The New 2012 AIPN Model International Joint Operating Agreement

What are the changes?

This month, the Association of International Petroleum Negotiators (AIPN) released the 2012 version of the Model International Joint Operating Agreement (2012 JOA). The 2012 JOA replaces the 2002 version of the Model International Joint Operating Agreement (Previous JOA).

For over 20 years, the AIPN model form joint operating agreement (JOA) has provided the benchmark for oil and gas joint venture arrangements internationally. It is one of the most significant and widely used contracts in the oil and gas industry. As its use has grown over the past 2 decades, particularly in emerging markets, its provisions have increasingly become the standard against which upstream oil and gas joint ventures are compared, measured, banked and financed.

The 2012 JOA is a flexible document. It contains a number of alternative and optional provisions that participants will need to consider when drafting the JOA. The AIPN has published revised guidance notes for the JOA. Given the JOA’s widespread usage, those notes include guidance on using and modifying the JOA in a civil law jurisdiction, instead of a common law jurisdiction.

Operator

In the wake of the Macondo and Montara incidents, there has been considerable focus on the degree to which an operator should be held liable in respect of the performance of its duties. Consequently,
there was a great deal of discussion with the AIPN's JOA drafting committee as to how and whether the corresponding provisions of the 2012 JOA should be modified.

However, in the latest iteration, these provisions have not materially changed. While the operator is still required to conduct joint operations in a diligent, safe and efficient manner in accordance with standard industry practices, the 2012 JOA continues to limit the operator's liability for loss suffered by the operator while conducting activities under the 2012 JOA.

In support of this limitation of liability, the 2012 JOA contains an indemnity in favour of the operator in respect of loss resulting from joint operations. This reflects the customary commercial position that an operator conducts its activities on behalf of all co-venturers and should not gain or lose by virtue of being the operator.

The limitation of the operator's liability does not extend to circumstances where a loss or damage is incurred as a result of the operator's (or the operator's senior supervisory personnel's) gross negligence or wilful misconduct. The 2012 JOA retains optional provisions allowing the joint venturers to select if, and the extent to which, the operator's liability will be limited in such circumstances.

**Assignment of Operatorship**

The 2012 JOA has been modified to provide some additional flexibility to accommodate the different ways in which operatorship is increasingly being structured and undertaken in the oil and gas industry.

An optional provision has been added to the 2012 JOA to allow the operator to assign its obligations as operator to an affiliate subject to certain customary conditions (such as government consent) and provided that the assignee has sufficient financial and technical capacity to perform the operator's duties. Where the assignee does not have that capacity, the operator may provide, or arranging for one of its other affiliates to provide, a performance guarantee in respect of the asignee's operatorship duties (provided that the entity providing that guarantee has the requisite underlying technical and financial capacity itself).

**Removal of Operator**

The 2002 JOA limited the ability of non-operators to remove an operator for material breach of its obligations where one or more of the non-operators in a joint venture were also affiliates of the operator. This put non-affiliated non-operators at a significant contractual disadvantage in such circumstances.

It arose because the relevant provision of the 2002 JOA (Article 4.10.B), provided only that an affirmative vote of a contractually prescribed proportion of non-operators be obtained in order to issue the relevant notice of operator breach (pursuant to which, subject to certain conditions, removal of the operator would follow). The 2012 JOA rectifies this position by requiring that the above affirmative vote be obtained only with respect to non-operators who are not affiliated to the operator.

**Work Programs and Budgets**

The provisions in the 2012 JOA dealing with work programs and budgets have been substantially revised, particularly in relation to the preparation and approval of work programs and budgets and decommissioning work programs and budgets.

The operator must deliver to the parties the annual work program and budget detailing the joint operations proposed and the estimated costs forecast to be charged to the joint account for that year.

The 2012 JOA is more prescriptive with respect to the content to be included in each annual work
program and budget. The 2012 JOA contains a number of optional provisions for items that parties may wish to include in the work program and budget, including, for example, specifying whether a line item is contingent, the estimate of funds to be expended by the calendar quarter, during the exploration period, a forecast of annual operations and activities and the corresponding estimated costs. As a result of the inclusion of these optional provisions, parties will need to consider the level of detail they wish to be included in the annual work programs and budgets.

The provisions relating to consultation, modification and approval by the operating committee of the annual work program and budget have also been expanded in the 2012 JOA. The 2012 JOA contains a new provision that requires the operator to consult with the operating committee during the preparation of the proposed work programs and budgets, appraisal plans and development plans regarding the contents of such documents. Following delivery of the work program and budget, the operating committee must meet to consider, modify (if appropriate) and either approve or reject the proposed work program and budget.

Approval of a work program and budget by the operating committee authorises the operator to submit the work program and budget to the government (if required). Subject to approval by the government, the operator may conduct the joint operations as set out in the approved work program and budget.

