

Table of contents

Introduction _____	7	3. Parties, participating and carried interests and collateral support _____	61
Glossary _____	9	3.1 The parties	
1. First principles of the JOA _____	13	3.2 Participating and carried interests	
1.1 The logic for a joint venture		3.3 Collateral support	
1.2 The concept of the JOA		3.4 Joint property	
1.3 The incorporated joint venture		4. Managing state participation _____	79
1.4 Hybrid project structures		4.1 State participation in the concession and JOA	
1.5 Partnership contrasted		4.2 Later state participation	
1.6 Pre-JOA agreements		4.3 Carried interests	
1.7 Model form contracts		5. Duration _____	83
1.8 JOA evolution and economics		5.1 Pre-JOA arrangements	
2. Concession forms and the JOA relationship _____	41	5.2 Commencement	
2.1 Introduction		5.3 Term	
2.2 Applicable terms		5.4 Termination and surrender	
2.3 Operator rights and duties		5.5 Surviving provisions	
2.4 State participation in the joint venture		6. Scope _____	97
2.5 Liability		6.1 Joint operations	
2.6 Disposal of petroleum		6.2 Excluded activities	
2.7 Property and ownership		6.3 Expanding the scope	
2.8 Decommissioning		6.4 Definition of the scope	
2.9 Information and confidentiality		6.5 Modification of the scope	
2.10 Dispute resolution		7. The operator _____	111
2.11 Exclusive operations and non-consent		7.1 The operator's advantage	
		7.2 Selection of the operator	

- 7.3 The role of the operator
 - 7.4 The locus of the operator
 - 7.5 Resignation and removal
 - 7.6 Hybrid operator structures
 - 7.7 The operator's perspectives
 - 7.8 Fiduciary duties and relational contracts
- 8. The non-operating _____ 143 parties**
- 8.1 The role of the non-operating committee
 - 8.2 Operating committee mechanics
 - 8.3 Subcommittees
 - 8.4 Voting control
 - 8.5 The non-operating parties' perspective
- 9. The accounting _____ 159 procedure**
- 9.1 Model form accounting procedures
 - 9.2 Accounting principles
 - 9.3 Contents of the accounting procedure
 - 9.4 Accounting procedure issues
- 10. Economic management _____ 167**
- 10.1 Introduction
 - 10.2 Work programmes and budgets
 - 10.3 Authorities for expenditure
 - 10.4 Cashcalls and invoice requests
 - 10.5 Payment obligations
 - 10.6 Dealing with default
- 11. Contracting _____ 187**
- 11.1 Procurement options
 - 11.2 Third-party contracts
 - 11.3 Affiliate contracts
 - 11.4 Federal contracts
 - 11.5 Contributions in kind
 - 11.6 Awarding of contracts
 - 11.7 Contract management, audit and ABC compliance
- 12. Petroleum management _____ 197 and disposal**
- 12.1 Introduction
 - 12.2 Petroleum allocation
 - 12.3 Petroleum lifting
 - 12.4 Petroleum disposal
 - 12.5 Production sharing contract allocation
- 13. Exclusive operations _____ 215**
- 13.1 Defining exclusive operations
 - 13.2 Exclusive operations mechanics
 - 13.3 Buy-back rights
 - 13.4 Excluding exclusive operations
- 14. Transfers and _____ 237 withdrawals**
- 14.1 Transfers under applicable law
 - 14.2 Transfer mechanics in the JOA
 - 14.3 Incomplete transfers
 - 14.4 Pre-emption rights
 - 14.5 Change of control
 - 14.6 Affiliate transfers
 - 14.7 Withdrawal
 - 14.8 The use of the withdrawal mechanism
- 15. Joint venture _____ 265 information and competition law**
- 15.1 Information and confidentiality

