

Funding and accounting

1. Work programme and budget

As mentioned in the previous chapter, commonly the operator acts on the behalf of the joint venture. One of the operator's main duties is to prepare the work programme and budget for approval by the Opcom¹ (if applicable, or by the other parties).² This role and obligation is likely to be exercised by an international oil company (at least in the exploration stage) as the main investor in the consortium, but in some cases the national oil company will lead the consortium.

There is no doubt about such an obligation,³ but the extent to which it occurs in practice is questionable. Is there any limit, or does the operator freely decide the expenditure required during the existence of the enterprise? The nature of this agreement is self-explanatory: as the parties will jointly share the costs involved, it is logical that all parties together will share decisions on running the enterprise.⁴ This is the exact aim of the work programme and budget provision as it establishes the overall destination of the consortium expenditure. The operator can only proceed with any form of expenditure if it has been established in the work programme and budget. This is very important for the national oil company and the international oil companies as commonly there will be more than one international oil company in the consortium and each of them will want to control the consortium's expenses.⁵

On the other hand, the operator might seek more flexibility so it can incur expenditure outside that determined by the work programme and budget.⁶ As a

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- 1 References to the Opcom within this section apply to those JOA models that provide for an Opcom. For those models that do not, the Opcom should be read as the approval or determination of the contracting parties.
 - 2 Bernard G Taverne, *Co-operative Agreements in the Extractive Petroleum Industry* (Kluwer Law International, The Hague 1996) 66-67.
 - 3 Hugh Dundas, 'Joint Operating Agreements: An Introduction' (1994 Summer Programme: UK Oil and Gas Law, CPMLP 09/09, 1994) 5, Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 290, Ernest E Smith and others, *International Petroleum Transactions* (3rd edn RMMLF, Westminster 2010) 543, Terence Daintith, 'Right to Explore For and Exploit Petroleum: The Licence' in Terence Daintith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil and Gas Law* (3rd edn Sweet & Maxwell, London 2009) 1140, Anthony Jennings, *Oil and Gas Exploration Contracts* (2nd edn Sweet & Maxwell, London 2008) 25, Bernard G Taverne, *An Introduction to the Regulation of the Petroleum Industry: Law, Contracts and Conventions* (Graham & Trotman, London 1994) 136, Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements* (CP Thorpe, UK 2008) 126, John Wilkinson, *Introduction to Oil and Gas Joint Ventures* (OPL, Ledbury 1997) 41-42, Gerard M D Bean, *Fiduciary Relationships, Fiduciary Duties and Joint Ventures: The Joint Operating Agreement* (University of Cambridge, Cambridge 1992) 15.
 - 4 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 105.
 - 5 Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 36.

general rule, such unauthorised action is not allowed. However, it is important to note that it is not possible to predict the precise budget for the entire operation and/or annual work, as there are several factors that might require adjustment and which might be outside the control of the parties, such as market fluctuation in the cost of supplies, the geological conditions of the reservoir, technical difficulties and emergencies, among others.⁷ As a consequence, the work programme and budget is an estimated⁸ prediction, and may be modified if technical or other issues justify such a procedure.⁹

Nevertheless, from a non-operator's perspective, a fairly detailed work programme and budget might facilitate control over the operations such that less discretion is provided to the operator.¹⁰

The general rule provides that the operator must obey the precise determination of the work programme and budget as approved by the Opcom. However, as an exception, it may be modified. In this case, it is important to note the distinction between modifications imposed by the Opcom and modifications imposed by the operator. The right to make the former kind of modification is a right which is commonly provided within the powers of the Opcom, as it is the highest authority of the JOA; the Opcom may, at any time, change any approved work programme and budget, if it obtains the necessary pass mark.¹¹ The latter kind of modification is a certain amount of flexibility which the JOA provides for the operator to disregard the work programme and budget already approved by the Opcom. If the required modification is no more than a fixed percentage (commonly 10%), the operator does not need to obtain further approval (as the parties previously accepted such discretion), but if the amount of additional expenditure is anything above the agreed percentage, the operator must obtain the approval of the parties.¹²

This is a very practical and efficient provision. If the modification to expenditure is not significant (ie, it is minor), from a wider perspective it should not need any further consents and delays; but if the variation is considerable, then it must be reviewed by the Opcom. This is especially important for an international oil company if there is a national oil company in the consortium, as the national company's level of approval could be fairly complex and take a long time to achieve.

In addition to this tolerance, there is only one specific situation where it is

6 David F Asmus, 'The 1995 Model Form International Operating Agreement' (1996) 14 J Energy & Nat Resources L 14, 22.
 7 Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 41.
 8 Terence Dainith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil and Gas Law* (3rd edn Sweet & Maxwell, London 2009) 1145.
 9 See also: Bernard G Taverne, *Co-operative Agreements in the Extractive Petroleum Industry* (Kluwer Law International, The Hague 1996) 66-67, Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 108-109, Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 42, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 20, Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press, Dundee 2007) 288.
 10 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 108.
 11 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 108.
 12 Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 298.

possible for the operator to modify the work programme and budget without the Opcom's consent.¹³ In the case of emergencies (such as pollution, explosion, and fire, among others¹⁴), an immediate response is necessary, with no time to obtain the other parties' consent. Nevertheless, the operator must inform the non-operators immediately of such an emergency situation.¹⁵

If the operator exceeds the level of flexibility mentioned above in a situation that is not an emergency procedure, it must follow the exact provisions of the work programme and budget or request a revision in the Opcom. This is a very critical position for all the parties in the consortium (both national and international oil companies) as they should know their exact financial exposure towards the joint operations.

