Hawkins Oil & Gas Inc.* (discussed on page 227) and *ENI v Samson Inv. Co*. (discussed on page 232). However, there are limits to this point as illustrated by *Red Hill Iron Ltd v API Management Pty Ltd* discussed on page 57-58 which recognises the freedom of the parties to act outside of the scope of the joint venture according to their commercial best interests.

It is more difficult to identify a trend in the attitude of courts and tribunals towards a party's failure to comply with procedural rules under the JOA and the right of parties to withdraw or change notices and decisions after they have been communicated to the other parties. The contrasting approaches of US and non-US courts with respect to compliance with budget and

[2] For example, *Powermax Energy Inc v Argonauts Group Ltd*, discussed on page 93, *Prairie Pacific Energy Corp v Scurry- Rainbow Oil Ltd* 13 discussed on page 234; and
Bank of Nova Scotia v Société Générale (Canada) discussed on page 236 and *Texas Oil & Gas Corporation v Hawkins Oil & Gas Inc* discussed on page 227.

cost control have been discussed. Chapters 8 (Allocation of Costs) and 9 (the Accounting Procedure) both discuss cases where the Non-Operators' right of audit was particularly important in decisions denying the Non-Operator the right to challenge a cash call on the grounds of a technical non-compliance or allegation of Operator mis-performance. At least in relation to international JOAs, the importance of maintaining joint venture cash flow by payment of cash calls in accordance with the principle of "pay now and argue later" continues to be recognised, allowing the Operator a margin of appreciation to cope with unexpected circumstances and cost increases without having to seek fresh operating committee approval and/or resort to immediate dispute resolution to the extend it is consistent with the relevant JOA and applicable law.

By contrast, procedures relating to the exercise of preferential rights on the transfer of an interest under the JOA are treated more formally, often on the basis that a withdrawal of a notice agreeing to pre-empt the transaction may impact on third parties and their accrued rights. Likewise, the default provisions discussed in Chapter 10 are also likely to be construed narrowly and enforced closely, precisely because they ultimately lead to dramatic and irrevocable impacts on the defaulting party (and indeed the non-defaulting parties that are expected to make good the default) but the outcome should be closely related to the given applicable law.

The influence of the JOA's governing law is sometimes hard to discern. Several of the cases considered[3] follow a typically English law approach of respecting the express language of the JOA where it excludes implied terms and common law principles of interpretation, such as any duty of good faith between partners and any fiduciary duty to non-operators owed by the operator. Two vital questions arise – is English law the only regime which consistently respects the exclusion of any such duties by the express language of the JOA? Secondly, if that exclusion is absent or perhaps ambiguously worded, in what circumstances would a court or tribunal allow a party to rely on such implied duties[4]? Put another way, can the JOA drafter rely on the model JOA's exclusion of such duties and not be concerned about potential, and not necessarily extreme, circumstances where that exclusion may be overridden or at least narrowly construed to allow a court or tribunal to arrive at a "fairer" result?

Take the example of the rights of the Operator to represent the Non-Operators in dealing with the applicable Government.[5] This is such an important issue because the Government and the Operator will be reaching decisions applicable to the contract or licence under which the joint venture operates and for which the Non-Operators are jointly and severally liable. A key test applied by English law in deciding if one party owes another a fiduciary duty or other duty to act in good faith, honestly and reasonably, depends on the degree to which the second party's commercial interests may be affected by the actions and decisions of the first party, acting in the first party's discretion, and potentially having access to information not available to the

[3] For example, *US Truck Lines v. Texaco Inc* considered on page 225; *TAQA Bratani Ltd and Others v Rockrose17* considered on page 297;

[4] The Alberta Court of Appeal decision in *Adeco Exploration Co Ltd v. Hunt Oil Company of Canada Inc* (discussed on page 237) is a good example of exactly that narrow interpretation of a clause excluding fiduciary duties.

[5] The book discusses 2 cases squarely on this point, emphasising its importance: *Venture North Sea Gas Ltd v Nuon Exploration & Production UK Ltd* discussed at page 240 and *EurOil Ltd v Cameroon Offshore Petroleum Sàrl* discussed at page 255 and following.

second party.[6] This is a subtle test and not one to be nonchalantly covered off by a standard exclusion of fiduciary duties.

The question is all the more important if the same JOA includes a provision which permits any party to act freely and in its absolute discretion, following its commercial best interests. This might create a conundrum – on its face, such a clause might permit the Operator to act freely, in its discretion, but could be seized upon by a court or tribunal as evidence that the Operator has exactly the level of discretion which justifies imposing upon it a duty of good faith. An English court might also consider the "conflict-of-interest" clause which JOAs routinely include, providing that the Operator must refrain from leveraging its own commercial interests in making procurement decisions. Again, that clause can cut both ways – does it mean that the Operator can freely exercise its discretion in favour of its commercial best interests in other contexts, such as representing the joint venture before the Government? English law is a curious beast – it respects the language of the agreement to a fault, but in so doing, may interpret the agreement as providing a more nuanced and sophisticated allocation of duties and discretions than the parties originally intended. The authors pick out several non-English decisions[7] and at least one English law judgment where the court was able to supplement, but not override, the JOA's express terms by reference to common law principles of fair dealing.[8]