15.2	Public announcements	17.3	Liability for exclusive operations
15.3	Intellectual property rights and rights in information	17.4	Third-party liabilities
15.4	Intellectual property rights – JOA drafting considerations	17.5	Liabilities and insurance
15.5	The operator as custodian of information and intellectual property	17.6	General liability
15.6	Competition law	18. Default	_____ 321
15.7	The nature of the agreement under competition law	18.1	Consequence of default
15.8	Relevant JOA provisions	18.2	Definition of default
15.9	Concessions	18.3	Reaction to default
15.10	Procurement of goods, works and services	18.4	Remedies for default
15.11	Sales of hydrocarbon production	18.5	Mortgage and lien protection
15.12	Downstream transportation and processing facilities	18.6	Interest sales
15.13	Geological and geophysical data; other forms of technology	18.7	Forfeiture
15.14	Competition law and information exchange	19. Dispute resolution	_____ 351
16. Decommissioning	_____ 285	19.1	Dispute resolution principles
16.1	The decommissioning phase	19.2	Dialogue
16.2	The regulatory regime	19.3	Expert determination
16.3	Collateral support for decommissioning costs – regulatory requirements	19.4	Arbitration
16.4	Decommissioning and the JOA	19.5	Litigation
16.5	Decommissioning on the UKCS	19.6	Arbitration or litigation?
17. Liabilities	_____ 307	19.7	Consolidation
17.1	The operator's liability to the parties	19.8	Confidentiality
17.2	Liability allocation between the parties	19.9	Jurisdiction
		19.10	Sovereign immunity
		20. Other provisions	_____ 363
		20.1	Corporate and social responsibility
		20.2	Entire agreement and amendment
		20.3	<i>Force majeure</i>
		20.4	Governing law
		20.5	Health, safety and the environment
		20.6	Insurance
		20.7	Litigation management
		20.8	Notices
		20.9	Secondment and teams
		20.10	Taxation

20.11 Third-party involvement

20.12 Warranties and
representations

Appendix 1: Farm-outs _____ 383
and the JOA

Appendix 2: _____ 393
Unconventional petroleum JOAs

Appendix 3: Unitisation
and the JOA _____ 405

About the authors _____ 419

Index _____ 421

About Globe Law _____ xxx
and Business

<http://www.pbookshop.com>

15. Joint venture information and competition law

The purpose of this chapter is to consider two separate but connected issues; the relevance of competition law to joint operating agreements and the joint ventures they govern, and intellectual property rights and rights in information deployed by the joint venture in its operations.

15.1 Information and confidentiality

The JOA will contain a confidentiality provision by which the parties will be obliged to keep confidential the contents of the JOA (and, more particularly, any data or information generated under the JOA) which is not otherwise legitimately in the public domain.¹ This obligation of confidentiality will subsist for the duration of the JOA and for a defined period thereafter, with this ongoing commitment to continue to apply whether the JOA comes to an end in itself or whether a party ceases to be a continuing party to the JOA.² If the JOA is subject to a concession agreement or other form of host government agreement, the duration of the JOA confidentiality obligation should last at least as long as the corresponding obligation in the concession agreement.

This principle of the confidentiality of the data generated under the JOA should apply equally to a party's use of that data for activities in another concession area within which that party also has an interest, although it will be difficult for a party which is directly interested in two separate concession areas to disabuse itself of the information which it has learned in respect of one of those areas in relation to its activities in the other area. However, where the interest in two concession areas is held between two affiliated (and so corporately distinct) entities, rather than by the same entity, a strict separation of interests (and a corresponding maintenance of confidentiality) might more reasonably be expected.

The usual formulation of the confidentiality provision is that a party wishing to disclose information relating to the JOA must obtain the prior consent of the other parties (with such consent not to be unreasonably

1 AAPL JOA §7.1; AIPN JOA §15.2; CAPL JOA §18; OGUk JOA §19.
2 AIPN JOA §15.4; OGUk JOA §19.1(e).

withheld or delayed – and it might well be reasonable for a party to withhold its consent where the proposed disclosure of confidential information by a party is intended to be purely for commercial gain) before that disclosing party can reveal such information to a third party (see 15.3 below). It may also be a requirement of the consenting parties that the person to which disclosure is made will enter into a separate obligation of confidentiality with the disclosing party or even directly with the consenting parties.

There is usually a limited set of circumstances in which a party can make a disclosure of confidential information without the prior consent of the other parties, such as:

- disclosures required by applicable law, judicial process or the rules of a recognised stock exchange;
- disclosures to persons necessary to facilitate the commercial intent of the JOA (such as insurers, employees, affiliates and professional advisers); and
- disclosures to *bona fide* lenders and prospective transferees of interests.

These permitted disclosures could (wherever possible) be subject to a requirement that the person to which disclosure is made also undertakes a separate obligation of confidentiality to the disclosing party or to all of the parties.

Despite the desire of the parties to protect the confidentiality of their operational data, it may be that the operator can procure an opportunity to exchange some or all of that data with a third party in order to receive data in return which could be of assistance in the performance of the joint operations. To this end, the JOA might provide³ that the operator can enter into a data exchange agreement, subject to the approval of the parties through the operating committee (see 8.4). Any data which is so acquired by the operator will form part of the joint property, to which all of the parties will be entitled to have access (see 3.4 and 7.3).