However, a critical problem may arise if the non-operators can exert an effective control on the Opcom by a higher pass mark and reject the operator's proposal for the work programme and budget. As a general rule, the operator would then have to revise its proposal and resubmit it. But the critical part goes back to the deadlock situation, which was discussed in another chapter.¹⁶ For the sake of the argument, if the non-operators keep rejecting a proposal made by the operator, what would happen? If it involves the minimum work programme (provided that exclusive operation is forbidden)¹⁷ the answer is quite drastic, as it could lead to the termination of the petroleum title and thus the termination of the joint venture, and also it could affect future applications with that host government.¹⁸

Deadlocks can be even more complicated if the consortium includes a national oil company. National oil companies may have different views and concerns about the speed of the joint operations as commonly the host government has a higher input on the strategy and decision-making process of most national oil companies. For example, the ministry of petroleum may wish for more investments on the ground and require a more aggressive work programme.¹⁹

Therefore, it is very important to adopt a resolution process for work programme and budget deadlocks in order to preserve the existence of the petroleum licence and joint venture. There are several procedures available to address this issue, such as mediation, mini-trial, and expert determination, among others. These options could take a long time and may not be the most suitable to reach a quick solution.

A simple solution is to give the decision-making power to the operator if the consortium cannot reach an agreement. This may be the easiest solution to protect

13 Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 36.

14 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 109.

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) 561.

16 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 109.

17 Howayda Hassan Fawzi, *The Evolution of the Legal and Contractual Framework for Exploration and Production of Oil in Sudan and the United Kingdom, A Comparative Approach to Developing and Developed Countries* (PhD Thesis presented to the University of Dundee, 1996).

18 For further information about minimum work obligations see: David A W Maloney, 'Australia's Offshore Petroleum Work Programme Bidding System' (2003) 21 *J Energy & Nat Resources* L 127.

19 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 109.

the consortium's interests but, on the other hand, it does not prevent abuse by the operator, which will have the final decision on the minimum work obligations. In other words, it is not a balanced solution but, rather, the most practical alternative.

Another, perhaps more reasonable, solution is to allow the proposal that receives the most support to prevail.²⁰ This alternative may solve the problem of securing the existence of the petroleum title and ultimately the consortium. However, it also puts the non-operators in a difficult situation if the operator has the largest participating interest in the consortium.

On the other hand, the alternative described by Anthony Jennings may be more balanced if such a right of final decision could alternate between the parties, that is, a rotation process.²¹ Thus, if the operator used such a right for a particular work programme and budget proposal, then this right would pass to the non-operators for the next work programme and budget, and so on. This is an interesting provision in the long term but certainly not the best for the short term as initially one party will have more powers.

A radical alternative would be to prohibit the operator from voting on any proposal prepared exclusively by itself. The operator would be forced to gather the non-operators' input or otherwise would have to prepare the work programme and budget, bearing in mind that it would not be permitted to vote on the proposal. This could provide an alternative to balance the participation of the parties regarding the approval of the work programme and budget. However, it is unlikely that any operator would accept such terms, as it would provide far too many powers for the non-operators.

A moderate alternative would be to limit the number of rejections, so that after a specific number the operator would lose its powers to prepare the work programme and budget and the non-operators would take over the role and submit the work programme and budget as an ad hoc provision. However, in this approach the operator might also block the proposal and the problem would persist.

The best solution would be balanced provisions imposing a duty on the operator to prepare a reasonable work programme and budget proposal in collaboration with the non-operators, which could not be rejected by any party without reasonable grounds. If there were reasonable grounds to reject the proposal, alternative dispute resolution procedures could be installed to resolve the deadlock by third party determination or whatever means to reach a quick and fair solution to the conflict.

It is obvious, but nevertheless important, to comment briefly on the distinction between the work programme and the budget. The work programme details the activities that the joint venture will perform and the budget provides an estimate of the cost of those activities.²² Commonly, the budget is divided between capital budget and operating budget. Capital budget relates to the costs of the main activities, such as seismic acquisition and drilling costs.²³ Operating budget relates to the manpower

20 Claude Duval and others, *International Petroleum and Exploration Agreements: Legal, Economic & Policy Aspects* (2nd edn Barrows, New York 2009) 291.

21 Anthony Jennings, *Oil and Gas Exploration Contracts* (2nd edn Sweet & Maxwell, London 2008) 27.

22 Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press, Dundee 2007) 288, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 20.

and overhead costs.²⁴ The latter is a potential area of conflict between operator and non-operators as the operator may wish to increase its revenues by setting the overheads as high as possible.²⁵ The non-operators should check carefully whether the accounting procedures control the extension of the application of overheads.²⁶

The work programme and budget will cover a certain period of time. In this case, it is based on a specific phase of the enterprise, such as exploration, development or production.²⁷

As a general rule, the operator will prepare the work programme and budget programmes on an annual basis.²⁸ However, this may not be the case for certain phases of the project.²⁹ The exploration phase deals primarily with the minimum work programme, which must be performed entirely as set out in the petroleum title.³⁰ Thus, in the exploration phase the parties might provide just one programme and budget to cover the whole minimum work programme, but this can be subject to amendment if further work is necessary to progress towards the development phase.³¹ A similar situation applies for the development phase³² as, commonly, before moving to such a phase the host government must approve the work programme and budget plan, and it will be looking to maximise its economic recovery.³³ On the other hand, some parties may use a multi-year work programme and budget in order to deal with such situations.³⁴ The production phase will be more straightforward on an annual basis and is likely to be accepted without major amendment.³⁵

