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Joint Operating Agreement: Operatorship role, options and concerns

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Introduction

Any Joint Operating Agreement (JOA) requires an operator to conduct the operations on the behalf of the Joint Venture (JV) or consortium. The most common approach in the petroleum industry is to elect one party of the consortium as the Operator. The Operator will be leading the consortium to conduct the operations by (i) hiring any service required to perform the joint operations, (ii) proposing the work to be done internally for the Non-Operators approval through the appropriate mechanisms and committees (if applicable), (iii) representing the consortium towards the government and third parties, (iv) requesting the financial resources from the Non-Operators and itself through cash calls or bills. This is efficient because it allows one party to conduct and manage operations for the consortium, but it also causes Non-Operators concern because they share in the risks and rewards of operations, but they lack day-to-day control. Consequently, Non-Operators are eager for some method to provide input, exercise oversight, and gain some level of control, with a goal of ensuring that operations are conducted diligently, efficiently, and in the best interests of the JV.³

Often, therefore, JOAs contain provisions to give the Non-Operators some level of input and control. For example, some JOAs establish operating committees and subcommittees that have certain authority. Such provisions give the Non-Operators some oversight and control, but do not eliminate the imbalance in the role and perspectives between Operator and Non-Operator as the Operator is leading and representing the consortium towards the government and third parties as well as internally for the preparation and proposition of the work and actions

³ See the following books authored, co-authored or edited by Eduardo G. Pereira on JOAs: *Joint Operating Agreements: Controlling risks to the Non-operator* (globe law and business, 2013), *Joint Operating Agreements: Mitigating Operational and Contractual Risks in Exclusive Operation* (globe law and business, 2013), *Joint Operating Agreements: Challenges and Concerns from Civil Law Jurisdictions* (Kluwer International, October 2015), *Accounting Procedures on Joint Operating Agreements: An International Perspective* (globe law and business, 2016).

to be done. Thus, the Operator is commonly in a better and dominant position to determine the future of the said consortium. Accordingly, such provisions do not fully address the Non-Operators' concerns that arise from the fact that commonly the Operator leads and performs nearly all activities of the consortium (including the sole risk in most cases) and quite often has the final and sometimes sole say in the conduct of joint operations, with Non-Operators having much more limited opportunities to directly participate in the joint operations.

But the imbalance in roles and perspectives could be minimised or eventually completely removed if the JOA parties opt for a different type of operatorship. Typically the JOA parties elect one member of the consortium to become the Operator at "no gain no loss" principle. But what happens if the JOA parties elect a third party Operator, create a joint operating company, split the operatorship, create a dual operatorship, or conduct operations in some other way on the behalf of the consortium? Would all of these options (with regards to the replacement of the traditional selection of one party Operator) eliminate the different roles and perspectives between the Operator and Non-Operators in the JOA? Would these alternatives for the operatorship provision create new liabilities and further thoughts for the JOA parties' consideration?

This paper will analyse alternative options available for the JOA parties to minimize the excessive power given to one party to conduct the operations on the behalf of the consortium and possible concerns and risks that each option could bring to the said consortium.

1 Chapter one – Background

Any JOA has two types of parties: The Operator and Non-Operators.⁴ The Operator is the leader of the *consortium*,⁵ as this is the person responsible for conducting the daily operations in the name of the consortium.⁶

The majority of the duties of any JOA are placed on the Operator, including duties for dealing with the administration of the day-to-day activities of the JV. The Operator is usually the party with the highest level of participation and interest in the enterprise, and sometimes it will have the best financial and technical resources to deal with such duties. The Non-Operators tend to retain a smaller working interest in the JV (at least individually), and often they have fewer financial and technical resources than the Operator. The Non-Operators' situation is similar to that of minority shareholders, as they too, have less say in the

⁴ The Operator is commonly a party of the JV, but there are existing cases in which the role of the Operator is given to a contracted Operator or even a company in which the JOA parties are the shareholders. For further information see: Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 89–93, Sandy Shaw, 'Joint Operating Agreements' in Martyn R. David, *Upstream Oil and Gas Agreements* (Sweet and Maxwell, London 1996) 17.

⁵ It is important to note that usually, the Operator is approved by the Host Government who issued the petroleum title, as the Host Government is keen to control the person who will conduct the operations of the consortium. In this context, any modification of the Operator shall also be approved by the Host Government. See: Model Clauses 40, 42 and 42 of the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008.

⁶ See: Chavez Gonvala, 'Upstream joint ventures – bidding and operating agreements' in Geoffrey Picton-Tubervill (ed.), *Oil and Gas: A practical handbook* (Globe Law and Business, London 2009) 46, Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2ndedn Barrows, New York 2009) 289–291, Anthony Jennings, *Oil and Gas Exploration Contracts* (2ndedn Sweet & Maxwell, London 2008) 24, Michael P. G. Taylor, Sally M. Tyne, *Taylor and Winsor on Joint Operating Agreements* (2ndedn Longman, London 1992) 1–5, Bernard Taverne, *An introduction to the regulation of the petroleum industry: Law, Contracts and Conventions* (Graham & Trotman, London 1994) 135–136, Peter N. Swan, *Ocean Oil and Gas Drilling & The Law* (Oceana, 1979 New York) 65–69, Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements* (CP Thorpe, UK 2008) 123–126, Hugh Dundas, 'Joint Operating Agreements: An Introduction' (1994 Summer Programme: UK Oil and Gas Law, CPMLP 09/09, 1994) 4–5.

conduct of the company's operations. However, they still have shares in the company, along with their own particular views of the company's operations.⁷ Thus, it is necessary to understand the needs and perspectives of Non-Operators, in order to establish an efficient, reasonable and fair agreement.⁸ If Non-Operators' perspectives are completely ignored, it is extremely hard to create a balanced instrument, and consequently critical problems might arise and possibly jeopardise the existence of the *consortium*, as the cooperation of all its participants are required to establish a successful enterprise. It is also important to note the fact that the JOA is usually in force for the whole duration of the License (or other type of consent, permission or concession depending on the petroleum legal regime in place) which can last up to thirty years or more.⁹ In some

⁷ Because of such similarity this research will provide (whenever suitable) few comments about the minority shareholders situation. However, it is outside the scope of the present research to compare and fully analyse the context of minority shareholders. For further information see: F. Hodge O'neal, *Squeeze-Outs of Minority Shareholders, Expulsion or Oppression of Business Associates* (Callaghan & Company, Chicago 1975), Victor Joffe QC and others, *Minority Shareholders: Law, Practice, and Procedure* (3rd edn OUP, Oxford 2008), AIJA Law Library, *Protection of Minority Shareholders* (Wolters Kluwer, London 1997), A. J. Boyle, *Minority Shareholder's Remedies* (CUP, Cambridge 2002), Robin Hollington Q.C., *Minority Shareholders' rights* (3rd edn Sweet & Maxwell, London 1999), Jacques Cory, *Business Ethics, The Ethical Revolution of Minority Shareholders* (Springer, Haifa 2001), Sylvain Dubois, *Corporate Litigation as a Device to Protect Minority Shareholders, France, England and Wales: A Comparative Analysis* (VDM, Berlin 2010), Daniel Szentkuti, *Minority Shareholder Protection, Germany, France and the United Kingdom: A Comparative Overview* (VDM, Berlin 2008), Marija Bartl, *Squeeze Out: How Much Protection for Minority Shareholders? Comparative Constitutional Analysis of the Czech Regulation of Squeeze Out* (Lambert Academic Publishing, Berlin 2010), Rita Szudoczky, *Takeover Regulations and Protection of Minority Shareholders: A Comparison between the European and US Approach* (Lambert Academic Publishing, Berlin 2008).

⁸ It is common to analyze a JOA under the Operator perspective, but it is important to note that few authors also recognized the importance of Non-Operators such as Jonh B. B. Bullough, 'The Norwegian Experience – The Role of a Non-Operator' (1996) 11 *Oil and Gas Finance & Accounting* and Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 244–245.

⁹ 'Joint operating agreements are designed to last for the life of the field, during exploration, appraisal and development. Amendments, though not rare, are less common than might be expected for a document with a 30-year lifespan.' Charez Golvala, 'Upstream joint ventures – bidding and operating agreements' in Geoffrey Picton-Turbervill (ed.), *Oil and Gas: A practical handbook* (Global Law and Business, London 2009) 45–46.

cases, a provision which appears to be favourable to a party in the early stages might turn out to be unfavourable to the same party later in the life of the JOA. Consequently, balanced terms should offer reasonable terms for all the contracting parties from the beginning until the end of the JOA's life.

This topic might be of great value to countries that have reached the stage of being a mature province (e.g. the UK and Norway),¹⁰ as large International Oil Companies (IOCs) are likely to remove their investments from such areas and prefer to invest elsewhere with greater rewards. These IOCs are being replaced by small or medium independent companies, commonly with less experience and lacking the financial resources to operate in the Exploration and Production (E&P) phases.¹¹ In other words, the traditional context, in which a JOA is based on a strong, dominant Operator, is significantly changing, and some JVs are composed of parties in a similar position (the parties are more equal). Some oil and gas regions have already reached maturity and the trends mentioned will grow even though new technology might extend the life of current fields in these regions.¹² This new scenario requires better-balanced agreements to govern joint operations. Considering these facts, it is important to understand the perspectives and views of Non-Operators, as this would have great value for today's JOAs (which have a stronger Operator), but

¹⁰ *'The UK government has for some time recognised that the maturing provinces of the North Sea, coupled with more recent smaller developments, have created a need for a change in its approach to licensing and taxation.'* Stephen Dow, 'The 20th Round Standard Form Joint Operating Agreement' (2003) 1 OGEL.

¹¹ *'Twenty years ago Southeast Asia was a hotbed of international exploration activity, and Indonesia represented fully half of that activity. Indonesia still represents a large share of the activity in the region but the region is not the focus of attention it was back then. Southeast Asia has moved from center stage. Furthermore, SE Asia has matured significantly in the past two decades. So have other regions of course (...).'* Daniel Johnston, 'Contract Terms Worldwide: A Case for New Frameworks' (2004) 2 (3) OGEL.

¹² *'The basins of this planet have matured perhaps more quickly than many of us anticipated.'* Daniel Johnston, 'Contract Terms Worldwide: A Case for New Frameworks' (2004) 2 (3) OGEL.

it will have even more value for future JOAs where the parties are in a more equal position.¹³

1.1 The concerns of Non-Operators

As previously described, the Operator is commonly the party with the largest interest in the JV, as it might be argued that the Operator needs to retain robust financial and technical resources to conduct such operations. In this sense, the current agreements secure a dominant position for one party, as extensive rights are given to and duties placed on the Operator and agreements also restrict the number of parties that would be able to exercise such a role.

On the other hand, the Non-Operators are the remaining parties of the JV. The Non-Operators are not going to conduct the operations but their participation is restricted to financial contributions to enable the performance of such operations and sometimes in operating committees.¹⁴ However, beyond such financial contributions the role of Non-Op-

¹³ It is important to note that might exist scenarios where Operators are not strong or even the dominant party of the enterprise. For example independent companies appear more commonly in onshore operations but this scenario is not usual in offshore operations, as the risks and costs are extremely more significant. However, generally this is not an ordinary situation, as the Operator is in a better position to control the joint operations. Consequently, major companies prefer to secure their assets in an efficient operation conducted by them. Nevertheless, some huge developments will require the participation of several major companies together which will also lead to the same point where the parties are in a position of equals.

¹⁴ See: Terence Daintith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil & Gas Law* (3rdedn Sweet & Maxwell, London 2009) 1140, Gerard M. D. Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (OPU, Oxford 1995) 14–15, Kenneth Charles Mildwaters, *Joint Operating Agreements, A Consideration of Legal Aspects Relevant to Joint Operating Agreements used in Great Britain and Australia by Participants thereto to Regulate the Joint Undertaking of Exploration for Petroleum in Offshore Areas with Particular Reference to their Rights and Duties* (PhD Thesis presented to the University of Dundee, 1990) 427, John Wilkinson, *Introduction to Oil & Gas Joint Ventures: Volume one, United Kingdom Continental Shelf* (OPL, Ledbury 1997) 40, Ernest E. Smith and others, *International Petroleum Transactions* (3rdedn RMMLF, Westminster 2010) 538–544, Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 79–87, Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 288.

erators is far less certain as some JOA models strengthen their position by increasing their participation and control of the Joint Operations (specially through operating committees and sub-committees and the related approvals);¹⁵ but others arguably position the Non-Operators as mere observers or investors of the same Joint Operations.¹⁶ Nevertheless, it is possible to argue that no JOA provides a direct and profound participation and collaboration in operations for the Non-Operators as the title of the models suggest.

Consequently, the imbalance between the strength of the parties also affects the role of the parties in the JOA, as the consortium is focused on only one side of the consortium, namely the sole operatorship by the Operator.

Therefore it is easy to understand the reasons for the different views and perspectives held by these parties, as each one has a different role in the JV. The Operator, as the 'manager' of the JV,¹⁷ desires more power to conduct the joint operations. On the other hand, the Non-Operators, as participants in the JV, desire more control over the joint operations.¹⁸

Of the differing circumstances and position of the Operator on the one hand and the Non-Operators on the other can lead to tension between the parties and provide grounds for dispute. In other words, it is possible to argue that the most JOAs fail to provide a collaborative agreement which would increase the participation of all parties and at the same would reduce the level of uncertainty and conflicts which affect all JOAs even though a strong control over the operating committee might give a

¹⁵ *''But non-operators are active investors in that they have an active say in the managing of the project through the JOC. The existence of the Opcom is one of the most significant differences between the typical UKCS JOA and US one based on AAPL Form 610* Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 286.

¹⁶ *'The role of non-operators in the alliance is one of non-operating, non-working, interest owners or, to put it more simply, the role of an investor.'* Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 286.

¹⁷ Gerard M. D. Bean, *Fiduciary Obligation and Joint Ventures, The Collaborative Fiduciary Relationship* (Clarendon Press, Oxford 1995) 161–175.

¹⁸ Sandy Shaw, 'Joint Operating Agreements' in Martyn R. David, *Upstream Oil and Gas Agreements* (Sweet and Maxwell, London 1996) 21–22.

reasonable degree of control for the Non-Operators. Ideally, all parties would participate in the decision-making process.

The JOA is commonly between private parties as this type of agreement relates to the horizontal relationship of the consortium parties.¹⁹ Consequently, the state's participation is limited to certain approvals required to explore and to produce natural resources, as these resources belong to the host government. In other words, the terms of a contractual arrangement, such as a JOA are not usually dictated by the HG, but only to the extent they affect relevant and strategic issues from the governmental perspective.