Care should be taken to understand whether the obligations of confidentiality which are expressed in the JOA apply against a party in its capacity as a party only⁴ or apply against a party when acting as the operator.⁵ This will be relevant to the liability of the operator for a breach of the terms of the JOA (see 17.1).

It should also be appreciated that the terms of the prevailing petroleum law or of the concession may have something to say about the ownership of data which has been generated by the joint operations, and that the rights of the

3 AAPL JOA §7.2, Exhibit I; AIPN JOA §15.5; OGUk JOA §19.2.

4 AIPN JOA §15.2.A.

5 OGUk JOA §19.1.

parties under the JOA might need to be subordinated to the rights of the state in this regard (see 15.4 and Chapter 2).

A point of interest to consider is the application of the confidentiality provisions in the JOA to data generated in respect of any exclusive operation (see 13.2 (e)). The parties that have participated in an exclusive operation might argue that they own the relevant data and that the confidentiality provisions in the JOA do not apply to them because those provisions relate only to the data associated with the joint operations. Thus, the duty of confidentiality in respect of data generated from the exclusive operation will be owed only between the parties that participated in that exclusive operation and will not be owed by those parties to any party which did not so participate.

However, the non-participating parties might feel that this argument is inconsistent with the general principle of confidentiality which the JOA seeks to import (and the AIPN JOA's confidentiality provision is not particularly distinct on this point as it is expressed to apply to all information in relation to joint operations or exclusive operations),⁶ and particularly to the right of any non-participating party to access that data (see 13.2 (e)). The JOA should seek to address this issue with clarity.

15.2 Public announcements

As part of the confidentiality regime, the JOA might also restrict the making of public announcements by a party. The usual JOA formulation is that the operator has sole authority to make public announcements regarding the JOA or the joint operations, subject to approval of any announcement by the operating committee beforehand (wherever possible – there may be some emergency circumstances where securing operating committee approval is not practicable), and with some allowance for announcements which are required to be made directly by a party in accordance with the rules of a recognised stock exchange or by applicable law.⁷

A practical problem which should be considered in connection with the confidentiality and announcement provisions in the JOA is the liability which a party might have in the event of a breach of those obligations by that party. A breach by the operator (in its capacity as such) would be subject to the provisions of the JOA which customarily limit the liability of the operator to the parties (see 17.1), although such a breach could give grounds for the removal of the operator (see 7.5) and a breach by a party (in its capacity as such) would be subject to any consequential loss liability limitations which are recited in the JOA (see 17.1).

There might also be some difficulty for a party to prove or quantify an actual

6 AIPN JOA §15.2.A.

7 AAPL JOA §9; AIPN JOA §20.3; CAPL JOA §19; OGUK JOA §20.

monetary loss or liability which it has suffered because of another party's breach of confidentiality or the making of an unauthorised announcement. In these circumstances, therefore, the value of the undertakings given by the parties might be better reflected in the ability of any affected party to seek some form of injunctive relief in order to protect its interests (at least where a breach of the JOA can be anticipated). The grant of an injunction will be in the discretion of the court, and will be made only if damages would not be an adequate remedy.

Alternatively, an order might be sought from the court for an account of any profits made by the party which breached the confidentiality obligation, or for the destruction or delivery up of any materials which were used in or which have resulted from such a breach. A breach of the obligation of confidentiality in the JOA might also lead to an allegation of the breach of a fiduciary duty (see 7.8).

15.3 Intellectual property rights and rights in information

This section addresses information and intellectual property. It is an understatement to say that information is an essential by-product of the successful upstream oil and gas joint venture. After all, the concession agreement or licence is likely to set minimum work obligations in terms of data gathering, acquiring seismic data and/or drilling exploration or appraisal wells, all in pursuit of information. That same information is critical to the decision to declare commerciality in respect of any hydrocarbon reservoir, and in due course distinguishes possible, probable and proven hydrocarbon reserves, which in turn impact the joint venture partners' respective share prices. Simply put, information defines the value of the concession or licence, as its commerciality is proven in the course of operations. It is important therefore to understand the nature of legal rights with respect to information and technology, how they are acquired, protected and transferred, into and out of the joint venture.