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- 23 Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press, Dundee 2007) 288, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 20.
- 24 Scott Styles, 'Joint Operating Agreements' in John Paterson, Greg Gordon (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press, Dundee 2007) 288, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 20.
- 25 Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 44.
- 26 "Sensitive questions arise with regard to the audit of company overhead ..." Terence Daintith, 'Right to Explore For and Exploit Petroleum: The Licence' in Terence Daintith, Geoffrey Willoughby (eds), Adrian Hill, *United Kingdom Oil and Gas Law* (3rd edn Sweet & Maxwell, London 2009) 1146.
- 27 Some scholars and JOAs add another phase, 'appraisal', between the exploration and development phases. For further information see: Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 36-41, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 19-20, 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) 47.
- 28 Bernard G Taverne, *An Introduction to the Regulation of the Petroleum Industry: Law, Contracts and Conventions* (Graham & Trotman, London 1994) 136, Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements* (CP Thorpe, UK 2008) 126, John Wilkinson, *Introduction to Oil and Gas Joint Ventures* (OPL, Ledbury 1997) 41-42, Gerard M D Bean, *Fiduciary Relationships, Fiduciary Duties and Joint Ventures: The Joint Operating Agreement* (University of Cambridge, Cambridge 1992) 14, Sandy Shaw, 'Joint Operating Agreements' in Martyn R David, *Upstream Oil and Gas Agreements* (Sweet & Maxwell, London 1996) 19, Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 105.
- 29 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) 47.
- 30 Model Clause 16 (1) – Petroleum Licensing (Production) (Seaward Areas) Regulations 2008.
- 31 However, the practice may vary in the exploration phase as some parties may still prefer to approve an annual programme and to address the minimum work programme accordingly. See: Michael P G Taylor, Sally M Tyne, *Taylor and Winsor on Joint Operating Agreements* (2nd edn Longman, London 1992) 36-37.
- 32 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 109.
- 33 Model Clause 17 (1) and (2) – Petroleum Licensing (Production) (Seaward Areas) Regulations 2008.
- 34 P R Weems, M Bolton, 'Highlights of Key Revisions – 2002 AIPN Model Form International Operating Agreement' (2003) 1 OGL 5.
- 35 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 108.

It could be suggested that in practical terms such distinction between an annual basis and a programme of activities will not affect the non-operators provided the Opcom has powers to amend any approved work programme and budget.³⁶ Nevertheless, an annual work programme and budget will ensure a higher degree of participation by the non-operators, as the exploration and development phases may take a year or two before reaching the production stage, so they will have more opportunities to give their input on each proposal of the work programme and budget.

From a non-operator's perspective, the establishment of a work programme and budget provision is an excellent opportunity to exert control over the expenditure – they can participate in the decision that will determine the allocation of expenditure.³⁷ However, the work programme and budget will only represent an effective procedure to control the operator's discretion to conduct the joint operations if the non-operators have effective control in the Opcom.

Additionally, the preparation of the work programme and budget might be difficult for non-operators given their position in the JOA, as the operator will prepare all the programmes and budgets required for the execution of the joint operations.³⁸ Thus, it is essential to allow the non-operators to participate in the ongoing process of formulation and preparation of the programmes, or at least include a requirement to consult them, so that full control and participation is provided for the non-operators.³⁹ In fact, such participation may reduce the chance of deadlocks over the work programme and budget proposals as all parties would have taken part in the development of each proposal.

Although the work programme and budget provision is a valuable protection for the non-operators, it is important to note that it is not widely established in the JOA forms – some JOAs do not provide for the existence of such a mechanism of control.⁴⁰ The following paragraphs will examine how each JOA model deals with such provisions and, if there is no implementation of a work programme and budget provision, the reason why will also be discussed.

AAPL Form 610 does not allow for the existence of a work programme and budget provision. It clearly provides extensive discretion to the operator, as it shall “conduct and direct and have full control of the all operations on the contract area ...”⁴¹

36 The same principle applies for multi-year programmes since the programme may need revision as the activities evolve. 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) 47.

37 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 105.

38 Hugh Dundas, 'Joint Operating Agreements: An Introduction' (1994 Summer Programme: UK Oil and Gas Law, CPMLP 09/09, 1994) 5, Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements* (CP Thorpe, UK 2008) 125, 126, John Wilkinson, *Introduction to Oil and Gas Joint Ventures* (OPL, Ledbury 1997) 39, Gerard M D Bean, *Fiduciary Relationships, Fiduciary Duties and Joint Ventures: The Joint Operating Agreement* (University of Cambridge, Cambridge 1992) 15.

39 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) 561.

40 Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business, London 2010) 105.

41 AAPL JOA Form 610 Article V (A).

The only procedure available for the non-operators is to request an estimate of the expenditure.⁴² However, it only allows this procedure for the parties who consented to the operation, but not before the operation is approved. Does this mean that, under such a model form, the non-operators have no participation whatsoever in the control of expenditure? Considering the work programme and budget mechanism to control expenditure, the answer should be affirmative, as the operator's total control of the operations clearly weakens the position of the non-operators, but this is not completely true from a wider perspective, as this model secures an effective control of expenditure by another mechanism (ie, the authorisation for expenditure provision), which will be discussed in the next section.