However, certain jurisdictions (e.g. Norway, Nigeria, Angola, Iran, Brazil and even the UK by past legislation about the BNOC) require and/or allow by law, state participation in some or all oil and gas operations, so it might be compulsory to include a governmental party in the relevant JOA.²⁰ This participation could occur at an earlier or later stage. If the government desires to participate from the beginning of the operations, it would commonly involve a carry of interest, as the state company would be less likely to share any risk until the production of natural resources. If the government wants to participate at a later stage, (after the exploration phase) it is less likely to involve a carry of interest, as the critical risks occur during the exploration phase, so the NOC would not share the critical risks of the project even though some NOCs can bear risks and costs from the early start of the project.

In principle, the NOC should be treated as a normal party in the JOA, when it decides to join the operations, unless a carry of interest is provided or specific special rights could be given (e.g. preferential rights on transfers in Norway and Angola). But the reality is quite different from such a principle, as the default provision might be far more complicated to enforce against the state company, as it is not willing to lose all of its participation of interest. On the other hand, it could be argued that

¹⁹ Ibid.

²⁰ See: Rajendra Ramlogan, 'State Participation in Joint Ventures: The Republic of Trinidad and Tobago Experience' (1992) 10 J. Energy & Nat. Resources L. 279–284, Mirian Kene Omalu, Armando Zamora, 'Key Issue in Mining Policy, A Brief Comparative Survey as a Background Study on the Reform of Mining Law' (CEPMLP PAPER NO CP 9/98).

having a state company as a co-venturer is a positive thing as it should be easier to obtain any additional permissions/authorisations/licences related to the oil and gas operations (e.g. environmental consents, access to land, access to infrastructure, etc) and it might reduce the political risks involving assets expropriation.²¹

Therefore, the involvement of a NOC in the JOA might increase the demand for a more balanced agreement as a Non-Operator NOC is less likely to accept being a dormant partner or passive investor (e.g. the last section of this paper is going to provide a practical example on how a NOC might desire to balance the operatorship provision through a cooperative agreement). Equally IOCs might be concerned to have a NOC with strong Operator powers with limited controls.

1.2 What is the main concern with the operatorship clause?

Ideally a JOA should contain balanced provisions which should reflect the concerns of all parties involved: Operator and Non-Operators. It should also allow participation of all parties, as they all share the ownership of the JV. However, this is not usually the case as current JOAs tend to reflect the wishes of one party in the consortium (i.e. the Operator) instead of all parties.²² JOAs aim to regulate an enterprise that clearly depends on the contribution of all parties, (oil and gas operations often involve extraordinarily large amounts of expenditure over a long time scale)²³ so the question is, why are JOAs not often balanced? The answer for such a question lies in the context and history of oil and gas operations.

²¹ For further information see: Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 49–51.

²² ‘(...) traditionally the perception has been that the Operator has *de facto* much more to say over the entire project and is best positioned to take the initiative; thus the operator is rewarded with greater power, rather than greater profits. Scott Styles, ‘Joint Operating Agreements’ in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 277–278.

²³ *Ibid.*

The stronger position of the Operator comes from the historical approach contained in the first standard form JOA in 1956, but it still exists in modern operations.²⁴ It is considered the ‘traditional’ approach. This fact is clearly recognised by the overall majority of academics and professionals related to oil and gas operations. Traditionally, the oil and gas industry has always assumed there was a need for a strong and dominant Operator, who was supposed to dominate the consortium and determine the pace of the operations²⁵ As a consequence, the unbalanced relationships did not favour a higher degree of participation by the Non-Operators, but rather resulted in an Operator-biased document.²⁶ So the question is, why was it necessary to give one party great authority over the others?

Experts give three reasons for such a stronger party, which can be summarised as: a) Burden, b) Formation, c) Commitment. The first theory is based on the fact that the Operator has several duties to perform and comply with, so it should obtain certain benefits in order to compensate it for such a ‘burden’. The second theory is based on the formation of the *consortium*. The theory is that a leader needs a higher level of benefit to encourage him to create and take the lead in a JV. The third theory is the most accepted by experts in this field, which is related to the level of commitment of the Operator. Oil and gas operations involve several risks and costs; therefore, it is very important to maintain a higher level of commitment from the Operator towards the success of the JV. At the same time, the Operator’s higher level of commitment reduces the

²⁴ Ibid

²⁵ *being operator will allow a party to drive the agenda for performance of the joint operations and to better control the associated activities. This will be a positive outcome where the party-operator is keen to progress the requirements on the concession, but equally the level of control which is vested in the party-operator could be applied negatively where that party-operator has, for its own reasons, any reluctance to do anything other than the bare minimum which is necessary to perform the concession.* Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 80.

²⁶ ‘(...) traditionally the perception has been that the Operator has *de facto* much more to say over the entire project and is best positioned to take the initiative; thus the operator is rewarded with greater power, rather than greater profits.’ Scott Styles, ‘Joint Operating Agreements’ in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 277–278.

risk that the Operator will take the opportunity to make more profit or recover any losses during the negotiation period, which it might if it were a smaller participant.²⁷

In addition, often, circumstances require the Operator to pay, in advance, the costs of the operation, which are later reimbursed by the Non-Operators according to their shares.²⁸ In this sense, a stronger Operator is able to deal more easily with any advance costs which might be required.

The first and second theories are likely to be raised by the Operator during the negotiation period to support its arguments in favour of a

²⁷ See: Terence Daintith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil & Gas Law* (3rd edn Sweet & Maxwell, London 2009) 1140, Gerard M. D. Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (OPU, Oxford 1995) 14–15, Kenneth Charles Mildwaters, *Joint Operating Agreements, A Consideration of Legal Aspects Relevant to Joint Operating Agreements used in Great Britain and Australia by Participants thereto to Regulate the Joint Undertaking of Exploration for Petroleum in Offshore Areas with Particular Reference to their Rights and Duties* (PhD Thesis presented to the University of Dundee, 1990) 427, John Wilkinson, *Introduction to Oil & Gas Joint Ventures: Volume one, United Kingdom Continental Shelf* (OPL, Ledbury 1997) 40, Ernest E. Smith and others, *International Petroleum Transactions* (3rd edn RMMLF, Westminster 2010) 542, Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 80, Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 277–278, Charez Golvala, 'Upstream joint ventures – bidding and operating agreements' in Geoffrey Picton-Tuberville (ed.), *Oil and Gas: A practical handbook* (Globe Law and Business, London 2009) 46, Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 289, Anthony Jennings, *Oil and Gas Exploration Contracts* (2nd edn Sweet & Maxwell, London 2008) 24, Michael P. G. Taylor, Sally M. Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 2, Bernard Taverne, *An introduction to the regulation of the petroleum industry: Law, Contracts and Conventions* (Graham & Trotman, London 1994) 136, Peter N. Swan, *Ocean Oil and Gas Drilling & The Law* (Oceana, 1979 New York) 65–69, Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements* (CP Thorpe, UK 2008) 127, Hugh Dundas, 'Joint Operating Agreements: An Introduction' (1994 Summer Programme: UK Oil and Gas Law, CPMLP 09/09, 1994) 4–5.

²⁸ 'The JOA will set up procedures for "cash calls" by the operator to the other participants to advance monies to be used for the joint account. Some JOAs, however, depart from the usual procedure of cash calls, as in the UK Model JOA which provides that the operator shall fund the costs of the joint operations on the behalf of the participants, subject to reimbursement and payment of a financing fee upon receipt of invoices from the operator.' Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 298.

higher percentage of return ('profits') from the JV.²⁹ However, the strongest reason for the larger interest retained by the Operator is certainly the third theory which is related to economic reasons. This view is supported by a large variety of scholars such as Gerard Bean,³⁰ Ernest Smith,³¹ Claude Duval³² and Kenneth Mildwaters.³³

From a horizontal perspective, (i.e. JOA party to JOA party) there is no doubt that the third theory is the main reason behind the tradition of a strong Operator's position, as it would avoid questions about such a party's motivation to become an Operator, *i.e.*, the possibility to make profit from such a role.

From a vertical perspective (i.e. party to HG), the government might also exercise an important role in determining the larger interest of the Operator, as in some cases the petroleum legal regime will require that the Operator shall retain no less than a certain percentage of interest for the whole duration of the JOA, subject to its removal, if such obligation is not complied with.³⁴

It can be seen both Non-Operators and Host Governments sometimes fear that an Operator with a smaller interest might not dedicate the necessary effort and commitment in such operations, so the Operator is likely to be the party with the greatest interest and with the strongest position in the JV.

²⁹ Terence Daintith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil & Gas Law* (3rd edn Sweet & Maxwell, London 2009) 1140.

³⁰ Gerard M. D. Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (OPU, Oxford 1995) 14–15.

³¹ Ernest E. Smith and others, *International Petroleum Transactions* (3rd edn RMMLF, Westminster 2010) 542.

³² Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 289.

³³ Kenneth Charles Mildwaters, *Joint Operating Agreements, A Consideration of Legal Aspects Relevant to Joint Operating Agreements used in Great Britain and Australia by Participants thereto to Regulate the Joint Undertaking of Exploration for Petroleum in Offshore Areas with Particular Reference to their Rights and Duties* (PhD Thesis presented to the University of Dundee, 1990) 427.

³⁴ *Ibid.*

It could also be argued that it is the nature of business, that the party who is in the better negotiating position, gets more benefits.³⁵ In general terms it might be true, but for an oil and gas operation such a scenario might be slightly different. Firstly, the Operator does not desire to bear all the risks and costs of the relevant operation by itself as they could be extremely high. Consequently, the Operator should have “partners” to share the risks and cost involved. Secondly, the Non-Operators are not only part of the JV, but also jointly liable for the operations conducted by the Operator, regarding any third party. Thirdly, oil and gas companies usually have their assets spread out in different investments, so normally no party can realistically conduct all operations alone. In some areas they operate and in others someone else operate those assets. Therefore, it is highly important for the all parties (including the Operator) to maintain certain equilibrium between the role of each party of the consortium, as in the end, it will benefit all of them.

If the parties do not establish a balanced agreement, it might cause some problems.³⁶ Firstly, the unbalanced provisions might cause uncertainty, as any Non-Operator could seek court protection or relief against unfair provisions of the applicable JOA (e.g. relief against a forfeiture provision). In an extreme case, draconian provisions might not allow the Non-Operators to remain as a party in the agreement, which might jeopardise the whole consortium. If this happens, the Operator has to find another ‘partner’ and negotiate another JOA and at the same time might even get involved in court litigation with its previous “partners”. In other words, the current unbalanced JOAs can cause serious damage to the consortium and also to the Operator itself.

³⁵ *‘The greater the number of parties and the bigger the issues, particularly if they are wholly or in part political, the more complex the negotiations tend to be, but even bilateral negotiations on comparatively minor issues can become complicated.’* Professor R. W. Bentham, ‘The Negotiation of Agreements’ (1987) 5 J. Energy & Nat. Resources L. 134.

³⁶ *‘But at the same time drafting which is ambiguous or over-clever should as a rule be avoided, since although this may solve, or appear to solve, immediate problems it can lead to trouble in the future, and the agreement should, in my view, be the bedrock upon which the parties found their future relationship.’* Professor R. W. Bentham, ‘The Negotiation of Agreements’ (1987) 5 J. Energy & Nat. Resources L. 139.

It is possible to suggest that the adoption of unbalanced JOAs for modern operations is understandable, because of the dominant position of the Operator, even though it is fairly risky, as previously described. However, it will be less suitable for future operations when more oil and gas regions reach maturity. The mature stage of a region for oil and gas operations is less attractive for major or large companies, as most of the reserves have been produced which leaves only small or medium fields to be explored. In such a scenario, large companies move towards new regions where large reserves are still waiting to be found. Consequently, as major or large companies exit the mature provinces they are replaced by new companies, which are mainly small and medium-sized companies. In this case, the whole paradigm of the JOAs changes radically. The Operator is no longer in a dominant position compared with the Non-Operators but in an equal position. As a consequence, the unbalanced JOA is less likely to be useful in mature areas, as the parties should seek to negotiate another agreement based on equitable grounds. For those reasons, it is crucial to understand the Non-Operators' views of and concerns about a JOA, so it is possible to achieve a balanced agreement which should reflect the views and concerns of all parties involved (Operator and Non-Operators).

The bargaining power of the parties is still unequal and the dominant party is always likely to seek the best outcome for itself. Such a lack of equality in bargaining power is problematic when the smaller party tries to include optional provisions in a model form (especially in the AIPN JOA 2012 Model form). Optional provisions will not be implemented unless they are beneficial to the stronger party.³⁷

If the standard form does not provide the right balance between the parties, then it is unlikely that the parties will achieve such a balance as their size and the context will favour the stronger, dominant party, i.e. the Operator. Nevertheless, if the Non-Operators are all large IOCs then they might be able to include more protections and controls over the Operator.

³⁷ P.R. Weems, M. Bolton, 'Highlights of Key Revisions – 2002 AIPN Model Form International Operating Agreement.' 1 OGE 5 (2003) 32.

The extent of such an imbalance is clearly seen in the roles of the parties in the consortium. Although the agreement refers to ‘joint operations,’ the reality is quite far from that, as one party will perform and conduct the operations and the others will mainly contribute financially even though in some occasions Non-Operators might have more control through certain mechanisms like operating committee and other approvals inside the JOA. However, as regards the consequences and liabilities of the enterprise it truly is a “Joint Operating Agreement”, as all parties are jointly liable for all the operations performed under the petroleum title. In other words, the costs and liabilities are shared, but the conduct of the operations is not. As a matter of fact, the situation for the Non-Operators is even more complicated, as in many cases, they cannot even participate or determine the decisions concerning the operations. For example, this is often the cause under North American JOA model forms, which do not provide for operating committees. In other words, the Non-Operators are in the same situation as mere passengers in public transport. They share the costs of the transport and choose the final destination,, but they cannot determine the route However, for an oil and gas operation, the lack of participation might have severe consequences.