An upstream oil and gas joint venture may acquire and handle a wide range of information, not only seismic data and well data, and its interpretations, which are associated exclusively with the contract area to which the JOA applies. The joint venture will also deploy technology, in executing wells and building production infrastructure, some of which may be protected by design rights. It will use know-how in assessing the physical and chemical characteristics of the hydrocarbons it finds. It or its contractors may use patented pieces of drilling technology. Its reservoir data is likely to be processed by specialist software programs protected by copyright. The operator may compile seismic and well data into a single interpretation of the contract area's geology, and this may form a database capable of protection under the EU Database Directive⁸ or the UK Copyright, Designs and Patents Act 1988. Just as

8 EU Directive 96/9/EC, brought into English law by Copyright and Rights in Databases Regulations 1997 (SI 1997/3032).

a joint venture cannot predict the form or type of hydrocarbons it may encounter in the contract area, it cannot predict what information it may need and may acquire in the course of operations. That does not prevent JOA drafters from addressing the acquisition, ownership and transfer of rights in information and technology properly.

Under English law, information cannot be owned. However, a person can acquire it for the first time, and having acquired it, may keep it a secret. Some forms of information can be organised or incorporated in creative work in such a way that it can be protected by intellectual property rights. Such intellectual property rights will have a registered owner.

15.4 Intellectual property rights – JOA drafting considerations

JOA negotiators need to consider the following questions with respect to information and intellectual property.

- What information and intellectual property rights owned or controlled by a joint venture partner will be made available for use by the joint venture, particularly the operator? Will that information or intellectual property rights be transferred into the ownership of the joint venture or licensed to it, so that the partner providing it retains control of it? Will the source partner be compensated? Can the information or intellectual property be used in the creation of new information, databases or other forms of intellectual property, and who will own the rights in such information?
- How will the joint venture go about acquiring access to third-party information and intellectual property rights it may need in the course of operations? What terms shall apply?
- What will be the relationship between the operator and the joint venture in relation to information and intellectual property rights? Will the operator control the information and own rights in it and will it licence that information to the other joint venture partners or will the rights in information be held and controlled jointly by each partner?
- In what circumstances will the joint venture try to monetise information and intellectual property rights that it controls?
- In what circumstances can joint venture affiliates make use of information and intellectual property rights controlled by the joint venture or the operator?
- What happens to a party's rights of access to information and intellectual property when it leaves the joint venture? To what extent do its rights of access and obligations of confidentiality continue?
- What happens to the operator's ownership and/or control of information and intellectual property when it resigns and transfers operatorship?

15. Joint venture information and competition law

- How is the decision made with respect to the protection of information and intellectual property rights owned or controlled by the joint venture? Who pays the costs of registering and maintaining intellectual property rights?
- Does the concession agreement require the joint venture to transfer information and intellectual property into the ownership or control of the state before or upon the termination of the relevant concession agreement? This point is also discussed in Chapter 2.

There are no right answers to these questions. However, given the significant investment by the partners in acquiring information, its commercial value and the costs involved in protecting such commercial value, there is room for argument in negotiating the JOA and subsequently in the operating committee as to how to resolve these issues. In the broadest sense, a balance needs to be struck between possible conservative and *laissez faire* approaches.

In an extreme version of the conservative approach, the partners retain control of their own information and intellectual property, licensing it to the extent necessary for use by the joint venture, or the operator, solely for the purposes of joint operations. Partners licensing information and intellectual property to the joint venture will not permit it to develop new intellectual property or compile fresh information databases by using the partners' information and intellectual property as a starting point. Nor will they permit other joint venture partners to make their information or intellectual property available for use by their affiliates for use in different operations. This approach allows each partner to retain control of its intellectual property and to monetise it entirely for their own commercial benefit. By segregating intellectual property in this way, there is minimal risk of contamination by which intellectual property from several sources is combined in a fresh invention which may be registered as intellectual property by the creator in competition and in conflict with the interests of the creators of the background sources. This approach also avoids the complexity associated with registering intellectual property rights in joint ownership. However, it eliminates the synergies otherwise obtainable by the joint venture by aggregating information and intellectual property rights insofar as they support operations in the contract area. It also misses out on the potential added value of such aggregated information and intellectual property when traded as a package to third parties.