AAPL Form 810 provides for the existence of the work programme and budget provision, which is referred as the "Annual Operating Plan". However, the work programme and budget mechanism adopts a soft approach. Such a soft approach is clearly stated in Article 6.4.1 of the form.

In effect, this work programme and budget provision is a bureaucratic mechanism, as it secures nothing apart from information for the non-operators. There is no effective participation of the non-operators, except for the right to make suggestions, additions or deletions to the annual operating plan, but these do not bind the operators – the operator is not obliged to incorporate any input from the non-operators.⁴³ The strong position of the operator is very clear under this model, as it provides that the operator has the exclusive right and duty to conduct the consortium activities.⁴⁴

Thus, AAPL Form 810 provides the non-operators with similar rights to an investor, as they will have access to information but no effective participation in the activities that are performed by the joint venture. However, it is important to stress that the exclusion of an effective work programme and budget provision does not necessarily mean that the non-operators have no right to control the expenditure incurred by the operator, as there are other methods to control this. This model Form 810 also provides for the existence of an authorisation for expenditure mechanism, which is an efficient and effective method to control the expenditure.

In conclusion, the AAPL JOA model forms do not secure the participation of the non-operators in the work programme and budget provisions, as they allow extensive discretion to the operator, allowing it to act freely without control of its expenditure by other parties. Nevertheless, both models secure the non-operators' position as they can exert effective control of the expenditure via the authorisation for expenditure mechanism, as will be discussed in another section.

The historical RMMLF model form does not provide for the existence of a work programme and budget provision. A simple analysis of paragraph 4.1 leaves no doubt about the total control of the operation, since the "Operator shall direct and have control of all operations conducted hereunder and shall have exclusive custody of all materials, equipment and other property owned by the Parties".⁴⁵

42 AAPL JOA Form 610 Article V (D) (8).

43 AAPL JOA Form 810 § 6.4.3.

44 AAPL JOA Form 810 § 5.1.

45 RMMLF JOA § 4.1.

In other words, under this model form the operator is in a very strong position and has extensive discretion to conduct the joint operations. However, the non-operators may have an opportunity to participate in the preparation of the work programmes as the operator must: "Consult freely the other Parties concerning operations hereunder and keep them advised of all matters arising in operations hereunder which Operator deems important in the exercise of its best judgement."⁴⁶

Again, this is not true participation as the operator has no obligation to obtain input from the non-operators. It could be argued that the word 'freely' suggests that it is at the operator's discretion whether to consult the non-operators. Thus, it could be suggested that the RMMLF JOA model does not provide the non-operators with any control over setting each work programme and budget. However, the non-operators could exert control of expenditure via the authorisation for expenditure, which will be discussed in another section.

The Canadian OP model form adopts a similar approach to the American JOA model forms, as there is no provision on the work programme and budget. The operator has extensive discretion to conduct the operations.

However, this model suggests more participation by the non-operators in comparison with the American models as it requires the operator to consult the other parties on exploration, development and operation of joint lands.⁴⁷

In this case, the operator must consult the non-operators, which is a valuable provision for the them. Nevertheless, it is important to stress that such consultation has no influence on the operator's decision, as the operator is not obliged to accept any input from the non-operators. Consequently, this is not true participation as there is no guarantee that the non-operators can effectively contribute to setting each work programme and budget.

Considering the work programme and budget provision, this model puts the non-operators in a weak position as there is no procedure to control the expenditure of the joint operations. However, it is not correct to state that under the CAPL OP model form there is no control whatsoever of the expenditure as the work programme and budget gap is addressed via the authorisation for expenditure mechanism.

Therefore, the Canadian model form provides a similar approach to the American JOA model forms, as it provides a great discretion for the operator's conduct of the joint operations, with no effective control over the work programme and budget for the non-operators, but it does contain an authorisation for expenditure mechanism, which is another procedure to control the expenditure of the joint venture.

The OGUK JOA model form clearly provides for the existence of a work programme and budget provision. The operator is obliged annually to submit the work programme and budget for the following year, which must be approved by the Opcom.⁴⁸ Additionally, the Opcom has powers to revise, and also to make adjustments to, any work programme and budget previously approved.⁴⁹

46 RMMLF JOA § 5.1 (B).

47 CAPL OP § 3.01.

48 OGUK JOA § 10.1.1.

49 OGUK JOA § 10.1.2 and 10.3.

This model follows the general rule that the operator cannot incur any expenditure until it is approved by the Opcom. However, it allows more flexibility for the operator if commitments are required in advance as the Opcom may call special meetings to consider such requests.⁵⁰

In general terms, this may be a positive provision as certain issues will need to be approved more urgently than others, and ultimately this will benefit the consortium as a whole. On the other hand, the operator could use the provision to pressurise the Opcom into approving its preferred issues as there is no clear regulation on who will determine which commitments require approval before the work programme and budget is set and how such a right could be controlled.

In order to keep the petroleum title, this model avoids minimum work programme deadlocks by providing a practical solution.⁵¹ It allows extensive discretion to the operator, as the programme proposed by the operator will be deemed to be approved unless an alternative plan is approved by a simple majority of votes. In other words, if the non-operators cannot control the Opcom, the operator is likely to determine the work programme and budget by itself, which might happen in the majority of the cases. Nevertheless, the deadlock cannot be resolved if it concerns anything that is not related to the minimum work programme. This could be problematic as, if no work is approved, the consortium will face critical challenges because the licence rigorously imposes several deadlines, but the model appears to address the situation as an exclusive operation, as will be analysed further.