2 Chapter two: Perspectives between incorporated and unincorporated joint venture

Any time that one or more persons own and operate a business, they must make a decision regarding the form that the enterprise will take – for example, whether it will be a sole proprietorship, a corporation, or some sort of unincorporated association, such as a partnership or joint venture. The owners do not necessarily need to make an explicit decision. If they do not make an explicit decision, their actions and the decisions they make regarding the business and their relationship will implicitly control the form of the enterprise. Indeed, even if the parties make an explicit decision regarding the form that they wish the enterprise to take, their actions can be significant to the proper classification of the form of their business because the law sometimes requires certain factors or elements be satisfied in order for a enterprise to be classified under law in a certain way. Thus, the parties' characterization of the form of their business might not correspond with the way that the business would be classified under the law.³⁸

If more than one person is an owner of the business enterprise, then by definition the business cannot be a sole proprietorship, though the parties may be able to operate the business in an analogous way. For example, if the parties are co-owners of property, they may be able to use and develop the property as co-owners in indivision, and do so for the purpose of seeking commercial gain, without creating a corporation, partnership, or joint venture. There are various advantages and disadvantages to the different forms of business. This chapter will consider the different

³⁸ One commentator explained:

Through careful counseling and drafting it is possible to create optimum relationships for clients engaged in oil and gas operations. However, it is not possible to make what is in fact a “cat” into a “dog” by merely labeling it a “dog.” If the factual attributes point towards “cat,” we have a “cat,” not a “dog.” David E. Pierce, *Transactional Evolution of Operating Agreements in the Oil and Gas Industry*, Rocky Mtn. Min. L. Inst. on Oil and Gas Agreements: Joint Operations (2008).

forms that a business enterprise may take, as well as the advantages and disadvantages of each.

2.1 Incorporated forms

There are various types of incorporated entities. One of the main types is the corporation. A corporation is an artificial, juridical person³⁹ that is owned by one or more shareholders.⁴⁰ Another type is the limited liability company, which is an artificial, juridical person that is owned by one or more members.⁴¹ There are other types of incorporated entities which might vary in accordance to the local law (e.g. *sociedad en comandita*).⁴² But the most common types are limited liability companies and corporations.

Use of a corporate form to conduct a business has certain advantages.⁴³ Some of these relate to ease of administration and operation of the business. For example, use of the corporate form facilitates centralization of management and decision making.⁴⁴ Further, because the law treats corporations and limited liability companies as persons, a corporation or limited liability company can own and transfer property, enter contracts, and also sue and be sued in its own name.⁴⁵ Accordingly, there is no need for each of the co-owners to personally join in each of the many transactions entered by the business or, alternatively, to designate an agent that is empowered to enter each of the transactions on that co-owner's behalf. This greatly

³⁹ See, e.g., La. Civ. Code art. 24 (“A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership.”); 31 Laws of Puerto Rico § 101 (“The following are artificial persons ... Corporations”); *Blume Const., Inc. v. State ex rel. Job Service North Dakota*, 872 N.W.2d 313, 316 (N.D. 2015). Under both common law and civil law systems, a corporation constitutes a juridical entity. Harry G. Henn and John R. Alexander, *Laws of Corporations* § 9 at p. 16 (“corporation is a separate entity in the civil law”) and p. 18 (“common law ... [applies] ... entity theory to the corporation”) (West Publishing 3rd ed. 1983).

⁴⁰ Henn, *supra* n. 39 § 974 at pp. 130-1.

⁴¹ See, e.g., Tex. Bus. Org. Code § 101.001; La. Rev. Stat. 12:1301.

⁴² See, e.g., *People of Puerto Rico v. Russell & Co., S. En. C.*, 288 U.S. 476, 480-1 (1933).

⁴³ Henn, *supra* n. 39 § 16 at pp. 50-1.

⁴⁴ Henn, *supra* n. 39 § 16 at pp. 50-1.

⁴⁵ Henn, *supra* n. 39 § 16 at pp. 50-1 (West Publishing 3rd ed. 1983).

simplifies administration of the business. If a business enters numerous transactions or has many owners (or both), it would be impractical to have every owner join in every transaction. Moreover, in many cases one or more owners likely would object to a transaction that other owners wanted to enter, potentially leading to a deadlock. But when a business operates as an incorporated entity, the entity can act on its own, through employees or other agents, and pursuant to articles of incorporation or organization and by-laws that govern decision making and the entity's organizational structure. Thus, unless the entity's organizing documents provide otherwise, a single owner generally cannot cause a deadlock.

Use of the corporate form can also make transfers of ownership interests easier.⁴⁶ Because a shareholder or member simply owns a fraction of the incorporated entity rather than directly owning a fraction of each item of property used in the business, and because the individual shareholders or members generally are not parties to each of the entity's contracts, an owner generally can transfer his interest simply by selling his shares or his membership interest. He or she does not have to sell a fraction of each item of property and make assignments of numerous contracts. Further, the corporate form brings another benefit. Although the general rule is that contracts are freely assignable,⁴⁷ the transferor typically remains liable for contractual obligations unless he or she secures a release from the party or parties on the other side of the contract.⁴⁸ Because a shareholder or member is not a party to the entity's contracts, he or she generally need not worry about attempting to secure releases from contractual liabilities after he or she has sold his interest.

Indeed, as a general rule, even current shareholders or members are not personally liable for the obligations of the corporation⁴⁹ or limited

⁴⁶ Henn, *supra* n. 39 at § 16, pp. 50–1.

⁴⁷ La. Civ. Code art. 2642; *Cloughly v. NBC Bank-Seguin N.A.*, 773 S.W.2d 652, 655 (Tex. App. 1989, writ denied).

⁴⁸ *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 347 (Tex. 2006); La. Civ. Code art. 1821; Restatement (Second) Contracts § 318.

⁴⁹ See, e.g., Henn, *supra* n. 39 § 16 at pp. 50–1 and § 73 at pp. 130–1; N.D. Cent. Code § 10-19.1-69.

liability company.⁵⁰ If the entity itself becomes worthless, the shareholder or member can lose whatever investment he made into the entity, but that is generally the worst that can happen.⁵¹ The fact that shareholders and members do not have personal liability for an incorporated entity's obligations is one of the principal benefits of the corporate form.⁵²

2.2 Potential Advantages

When multiple parties wish to jointly own an oil and gas license, they typically do not do so through each of them owning a fraction of an incorporated entity that itself owns the license. Instead, the parties typically will each own a direct interest in the license. They choose one of the parties to actually operate the license, and the parties regulate their relationship to one another and with the operator using a JOA. But another option would be for the parties to use the corporate form. They could create a corporation or limited liability company, with each of the parties owning a fraction of the entity, and the incorporated entity itself could own and operate the license. Use of the corporate form in this context could have some of the same advantages that the corporate form provides in other contexts. For example, use of the corporate form can limit the liability of the shareholders or members. And given that oil and gas operations can result in large liabilities, this limitation of liability has obvious value.

Further, if the parties create a corporation or limited liability company that they jointly own, and that entity serves as operator, the parties may find it easier to retain a voice in controlling operations than when the parties each directly co-own a fraction of the license and one party

⁵⁰ See, e.g., Cal. Corp. Code § 17703.04; Colo. Rev. Stat. § 7-80-705; La. Rev. Stat. 12:1315(A); N.D. Cent. Code 10-32.1-26; N.M. Stat. § 53-19-13; Ohio Rev. Code § 1705.48; 18 Okla. Stat. § 2022; 15 Pa. Consol. Stat. § 8922(a); Tex. Bus. Code § 101.114.

⁵¹ *Taszarek v. Lakeview Excavating, Inc.*, 883 N.W.2d 880, 883 (N.D. 2016); Henn, *supra* n. 39 § 73 at p. 130.

⁵² *Hanewald v. Bryan's Inc*, 429 N.W.2d 414, 416 (N.D. 1988) (“one of the primary advantages of doing business in the corporate form” is “avoid[ing] personal liability”); Henn, *supra* n. 39 § 73 at p. 130 (“Limited liability is probably the most attractive feature of the corporation....”).

serves as operator. If a jointly-owned entity serves as operator, each party will be a shareholder or member of the entity and probably will have representation on any corporate board of directors. Further, if the parties staff the entity with secondees, then each party that loans secondees to the incorporated entity will have one or more of its own employees on the inside of the operating company. Those employees can then be the party's "eyes and ears" within the operator itself (this can be done with an unincorporated association as well) even though this can also be done within unincorporated joint ventures to certain extent.

In addition, the ease of transferring ownership that is promoted by use of the corporate form can be a benefit with respect to oil and gas interests, just as it is for other types of business and property interests. Moreover, use of the corporate form can help avoid certain problems relating to transfers of ownership that can arise if parties each directly own fractional interests in a license and the various facilities associated with it, rather than each party owning shares in a corporation that owns the license and associated facilities. One such problem is the possibility that one of the co-owners would seek a partition of ownership. In some jurisdictions, a partition could result in a judicial sale of the entire license and the associated facilities.⁵³

Another potential problem is the possibility that a party chooses to sell its interest in a way that results in an individual party owning different fractions of different facilities. Suppose, for example that Party C holds a 40% interest in the license and all facilities associated with it, while Parties A and B each own 30%, and that ten wells have been drilled and are operating under the license. A problem can arise in the following way. Suppose that Party C: (1) sells the entirety of its interest in Wells 1 through 3 to Zulu; (2) sells half of its interest in Wells 4 through 7 to Yankee, while retaining the other half of its interest in those wells; (3) sells the entirety of its interest in Wells 8 through 10 to X-Ray; and finally (4) sells its entire interest (other than the existing wells) in the northern half

⁵³ See, e.g., La. Rev. Stat. 31:173 (co-owner of an oil and gas lease may compel partition); La. Civ. Code art. 811 (possibility of partition by sale of co-owned item and distribution of proceeds of sale).

of the area covered by the license to Whiskey, while retaining its interest in the southern half. This will result in the following ownership patterns:

	<i>Wells 1-3</i>	<i>Wells 4-7</i>	<i>Wells 8-10</i>	<i>Future Wells in the South</i>	<i>Future Wells in the North</i>
A	30%	30%	30%	30%	30%
B	30%	30%	30%	30%	30%
C	0%	20%	0%	40%	0%
Whiskey	0%	0%	0%	0%	40%
X-Ray	0%	0%	40%	0%	0%
Yankee	0%	20%	0%	0%	0%
Zulu	40%	0%	0%	0%	0%

Such a deviation from uniform interest can create various problems and complications. But if the parties do not directly own an interest in the license, and instead own shares in a corporation that owns the license, Party C would not be able to create a deviation from uniform ownership of interests.

Another potential advantage of using a corporate form relates to capital gains taxes. In some host countries, if an interest in a license and the operations associated with it are sold for a large gain, the possibility exists that the seller may own capital gains tax on the sale. In an effort to avoid that possibility, some parties will create a special purpose vehicle to hold the license. The special purpose vehicle might be a company organized in a tax-friendly jurisdiction. If the party decides to sell its interest, it sells its interest in the special purpose vehicle, but the special purpose vehicle continues to own an interest in the license. That way, the seller can assert that no sale has taken place in the host country even though some nations might challenge this approach and theory (including with provisions dealing with indirect transfer of interest).

2.3 Reasons Why Parties Might Choose Not to Use the Corporate Form

Although the very nature of incorporated entities provides some benefits, parties to a JOA can include provisions in their agreement that attempt, by contract, to gain some of the same benefits that can be achieved with the corporate form. For example, parties often include in their JOAs a maintenance of uniform interest provision that prohibits parties from selling portions of their interest in a manner that creates non-uniform interests.⁵⁴ This can avoid the sort of problem discussed above. Further, many JOAs contain a waiver of partition rights,⁵⁵ thereby eliminating the risk of a judicial sale of the entire license.

In addition, parties are able to use the terms of their JOAs to achieve certain other advantages that are commonly associated with the corporate form. For example, under most JOAs, the operator is given exclusive authority to conduct all operations, and the operator's conduct of operations generally is not subject to the direction or control of the non-operators.⁵⁶ This can bring about, for day-to-day operations and administration of the license, as effective a centralization of operations and administration as could be achieved by using the corporate form.

⁵⁴ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. VIII.D.

⁵⁵ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. VIII.E; Canadian Assoc. Petroleum Landmen (2007) Model Operating Procedures, § 25.02; AMPLA (2011) Model Form Joint Operating Agreement § 4.7.

⁵⁶ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.A (Operator will have “full control of all operations” and is “not subject to the control or direction of the Non-Operators”). In the 2012 AIPN Model Form JOA, Article provides for designation of an “Operator” and Article 4.2 provides that the Operator “shall have exclusive charge of Joint Operations, and shall conduct all Joint Operations.” Section 6.1 of the AMPLA Form provides for appointment of the “Operator” and Section 7.2 provides that “the Operator is entitled to have possession and control of all Joint Venture Property and must, either itself or through such third parties as it may engage” perform various tasks, including joint operations. Section 5.1 of a standard form used on the U.K. Continental Shelf provides for designation of an “Operator” and Section 6.1 provides that “the Operator has the right and is obliged to conduct the Joint Operations by itself, its agents or its contractors.” See also AAPL-710 (2002) § 5.1; AAPL-810 (2007) § 5.1; CAPL (2007) Model Form Operating Procedures, § 3.01.

For the non-operators, a centralization that is achieved by appointing one party to be operator comes at the cost of the operator having more control and more information regarding day-to-day operations than do the non-operators. To the extent that this is a concern, the parties can minimize this disadvantage by including in their JOAs provisions that: (1) give the non-operators a right to information and physical access to operations;⁵⁷ and (2) provide for an operating committee of all the parties that has authority to set budgets and make some other decisions regarding operational matters.⁵⁸ And in fact such provisions are common JOAs. Further, the non-operators' lack of direct control over operations under a JOA is not necessarily that different than the level of control they would have when the corporate form is used.

As for liability protection, if a party wants the liability protection that comes with the corporate form, that party can create a corporate subsidiary to own its interest in the license, and that would protect the party from any liability that exceeds its investment. Further, when parties each directly own a fractional interest in an oil and gas license, with one of the parties serving as operator, the parties may be able to structure their JOA so as to provide the non-operators with protection against direct liability to third persons for the torts committed and contracts entered by the operator. In particular, the parties seek to make sure that their relationship does not constitute a partnership or joint venture,⁵⁹

⁵⁷ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.D.5; AIPN 2012 Model Form International Joint Operating Agreement, Art. 4.2.B.8.

⁵⁸ AIPN 2012 Model Form International Joint Operating Agreement, Art. 6.1.D. The use of operating committees somewhat lessens the centralization of decision making, but it does so with respect to issues on which the non-operators want to retain a greater voice.

⁵⁹ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.D.5; CAPL (2007) Model Form Operating Procedures § 1.05(A); AIPN 2012 Model Form International Joint Operating Agreement, Art. 14.1; AMPLA (2011) Model Form Joint Operating Agreement § 3.3(f).