The AIEN international model operating agreement addresses the question of the operator's discretion to represent the parties before a Government in clause 4.12.B.2.[9] Both alternative versions of that clause focus on trying to distinguish between the joint venture's interests and the independent interests of joint venture parties, and allowing the Non-Operators freedom to discuss the latter independently with a Government. The drafting deals with the scope of the Operator's authority very briefly, simply by providing that the Operator must act in accordance with the decisions of the Operating Committee. In practical reality, Governments rarely give the Operator a chance to consult the Operating Committee on items that have attracted the attention of the relevant ministry and the Operator is often forced to bring the Non-Operators, not as observers, but as fully empowered representatives, to meetings, simply to avoid making representations or commitments to the Government in the absence of a clear mandate from the joint venture.

The book is eloquently presented mostly in simple English and the overall creative design is spotless. The book has an index at the end, which provides a roadmap to the book that helps promptly direct readers to the information they are trying to find. Since the index comprises a list of all the names, subjects, and ideas in the book and where they are examined and discussed in the text, this is generally helpful for a reader who is searching for specific information in the book but because for several reasons does not have the extravagance of time to read the entire

---

[6] See the discussion in Richard Hooley "Controlling Contractual Discretion" Cambridge Law Journal, 72(1), March 2013, pp. 65–90 doi:10.1017/S0008197313000019

[7] The authors refer to the Texas Court of appeals for the 5th circuit judgment in "*Norman v. Apache Corporation*" discussed on page 230 "*under Texas law, the scope of an operator's duty is not necessarily limited to only those affirmative obligations expressly detailed in the joint operating agreement".*

[8] In the English Court of Appeal decision in *Spirit Energy v. Marathon*, the court considered that non--operators were protected by the operator's duty to act genuinely, honestly and in good faith in contracting for liabilities chargeable to the joint venture (as discussed on page 98 and following).

[9] In this context, it is interesting that the Oil & Gas UK standard JOA discussed in the *Venture v. Nuon* apparently adopts the opposite position compared to the AIEN JOA, suggesting that the Operator does not require Operating Committee approval for its engagements with the State. A closer reading of the relevant OGUK JOA reveals the position is more nuanced.

book. We similarly consider the endnotes that include referred sources as helpful, as they provide the readers with additional information for future research. Furthermore, the endnotes offer both readers and researchers the opportunity to have extensive information and understanding of a topic a little more or an explanatory remark, without interjecting the flow of the main text with the information. Put differently, the endnotes allow both readers and researchers to access extra information that doesn't fit well into the main text of the book. Notwithstanding the theoretical and policy contribution of this book, it does have certain limitations. Cases from only one country from Africa (that is, Nigeria), one country from South America (that is, Brazil), two countries from Europe (that is, UK and Norway), and two countries from Oceania (that is, Australia and New Zealand) are considered. This is a natural consequence of the distribution of hydrocarbon provinces and the preferences of litigants to bring their cases before courts in OECD countries and capitals. Nevertheless, it is important to point out that the same case might result in a different outcome in other jurisdictions where domestic courts will apply their own interpretative approaches (especially in civil law jurisdictions).

Generally, this book makes a valuable and timely contribution to the academic and policy discourse on "Joint Venture Disputes in the Energy and Natural Resources Sector". Given the breadth and depth of its analysis, this book will be a valuable resource for those involved in negotiating, drafting, managing, and advising on the energy and natural resources joint ventures throughout their life cycle, which can last for decades. Since it identifies the key risk areas in such JVs, and where and how they commonly generate disputes, it will also be an extremely helpful reference work for counsel, advocates, judges, and arbitrators who deal with the energy and natural resources joint venture disputes. The book should also be of assistance to those responsible for drafting model JV contracts, which are intended for use in the energy and natural resources sectors.

This book must be warmly welcomed precisely because it makes such a significant contribution towards analysing these issues and many others. It shows the vital importance of understanding the factual matrix of any dispute, particularly the language chosen by its governing JOA. The choice of language may be a consequence of the relevant model form's tradition, the governance structures routinely adopted by the industry in the relevant region, and of course the outcomes of the parties' negotiations, and most likely all three. Naturally, each court or tribunal faced with a decision interpreting such language will draw upon industry practice and its understanding of JOA model forms as far as that analysis will take them, but is likely to bridge any analytical gap by reference to the governing law.

Finally, the book will help parties in the energy and natural resources joint ventures avoid or quickly resolve some of the problems and disputes that are encountered in these business sectors. The book will equally be a valuable resource for students, researchers, policymakers, and investors in the energy and natural resources sectors, especially, the energy and natural resources joint ventures. There is no doubt that this book, A. Timothy Martin, John Gilbert and Peter Roberts, provide the most comprehensive discourse on "*Joint Venture Disputes in the Energy and Natural Resources Sector*". We therefore strongly endorse and recommend this book to all readers.