The minimum work programme is not the only flexibility provided within the British JOA model form as the operator may overspend the overall terms defined in the budget. However, the limitation is left blank, so the parties can define the limitation during the negotiation process.⁵² The model does not put any obligation on the operator to notify the non-operators about such overspending, but only to obtain the Opcom's approval if the limit is exceeded. On the other hand, such an obligation is clearly imposed whenever the operator is required to take action to deal with emergencies.⁵³

No indication whatsoever is given that the operator must obtain the non-operators' input during the process of setting the work programme and budget, and even direct consultation is not required.⁵⁴ On the other hand, it is important to stress that the general duties of the operator establish that: "The Operator shall freely consult with the Participants and keep them informed of matters concerning the Joint Operations."⁵⁵ This provision gives grounds for non-operators to insist on participating in the discussion process but does not force the operator to implement their views, and the mention of 'freely' also indicates that more discretion is provided to the operator.

Therefore, it could be said that this approach is definitely not beneficial to the non-operators, as their participation is restricted to the Opcom's approval. The

50 OGUK JOA § 10.1.2.
 51 OGUK JOA § 9.9.1.
 52 OGUK JOA §§ 10.5, 11.4, 12.4 and 13.4.
 53 OGUK JOA § 6.10.2.
 54 OGUK JOA § 10, 11, 12, 13 and 14.
 55 OGUK JOA § 6.9.1.

approach could lead to two different scenarios. The first is when the operator has overall control of the Opcom. In this case, the non-operators are mere observers, as they cannot participate in the discussion process or in the determinations of the Opcom. The second is when the non-operators have negative control of the Opcom, as they can block decisions. In this case, the non-operators can minimise their lack of participation in the ongoing discussions of the work programme and budget proposals by blocking them. However, this will not apply to the minimum work programme as the operator has more discretion to deal with this. Therefore, it could be suggested that the British JOA model does not provide for effective participation by the non-operators regarding the work programme and budget provision and that partial participation will only be effective if the non-operators can control the Opcom; otherwise they will be mere spectators in the process.

On the other hand, this model secures a higher level of detail that must be provided by the operator in any work programme and budget proposal.⁵⁶ Such a provision is very valuable for the non-operators as they will have a better basis to vote on the Opcom. Possibly this provision seeks to minimise the effect of the non-operators being unable to participate in the discussion of the work programme and budget proposals.

In conclusion, it could be suggested that the British JOA model puts the non-operators in a relatively weak position, as the model allows extensive discretion to the operator in preparing the work programme and budget, as well as in dealing with minimum work programmes and not placing limitations on overspending the budgets. However, the model also has a positive side for the non-operators, as a higher level of information must be provided on each work programme and budget proposal and it is possible for the non-operators to block a proposal if they can effectively block it in the Opcom.

Under the Norwegian JOA model, the operator is responsible for preparing the overall proposals for submission to the Opcom.⁵⁷ However, this model clearly requires the participation of the non-operators, as follows: "When preparing proposals for work programs and budgets, the operator shall involve the Parties before the proposal is submitted to the Opcom for final adoption."⁵⁸ This is a valuable provision for the non-operators as they will have a chance to participate in the discussion on the work programme and budget.

Any party may propose amendments to the approved work programme and budget to the Opcom.⁵⁹ The Opcom has authority to change any limitation or content approved in a work programme and budget programme.⁶⁰ This is a positive provision for non-operators, as it clearly provides the right for any non-operator to call for amendments. Nevertheless, such a right is commonly provided in the Opcom regulations, as any party can add topics to the agenda before the relevant meeting within a specific time period.⁶¹

56 OGUK JO § 10.4.

57 Norwegian JOA § 3.3.

58 Norwegian JOA § 12.2.

59 Norwegian JOA § 12.2.

60 Norwegian JOA § 12.2.

This model requires detailed provisions about the work programme and budget proposals.⁶² After such a general statement, it separates the provisions between the work programme proposal and the budget proposal in order to address the minimum requirements for each category. The work programme should:

*a) Define clear goals, deliverables and deadlines for significant activities; b) Clarify how the activities in the coming Year will contribute to realizing goals set forth for activities, and c) Identify significant risk factors and relevant actions to manage risk.*⁶³

There are fairly detailed provisions on the budget proposal, as the operator shall “explain the allocation procedures for charging costs”.⁶⁴ However, the most important provision concerns the structure and content of the budget items, specifying the items according to the activity that should be performed by the joint venture.⁶⁵ This is a valuable approach for the non-operators as it secures a fairly detailed provision to exert control over the overall work programme and budget.

This model also provides a certain flexibility for the operator, as it is allowed to exceed the budget line by up to 10%, although not by more than 5% of the overall budget.⁶⁶ In cases of emergency, the operator may incur a liability or expenditure outside the approved work programme and budget in order to protect life, health or property.⁶⁷ The model also mentions the power to expend up to a limit of 3 million Norwegian kroner a year, subject to adjustment by the Opcom. However, the operator must provide the Opcom, “with no undue delay”, a written notice detailing all unforeseen expenditure and expenditure that may exceed the approved work programme and budget.⁶⁸

However, it is important to note that any event will only be considered an emergency “if there is not sufficient time to present the matter to the committee”, which implies that if the operator is going to prepare an emergency plan, it must consult the non-operators, which is a valuable protection for them. In addition, it is not very clear whether the 3 million Norwegian kroner allowance is included in the aforementioned percentages or if this is a supplementary sum. The grammatical interpretation suggests a supplementary allowance as it uses the terminology “may also”, but a logical analysis indicates that they are all connected.