In some jurisdictions, such as the United Kingdom, “joint venture” has no particular legal meaning or significance. But in other jurisdictions, such as most states within the United States, a “joint venture” is recognized as being a particular type of relationship that is very similar to a partnership. The primary distinction between a partnership and a joint venture “is that, while a [partnership] is ordinarily formed for the transaction of a general business of a particular kind, a joint venture is usually, but not necessarily,

and that the operator is classified as an independent contractor, rather than an agent, of the parties even though this can be challenged as well.⁶⁰

If the parties succeed in this, the non-operators may not have any direct liability to third persons for the operator's torts and contracts. In some circumstances, this may obtain more protection to the non-operators than using a single incorporated entity that is owned by all the parties. If a single corporate form is used, the parties would not have direct liability, but each party would suffer a loss to the extent that the incorporated entity that the party owns is diminished in value because of some corporate liability. In contrast, if the parties directly own an interest and only the operator is liable to some third person, then the non-operators in some circumstances will incur neither direct liability nor a diminution in the value of their investment. Admittedly, these circumstances will be rare. In most cases, the non-operators ultimately will be responsible for liabilities arising from joint operations because, under virtually all JOAs, the non-operators agree that they generally will pay their proportionate share of such liabilities and the JOAs tend to be bound by a host granting instrument which requires joint and several liabilities of the consortium parties.⁶¹ Thus, as between the parties, this

limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years." *Daily States Publishing Co. v. Uhalt*, 126 So. 228, 231 (La. 1930). See also *Ben Fitzgerald Realty Co. v. Muller*, 846 S.W.2d 110, 120 (Tex. App. 1993) ("The principal distinction between a joint venture and a partnership is that a joint venture is usually limited to one particular enterprise."); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 668 S.W.2d 16, 16 (Ark. 1984) ("a joint venture is 'in the nature of a partnership of a limited character'"); *Boles v. Akers*, 244 P. 182, 184 (Okla. 11925) ("a joint venture generally relates to a single transaction"); *Bebo Const. Co. v. Mattox & O'Brien, P.C.*, 998 P.2d 475, 477 (Colo. App. 2000) ("A joint venture is a partnership formed for a limited purpose...."); *SPW Assocs., LLP v. Anderson*, 718 N.W.2d 580, 583 (N.D. 2006) ("A joint venture is generally considered akin to a partnership, although more limited in scope and duration...."); *Lightsey v. Marshall*, 992 P.2d 904, 909 (N.M. App. 1999) ("a joint venture 'is generally considered to be a partnership for a single transaction'"); *Madrid v. Norton*, 596 P.2d 1108, 1118 (Wyo. 1979) ("The principal distinction between a joint venture and a partnership is that a joint venture usually relates to a single transaction.").

⁶⁰ See, e.g., A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.A.

⁶¹ See, e.g., AIPN 2012 Model Form International Joint Operating Agreement, Arts. 3.1 and 4.6.

generally requires non-operators to pay their proportionate share of contract liabilities incurred by the operator and even pay their proportionate share of tort liabilities incurred by the operator.⁶² Nevertheless, there may be some value to the non-operators in not having direct liability to third persons. More important, under most JOAs, the non-operators' promise to pay their proportionate share of liabilities is not unconditional. Under many JOAs, the operator alone must bear any liability that arises from its gross negligence or willful misconduct.⁶³ The vast majority of obligations that arise from joint operations do not result from the gross negligence or willful misconduct of the operator, but occasionally this limitation on the non-operators' liability will be important. In addition, some JOAs might provide even stronger protection for the Operator, providing that: (1) even if a liability arises from gross negligence or willful misconduct, the Operator still will bear only its proportionate share of such liability unless the action or inaction that constituted gross negligence or willful misconduct was committed by senior personnel; and (2) the Operator will not be liable as Operator for environmental and indirect losses as these are difficult to estimate and to bear alone such risks and costs.

For example, the explosion aboard the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico in 2010 resulted in liabilities amounting to tens of billions of U.S. dollars. In that case, BP was the operator, pursuant to a JOA that required the parties to each pay their proportionate share of all liabilities arising from joint operations, unless the liability arose from the gross negligence or willful misconduct of the operator. That exception to the non-operators' obligation, along with a plausible argument that the incident arose from gross negligence of the operator, gave the non-operators some leverage to seek a settlement in which would pay less than their proportionate share of liability, leaving

⁶² Further, under the laws of some jurisdictions, any third persons who are not paid for goods or services may be able to assert lien rights or a privilege against all owner's interest in the operation, not merely against the operator's ownership interest. *See, e.g.,* La. Rev. Stats. 9:4861 thru 9:4873

⁶³ *See, e.g.,* A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.A; CAPL (2007) Model Form Operating Procedures, § 3.04; AMPLA (2011) Model Form Joint Operating Agreement, § 6.3(c).

the operator to pay more than its proportionate share. If the parties had not directly owned their interests, and instead that had each owned shares in a corporation that owned the license, the corporation that they co-owned presumably would have borne all of the liabilities arising from the incident. Thus, at least to the extent that the corporation had assets, each of the parties indirectly would have borne its proportional share of the entire liability because of the diminished value of the corporation.

Another of the advantages often associated with the corporate form is the ease of transfer of ownership. When the corporate form is used, a shareholder or member can transfer a fractional ownership in the business enterprise without having to transfer a fractional share of each and every item of property used in the business. Instead, a shareholder or member simply transfers his shares or his membership interest.⁶⁴ But this advantage may not be very great in the case of a jointly owned license for oil and gas operations.

If an incorporated entity is used to own the license and conduct operations, the parties will have to create the entity. The formal process of incorporation typically will be simple, but the process of actually building and staffing the entity raises issues that will not exist under a JOA that governs the relationship of parties that each directly own an interest in a license. Under the typical JOA, the operator simply dedicates some of its employees to the task of operating the license. Further, the company may be able to achieve some efficiencies by using some employees who only dedicate a portion of their time to the joint operation.

If an incorporated is used, the option of using employees that dedicate just a portion of their time to the joint operation may not be readily available. Further, a new organization will have to be created from scratch. What will be the policies of this entity? How will it be staffed? Would it

⁶⁴ Sometimes the parties may place restrictions on the transfer of ownership interests. Certainly when parties each directly own interests in a license and govern their relationship with a joint operating agreement, the parties sometimes place restrictions on transfers. But these restrictions do not involve some purely practical inherent in transferring ownership in a multitude of individual things owned for purposes of the business. Rather, these restrictions are restrictions that the parties agree to impose – such as rights of first refusal (on sales of ownership interests) that run in favor of the other parties or a requirement that the other parties consent to a transfer of interests.

be staffed entirely by secondees? If so, the shareholders or members of the entity will have to agree whose employees will fill various positions. Instead of using secondees, the parties could decide that the incorporated entity will hire its own employees, but presumably the entity would be created for the sole purpose of owning and operating the one license (or perhaps a group of related licenses). The entity therefore would need to hire employees willing to join a company that operates just one license and which presumably will cease to exist once the license is no longer operated (if this entity do not have participation in other host government instruments).

Further, certain of the commercial terms by which parties typically want their relationship to be governed may be simpler to achieve with a JOA and direct ownership of a license than by use of the corporate form. An example is the choice of which operations to conduct. When parties enter JOA, they grant day-to-day control of operations to the Operator, but they might not cede to the Operator the right to decide which operations to conduct. The parties might retain the right to participate in that decision.⁶⁵ That level of control can be achieved easily enough with the corporate form by delegating such decisions to a board or committee on which all of the parties have representation. But when multiple parties directly own interests in a license, they typically enter a JOA in which they retain more individual autonomy than shareholders in a corporation generally have. As a general rule, an incorporated entity either will conduct an operation or not. Thus, in some sense, either all of the shareholder's interests participate in an operation or none do. But many JOAs contain provisions that allow each party to participate or not participate in operations.⁶⁶

An example of a JOA form that contains such a provision is the AIPN JOA 2012 Model form (Article 7 of that form), entitled "Operations by Fewer than All Parties," authorizes and governs "Exclusive Operations." Subject to certain exceptions, the model form provides that, if a proposed

⁶⁵ See, e.g., AIPN 2012 Model Form International Joint Operating Agreement, Art. 5.2.

⁶⁶ See, e.g., AIPN 2012 Model Form International Joint Operating Agreement, Art. 7; A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. VI.B.2.

operation has not been approved by the parties, a party that supported the proposed operation may send to the other parties a proposal for an “Exclusive Operation,”⁶⁷ sometimes called “sole risk” operations. Within a specified time after receiving such notice, each of the other parties must give notice whether they wish to participate in the proposed operation.⁶⁸ The parties that choose not to participate are deemed to have relinquished their proportional interests in the operation to the “Consenting Parties,” who must collectively bear all the costs and risk of the operation.⁶⁹ If the Consenting Parties may a discovery that they decide to develop, the Non-Consenting Parties generally must be given a limited amount of time during which they may buy back into the operation, but in order to buy their way back into the operation they must pay their proportional share of costs, plus a premium.⁷⁰ The premium compensates the Consenting Parties for having borne the initial risk of the operation. A similar provision is the “non-consent” option of Article 5.13.B. The consequences will be the same as a sole risk (i.e. exclusive operation) but the only difference is that this provision protects a party who do not wish to proceed with an approved joint operation. This non-consent provision is less often used as they tend to protect smaller parties.

Like the AIPN JOA 2012 Model Form, other major JOA forms typically have provisions that allow for operations by less than all the parties.⁷¹ Similar to Article 7 of the AIPN form, these provisions typically authorize the conduct of operations in which some parties will participate and some will not. The prevalent use of such provisions in model forms demonstrates that many parties to JOAs like this sort of clause. If parties choose to own interests in a single incorporated entity that owns an oil and gas license, it should be difficult to draft a shareholder or membership

⁶⁷ AIPN 2012 Model International Joint Operating Agreement, Art. 7.2.A. Under the model form, it is possible that some parties will have forfeited their right to participate in such a proposed operation, and those parties will not be entitled to receive notice, but otherwise the notice must be sent to all parties.

⁶⁸ *Id.* at Art. 7.2.B.

⁶⁹ *Id.* at Art. 7.4.B.

⁷⁰ *Id.* at Art. 7.5.

⁷¹ *See, e.g.*, A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. VI.B.2.

agreement that provides for the possibility of operations by less than all the owners (ie without affecting all parties). But a clause that provides for some (but not all) owners bearing the costs of an operation, and for some (but not all) owners receiving the income from operations would deviate from a simple corporate model in which each share or given fraction of interest is treated the same as any other share or equivalent interest. Thus, a business model in which each party directly owns a share of the concession and the parties' relationship is governed by a JOA arguably is better suited to implementing "exclusive operations" provisions than is a model in which a single corporation owns the license and the parties own fractions of an incorporated entity.

Provisions that authorize and govern "exclusive operations" are not the only type of commercial term that may be simpler to implement when the parties directly own a license and they govern their relationship with a JOA, than when each party owns shares in a single entity that owns the license. Typically, the parties do not wish to each contribute an initial sum of cash or property sufficient to establish a juridical entity that has a sufficient stake of cash that it can function on its own, managing its own account, paying its own bills, and hopefully making a profit that it can distribute to the shareholders or partners. Instead, parties typically prefer to proceed as a group of individuals, albeit a group that has agreed to cooperate in specified ways.

One illustration of this is the fact that, under the great majority of JOAs, there is no joint account that contains a large reserve of cash. Instead, the parties operate on a pay-as-they-go basis, with each party paying its share of expenses, typically monthly. Consider, for example, AIPN JOA 2012 Model form. This is a widely-used form in international oil and gas joint operations. The model form's accounting procedure⁷² provides that, each month, the Operator may submit a cash call to each of the parties for its share of the expenses that the Operator expects to

⁷² There is a separate document called the "2012 AIPN Model Form International Accounting Procedure" (herein, "AIPN Accounting Procedure") that provides the accounting procedure that is designed to be used with the AIPN's 2012 Model International Joint Operating Agreement.

incur in approved operations the next Calendar Month, which the party then must promptly pay.⁷³ If a party's payment "exceeds its share of cash expenditures for a Calendar Month, then the next Cash Call for that Non-Operator shall be reduced by the excess."⁷⁴ Further, if the excess exceeds that party's share of the estimated expenses for the following month, that party has a right to request a refund.⁷⁵

Other model form JOAs contain similar provisions. An Australian form requires the Operator to send authorizations for expenditure (AFE) to the parties each month, which the parties must then pay.⁷⁶ The accounting procedure for the JOA model form commonly used on the United Kingdom's continental shelf provides that the operator should bill the non-operator's each month for their respective shares of the prior month's expenditures. For onshore operations in the United States, the Model Form 610 published by the AAPL is the most commonly used form.⁷⁷ The latest version of that form, the 2015 version, gives the operator the right to bill each party for its share of the expenses estimated by the operator for the following month;⁷⁸ otherwise, the operator bills the parties each month for the expenses it incurred in conducting joint operations during the prior month. This pay-as-you-go system effectively treats the owners as separate individuals who are each participating in a common enterprise, not as persons who co-own a functioning entity.

Direct ownership of a license, with the parties' relationship governed by a JOA, is well-suited for implementing such a pay-as-you-go system. The use of a corporate form is less suited. Typically, after owners of a corporation acquire their shares, they are not obligated to answer cash calls (even though they might be required to follow an increase of capital). No doubt a shareholder or member agreement that requires the owners

⁷³ AIPN Accounting Procedure §§ 1.6.1 thru 1.6.3.

⁷⁴ AIPN Accounting Procedure § 1.6.5.

⁷⁵ *Id.*

⁷⁶ AMPLA (2011) Model Form Joint Operating Agreement, § 8.3(a).

⁷⁷ Keith B. Hall, *The Operator Under Oil & Gas Joint Operating Agreements – The 3 Rs of Responsibilities, Removal, and Replacement*, Special Institute on Joint Operations and the New AAPL Form 610-2015 Model Form Operating Agreement (2016).

