Introduction

At the start of 2012, the Association of International Petroleum Negotiators (AIPN) released a new version of its model form joint operating agreement (JOA). The new 2012 JOA updates the existing 2002 JOA. It was first issued in 1990 and subsequently revised in 1995, 2002 and now 2012. The drafting committee for the 2012 JOA (made up of 180 international petroleum negotiators) began its work in December 2007 and took over four years to finalise the 2012 JOA.

Aim of the AIPN JOA

For over 20 years, the AIPN JOA has provided a benchmark for oil and gas joint venture arrangements internationally. It is now one of the most significant and widely used contracts in the oil and gas industry. The AIPN JOA strives to give a middle ground representation of what is "standard". As its use has grown over the past two decades, particularly in emerging markets, its provisions have increasingly become the standard against which upstream oil and gas joint ventures are compared, measured, banked and financed.

Owing to its significant use within the upstream oil and gas industry, the drafting committee for the AIPN JOA decided to update the model form to bring it in line with the current-day realities of international oil and gas operations. Such realities, which have redefined the industry’s approach to doing business, include the 2008 crash of the financial markets, the 2010 Macondo incident and the introduction of the UK Bribery Act in 2010.

Aim of this article

The 2012 JOA is expected to take over as the new international industry standard, though parties will still be free to elect to continue to use the 2002 JOA (or bespoke arrangements) if they wish. In this article we look at some of the key revisions made to the 2002 JOA in the 2012 JOA, and consider what impact these changes will have on negotiations between JOA parties.

General observations on the 2012 JOA

First the 2012 JOA seeks to clarify and improve existing provisions of the 2002 JOA. Extensive use is made in the 2012 JOA of defined terms which reflect common industry practice and, by welcome contrast to the 2002 JOA, commonly used words and phrases are, on the whole, now defined in Article 1 of the 2012 JOA. The 2012 JOA has been rebranded as the model "international joint operating agreement", whereas the 2002 JOA had the somewhat confusing name of the "international operating agreement".

Secondly some of the revisions to the 2002 JOA also cover a number of substantial issues which reflect current matters of concern for the petroleum industry, such as:
Despite the drafting committee spending many hours debating the limitations on an operator's exclusive liability in the post-Macondo era, the provisions dealing with the operator's liability remain substantially unchanged.

**Operator's liability**

The 2002 JOA reflects the commonly accepted position underpinning a JOA that the operator should make neither profit nor a loss in carrying out its duties as operator. (The operator's losses and profits from the joint operations are generally limited to the proportion of its participating interest in the JOA.) The basic position on operator liability under JOAs has always historically been that the operational liabilities are shared on a pro-rata basis between the interest holders, including the operator. However, this is generally subject to a "carve-out" where the operator is guilty of gross negligence or wilful misconduct. Such operator liability expressly does not apply to consequential or environmental loss. The definitions and approach to this carve-out vary from agreement to agreement. One relatively common approach to the "wilful misconduct" carve-out is to include the involvement of senior personnel in the definition of wilful misconduct.

The inclusion of senior management failings in the definition of wilful misconduct has been seen by some commentators as an "operator friendly" approach. This is because in practice it may be difficult to prove wilful misconduct due to the narrow definition and even harder to prove if you also have to show involvement of senior managers. The drafting committee did consider whether new provisions should be inserted into the 2012 JOA in an attempt to address the "operator friendly" concern by extending the carve-out to include various scenarios where the operator or any personnel of the operator are shown to have acted in a grossly negligent way, or to be guilty of wilful misconduct and where this has caused an operational breach.

The final version of the 2012 JOA does not include any significant changes to the provisions relating to the liability of the operator. The main reason for this decision is that the principle behind the limitation of operator liability is to encourage parties to take on the role of the operator, and any party taking on this role may be very wary of accepting any greater liability than provided for in the 2002 JOA. However this is an area which will typically lead to heavy negotiations when drafting a JOA. There will be other JOA parties (particularly minority interest holders) who will invariably argue, particularly in the post-Macondo era, that the operator should take greater responsibility for its decisions and actions.

**Guidance Notes**

The AIPN has published revised guidance notes to accompany the 2012 JOA (the Guidance Notes). Given the JOA's widespread usage, those notes include guidance on using and modifying the JOA for use in a civil law jurisdiction, as opposed to a common law jurisdiction. The Guidance Notes also contain a warning that the 2012 JOA is not suitable for use in connection with unconventional petroleum projects (e.g. coal seam gas and shale gas developments). By way of example, the exclusive operations provisions revolve around petroleum structure concepts that do not generally
Conduct of parties

Given the development of this area of law in key jurisdictions internationally (e.g. the UK Bribery Act 2010 and the Foreign Corrupt Practices Act in the United States), these provisions have been revisited in the 2012 JOA. The 2012 JOA sets out more stringent anti-bribery and corruption provisions, which include additional warranties. There are also requirements for the parties to maintain records, provide information on request to show compliance with the undertakings and to notify other parties of alleged violation of applicable anti-bribery laws and obligations.

The main impacts of the new anti-bribery provisions on JOA parties come in the form of wide indemnities to cover any losses suffered by the non-breaching parties, and the following optional provisions: (i) non-operators will be entitled to remove the operator for violating anti-bribery laws and obligations; and (ii) a party that is withdrawing from the JOA for the sole reason that another party has breached anti-bribery and corruption warranties will have the benefit of an indemnity and have included in its calculations of damages the amount of its investment that it lost as a result of withdrawal. It is possible that this withdrawal right could lead to abuse of such provision by parties to the JOA as a JOA party may have reasons, other than the breach of anti-bribery and corruption warranties, for wishing to withdraw from the JOA.