The major flaw in the Norwegian model is its lack of a resolution process for deadlocks. As mentioned previously, it is very important to perform the minimum work programme as established in the relevant licence so that the consortium is preserved. On the other hand, the model does allow for sole risk operations, which might be a way of resolving a deadlock, but this resolution is forbidden in situations that include a minimum work obligation.⁶⁹ Nevertheless, it is important to verify that any alternative adopted does not provide excessive powers to the operator when it

61 Norwegian JOA § 2.1.
 62 Norwegian JOA § 12.1.
 63 Norwegian JOA § 12.1.
 64 Norwegian JOA § 12.3.
 65 Norwegian JOA § 12.4.
 66 Norwegian JOA § 12.5.
 67 Norwegian JOA § 12.5.
 68 Norwegian JOA § 12.5.
 69 Norwegian JOA § 18.3 (d).

deals with the situation. Consequently, flexibility and balance are the key words to describe any alternative chosen by the parties to address deadlocks related to a minimum work programme or even the work programme and budget as a whole.

The Norwegian JOA model appears to secure a fairly positive position for the non-operators and, most importantly, a higher level of participation from the non-operators in the preparation of the work programme and budget. However, it fails to provide a resolution process for deadlocks, which might jeopardise the existence of the consortium.

The AIPN form provides for the existence of a work programme and budget provision, which is a valuable procedure for the non-operators as it allows them to exert more control over the key elements of the joint operations – that is, the costs and expenditure.⁷⁰

This form follows the common procedure, under which the operator has the duty to prepare the work programme and budget programmes.⁷¹ However, there is no doubt about the supremacy of the Opcom, as the form clearly establishes the requirement to obtain the decision-making body's approval and also the authority of this committee to make modifications to any work programme and budget that has been already approved.⁷²

It is important to note the provision requiring the operator to consult with the Opcom or applicable subcommittees on the contents of the work programme and budget plans.⁷³ This is a very positive provision for non-operators, as it allows them the opportunity to give their input on such important issues. However, the provision only mentions “consult”, which means that the operator may not necessarily use the non-operators' suggestions. In addition, the AIPN model allows a multi-year work programme and budget, which might cause problems.⁷⁴ On the other hand, the model also requires a fairly reasonable amount of detail in the work programme and budget proposal, so it is much easier for a non-operator to exert control when voting on the work programme and budget proposals in the Opcom.⁷⁵

This model also secures certain flexibility for the operator, as it may overspend by 10% on each item approved, but it must not exceed 5% of the total work programme and budget approved for the year.⁷⁶ If the operator exceeds these percentages, it must obtain the approval of the Opcom.⁷⁷

However, this restriction does not apply to urgent matters (eg, explosion, sabotage, crude oil release), when the operator is allowed to incur expenditure without obtaining the Opcom's consent.⁷⁸ Nevertheless, the operator shall “as soon as reasonably practicable, report to Non-Operators the details of such event and any

70 AIPN JOA clause 6.

71 AIPN JOA § 4.2 (B) (5).

72 AIPN JOA § 6.1 (E).

73 AIPN JOA § 6.4 (A).

74 David F Asmus, 'The 1995 Model Form International Operating Agreement' (1996) 14 J Energy & Nat Resources L 14, 16.

75 AIPN JOA § 6.1 (F) and 6.2 (A).

76 AIPN JOA § 6.8 (A).

77 AIPN JOA § 6.8 (B).

78 AIPN JOA §§ 6.8 (C) and 13.5.

79 AIPN JOA § 4.2 (B) (13).

measures Operator has taken or plans to take in response thereto”.⁷⁹ It could be suggested that this provision achieves sufficient flexibility to protect both the operator’s and the non-operators’ interests, but this is not entirely true. First, “as reasonably practicable” is not the best wording for urgent measures. It should provide that “immediately after the event” the operator should report to the non-operators. Secondly, an immediate response from the non-operators may allow their input on alternative plans and decisions to deal with such a catastrophic event. Thirdly, for a plan to address the emergency, the operator must obtain the non-operators’ approval – the consequences of the measures will affect all the contracting parties, so it is reasonable to allow them to participate at such a critical moment.

This model adopts a resolution process for deadlocks regarding the minimum work programme, which will be imposed by the owners of the applicable petroleum title:

The Work Program and Budget agreed pursuant to this Article shall include at least that part of the Minimum Work Obligations required to be carried out during the Calendar Year in question under the terms of the Contract. If within the time periods prescribed in this Article 6.1 the Operating Committee is unable to agree on such a Work Program and Budget, then the proposal capable of satisfying the Minimum Work Obligations for the Calendar Year in question that receives the largest Participating Interest vote (even if less than the applicable percentage under Article 5.9) shall be deemed adopted as part of the annual Work Program and Budget. If competing proposals receive equal votes, then Operator shall choose between these competing proposals. Any portion of a Work Program and Budget adopted pursuant to this Article 6.1(D) instead of Article 5.9 shall contain only such operations for the Joint Account as are necessary to maintain the Contract in full force and effect, including such operations as are necessary to fulfil the Minimum Work Obligations required for the given Calendar Year.⁸⁰