⁷⁸ AAPL Form 610 (2015) Art. VII.C.

to answer cash calls could be drafted, but such a requirement would be unusual. Further, if the owners are effectively paying corporate obligations on a pay-as-you-go basis, such an arrangement might invite attempts by creditors of the incorporated entity to “pierce the corporate veil,” thus potentially impose personal liability on the owners for the entity’s debts.⁷⁹

Finally, the corporate form may carry tax disadvantages.⁸⁰ Tax issues will vary by jurisdiction and are beyond the scope of this paper but it is worth noting in passing that in some jurisdictions use of the corporate form may result in double taxation – with a first round of taxation being imposed on the corporation’s profits or simply higher taxation than on an unincorporated joint venture.⁸¹ The incorporated entity is taxed on its profits because it is considered a person. The second round of taxation comes when each shareholder or member receives income in the form of a distribution from the incorporated entity.⁸²

However, the use of a corporate form sometimes can have tax advantages in a merger and acquisition transaction. For example, if the target entity possesses relevant historical tax credits, then it could be beneficial for the new shareholder may be able to gain the benefit of such credits by merging with or acquiring the entity. If a corporate form had not been used, a person acquiring the assets used in a particular venture might be unable to acquire the advantages of the tax credit. However, if the corporate form is used and the target entity possesses tax liabilities to be paid then those liabilities will not discourage an acquisition unless

⁷⁹ Henn, *supra* n. 39 § 73 at p. 130 (“where the corporation is undercapitalized ... a court might disregard the corporate entity as an insulator or nonconductor of liability”) and § 146 at p. 349.

⁸⁰ See: Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 252, Scott Styles, ‘Joint Operating Agreements’ in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 273–277, Michael P. G. Taylor, Sally M. Tyne, *Taylor and Winsor on Joint Operating Agreements* (2ndedn Longman, London 1992) 27.

⁸¹ Henn, *supra* n. 39 § 76 at p. 134.

⁸² Henn, *supra* n. 39 § 17 at p. 54. In the United States, limited liability companies typically are treated as pass-through entities for purposes of federal income taxes. 26 C.F.R. § 301.7701–3(b)(1). That is, the limited liability company’s profits are not taxed. Thus, there is only one round of taxation, which occurs when the limited liability company distributes profits to its members.

the tax liabilities would be absorbed by the party wishing to sell their shares in the target entity.

Anita Himebaugh describes the ‘real’ impact that tax applications can exercise on certain oil and gas operations in the following terms:

In 1981 the oil and gas industry paid in excess of \$ 17 billion in federal income taxes and an additional \$8 billion in windfall profits taxes. Obviously any energy company’s great concern is the specific tax treatment accorded its exploration and development arrangements.⁸³

In short, the tax regime in a given jurisdiction can create more or less advantages to develop your upstream business through an unincorporated or incorporated joint venture. But the industry tends to favour the former option for tax and other reasons mentioned elsewhere in this paper.⁸⁴

2.4 Unincorporated associations

When parties wish to jointly pursue a business enterprise, one option is to use an unincorporated association. There are various types of unincorporated associations that parties can use to conduct business. One of the leading types is partnership. Under one definition, “[a] partnership is an association of two or more persons to carry on as co-owners a business for profit.”⁸⁵ In some jurisdictions, partnerships are considered

⁸³ Anita Gefreh Himebaugh, ‘An Overview of Oil and Gas Contracts in the Williston Basin’ (1983) 59 North Dakota Law Review 49.

⁸⁴ “The term “joint venture” is not a term of art in English or Scots 11.2 law and it can be used to refer to a specifically established limited company, a partnership or an unincorporated contractual association for a given purpose. It is the unincorporated joint venture which is used by the oil industry in the UKCS (and most commonly throughout the rest of the world). The unincorporated joint venture has been favoured by the oil industry over other possible models such as legal partnership or incorporation because of the tax advantages it provides and the lack of mutual liability which is possible under the JOA.” Scott Styles, ‘Joint Operating Agreements’ in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP, Dundee 2007) 273–277.

⁸⁵ N.Y. Partnership Law § 10.

a juridical entity, while other jurisdictions consider a partnership to be simply a relationship between the partners, rather than a juridical entity.⁸⁶ Often, civil laws systems treat partnerships as a juridical entity.⁸⁷ In contrast, the common law historically applied the “aggregate” theory to partnerships,⁸⁸ a theory which holds that a partnership is simply an aggregate of individuals, not a separate entity, because a partnership is merely a relationship between individuals. Now, however, many common law jurisdictions have enacted detailed statutory regimes to govern partnership law, so that partnership law is no largely a matter of statute, rather than common law, in those places. And many of those statutory regimes treat partnerships as entities. For example, in the United States, all 49 states other than Louisiana have adopted some version of the Uniform Partnership Act, and that Act largely treats partnerships as entities.

Whether a partnership is considered an entity or merely a relationship between the partners, certain elements or characteristics of a partnership tend to be very similar from one jurisdiction to another. One common law source defined a partnership as: “A contract of two or more competent persons, to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions.”⁸⁹ The Louisiana Civil Code, a civil law source, provides a definition that is very similar, except it includes a phrase indicating that Louisiana classifies a partnership as an entity. That definition states: “A partnership is a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit.”⁹⁰ A previously-quoted statute that is part of a codification that has superseded the common law

⁸⁶ Henn, *supra* n. 39 § 9 at pp. 50–1.

⁸⁷ Henn, *supra* n. 39 § 9 at pp. 16–19.

⁸⁸ *Id.*

⁸⁹ *Estep v. Travelers Ins. Co.*, 235 S.W.2d 732, 734 (Tex. App. 1950) (quoting *Corpus Juris Secundum* and a definition attributed to Chancellor Kent).

⁹⁰ La. Civ. Code art. 2801. Louisiana is largely a civil law or mixed jurisdiction, even though it is part of the United States, where the common law has predominated historically.

in one jurisdiction states that “[a] partnership is an association of two or more persons to carry on as co-owners a business for profit.”⁹¹

If parties wish to jointly pursue oil and gas development under a particular license, there are some potential benefits associated with use of a partnership. For example, if the parties create a partnership that has employees and actually functions as an entity (whether or not the relevant jurisdiction considers partnership a separate entity), the partnership could administer and operate the license. This could allow for the centralization of administration and operation, without the need to name one of the parties as operator. Further, in some jurisdictions, such as the United States, partnerships profits generally would not be subject to double taxation in the same way that a corporate profits generally are.⁹² These things are potential advantages of using a partnership, but there are also potential disadvantages to using a partnership.

First, one of the disadvantages of creating a partnership – when compared to the option of naming a party as operator – is that the parties will need to build-up the partnership. This raises issues. For example, the parties will need to determine how to staff the partnership. Will the partnership’s employees be secondees who are loaned to the partnership by the partners? If so, the parties will have to determine which positions will be filled with which secondees and those secondees will have to be melded into a single organization. Or, if the partnership hires its own employees, it will have to build an organization from scratch for purposes of operating a single license. Creating a new organization is by no means an insurmountable task, but the parties can achieve centralization of administration and operations for day-to-day matters even if they do not create an entity to serve as owner and operator. As noted before, they can do so by making one party the operator. And, as also noted before, they can include provisions in a JOA to give the Non-Operators the right to information and physical access to facilities.

⁹¹ N.Y. Partnership Law § 10.

⁹² The partners are taxed on their share of partnership income, but the partnership itself generally is not taxed. Henn, *supra* n. 39 § 27 at pp. 80–1.

Further, a disadvantage of a partnership – when compared to a corporation – is that a partnership generally does not insulate the individual owners (the “partners”) from liability for the partnership’s obligations. In many jurisdictions, each partner potentially has liability for the entirety of the partnership’s debts.⁹³ Whether because of these disadvantages or for other reasons, parties typically do not create a partnership that functions like an entity and which operates the oil and gas license.

It should be noted, however, that even if parties do not create a partnership that functions as an entity, and even if they do not subjectively intend to create a partnership, they may inadvertently create a partnership.⁹⁴ This can happen even if the parties each directly own their interests in the license, they name one party as operator, and they govern their relationship with a JOA. This can occur because the general rule is that, even if the parties did not consciously intend to create a partnership, a partnership is nonetheless created if the parties’ relationship has the features that characterize a partnership. Parties to a JOA typically would consider such an inadvertent creation of a partnership undesirable because the existence of a partnership brings with it various legal rules that will govern the parties’ relationship in a manner that the parties do not want. For example, partners generally owe fiduciary duties to each other and to the partnership,⁹⁵ and the parties to a JOA typically do not want to owe fiduciary duties to one another.⁹⁶ Instead, the parties generally would prefer that their duties to one another be more limited in scope and that those duties be defined by the JOA. For this reason,

⁹³ Colo. Rev. Stat. §7-60-115 (all partners jointly and severally liable for torts and breaches of trust, and jointly liable for other obligations); N.Y. Partnership Law § 26 (same); Pa. Cons. Stat. § 8327 (same); Tex. Bus. Org. Code § 152.304 (same); but see La. Civ. Code art. 2817 (the partnership is the principal obligor for partnership debts, but each partner is liable for his virile share of partnership debts).

⁹⁴ *Ziegler v. Dahl*, 691 N.W.2d 271, 275 (N.D. 2005); *Hillme v. Chastain*, 75 S.W.3d 315, 317 (Mo. App. 2002).

⁹⁵ *See, e.g.*, Colo. Rev. Stat. § 7-60-109; La. Civ. Code art. 2809; N.M. § 54-1A-301; Ohio Rev. Code § 1776.31; 54 Okla. St. § 1-301; Tex. Bus. Org. Code § 152.301; Wyo. Stat. § 17-21-301.

⁹⁶ A fiduciary duty is “[a] duty to act for someone else’s benefit, while subordinating one’s personal interest to that of the other person.” *Black’s Law Dictionary* 625 (6th edition 1990).

many JOA contain provisions that expressly disclaim the existence of a partnership and fiduciary duties.⁹⁷

Closely related to the possibility that the parties will inadvertently create a partnership is the possibility, in some jurisdictions, that they will inadvertently create a “joint venture,” a type of unincorporated association that is recognized in some jurisdictions.⁹⁸ A joint venture is similar to a partnership. The primary distinction between a partnership and a joint venture “is that, while a [partnership] is ordinarily formed for the transaction of a general business of a particular kind, a joint venture is usually, but not necessarily, limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years.”⁹⁹ Because joint ventures are essentially partnerships for a limited purpose, joint ventures generally are governed by the same rules that govern partnerships.¹⁰⁰ Accordingly, parties to a

⁹⁷ A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.D.4; CAPL § 1.05.

⁹⁸ In other jurisdictions, the term “joint venture” does not signify a type of association that has been recognized by the courts or legislation. *See note 84 above.*

⁹⁹ *Daily States Publishing Co. v. Uhalt*, 126 So. 228, 231 (La. 1930). *See also* *Ben Fitzgerald Realty Co. v. Muller*, 846 S.W.2d 110, 120 (Tex. App. 1993) (“The principal distinction between a joint venture and a partnership is that a joint venture is usually limited to one particular enterprise.”); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 668 S.W.2d 16, 16 (Ark. 1984) (“[A] joint venture is in the nature of a partnership of a limited character.”); *Boles v. Akers*, 244 P. 182, 184 (Okla. 1925) (“a joint venture generally relates to a single transaction”); *Bebo Const. Co. v. Mattox & O’Brien, P.C.*, 998 P.2d 475, 477 (Colo. App. 2000) (“A joint venture is a partnership formed for a limited purpose...”); *SPW Assocs., LLP v. Anderson*, 718 N.W.2d 580, 583 (N.D. 2006) (“A joint venture is generally considered akin to a partnership, although more limited in scope and duration...”); *Lightsey v. Marshall*, 992 P.2d 904, 909 (N.M. App. 1999) (“a joint venture ‘is generally considered to be a partnership for a single transaction’”); *Madrid v. Norton*, 596 P.2d 1108, 1118 (Wyo. 1979) (“The principal distinction between a joint venture and a partnership is that a joint venture usually relates to a single transaction.”); *see also* *Henn*, *supra*. n. 39 at § 49.

¹⁰⁰ *SPW Assocs., LLP v. Anderson*, 718 N.W.2d 580, 583 (N.D. 2006); *Ben Fitzgerald Realty Co. v. Muller*, 846 S.W.2d 110, 120 (Tex. App. 1993); *Cajun Elec. Power Co-Op, Inc. v. McNamara*, 452 So. 2d 212, 215 (La. App. 1984); *Boles v. Akers*, 244 P. 182, 184 (Okla. 1925); *Madrid v. Norton*, 596 P.2d 1108, 1118 (Wyo. 1979).

joint venture owe each other fiduciary duties,¹⁰¹ just as partners owe each other fiduciary duties.

The mere facts that parties co-own an oil and gas lease and that they have agreed that one co-owner will operate the lease on the parties' behalf is not sufficient to create a joint venture.¹⁰² On the other hand, the existence of a JOA will not automatically exclude the existence of a joint venture. In some such cases, courts have found that a joint venture existed.¹⁰³ In other cases, courts have determined that a joint venture did not exist.¹⁰⁴ The elements necessary to create a joint venture will be a question of law that depends on the jurisdiction, and whether a joint venture exists in any particular case will be an issue of fact that depends on such circumstances as the terms of the parties' agreement and perhaps on their conduct.¹⁰⁵ The elements necessary to form a joint venture can vary slightly from one jurisdiction to another, but in order for a joint

¹⁰¹ Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc., 668 S.W.2d 16, 17 (Ark. 1984); Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977); Madrid v. Norton, 596 P.2d 1108, 1118 (Wyo. 1979); see also Henn supra n. 39 § 49 at p. 107.

¹⁰² Hamilton v. Texas Oil & Gas Corp., 648 S.W.2d 316, 320 (Tex. App. 1982) (“Joint owners of an oil and gas lease, may contract for the operation of leases by one of them and for the operator, in the event of success, to pay to the other joint owners one-half of the proceeds of the sale of and gas less the expenses of finding it, without creating a joint venture or a mining partnership.”)

¹⁰³ Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977) (parties were “joint venturers for the development of a particular oil and gas lease”; nevertheless, plaintiffs were denied recovery because joint venture did not extend to the property that was at issue in the litigation). As one commentator noted, “the mere existence of an agreement between an operator and non-operator is not sufficient to avoid [the existence of a fiduciary] duty.” Christopher S. Kulander, *Old Faves and New Raves: How Case Law Has Affected Form Joint Operating Agreements – Problems and Solutions (Part One)*, 1 Oil and Gas, Nat. Res., and Energy J. 1, 11 (2015). Instead, courts will consider whether the terms of the agreement “create[] a partnership, joint venture, or agency relationship that may trigger a fiduciary duty.” *Id.*

¹⁰⁴ Ayco Development Corp. v. G.E.T. Service Co., 616 S.W.2d 184, 186 (Tex. 1981); Hamilton v. Texas Oil & Gas Corp., 648 S.W.2d 316, 321 (Tex. App. 1982).

