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2012 AIPN Model International Joint Operating Agreement – A New Industry Standard?

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After a 10-year reign, and having become the widely-accepted international standard, the Association of International Petroleum Negotiators’ (AIPN) 2002 International Operating Agreement, has been revised and in February 2012 AIPN published the 4th version of its model Joint Operating Agreement (JOA) (the “2012 JOA”).

The drafting committee for the 2012 JOA, made up of over 180 international negotiators representing various spheres of industry interest, began its work in December 2007 and took over four years to finalize the 2012 JOA. Their task was to update the model form to current-day realities of international oil & gas operations and to revise the form to make it more fluidly coherent with other AIPN model forms that may be used in conjunction with the JOA.

As the 2012 JOA drafting committee was working on the revisions, the “current-day realities” of international oil & gas projects encountered several significant events that are redefining the industry’s approach to doing business, including the 2008 meltdown of the financial markets, the 2010 Macondo blowout and the 2010 introduction of the UK Bribery Act. The drafting committee wrestled with these new realities and endeavored to adapt the model JOA in a way that would address the risks inherent in the changing global industry but still reflect current international practice.

The revisions to the 2012 JOA include changes and additions to provisions related to (i) Operator rights and duties, (ii) limitations on Operator liability, (iii) removal and replacement of Operators, (iv) revisions to Work Programs, Budgets, and AFEs, (v) decommissioning, (vi) the consequences of Exclusive Operations, (vii) default, (viii) conflicts of interest, and (ix) Bribery compliance. New Guidance Notes were also drafted that, in addition to explanatory commentary, provide sample drafting for certain provisions that did not make it into the text of the 2012 JOA.

We have briefly highlighted below some of the most significant new issues addressed and revisions made in the 2012 JOA.

**Operator Liability**

In the post-Macondo world, the drafting committee spent many hours debating the level of liability that should be confirmed on the Operator. Starting from the basic premise of AIPN’s model JOAs - that the Operator should neither profit nor suffer loss in carrying out its duties as operator, the Operator’s losses and profits from the joint operations are generally limited to the proportion of its participating interest in the JOA. A key argument in support of this position being that, if the Operator is not receiving a greater benefit from being named the operator, then it should also not be taking on greater risk due to accepting this role. This
fundamental premise is only circumvented through the model JOA’s optional clause providing for increased liability of the Operator in the case of “Gross Negligence / Willful Misconduct” of the Operator’s “Senior Supervisory Personnel”; however, such increased liability expressly does not apply to consequential or environmental loss.

Ultimately, the final version of the 2012 JOA does not include extreme changes to the provisions related to the liability of the Operator, and in many cases the changes are only minor revisions, many of a stylistic nature. Nevertheless, it is important to become familiar with the changes and particularly the new options with respect to the Operator’s obligations provided in the 2012 JOA, including, among other things, the anti-bribery provisions, triggers for automatic removal of the Operator, expanded obligations for the Operator to provide information prior to submission to the government authorities, and the Operator’s right to assign obligations to affiliates.

**Default**

The revisions in Article 8 of the 2012 JOA (Default) introduce a number of new options and alternatives for addressing default situations. Following the Macondo incident, the 2012 JOA drafting committee clarified the triggers of the default event to ensure that a party’s failure to pay an indemnity obligation would create an event of default for such party.

A new alternative has been introduced allowing the negotiating parties in the draft to elect to allow the “Defaulting Party” to transfer its Participating Interest while it is in default as long as it cures its default before or at closing of the transfer. The 2002 JOA only provided that the Defaulting Party could transfer its Participating Interest to a “non-defaulting Party” while the Defaulting Party remained in default.

In addition to the enforcement options provided to the non-defaulting Parties pursuant to the 2002 JOA (i.e., forfeiture, buy-out, foreclosure on security/mortgage), the 2012 JOA also introduces the concept of a “Withering Option”, by which the non-defaulting Parties have the right with respect to a default under an approved Development Plan, to require the Defaulting Party to sell and assign the portion of its Participation Interest in the respective Exploitation Area to the non-defaulting Parties, as calculated pursuant to the withering formula contained in the 2012 JOA. This option permits the non-defaulting Parties to acquire less than all of the obligations of the Defaulting Party and at the same time allows the Defaulting Party to remain in the project with a lesser participating interest.

**Decommissioning**

The 2012 JOA expands upon the decommissioning security options contained in the 2002 JOA. A new optional provision requires the Operator to prepare and provide the non-operators with a draft decommissioning work program and budget at the time of delivering the draft Development Plan.

In addition, a new exhibit, Exhibit E – Decommissioning Plan, has been added to the 2012 JOA that envisages the creation of a trust fund to which the Parties must either contribute at such times that the Operator makes a Trust Fund Cash Call or provide security instead of payment of such cash calls.

**Bribery Protections**

With the introduction of the UK Bribery Act and the continued strict enforcement of the US’s FCPA, the drafting committee expanded the anti-bribery, business ethics provisions of the 2012 JOA. The final version of the 2012 JOA provides an option to expand the definition of “Anti-Bribery Laws and Obligations” to include an alternative provision that would make all Parties ensure compliance of terms of the UK Bribery Act in the case of potential indirect application of the law. This expansion, if the definition option and the additional warranty language option are selected, results in the parties providing a warranty as to their past compliance and a covenant as to their future compliance with the “Anti-Bribery Laws and Obligations”, which, in such case, would include, among other things, compliance with the provisions of the UK Bribery Act.

The 2012 JOA also goes further to require each party to notify the other parties of any investigations or proceedings related to alleged violations of “Anti-Bribery Laws and Obligations” and to provide additional
information with respect to such notice if requested by another party. Each party is also required to indemnify the other parties from all losses “related to the events underlying” a party’s admission of violations of the Anti-Bribery Laws and Obligations or a final adjudication against such party (or its affiliates or representatives) with respect to a violation of the Anti-Bribery Laws and Obligations.

The parties may also elect to include a provision requiring a party to provide written certification of their compliance with the “Anti-Bribery Laws and Obligations” upon the request of another party.

**National Oil Company (NOC) Financial Carry**

While not included in the text of the 2012 JOA, the Guidance Notes for the 2012 JOA provide suggested text for the expansion of the 2012 JOA traditional provisions with respect to the participation of a “Government Oil & Gas Company” or a NOC. The Guidance Notes provide a brief discussion and potential language for a NOC carry provision that could be included in the 2012 JOA or in a separate carry agreement. The suggested language envisages a scenario in which the non-NOC participants would finance certain work, on behalf of the NOC, with repayment for such carry (financing) being made out of a portion of the NOC’s share of Cost Hydrocarbons.

**Integrated Projects Teams**

The Guidance Notes for the 2012 JOA also provide for suggested language for the introduction of an “Integrated Project Team”. An Integrated Project Team (or IPT) is made of representatives of all of the parties (or all the parties holding a participation interest higher than a certain determined threshold). The scope of the IPT member’s work (e.g., preparation of the Development Plan) is to be specifically defined in the agreement.

Integrated Project Teams have been discussed and debated over the years (even in past revisions of the AIPN JOA). They are seen as a tool for the non-operating parties to have the ability to participate actively in the project’s operations and decision-making. While the 2012 JOA drafting committee and AIPN Board ultimately decided that IPTs are not recognized standard industry practice, IPTs did evoke enough discussion and interest from the drafters to introduce the concept and suggested text in the Guidance Notes.