This resolution process is very positive in terms of preserving the integrity of the petroleum title and, as a consequence, the consortium. However, it clearly gives more powers to the operator, as this is the body which is likely to retain the largest percentage interest. It is also important to stress that this procedure does not follow the usual voting processes, as it does not consider the number of parties but only the level of percentage interests.⁸¹ Nevertheless, it is a significant improvement on previous editions of the model, as the operator used to have even more discretion to perform the minimum work obligations if consensus was not reached in the Opcom.⁸²

On the level of detail that the operator must provide, this JOA model form is very positive for non-operators as it adopts two procedures. First, it imposes an obligation on the operator to provide “detailed” information on the joint operations, which generally must be met.⁸³ Secondly, it imposes an obligation on the operator to provide certain detailed information during different stages of the operations.⁸⁴

80 AIPN JOA § 6.1 (D).

81 AIPN JOA § 5.9.

82 David F Asmus, ‘The 1995 Model Form International Operating Agreement’ (1996) 14 J Energy & Nat Resources L 14.

83 AIPN JOA § 6.1 (A), (B), (C).

Consequently, this system provides the non-operators with two layers of protection similar to the right of information.

Finally, it can be seen that the AIPN JOA model secures a reasonable protection for the non-operators, if they can exert effective control over the Opcom. The non-operators have valuable participation rights during the work programme and budget negotiations. However, if the operator has absolute control over the Opcom, from a non-operator's perspective this provision may be useful for information purposes only, rather than effective participation as consultation does not ensure acceptance of the non-operator's suggestions. In addition, this model fails to secure an immediate notification for the non-operators in an emergency situation, where they could provide assistance or, at least, their advice about an issue that clearly will affect their interest. Also, the model fails to provide a project team, which could provide a higher level of participation in preparing the work programme and budget proposals, but this could be addressed by implementing a subcommittee to deal with the task.

Under the Greenlandic JOA model form, the operator prepares and submits each work programme and budget proposal, which must be approved by the Opcom.⁸⁵ As usual, the Opcom also has the authority to amend any approved work programme and budget.⁸⁶

It is important to note that there is no requirement to gather the non-operators' input or even to consult them during the discussion and preparation process of the work programme and budget proposals. However, there is a general provision stating that: "The Operator shall freely consult with the Parties and keep them informed of matters concerning the Joint Operations."⁸⁷ As previously mentioned, such flexible terms indicate that the operator will have extensive discretion to determine the consultation, which includes the activities where consultation may be required.

As a consequence, the operator may choose not to consult with the non-operators, and their lack of participation may increase the chance of the proposal then being rejected by the Opcom. This situation is much more complicated during the exploration phase, as here there is no requirement to provide sufficient detail on any proposal.⁸⁸ Thus, the non-operators are likely to examine the work programme and budget proposal for the first time in the Opcom, without any relevant detail – that is, they will be voting on something they are not entirely sure about, which is clearly a dangerous situation. On the other hand, the development phase requires more detail on all proposals, which gives more protection to the non-operators as, even if they cannot participate in the discussion process, at least enough information is provided to allow them to make an informed decision in the Opcom.⁸⁹ There are no requirements to provide detail during the production phase, but this phase is far less risky and complex than the exploration phase.⁹⁰

84 AIPN JOA § 6.1 (F) and 6.2 (A).

85 Greenlandic JOA § 5.1, 5.2, 5.3.1, 5.3.2, 5.4.1, 5.4.2, 5.5 and 5.6.

86 Greenlandic JOA § 5.11.

87 Greenlandic JOA § 3.10.

88 Greenlandic JOA § 5.1 and 5.2.

89 Greenlandic JOA § 5.4.1.

90 Greenlandic JOA § 5.4.1.

It is important to stress that the Greenlandic model recognises the importance of dealing with deadlocks, as follows:

If the Operating Committee cannot decide on the manner of carrying out any Work Obligations or surrender of acreage required under the Licence in sufficient time to fulfil those obligations within the Licence terms and in accordance with the Licence conditions, then such Work Obligations will be carried out or satisfied or surrender of acreage effected in such manner as shall be favoured by the Party or Parties holding individually or in aggregate the greatest Percentage Interests, and all Parties shall be bound by any such decision and such manner of carrying out the Work Obligations or surrender of acreage shall be deemed adopted as part of the Programme and Budget for the year in question.⁹¹

This procedure is a practical solution to deal with work obligation deadlocks, but the mechanism provides extensive discretion to the strongest party in the consortium, that is, the operator. Thus, the operator could abuse such powers by creating artificial difficulties to get work obligations approved in the Opcom, where it can decide unilaterally, avoiding Opcom approval. It should be noted that this resolution applies only for work obligations and surrender of acreage, which are imposed by the licence, so it does not deal with any other work programme and budget proposals that may be necessary during the consortium's lifespan. Again, this procedure seems to apply the exclusive operation approach to resolving deadlocks in the Opcom.

This model also provides flexibility to the overall conduct of the operations, as the operator is permitted to incur expenditure that is not authorised by the approved work programme and budget in an emergency situation, or over-expenditure of up to 10% or a defined amount.⁹² In the case of emergencies, the operator must promptly notify the non-operators about the emergency (including actions taken).⁹³ However, in the case of over-expenditure, there is no provision in the JOA requiring the operator to notify the non-operators about the situation; instead the model prefers to deal with this issue in the accounting procedures.