¹⁰⁵ Grand Isle Campsites, Inc. v. Cheek, 262 So. 2d 350, 357 (La. 1972); Cajun Elec. Power Co-Op, Inc. v. McNamara, 452 So. 2d 212, 216 (La. App. 1984); see also Price v. Howard, 236 P.3d 82, 91 (Okla. 2010) (existence is a question of fact); Madrid v. Norton, 596 P.2d 1108, 1118 (Wyo. 1979) (question of fact). The agreement that supports the existence of a joint venture can be either express or implied. Pillsbury Mills, Inc. v. Chehardy, 90 So. 2d 797, 801 (La. 1956).

venture to exist the putative joint venturers typically must jointly own an interest in a venture, they must have reached either an express or implied right to share in profits and losses, and they must have a mutual right of control or management of the venture.¹⁰⁶

Even if the parties do not create a partnership or joint venture, it is possible, however, for the parties' relationship to be characterized in some way that triggers unwanted legal effects. This could happen, for example, if the parties are deemed to have a principal-agency relationship. Because the non-operators do not typically play an active role in conducting operations and managing the affairs of the parties, there generally is not a significant likelihood that they will be classified as agents for one another. On the other hand, the Operator conducts a wide range of activities on behalf of the parties, and someone could use this fact to argue that the operator is an agent of the non-operators. As a general rule, both the Operator and Non-Operators have an incentive to avoid the Operator being classified as an agent. The Operator has an incentive to avoid being classified as an agent because agents generally owe fiduciary duties to their principals, and the Operator would prefer the scope and extent of its duties to be governed by the terms of the JOA, rather than principal-agency law.¹⁰⁷ The Non-Operators have an incentive to avoid the Operator being classified as their agent because principals generally have direct liability for the torts committed¹⁰⁸ and contracts entered¹⁰⁹

¹⁰⁶ *Ayco Development Corp. v. G.E.T. Service Co.*, 616 S.W.2d 184, 186 (Tex. 1981); *SPW Assocs., LLP v. Anderson*, 718 N.S.2d 580, 583 (N.D. 2006); *Fullerton v. Kaune*, 382 P.2d 529, 532 (N.M. 1963); *see also* Henn, *supra* n. 39 at § 49 p.106 (“Mutual right to control” is an element).

¹⁰⁷ Restatement (Second) Agency § 13 (“An agent is a fiduciary with respect to matters within the scope of his agency.”); Restatement (Third) Agency § 8.01 (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002); *Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1120 (Pa. 2000); *Burlington Northern and Santa Fe Ry. Co. v. Burlington Resources Oil & Gas Co.*, 590 N.W.2d 433, 437 (N.D. 1999).

¹⁰⁸ Restatement (Third) Agency § 7.04; *Travelers Cas. & Sur. Co. v. Castegnaro*, 772 A.2d 456, 460 (Pa. 2001); *Marron v. Helmecke*, 67 P.2d 1034, 1035 (Colo. 1937).

¹⁰⁹ Restatement (Third) Agency §§ 6.01 thru 6.03.

by their agents while acting within the scope of their agency, and the Non-Operators would prefer to avoid direct liability to third persons.

Often, parties to JOA attempt to avoid having the operator classified as an agent (with some exceptions such as the OGUK JOA).¹¹⁰ In some JOAs, the parties do this by expressly disclaiming the existence of a principal-agency relationship.¹¹¹ In addition, some JOAs expressly declare that the Operator acts as an independent contractor.¹¹² The parties do this because classifying the Operator as an independent contractor is a plausible alternative to classifying the operator as an agent. Further, a person generally does not liability for the torts or contracts of his independent contractors,¹¹³ and an independent contractor generally does not owe fiduciary duties to its employer.¹¹⁴

An alternative or additional way that many JOA attempt to make the Operator an independent contractor, rather than an agent, is by giving the operator a freedom from control and direction that is characteristic of an independent contractor, but not an agent. The major distinction between an independent contractor and an agent is that an agent is subject to the principal's direction and control, whereas an independent contractor generally is not.¹¹⁵ Many JOAs give the Operator full control over day-to-day operations, and provide that the Operator is not subject to the direction and control of the non-operators with respect to the conduct of operations (though the parties, including the Non-Operators, collectively retain control over what operations are conducted). Such provisions typically are sufficient to avoid the Operator being classified as an agent for purposes of most of its conduct under JOAs.

¹¹⁰ See, e.g., Oil and Gas UK (2009) JOA Model Form, Clause 6.5.8.

¹¹¹ See, e.g., A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. V.A.

¹¹² See, e.g., A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. V.A.

¹¹³ Restatement (Second) Torts §§ 409, 414; *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 447 (N.D. 1994).

¹¹⁴ *Horwitz v. Holabair & Root*, 816 N.E.2d 272, 285–6 (Ill. 2004).

¹¹⁵ *Enterprise Mgt. Consultants, Inc. v. State*, 768 P.2d 359, 362 n.13 (Okla. 1988); Restatement (Second) Agency § 1. Of course, the person who hires an independent contractor does choose the job that will be done.

Nevertheless, even if an Operator is not classified as an agent in general, it may be classified as an agent for some limited purposes. For example, some JOAs provide that, if a party does not make arrangements to take and sell its portion of whatever hydrocarbons are produced, the Operator has the right, but not the duty, to sell the hydrocarbons on behalf of that party.¹¹⁶ Some courts have held that, if the Operator does so, it acts as an agent in making the sale.¹¹⁷ Further, to the extent that the Operator holds joint funds, it may be the agent of the other parties. Indeed, the AAPL Model Form 610 suggests that, to the extent that the Operator is the custodian of joint funds, it has fiduciary duties to the other parties.¹¹⁸

Assuming that the parties generally succeed in avoiding the existence of a partnership, joint venture, or principal-agency relationship, the non-operators generally will not have direct liability to third persons for the torts committed by or contracts entered by the Operator. This does not mean, however, that the Operator will have to satisfy all joint obligations on its own. JOAs uniformly provide that the Non-Operators generally must bear their proportionate share of all losses sustained and liabilities incurred in operations conducted under the agreement.¹¹⁹ Such “exculpatory clauses” typically contain exceptions, but only narrow exceptions as explored elsewhere in this paper.

There are various other types of unincorporated associations that are recognized in some jurisdictions, including “limited partnerships”¹²⁰ (the type of partnership discussed earlier in this chapter is sometimes

¹¹⁶ See, e.g., A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. VI.H.

¹¹⁷ *Atlantic Richfield Co. v. The Long Trusts*, 860 S.W.2d 439 (Tex. App. 1993).

¹¹⁸ A.A.P.L. Form 610 (2015) Model Form Joint Operating Agreement, Art. V.D.4.

¹¹⁹ A.A.P.L. Form 610 (2015) Model Form Joint Operating Agreement, Art. V.A; AIPN 2012 Model Form Joint Operating Agreement, Art. 4.6; see also CAPL (2007) Model Form Operating Procedures, Arts. 4.01 and 4.02; OGUK (2011) Model Form Joint Operating Agreement, Clause 6.2.4; AMPLA (2011) Model Form Joint Operating Agreement, § 6.5.

¹²⁰ See, e.g., Tex. Bus. Org. Code § 153.001; N.Y. Partnership Law §§ 90 and 121-001; Civ. Code Quebec s. 2189. Limited partnerships typically must have at least one “general partner” that is personally liable for partnership debts, but it can also have “limited partners” who do not have personal liability.

called a “general partnership” to distinguish it from the other types of associations whose name includes “partnership”¹²¹), “limited liability partnerships,”¹²² partnerships in commendam,¹²³ mining partnerships, among others.¹²⁴ These and other types of unincorporated associations will not be discussed in detail here. Such organizations typically raise issues similar to those raised by corporations or partnerships, or sometimes a combination of both.

The table below summarises the key differences between an incorporated and incorporated joint venture:

¹²¹ For example, Title 4 of the Texas Business Organization Code is entitled “Partnership.” The first chapter of that Title is Chapter 151, “General Provisions.” That chapter is followed by Chapter 152, entitled “General Partnerships” and Chapter 153, entitled “Limited Partnerships.” Also, contrast Civil Code of Quebec Book 5, Tit. 2, Ch. X, Sections II (General Partnership) and III (Limited Partnerships).

¹²² See, e.g., N.Y. Partnership Law § 121-1500.

¹²³ See, e.g., La. Civ. Code art. 2837. A partnership in commendam is similar to a limited partnership. La. Civ. Code arts. 2840, 2844.

¹²⁴ A mining partnership is a special type of partnership that has been recognized in the United States. It is governed by state law. Under Oklahoma law, there are three elements of a mining partnership: (1) a joint interest in the property; (2) an express or implied agreement to share in profits and losses; and (3) cooperation in the project. *Spark Bros. Drilling Co. v. Texas Moran Exploration Co.*, 829 P.2d 951, 953 (Okla. 1991). Under West Virginia law, three essential elements of a mining partnership are: (1) co-ownership of lands or leases constituting a property interest; (2) joint operation thereof; and (3) sharing of profits and losses. *Valentine v. Sugar Rock, Inc.*, 745 F.3d 729 (4th Cir. 2014); see also *Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785 (W. Va. 2014).

	<i>Use of Single Incorporated Entity to Hold License</i>	<i>Each Party Directly Owns Interest in License Parties Use JOA</i>	<i>Each Party Directly Owns Interest; parties use JOA; Parties Relationship Classified as a Partnership</i>
Limited Liability?	Yes	No. As a general rule, the liabilities shall be proportional.	No. As a general rule, the liabilities will be joint and several.
Access to Information	Each party is owner of operator; has direct ability to seek information in theory	One party serves as operator. Other parties rely on JOA's provisions regarding the right to information	One party serves as operator. Other parties rely on JOA's provisions regarding the right to information. In addition, operator may owe fiduciary duties to other parties that may influence its obligation to provide information
Control of Operatorship	Each party is owner of operator; has direct vote, along with other parties, in actions of company	No direct control. JOA sets standards of conduct; non-operators can decide which operations to conduct; JOA may form operating committee that gives budget oversight; in specified circumstances, parties typically can remove operator	No direct control. JOA sets standards of conduct; non-operators can decide which operations to conduct; JOA may form operating committee that gives budget oversight; in specified circumstances, parties typically can remove operator

Double income tax liability?	Yes in many jurisdictions	No	No
Insulation Against Capital Gains Tax?	Potentially can obtain insulation by organizing corporation in a country that does not have capital gains tax, assuming host country does not require that corporation be organized under HC's laws	No	No
Ease of Implementing Sole Risk System	Difficult	Not difficult	Not difficult
Requirement to establish its own policies	Yes	Less likely	Less likely
Costs to create such association	Higher	Lower	Lower
Flexibility to design its own association terms and conditions	Lower as it should follow the types of forms and rights established under the applicable law for each form of incorporate entity	More flexible as it follows contract law	More flexible as it follows contract law

3 Chapter three: Alternatives to adjust a JOA model form

In order to maximize the effectiveness¹²⁵ of the joint operations, the parties determine one among them to conduct the operations on the behalf of the whole consortium.¹²⁶ In other words, the *consortium* will have one party who will act as the Operator of the consortium and the remaining will be the Non-Operators.

However, the title of the JOA implies a reasonable collaboration between all parties in the consortium not only on the consequences of the operations (i.e. costs and liabilities) but also on the preparation, decision process and execution of the operations. Under the American JOA models, however, many decisions are left to the Operator alone, particularly decisions regarding how operations will be conducted. The Canadian mode, which similarly puts a great deal of control in the hands of the Operator, implicitly recognizes this. It is the only model from does not call itself a ‘joint operating agreement,’ opting instead for the title “Operating Procedures”. The other models adopt a mid-approach as they provide for an Opcom. The Operator might argue that the Non-Operators can give their input via the Opcom so that everything is jointly decided. However, it is impossible to deny that the Operator will set the pace of the Opcom, as it will not only chair such body but also any subcommittee implemented, and also most of the work that will be analysed by the Opcom. As a matter of consequence, the Operator shall have far more control of the joint operations than the Non-Operators.¹²⁷

¹²⁵ ‘In order to run the joint venture efficiently, the parties will appoint an Operator to act on their behalf.’ Sandy Shaw, ‘Joint Operating Agreements’ in Martyn R. David (ed), *Upstream Oil and Gas Agreements* (Sweet and Maxwell, London 1996) 16.

¹²⁶ ‘It would be impractical for all participants in a jointly owned contract to undertake the actual operations. Thus, the JOA provides for the designation of one of the participants as the operator who is in exclusive charge of conducting all joint operations on behalf of all participants.’ Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 289.

¹²⁷ ‘Given the infrequency of the operating committee meetings, the standard of performance by the operator is critical.’ D. A. W. Maloney, ‘Managing the Multi-Participant Joint

As previously mentioned, the Non-Operators are likely to desire greater participation in the decision-making process of the operations. On the other hand, the Operator is likely to desire more discretion so that it can determine the pace of the operations. Between and above these different positions, there is an HG who will want to maintain control over the efficiency and maximization of the production.¹²⁸

So the main question is how to address all these different views in a balanced manner? In other words, is it possible for all these interests and views to co-exist inside the same agreement without eliminating some of them?

As we previously discussed the main issue between an Operator and Non-Operators is the tension between their roles. There are two options to solve this issue.

One option would be to use an incorporate joint venture (see chapter 2) and the entire JOA discussion and conflict of interests between an Operator and Non-Operator would not exist. The issue would be on who can staff the company and indicate positions in the management and board of the company. But most companies in the petroleum industry tend to prefer to keep the unincorporated joint venture for the reasons discussed in previous chapters.

Another option would to adjust the operatorship provision of the JOA model form to address this concern. The JOAs could offer some mechanisms to solve this operatorship tension in the following options: (i) split of operatorship, (ii) dual or co-operatorship, (iii) joint operating company, (v) third party Operator.

3.1 Split of operatorship

Companies might have different expertise and preferences from exploration to production phases. The life cycle of an upstream project and the duration of a JOA tend to be very long and it should be able to

Venture' (1988) 7(2) Australian Mining and Petroleum Law Bulletin 116.

¹²⁸ Juris Knut Kaasen, Scope of Joint Operating Agreements in Norway (Petroleum Law Seminar, St.Raphael, 2000) 19.

accommodate different Operators. A balanced provision would be the split of the operatorship.¹²⁹

Therefore, a split of operatorship might give a fair balance of powers between the JOA parties and allow them to use their best resources and expertise to conduct the operations of the consortium throughout the life cycle of the JOA.