Decommissioning

As oil and gas fields mature host governments are becoming increasingly focused on ensuring that provision is made for decommissioning of offshore facilities. This is also a concern for joint venturers as they inevitably will have to shoulder the costs of such decommissioning. The key objective of the new provisions in the 2012 JOA is to place greater emphasis on decommissioning and to ensure that one co-venturer does not bear a disproportionately large share of such costs. Therefore, in particular, the 2012 JOA expands upon the decommissioning security options contained in the 2002 JOA.

Government participation

While not included in the 2012 JOA, the Guidance Notes provide suggested text for the expansion of the 2002 JOA provisions with respect to the participation of NOCs. The Guidance Notes provide potential language for an NOC carry provision that could be included either in the 2012 JOA or in a separate agreement. The suggested language envisages a scenario in which the non-NOC participants would finance certain work, on behalf on the NOC, with the repayment for such carry (financing) being made out of a portion of the NOC's share of proven reserves of hydrocarbons.

It will be interesting to see to what extent the suggested new drafting relating to carried costs is followed. It is common practice to address the carry provisions as part of the host government contract (e.g. in the production sharing agreement), and therefore not in the JOA. The commercial arrangements on a carry usually depend on the outcome of negotiations between the host government and the oil and gas companies involved.

Integrated project teams

The Guidance Notes provide for suggested language for the introduction of an integrated project team. An integrated project team is made up of representatives of all the parties (or all the parties holding a participation interest higher than a certain determined threshold) and the scope of its work is to be specifically defined in the JOA. Integrated
project teams have been discussed and debated over the years (even in the past revisions of the JOA). They are seen as a tool for the non-operating parties to have the ability to participate actively in the project's operations and decision-making. While the 2012 JOA drafting committee and AIPN board ultimately decided that integrated project teams are not recognised standard industry practice, they did invoke enough discussion and interest from the AIPN drafting committee to be included in the Guidance Notes.

**Default and withering**

JOA parties often devote a significant amount of their negotiating time to the consequences of default, specifically a failure by one party to satisfy a cash call. Therefore the drafting committee for the 2012 JOA paid particular attention to this area. The most significant changes in the 2012 JOA concern the remedies available in the event of a default. Forfeiture, which is a default remedy in both the 2002 JOA and 2012 JOA, may be unenforceable in certain jurisdictions (e.g. it can be argued that loss of the whole participating interest may amount to a penalty under English law). As an alternative, the 2012 JOA provides for a "withering" clause. This enables a non-defaulting party to have the option to require the party in default to offer to assign a part of the defaulting party's participating interest in the corresponding exploitation area. As a remedy, the "withering" clause is more proportionate than a complete forfeiture because it is measured against the extent of the default, and therefore tries to avoid the enforceability concerns with "disproportionate" remedies. The new remedy also provides continuity by enabling the defaulting party to remain in the rest of the project.

There are also disadvantages to the new withering option, being that: (i) the new drafting in relation to it is complex and will require the parties to commit greater resources to the JOA negotiations; and (ii) it could be abused so as to operate as an escape for a party that wishes to reduce its liabilities, particularly in relation to less productive assets.

**HSE plan**

Under the 2012 JOA, operators will be required to prepare and establish a health and safety plan to achieve safe and reliable conduct of operations. The operator must carry out the plan in accordance with the relevant laws and in a manner consistent with the standards and procedures generally followed in the international petroleum industry. The operating committee must revise the HSE plan annually (in contrast to the 2002 JOA, which required a periodic review). The 2012 JOA also sets out a number of alternative provisions regarding the extent to which the operator must conduct HSE reviews, which the parties will need to consider when drafting the JOA.

**Work programmes and budgets**

The 2012 JOA is more prescriptive in its requirements for a work programme and budget than the 2002 JOA. Under the 2012 JOA, the parties will agree in greater detail to the content, sharing and approval of all information relating to joint operations. This comes in response to concerns about operators not providing adequate and timely information to non-operators. In particular, there are new provisions for work programmes and budgets prescribing the content to which operators must adhere and setting out how and when operating committee approval must be given to ensure that the operator is in a position to submit the work programme and budget to the government when required to do so under the host government contract. Several optional provisions are included in the work programmes and budgets provisions, and parties should be careful to modify the 2012 JOA to reflect their particular requirements.

**Assignment of operatorship**

Under the 2012 JOA, the operator is now entitled to assign its operatorship to an affiliate, subject to any necessary consent of the relevant government, and provided that the assignee has the technical and financial resources to perform the duties of the operator. This option may be useful for oil and gas companies that prefer the operatorship function to be governed by a separate company for tax reasons.
Conclusion

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

Despite numerous discussions on how the AIPN JOA should be modified to make the operator more accountable in light of Macondo, the fact that such operator liability provisions have not been amended reflects the fact that there is no easy solution to dealing with Macondo-related issues beyond the current mechanisms for allocating risk amongst parties.

Industry participants will need to be mindful of the differences between the 2012 JOA and the 2002 version when negotiating transactions: what is "AIPN standard" has been altered in some significant respects. Moreover industry participants will need to consider the consequences of implementing the new features of the 2012 JOA, which are yet to be tested in the upstream oil and gas industry context, in their own operations.

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