In conclusion, the Greenlandic model provides extensive discretion to the operators since (a) the operator is not obliged to allow the non-operators to participate in the preparation process of any work programme and budget proposal or in the case of emergencies, (b) the model also provides that for work obligations the ultimate decision is likely to be for the operator, and (c) few details are required on each work programme and budget proposal, except for the development phase. The only effective control and participation available to the non-operators is via Opcom approval, if they have enough control to block a decision, otherwise the operator will have the total control under the work programme and budget provision.

Initially, it is possible to make a distinction between the North American JOA models and all the others. The North American models do not provide control of

91 Greenlandic JOA § 4.7.4.

92 Greenlandic JOA § 5.10.

93 Greenlandic JOA § 3.11.

operations via a work programme and budget, so the operator has total discretion under those models. On the other hand, the remaining models clearly secure the control of the operations via work programme and budget provisions.

It is worth noting that such a situation is similar to the Opcom provision, as the North American models do not provide for the existence of an Opcom but all other JOAs do. Thus, it could be suggested that the existence of an Opcom is directly connected to the existence of a work programme and budget.

As usual, the AIPN and British models provide the non-operators with this essential participation and control.⁹⁴ On the other hand, the Canadian model does not contain such any provision, and the AAPL adopts a soft approach as it provides that the operator shall formulate the work programme, but the non-operators may only suggest modifications to the operator. Thus, the question arises whether it is possible to suggest that the British or international non-operators are in a safer position to determine and control the expenditure of the joint operations, and whether, on the other hand, the North American non-operators are in a dramatically weaker position as they do not have any obligation jointly to approve a work programme and budget. This seems unlikely as work programmes and budgets are not the only means to control costs and expenditure – other procedures are available, which are briefly examined below.

However, the main problem is the non-operators' participation as the majority of the JOAs do not require the non-operators' input during the preparation process of work programme and budget proposals, except the AIPN and Norwegian JOA models, which strongly indicates the importance of the non-operators' collaboration at such a stage. The lack of participation by the non-operators is very negative for the consortium as a whole, since the non-operators can add valuable input towards best practices and higher efficiency.

The historically dominant position retained by the operator provides it with extensive powers to conduct the joint operations. A balanced scenario would make an important distinction between discussion and implementation. This balance is more likely to be required when a national oil company participates in the consortium.

The discussion stage is a very important part of any work programme and budget proposal, as it addresses the main elements of the consortium – that is, the operations and costs involved. Thus, a higher level of participation from all parties not only minimises the chance of rejection in the Opcom, but also allows joint collaboration towards an efficient and effective operation. The best way to obtain input from the non-operators is to create a subcommittee or project team to deal only with work programme and budget proposals, with all parties putting forward a representative. This would give the non-operators the opportunity to participate in any work programme and budget proposal, even if they cannot control the Opcom's

94 The British and international models allow a certain flexibility to the operator's procedure as it may overspend on the limit established in the work programme and budget by up to 10% for each specific item, if this does not affect more than 5% of the overall budget. However, if the limit is exceeded, the operator must obtain the Opcom's approval. See: AIPN JOA item 6.8 and OGUK JOA items 10.5, 11.4, 12.4 and 13.4.

decisions. On the other hand, implementing a work programme and budget will have a different procedure. In order to maintain the efficiency of the joint operations, the implementation of the work programme and budget will fall under the operator's powers, and this can be controlled by other means, for example, information provided, right of audits, authorisation for expenditure.

This lack of participation by the non-operators increases the chances of rejection by the Opcom, if the non-operators can block such a proposal. It may lead to deadlock, which is a very important issue to be addressed, even though some JOAs try to resolve this concern. It should also be noted that, whenever JOA models deal with deadlock, the provision is focused on minimum work obligations, which are imposed by the licence. However, the outcome is very negative for the non-operators as the mechanism adopted to resolve deadlocks shows a clear preference for the easiest solution – that is, a greater discretion to the strongest party of the joint venture.

Another way to minimise the non-operators' lack of participation during the discussion process is the level of detail that is required in any proposal submitted by the operator. A higher level of detail facilitates the non-operators' decision to approve or reject a work programme and budget proposal; less detail may make the non-operators' decision difficult. The JOA models vary in their approach, from requiring a high level of information to a lower one.

The most effective way to control the work programme and budget proposals in any JOA is the requirement for the Opcom's approval. If the non-operators have at least a negative control of the Opcom (ie, if they can block any decision), effectively this control will exist. On the other hand, if the operator has overall control of the Opcom, the JOA models will provide only a bureaucratic work programme and budget provision, as the non-operators will be unable to participate at all, but only observe the decisions taken by the operator. Their only available alternative will be the right of non-consent or sole risk (if available).

Finally, it is important to stress that the work programme and budget is one of several mechanisms to control the expenditure of the joint operations. For this reason, it is not correct to say that North American JOA models do not secure any control of expenditure as they provide other routes to control expenditure.

Therefore, there is no doubt that several mechanisms exist to exert control over the consortium's expenditure. One effective mechanism is the authorisation for expenditure, which is examined in the next section.

This is an extract from the chapter 'Funding and accounting' by Anna Ovcharova and Eduardo G Pereira in Joint Operating Agreements: A Comparison between the IOC and NOC Perspectives, published by Globe Law and Business.