The 2012 JOA also expands the authorisation for expenditure (AFE) procedure set out in article 6.8. It provides alternative provisions so parties can elect to:

- send to each non-operator an AFE before incurring commitment or expenditure for a joint operation which is estimated to be over a certain month; or
- agree that no AFES are to be issued under the 2012 JOA, but after approval of each work program and budget, the operator must provide written information with respect to the anticipated expenditures containing information typically included in an AFE, but without requiring additional authorisation.

**Bribery and Corruption**

The 2002 JOA contained a basic set of provisions regarding bribery and corruption. Given the development of this area of law in key jurisdictions internationally over the past 10 years (particularly, the European Union, the United States, Canada and the United Kingdom), these provisions have been revisited. The 2012 JOA sets out more stringent anti-bribery and corruption provisions, which include additional warranties, requirements for the parties to maintain records, provide information on request to show compliance with the undertakings and to notify other parties of any alleged violation of applicable Anti-Bribery Laws and Obligations.

Under the 2012 JOA, each party must indemnify the other in respect of damages and costs arising from bribery allegations or final adjudication concerning violations of the bribery laws.

**Decommissioning**

The 2012 JOA includes a new set of provisions regarding decommissioning. The 2012 JOA requires that the operating committee approve an estimated decommissioning work program and budget with the delivery of each draft development plan for the decommissioning of facilities and/ or equipment that were acquired for or contributed to the joint account. If required, the operator must take steps to secure approval of such decommissioning work program and budget by the relevant government.

The Previous JOA required parties to negotiate and execute a security agreement. The 2012 JOA now requires parties to make a preliminary plan for decommissioning, furnish security for decommissioning and conduct the decommissioning in accordance with the decommissioning procedures set out in Exhibit E of the JOA.
HSE

The 2012 JOA contains revised health, safety and environment (HSE) provisions, which clearly define the operator's obligations with respect to HSE.

The operator must prepare and establish an HSE plan designed to achieve the safe and reliable conduct of operations, to avoid significant and unintended impact of the safety and health of people, property and the environment and to comply with HSE laws. The operator must also carry out the HSE plan in accordance with HSE laws and standard practice and conduct joint operations in accordance with the HSE plan.

The operating committee must conduct an HSE review annually (compared to the previous requirement for a periodic review). The 2012 JOA sets out a number of alternative provisions relating to the extent of the HSE review the operating committee must conduct, which the parties will need to consider when drafting the JOA.

Default

The 2012 JOA contains updated provisions dealing with protracted and more complex types of default.

Given the risky and capital intensive nature of oil and gas operations, default under a JOA can have significant consequences and accordingly, default provisions are often controversial. The default remedy provisions in each JOA must be carefully considered and drafted to ensure that the defaulting party's share of costs and liabilities is covered and the non-defaulting parties can continue operations.

Under the 2012 JOA, a party defaults if it fails to pay joint venture charges when due or maintain security as required under the JOA. In the event of a protracted default that is not remedied within a certain period, a non-defaulting party may require the defaulting party to:

- **(forfeiture)** withdraw from the JOA and assign its participating interest to the non-defaulting parties;
- **(buy out)** sell and assign its participating interest to any non-defaulting parties willing to purchase such participating interest;
- **(withering option)** with respect to default occurring under an approved development plan, assign part of its participating interest in the corresponding exploration area to non-defaulting parties; or
- **(enforcement)** foreclose its mortgage and security interest against a pro rata share of the collateral.

Parties will need to consider and modify the most appropriate default remedy in the context of the requirements of the 2012 JOA and the applicable laws and regulations of the host country.

Forfeiture as a default remedy may be unenforceable in some jurisdictions, including Australia, as courts may consider that the forced assignment of the whole of a party's interest is a penalty. As an alternative, the 'withering' clause may be viewed more favourably by Australian courts, as the default leads to a loss of the defaulter's interest in proportion to the default, which removes the risk of penalty. However, withering clauses are not without their problems; as the 2012 JOA shows, they are complex to draft and apply and they may be operate as an escape for a party who wishes to reduce their liabilities, particularly in relation to less productive assets.
The provisions regarding the creation and enforcement of a mortgage and security interest in the event of a party’s default have not changed materially. However, in the Australian context, parties should consider that steps may need to be taken to register certain security interests granted to them under the new personal property securities law that commenced in Australia in 2012.

Finally, the 2012 JOA now requires defaulting parties to join in such actions as necessary to obtain any required government approvals regarding their proposed withdrawal and assignment.

**Conclusion**

The 2012 JOA is a welcome improvement to an already robust and widely used joint venture framework for oil and gas operations. The latest iteration has been adapted to better accommodate legal, technical and economic developments in oil and gas joint ventures and structures internationally.

However, the specific terms and conditions of each JOA should be thoroughly evaluated and modified as appropriate for the jurisdiction, circumstances and the joint venture parties’ and the relevant asset’s commercial, legal and technical requirements.

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