According to the *laissez faire* approach, the joint venture owns as joint property any intellectual property created or paid for by it, and controls information acquired by it likewise. The joint venture partners may licence or transfer information and intellectual property to the joint venture, but also receive a licence to use information and intellectual property belonging to the joint venture in their separate operations, and in some variants, can also make

such information and intellectual property available to their affiliates for unconnected operations. This approach maximises the free use of information and intellectual property acquired in the course of operations in the sense that it allows them to be deployed by the widest range of parties for the widest range of purposes. At the same time, this approach minimises commercial value, for several reasons; first, it reduces the opportunities for sale for reward to partner affiliates. Secondly, it increases the risk that the confidentiality of information is destroyed by allowing it to be widely used, unless the disclosure is governed by appropriately non-disclosure terms. Thirdly, it enables a wide range of parties to combine the information or intellectual property with other information and technology, increasing the risk of contamination as described above, unless again this is prohibited by the relevant licence terms. It may also be harder to persuade joint venture parties to make their in-house information and intellectual property available to the joint venture if the JOA adopts the *laissez faire* approach. The AIPN JOA recognises this difficulty in Alternative #1 to Article 15.3.C, which allows the operating committee to accept a licence of proprietary technology on different terms if the source partner insists.

The conservative approach will be attractive to joint venture partners that contribute a disproportionate share of information and intellectual property to the joint venture. This might be the case where one of the partners is already established in the relevant hydrocarbon region and has geophysical and geological data relevant to the contract area which the joint venture needs. However, that partner could be persuaded to adopt a *laissez faire* approach if it was compensated in cash or by way of an enhanced participating interest for licensing its data to the joint venture. By contrast, the *laissez faire* approach may be more attractive to a joint venture which does not foresee significant opportunities for trading its information to third parties, where each partner sees the advantage of having a free hand in using information and intellectual property widely. This might apply in mature basins where the joint venture partners have interests collectively or individually in the other regional licences or concession agreements. Over the duration of a successful JOA, the partners' priorities on this issue may change and the JOA's provisions may come into conflict with their preferences.

The AIPN JOA recites an option⁹ whereby a party can extend the right to use the data to members of other joint ventures in which that party (or that party's affiliates) has an interest, subject to the recipient person giving an express obligation of confidentiality, but this might not be welcome in principle and it also reduces the ability of the operator to enter into a data trade (see 15.13) from which all of the parties might benefit.

On the other hand, the AMPLA JOA recognises the right (which,

9 AIPN JOA §15.1.B.

15. Joint venture information and competition law

paradoxically, is subject to the confidentiality provisions of the JOA) to use confidential information outside of the contract area, as long as the joint operations envisaged by the JOA are not impaired.¹⁰

15.5 The operator as custodian of information and intellectual property

Compared to other agreements for the purposes of research and development to be conducted by or for a joint venture, JOAs are unusual because the research and development is conducted by one of the parties as operator. Accordingly, the JOA needs to ensure that the operator takes appropriate precautions to protect the joint venture's information and intellectual property in the way that the operator interfaces with third parties. This goes much further than just inserting a confidentiality clause in procurement contracts. The operator is likely to contract out data processing and potentially the interpretation of seismic and well data. Care is needed to ensure that the data provided remains confidential, and more importantly, that the databases created by the contractor are owned and controlled by the operator on behalf of the joint venture.¹¹ Likewise, the joint venture should own any copyright in data interpretations for which it pays. The JOA should also require the operator to take proactive steps in identifying, registering and protecting intellectual property rights created at the cost of the joint venture; if the JOA is silent on this point, the operator may argue that it has the right to register and monetise intellectual property rights it creates, albeit at the cost of the joint venture, merely licensing the rights back to the joint venture partners.¹²

Some JOAs provide for the operator to be the registered owner of intellectual property paid for by the joint venture and held as joint property,¹³ on the understanding that any income earned from licensing such intellectual property rights is credited to the joint account. This may be an efficient means of centralising the ownership and commercialisation of intellectual property, but it may cause difficulties if the operatorship is transferred. It may be challenging to distinguish between the in-house intellectual property belonging to the operator party and intellectual property attributable to the joint venture, and the transfer to the new operator may be a taxable event.

10 AMPLA JOA §3.4.

11 The compiler of a database has certain rights under English and EU law which it can assert and which are not available to the holder of the raw data. See *British Horseracing Board & Ors v William Hill Ltd* [2004] EU ECJ C-203/02 (9 November 2004).

12 It is noteworthy that the EU Competition Law Block Exemption for Research and Development is only available where the participants have access to and rights to exploit the output of the relevant cooperation agreement. See Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

13 AIPN JOA §15.3.A Alternative #2.