

Disputes in joint operating / joint venture agreements

Background

An interesting research paper was published this summer¹. This article is a short summary of the 200-page report.

The report is highly interesting and relevant – in short, it contains a thorough analysis of disputes in the energy sector as it reviews all publicly available judgements and arbitration awards. It focuses on joint operating agreements within the oil and gas sector, however many of its conclusions are relevant within joint operating agreements or joint venture agreements in other energy and infrastructure sectors.

Disputes in the oil and gas and energy sectors

The paper asserts rightly that the international energy sector, along with its associated construction projects, make up the largest portfolio of international commercial and investment disputes in the world, which are shown in the statistics of major arbitral institutions.

In the years 2011 to 2018, between 12.5% and 19% of the ICC's (International Chamber of Commerce's) annual caseload derived from energy-related arbitrations.

At ICSID (International Centre for Settlement of Investment Disputes), the energy sector comprising oil, gas, mining, electric power and other energy accounted for a 41% share of registered cases in 2018. Previous years' figures show similar numbers.

Still, the paper concludes, outside of the USA, Canada and the UK, most jurisdictions in which international oil and gas operations are conducted have no or very little jurisprudence.

Review of court cases and arbitration

Based on the authors' review of court cases and arbitral awards, the most common issues disputed were reviewed and analysed. The review is not only interesting in itself, but it can also serve as a "checklist" of issue that negotiators must pay special attention to when negotiating and drafting joint operating agreements and JV agreements.

The most common issues disputed in the industry agreements were:

1. Approval of Joint Operations – when is a partner liable for costs incurred by the operator?
2. Accounting Procedure – which categories of costs and expenses go into the "joint account"?
3. Default – when and how does a partner/operator become non-compliant with the terms of the agreement?

¹ A Global Review of Joint Operating Agreement Disputes, by Tim Martin, Managing Director, Northumberland Chambers, John Gilbert, Partner, Bracewell, and Martin Gusy, Partner, K&L Gates, Association of International Petroleum Negotiators (AIPN), 2020

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4. Scope of Operator's Duties/Authority – how can an operator be challenged before, during or after an operation performed by the operator?
5. Removal of Operator – under what circumstances can the non-operating partners remove and replace the original operator?
6. Limitation of Liability and Indemnities – under what circumstances is the principle of “no gain no loss” and the wide liability limitations for the operator set aside?
7. Non-Consent or Exclusive Operations – under what conditions can a party abstain from participating in joint operations (non-consent), and conversely, when are parties allowed the right to conduct sole risk (exclusive) operations?
8. Transfer and Pre-emption Rights – how can a partner avoid pre-emption right obligations, granting a first right of refusal to the other partners, and conversely how are preferential rights enforced by a partner invoking these provisions?
9. Partition of Leases – this is a particular issue in onshore oil and gas operations in the USA and concerns how rights and duties are shared amongst co-owners of an onshore oil field.

Conclusion from the report

The authors, in summing up, conclude that the arbitration awards show what tribunals and courts have typically taken into consideration in reaching their conclusions on international disputes.

Their starting point was the fact matrix and the terms of the contract. However, disputing parties always have different interpretations of the same language because of ambiguity, unexpected event or unique circumstance.

Some of the tribunals considered case law from the jurisdiction of the law governing the contract, but those were only court cases relating to general principles of contract interpretation. Most of the tribunals turned to customary industry practice (or trade usage) to determine how these agreements were applied and interpreted.

According to the authors, this approach is also supported by most of the international arbitration rules.

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For questions or comments to this newsletter or energy and offshore in general, please contact Bo Sandroos on +45 4088 5422 or bos@wsco.dk.

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