However, the duration of the Operatorship role might create some tension during the negotiation phase. At one hand, a Non-Operator during an exploration phase might argue that its role as an Operator is uncertain as no one knows if the project will ever reach a development and production phase. On the other hand, a Non-Operator at a development and production phases might argue that its role as an Operator in the exploration phase is likely to be much shorter than the one in the development and production phase.

In addition, some companies might not be comfortable to hand-in operations between phases or even worst some host governments might not approve such assignment. For those reasons, this option is not often used by JOA parties.

3.2 Co-Operatorship/Dual Operatorship

The Operatorship is more likely to be given to one entity at a given time. A large variety of companies and even governments might be hesitant to allow more than one party to act as Operator at the same time. It might generate more confusion and less efficiency to allow several parties to do the same role. As it is often said there is only one captain in the ship and many companies would argue that the same principle should apply to a JOA.

However, some companies and/or governments might make a distinction between a technical and administrative Operator. The technical Operator is likely to be the IOC and the administrative Operator is more likely to be the NOC. In this case, some could argue that it is not a truly

¹²⁹ Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 92–93.

dual operator but rather one company dealing with the main business of the *consortium* and another one dealing with formalities to implement the main decisions in a similar way between a captain who would make the decisions and the sergeant who would implement them.

The Greenlandic JOA provides for a fairly unique co-operative agreement which is an attachment to the main body of the JOA.¹³⁰

This agreement is an interesting example on how NOCs without extensive expertise and knowledge could aim to become an operator in a nearby future. However, this is easier to be implemented in Greenland as Nunaoil is a NOC and this JOA is provided as an attachment of the relevant licence. Thus, any IOC interest to do business in Greenland should accept these terms and conditions and a normal Non-Operator might face more difficulties to negotiate similar terms and conditions without such statutory powers.

An easier solution would be to incorporate a joint operating company as all parties would be part of the Operator as described below.

3.3 Joint Operating Company

Some parties might balance the conduction of the operations by the creation of another vehicle to operate the joint operations (i.e. incorporated operator). This option is different than the one described in chapter two of this paper as in this case the parties should first sign a JOA and then create a company to be the operator of such JOA.

Such a vehicle should be composed of all parties of the consortium (even though less than all parties could be involved inside such entity).¹³¹

¹³⁰ See: https://www.govmin.gl/images/stories/petroleum/udbud/udbud_2018_2018/Davis_Strait_2018/Model%20Joint%20Operating%20Agreement_App%20B_Davis%20Strait%202018.pdf. Accessed 09 November 2016.

¹³¹ 'In exceptional instances, a separate entity may be formed to serve as operator and that entity may be staffed by the various participants.' Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 289.

In any case, this vehicle shall remain subject to the instructions of the relevant JOA.¹³²

In simple terms, this approach would create another Opcom to perform the day to day activities of the consortium in a similar approach to many JDZs.¹³³

This option to create a joint operating company is more likely to happen in a development or production phase (specially whenever a NOC is involved). But some companies might argue that this solution creates more complexities and less efficiency. There could be some overlaps and conflicts between the JOA and the shareholder agreement of the operating company.

In any case, it is relevant to stress that such solution might require more contribution from the Non-Operators and might even give more control to the Non-Operators (specially to be informed of “what is going on”). But the key issues should be determined by the decision process in the relevant committees, forums and staffing such operating company.

3.4 Third party operator

Rather than choosing one of the parties as operator or choosing an entity that is owned by one or more of the parties to serve as operator, the parties could choose a party that has no interest in the oil and gas license to serve as operator. Such an operator is sometimes called a “contract operator” or a “non-owning operator.” The co-owners of a license typically do not use a contract operator.

This is reflected in the terms of the A.A.P.L. Model Forms that are commonly used in the United States. The recently-released “2015” version of the AAPL Model Form-610¹³⁴ states a general rule that the operator

¹³² Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law Business, London 2010) 92.

¹³³ Rajendra Ramlogan, ‘State Participation in Joint Ventures: The Republic of Trinidad and Tobago Experience’ (1992) 10 J. Energy & Nat. Resources L. 284.

¹³⁴ The “2015” version was not released until late 2016. The first version of the AAPL Form 610 Model Form Operating Agreement was the 1956 version. Subsequent versions were

must own an interest.¹³⁵ The earlier versions of Form 610 did not expressly address whether the initial operator had to own an interest in the license, but the Forms seemed to assume that the Operator would. For example, the 1989 and 1982 Forms provide that the operator will “be deemed to have resigned” if it ceased to own an interest that is governed by the JOA,¹³⁶ and the 1977 Form states that the operator will “cease to be Operator” if it no longer owns an interest.¹³⁷ Further, the 1989, 1982, and 1977 versions of Form 610 provided that, in the event that an Operator resigned or was removed, the successor Operator would be chosen from amongst the parties that own an interest in the license.¹³⁸ Similarly, in the international context, the AIPN’s JOA 2012 Model Form contains an optional provision that would allow the parties to remove the Operator if the collective participation interest (ownership fraction) that the Operator and its affiliates holds in the license falls below a specified fraction.¹³⁹

One of the reasons that parties typically do not use a contract operator is that one or more of the parties often wishes to serve as operator. Their desire to serve as operator may come in part because, by serving as operator, a party has more influence over operations.¹⁴⁰

Another reason that parties typically do not use contract operators is that they prefer to have an operator that is an owner because they believe that such an operator will have the same incentive as the other owners – an incentive to maximize profits for the owners of the license while avoiding imprudent risks. Indeed, this belief often leads parties to choose as operator the party that owns the *largest* interest.¹⁴¹ In contrast to the motivations typically predominant amongst the owners of the license, the primary motivation of a contract operator will be to make a profit

the 1977, 1982, and 1989 versions. The AAPL Form 610 is the most commonly used form for onshore joint operations in the United States.

¹³⁵ 2015, Art. V.A.

¹³⁶ 1989 Form, Art. V.B.1.; 1982 Form, Art. V.B.1.

¹³⁷ 1977 Form, Art. V.B.1.

¹³⁸ This requirement is found in Art. V.B.2 of the 1989, 1982, and 1977 Forms.

¹³⁹ See optional provision Art. 4.10.C.

¹⁴⁰ See chapter 1.

¹⁴¹ *Ibid.*

by serving as operator.¹⁴² Such a motivation means that the operator's motives do not perfectly align with those of the owners, and such a non-alignment of interests is a concern.

Indeed, a corollary of the concern about non-alignment of interests is a commonly-held view within the industry that the operator generally should neither gain a profit nor incur a loss because of its role as operator. This view is made explicit in some international JOA forms. Article 4.2.B.5 of the AIPN JOA 2012 Model Form provides that, subject to exceptions provided in the JOA's accounting procedures or provisions for potential operator liability in the event of gross negligence or willful misconduct, the Operator should "neither gain a profit nor suffer a loss as a result of being the Operator." Article 6.3(c) of the AMPLA Form states: "It is intended that the Operator will neither gain nor, except where it has committed fraud or Wilful Misconduct, suffer a loss as a result of acting as Operator in the conduct of Joint Operations." Similarly, 6.2.2(d) of the UKCS Form states that, except in the case of willful misconduct, the Operator should "neither gain nor suffer a loss in such capacity as a result of acting as Operator in the conduct of Joint Operations."

This view also is reflected in substantive terms of JOAs – terms which have the effect of providing that the operator is not compensated for its service as operator. The operator is entitled to reimbursement of its expenses, which may include a reasonable overhead, but otherwise it works "gratuitously for the benefit of all members of the JOA."¹⁴³ Further, certain provisions in the JOA that are designed to ensure that the operator secures goods and services at a reasonable costs include extra safeguards that apply if the operator wishes to use its own materials and charge the

¹⁴² It would be possible to base a contract operator's compensation partially on the amount of profits from operations, but it probably would be impossible to completely align the interests of the of a contract operator with the owners of a license unless the contract operator shares in both profits and losses. And if the parties provide for the contract operator to share in profits and losses they essentially have converted the contract operator into an owner. If for example, the parties agree that a contract operator would receive 1% of revenue (in addition to reimbursement of operating costs) and pay 1% of all costs, the operator effectively would be a 1% owner.

¹⁴³ Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP 2nd ed., Dundee 2007) 375.

joint account, or if it wishes to purchase services or materials from an affiliate. These measures seek to ensure that the operator does not make nor lose money based on its service as operator. This helps ensure that parties do not overpay for goods and services and that the operator does not seek to profit from its position as operator.

Nevertheless, the co-owners of a license sometimes use a contract operator. Indeed, one commentator has suggested that the practice has become more common as described below.¹⁴⁴ Further, the recently released 2015 version of the American Association of Professional Landmen's "A.A.P.L. Form 610 – 2015 Model Form Operating Agreement" contains provisions recognize the possibility that the parties will choose a contract operator and establish special rules that will apply if a contract operator is used.¹⁴⁵ Obviously, if a company is not a co-owner of the license (or an uncompensated affiliate of an owner), then the company's only motivation to serve as operator will be to make a profit. Thus, the parties who elect to use a contract operator will have to reconcile themselves to the operator making a profit. For this reason, if the parties are using a model form that says that the operator should not make a profit, that portion of the agreement will have to be revised, or the parties will need to enter a separate agreement to govern the relationship between the operator and the non-operators. Similarly, if the parties' JOAs contains provisions that restrict the charges that an operator can charge, those provisions may need revision for use with a contract operator.

Parties who choose to use a contract operator may also find it prudent or even necessary to modify other parts of a model form (assuming they do not enter a separate agreement with the contract operator). Some of a model form's provisions relating to the operator will work fine with a contract operator, but because the forms often are written with an assumption that the operator will be an owner, some of the provisions in the model may not be appropriate for use with a contract operator.

¹⁴⁴ Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (DUP 2nd ed., Dundee 2007) 376.

¹⁴⁵ A.A.P.L. Form 610 – Model Form Operating Agreement (2015), Art. V.A (2nd para.) and V.B.5.

For example, many JOAs contain broad exculpatory clauses that protect an operator from liability. One of the justifications for such clauses is that, if the operator barred from making a profit by being operator, it is reasonable for the operator to receive protection against liability. This justification does not apply when the parties use a contract operator that is allowed to make a profit from its service as operator. Thus, the parties should consider eliminating the broad exculpatory protection generally given to operators. On the other hand, the potential losses that can occur in oil and gas operations are enormous compared to the amount of profit that a company likely will be able to make by serving as contract operator. For this reason, it may be reasonable for a contract operator to demand some limitations on liability. This is reflected in some service contracts. For example, the AIPN's 2012 Model Well Services Contract contains clauses that anticipate that the well owner will indemnify the contractor against various losses relating to a loss of well control.¹⁴⁶ The same form anticipates that the owner also will indemnify the contractor against claims relating to damage of the subsurface, including damage to a reservoir or well,¹⁴⁷ and against pollution claims arising from a blowout.¹⁴⁸

Parties should also consider whether they wish to make it easier to remove a contract operator than to remove an operator that is a co-owner. This is already reflected in one model form – the 2015 version of the AAPL Model Form 610. That form creates a general rule that the operator must own an interest, but the form recognizes the possibility that the parties will use a contract operator and the form establishes removal-of-operator rules that are different if the operator is a contract operator as opposed to being an owner of the oil and gas lease or leases governed by the agreement.

One of the 2015 Form's special rules is that a contract operator may be removed by a majority (in interest) of the owners, with or without good cause.¹⁴⁹ In contrast, an operator that is an owner may only be removed

¹⁴⁶ See Article 13.2.5.

¹⁴⁷ AIPN 2012 Model Well Services Contract, Art. 13.2.6.

¹⁴⁸ AIPN 2012 Model Wells Services Contract, Art. 12.2.10.5.

¹⁴⁹ A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. V.B.5.

for good cause.¹⁵⁰ Further, the AAPL Model Forms provide that the parties generally cannot remove an operator that is an owner unless the operator does not correct a “default” that constitutes good cause for removal within a specified time after being given written notice of the default.¹⁵¹ Under the 2015 AAPL Model Form, however, a contract operator is not entitled to such notice and an opportunity to cure before being removed.

Consequently, it is possible to say that the JOA parties would avoid most of their conflicts as a neutral third party would perform the work as per decision of their Opcom. Sandy Shaw describes the importance of such alternative to minimise concerns about overheads as follows:

*There is a growing trend in delegating in delegating major operating functions to contractors in an effort to reduce operating costs and overheads. At present, JOAs do not tend to deal in any detail with contractor-operator situations. In cases where contractors’ services are used for day to day operations, the parties will expect to be fully consulted and consent to such arrangements and any JOA amendments that may be required.*¹⁵²

In other words, the delegation of a third-party operator would avoid most of the conflicts between the JOA parties and none of the JOA parties would have any difficulty in requesting higher levels of control and performance on such a service agreement. However, none of the JOAs standard forms available in the industry offer this type of arrangement as the two basic principles of most JOAs are not fulfilled: (i) the Operator is a consortium member, (ii) the “Non Gain No Loss” principle as this third party would be paid to take this role.

¹⁵⁰ A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. V.B.4.

¹⁵¹ A.A.P.L. Form 610 (2015) Model Form Operating Agreement, Art. V.B.4. The time that the operator has to cure the default generally is 30 days, but the time is limited to 48 hours “if the default concerns an operation then being conducted.” *Id.*

¹⁵² Sandy Shaw, ‘Joint Operating Agreements’ in Martyn R. David (ed), *Upstream Oil and Gas Agreements* (Sweet and Maxwell, London 1996) 14.

3.5 Other practical examples

An interesting analogy occurs with the development of areas closer to the boundaries of different countries. As sovereign countries each one would prefer to maintain strong control over its resources and operations;¹⁵³ however, this might not be in the best interest of both countries, as an efficient exploration of such zone would require cooperation between them. In this sense, these countries might sign an agreement (Joint Development Zone – JDZ) or cross border unitisations to secure the maximisation of the recovery of the natural resources.¹⁵⁴

It is important to note the fact that the JDZ and cross border unitisations are commonly controlled by both countries; otherwise they would not accept the partial abdication of their sovereignty.¹⁵⁵

The same principle shall be applicable for the JOA as the situation is fairly the same (i.e. sharing risks and resources) but applicable to a relationship between private parties rather than governmental authorities. As a matter of fact, the similarity is greater with regard to the sharing of costs.¹⁵⁶ As a matter of fact, all JOA parties and the HG are keen to maximise the production of hydrocarbons in the most efficient way, so the final goal is the same for everyone. Consequently, it is possible to suggest that a higher degree of efficiency could only be implemented if a balanced agreement is established between the parties so that everyone

¹⁵³ Chidinma Bernadine states that ‘*The parties wanted a strong powerful JC. In view of this, they needed a kind of check on those powers.*’ Chidinma Bernadine Okafor, ‘Model Agreements for Joint Development, a Case Study’ (2007) 25 J. Energy Nat. Resources L. 98.

¹⁵⁴ Peter C. Reid, ‘Joint Development Zones Between Countries (1987) 6(1) AMPLA Bulletin 4,13.

¹⁵⁵ Peter C. Reid, ‘Joint Development Zones Between Countries’ (1987) 6(1) AMPLA Bulletin 4,13.

¹⁵⁶ Chidinma Bernadine states that ‘*Another interesting feature of the JA is the arrangement for its funding. Both states are to initially support the Authority but in the long term, it is to be funded by the oil revenue generated in area A. Nevertheless, the two states stand surety, in equal shares, for any shortfalls of the JA arising from its inability to pay, wholly or in part, an arbitral award against it under a production sharing contract.*’ Chidinma Bernadine Okafor, ‘Model Agreements for Joint Development, a Case Study’ (2007) 25 J. Energy Nat. Resources L. 73.

has equal participation in the conduction and performance of the joint operations, i.e. a real and effective combination of joint efforts.¹⁵⁷

However, it is important to note that the context between the parties in JOA to a JDZ is substantially different. The former is based on a context where one party has a dominant position in the agreement. The latter is based on a context where the parties are in an equitable relationship as each country has its own sovereignty. In this sense, the JDZ is a good example of the result of a balanced agreement to jointly explore and exploit hydrocarbons and to understand how they define the conduct of the relevant operations.¹⁵⁸

It is important to note that several countries have adopted a JDZ or a cross border arrangement such as Iceland/Norway, France/Spain, Jamaica/Colombia, UK/Norway, Senegal/Guinea Bissau, Nigeria/ Sao Tome, Czechoslovakia/Austria, Sudan/Saudi Arabia, Qatar/Abu Dhabi, Saudi Arabia/ Bahrain, Australia/Indonesia, Japan/Korea, Malaysia/ Thailand, Malaysia/Vietnam, Australia/East Timor, Netherlands/ Germany, Argentina/UKF.¹⁵⁹ Although several countries had signed a JDZ or cross border unitisation their total number is far smaller in comparison with JOAs. Firstly, the number of private players is far greater than public players. Secondly, the licensed area is far smaller than the one involved in a JDZ or cross border unitisation which allows more deals.¹⁶⁰ Consequently, it is possible to argue that the experience acquired from JDZs or cross border unitisation is not as well developed as JOAs. Nevertheless, it is not possible to deny the existence of such

¹⁵⁷ Peter C. Reid, 'Joint Development Zones Between Countries' (1987) 6(1) AMPLA Bulletin 4,13.

¹⁵⁸ Ibid 72-73.

¹⁵⁹ Ibid 58.

¹⁶⁰ David Ong, 'The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?' (1999) 14(2) *International Journal of Marine and Coastal Law* 207 at 245, M. Miyoshi, 'The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation' (1999) 2(5) *International Boundary Research Unit Maritime Briefing* 41, M. Miyoshi, 'Some Comments on Legal Aspects of Precedents for Joint Development' (1981) 6(11) *Energy* 1359, Chidinma Bernadine Okafor, 'Model Agreements for Joint Development, a Case Study' (2007) 25 *J. Energy Nat. Resources L.* 58.

practical mechanism which provides balanced terms to conduct the joint operations.

Therefore, the JDZs and cross border unitisations are a good example on how to balance different interest in a positive manner towards the mutual benefit of the parties as they need to find a solution and agreement on who is going to conduct the operations of such unitised area.

4 Conclusion

In conclusion, the reality in the upstream sector is that oil and gas companies tend to prefer to adopt unincorporated joint ventures rather than incorporated joint ventures. Usually they prefer unincorporated forms because when they use such forms they have more discretion and flexibility to design their relationship, and because they might be able to utilize better tax schemes through this option. But the incorporate joint venture could also secure some positive solutions to control the operations, operate the assets and to reduce certain liabilities.

But we also explored options to adjust the existing JOA model forms to provide more control for the parties on how to conduct the operations of the consortium.

The third party Operator is an interesting alternative to balance the position between the JOA parties, as a neutral party will perform the operations generally decided by them. However, it will change the format of the JOA. Firstly, the third party is less likely to become a member of the JOA and so the JOA will have to adjust accordingly. In this sense, the JOA parties should sign a separate contract with the third party. Secondly, the third-party Operator is likely to require government approval. Consequently, this third-party Operator might be an interesting solution to balance the position of the JOA parties, but the practicability of such an alternative is highly complex. However, the major obstacle for such an alternative is the complexity involved in the implementation of two agreements simultaneously and the transfer of the Operator 'powers' to a third party. For these reasons, such alternative is not well accepted in the industry for E&P activities but it is more commonly accepted for Lifting Agreements ('LA').

However, the split of operatorship or a special vehicle operator is far more common in the E&P industry. The practicability of these alternatives is found not only on agreements between countries (i.e. JDZ), but also

between private parties such as the Unit Operating Agreement ('UOA')¹⁶¹ which establishes the same concept of the JDZ inside the same jurisdiction (i.e. Unitisation).¹⁶² If the JDZ, UOA and LA address and deal with the same situation, or a situation that is fairly similar to a JOA,¹⁶³ then why is it not possible to provide these alternatives for a JOA? Some practical examples from the JDZ have shown whether they might work or not, but it remains a valid alternative to balance the desires of two parties with different views and wishes. Consequently, the most reasonable answer is that these alternatives require far more complex structures of operation management than a single party-operator. However, their major obstacle is the reduction of authority currently provided to the Operator.

¹⁶¹ Kenneth Barnhill explains the similarity between a JOA and a UOA as follows: "*Joint operations*" is the term generally used to refer to the procedure whereby co-owners of mineral properties agree upon the development and operations of such properties by one or more of the co-owners for the benefit of the other co-owners. "*Unitized operations*" denote a similar arrangement, but generally on a larger scale, such as for the exploration, development, and operation of an entire pool, structure or field, or a substantial portion thereof.' Kenneth E. Barnhill Jr., 'Taxation of Oil and Gas Operating Agreements, The Scope and Application of I. T. 3930' (1953–1954) 26 Rocky Mountain Law Review 133.

¹⁶² See: Richard R. Paradise, 'Unit Operation, The Rights, Duties and Remedies of the Working Interest Owners' (1959–1960) 32 Rocky Mountain Law Review 128, Kristen Grover, 'A Conceptual Comparison Between Unitisation Under Australian Petroleum Legislation and Coordination Under the Petroleum and GAS (Production and Safety) Act 2004 (QLD)' (2005) 24 ARELJ 331.

¹⁶³ For further information see: David Edward Pierce, 'Coordinated Reservoir Development, An Alternative to the Rule of Capture for the Ownership and Development of Oil and Gas' (1983) 4 J. Energy Law & Policy 129, Francis N. Botchway, 'The Context of Trans-Boundary Energy Resource Exploitation, The Environment, the State and the Methods' (2003) 14 Colo. J. International Environmental Law & Policy 191, David M. Ong, 'The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operations in Common Offshore Petroleum Deposits?' (1999) 14 International J. Marine & Coastal L. 207, Chidinma Bernadine Okafor, 'Model Agreements for Joint Development, a Case Study' (2007) 25 J. Energy Nat. Resources L. 58, Michael Dulaney, Robert Merrick, 'Legal Issues in Cross-Border Oil and Gas Pipelines' (2005) 23 J. Energy & Nat. Resources L. 247, David M. Ong, 'Joint Development of Common Offshore Oil and Gas Deposits, "Mere" State Practice or Customary International Law?' (1999) 93 Am. J. Int'l L. 771, John Holmes, 'End the Moratorium, The Timor Gap Treaty as a Model for the Complete Resolution of a Western Gap in the Gulf of Mexico' (2002) 35 Vanderbilt J. Transnational L. 926, Peter C. Reid, 'Joint Development Zones Between Countries' (1987) Vol. 6(1) AMPLA Bulletin 4, Pat Brazil, 'Comments, Historic Timor Gap Agreement Reached – Framework and Implications' (2001) 20 AMPLJ 133.

The dual or co-operator are less common practices in the industry as they could create more complexities rather than solutions. Usually the industry and even governments might prefer to deal with only one person rather than multiple entities as an operator.

In other words, these alternatives exist and might provide a reasonable balance between the parties even though it will require more complex arrangements and cooperation. However, the most interesting fact is that almost most of the standard forms of the JOA do not provide for any such alternatives to balance the position between the Operator and Non-Operator. This is probably the most blatant display of evidence to show the dominance exercised by the Operator and the lowered expectations with regard to the Non-Operator as a party, as well (and perhaps more importantly) as an investor.

The final question is this: Are the Non-Operators willing to accept such imbalance imposed by the Operator while continuing to proportionally share all the risks and costs involved at the same time? The Deepwater Horizon accident and the conflict between the JOA parties (i.e. BP, Anadarko and Mitsui) have shown the likelihood that the Non-Operators will challenge their agreements with regard to any possible right they might find under the applicable law to avoid the draconian consequences of any failure of performance.¹⁶⁴

As a matter of fact, the Operator should be more interested in obtaining the Non-Operators' participation as it might avoid eventual uncertainties about possible court relief against the Operator, based on lack of input or even acknowledgment from Non-Operators over the conduction of such operations.

¹⁶⁴ According to the daily finance 'As the liabilities associated with Deepwater Horizon mount, Anadarko and BP will surely square off in court to determine whether or not Anadarko has to kick in 25%. Anadarko will litigate how culpable BP was for the spill, an effort that directly aligns its interest with the plaintiffs' in all the other pending litigation. Indeed, BP is currently considering initiating that war.' For further information see: < <http://www.dailyfinance.com/2010/06/21/bp-oil-spill-update-anadarko-turns-on-bp-is-20-billion-enough> > [Accessed on 04 November 2016].

In conclusion, all JOAs should provide balanced and equitable provisions in order to minimise uncertainty¹⁶⁵ and to maximise efficiency.¹⁶⁶ The essence of such balance was described by D. Maloney as follows:

Given the likelihood that the members of a multi-participant joint venture will have disparate financial resources, joint venture agreements ordinarily include provisions which are designed to ensure that:

- a) the weaker participants are not forced out of a joint venture by reason of being unable to 'keep up' with the rate of expenditure of the stronger participants; and
- (b) *exploration, appraisal and development progress at a reasonable rate, rather than that at which the Weaker participant's financial resources permit.*¹⁶⁷

In addition, for mature operations where the parties are likely to be in equitable¹⁶⁸ positions, most of the current JOAs will provide adequate terms so that such agreements lose their functionality.¹⁶⁹ In other words, if most standard forms provide favorable terms for the Operator party, then the Non-Operators are unlikely to accept such model forms under a scenario of similar financial and technical capabilities. Consequently,

¹⁶⁵ *'In most alliance agreements there will inevitably be some issues that are left open, but this is the nature of the agreement.'* James Lacey, 'Partnering and Alliancing, Back to the Future?' (2007) 26 ARELJ 82.

¹⁶⁶ Thomas C. Marvin, 'Above the Law? Dealing with the abuse of Joint Operating Agreements under the Newspaper Preservation Act' (1995–1996) 42 Wayne L. Rev. 1719, Michael Moy, 'Beware! The Unfair Contracts Jurisdiction' (2005) 24 ARELJ 227, John Tarrant, 'Agreements to Co-Operate at Common Law' (2006) 25 ARELJ 281, James D. Dinnage, 'Joint Activities Among Gas Producers, the Competition Man Cometh' (1998) 16 J. Energy & Nat. Resources L. 249.

¹⁶⁷ D. A. W. Maloney, 'Managing the Multi-Participant Joint Venture' (1988) 7(2) Australian Mining and Petroleum Law Bulletin 118.

¹⁶⁸ Rachel A. Hird, 'Thomas W Walde and Fair and Equitable Treatment' (2009) 27 J. Energy & Nat. Resources L. 377, Roscoe L. Barrow, 'The Fairness Doctrine: A Double Standard For Electronic and Print Media' (1974–1975) 26 Hastings L.J. 659, Dominic E. Markwordt, 'More Folly than Fairness, The Fairness Doctrine, The First Amendment, and the Internet Age' (2009–2010) 22 Regent U. L. Rev. 405 2009–2010.

¹⁶⁹ See: John R. Meyer, William B. Tye, 'Toward Achieving Workable Competition in Industries Undergoing a Transition to Deregulation, A Contractual Equilibrium Approach' (1988) 5 Yale J. on Reg. 273.

they will propose new terms for their contractual arrangements rather than adopting the model forms available.

Finally, for current and most of all future operations, it will be necessary to find balanced and equitable terms to conduct and execute the joint operations (specially in mature areas). Nevertheless, it is important to note that balanced terms and adequate participation of all parties will demand a higher degree of collaboration between the JOA parties in order to implement an effective and efficient instrument. The current imbalanced JOAs seek to avoid this by creating an 'unilateral mechanism' to perform the joint operations.¹⁷⁰ However, under a balanced scenario between the JOA parties (i.e. financial, technical, personnel capabilities) the management of the joint operations is likely to be as challenging as the current imbalanced scenario.¹⁷¹

¹⁷⁰ D. Maloney describes this situation in the following terms '*Multi-participant joint ventures are difficult and expensive to manage. At technical committee meetings, the number of geologists, geophysicists and engineers present makes it difficult to reach consensus on technical strategies. The same is true of operating committee meetings, at which the programs and budgets to give effect to the technical committee's recommendations must be considered and adopted. As the number of participants increase, so do the costs of duplication of reports, maps, minutes and general communications. Field inspections become expensive and difficult to manage. Joint venture managers become pre-occupied with co-venturer's queries and suggestions, rather than with the implementation of approved programs.*' D. A. W. Maloney, 'Managing the Multi-Participant Joint Venture' (1988) 7(2) Australian Mining and Petroleum Law Bulletin 115.

¹⁷¹ '*Managing a multi-participant joint venture is a difficult task. The task is made easier if the co-venturers selected have similar financial capacity, corporate objectives and exploration strategies. In the troubled times ahead, the importance of selecting compatible co-venturers will be amplified.*' D. A. W. Maloney, 'Managing the Multi-Participant Joint Venture' (1988) 7(2) Australian Mining and Petroleum Law Bulletin 125.