

1. First principles

Before undertaking a detailed examination of the terms of a typical JOA it will be useful first to consider some of the conceptual and structural principles that underpin the content and the effect of, and even the rationale for, the JOA.

These principles relate to the mineral laws that permit private sector participation in the business of exploring for and producing petroleum and the award of concessions that facilitate that participation.

These principles also relate to why joint ventures are an inherent part of the petroleum projects landscape, the form that the JOA might take in structuring a joint venture (including the use of model form contracts) and the relationship that will exist between the JOA and the concession that it underpins.

1.1 Mineral laws and concessions

In most jurisdictions possessed of petroleum deposits there is usually, in broad terms, some form of mineral law by which the ownership of that petroleum will become vested in the state.¹

The state can elect to develop those petroleum deposits entirely by itself and for its own account, or alternatively the state can choose to invite certain participants from the private sector (both domestic and international) to develop at least some of those petroleum deposits on the state's behalf.

In this latter instance the state, acting through a duly appointed entity, might award some form of concession to a private sector participant for the development of a particular petroleum deposit. The concession is effectively the vehicle by which the state's interests in a petroleum deposit is conveyed to a private sector participant so that the petroleum deposit can thereby be developed. The mineral law should provide that the state has the necessary legislative authority for authorising private sector participation in the exploitation of petroleum reserves, which are owned by the state.

The concession that is awarded to the private sector participant might be a licence, a production sharing contract, a risk service contract or a hybrid form of any of the foregoing concession forms.

The point will be made several times in this book that the JOA acts as the servant of the concession that has been granted to a group of parties to facilitate petroleum exploration and production, and that the JOA must be read in conjunction with the

¹ In the United Kingdom, for example, this mineral law was represented originally by the Petroleum (Production) Act 1934, which was consolidated most recently by the Petroleum Act 1998.

concession. To give this point some substance therefore, two forms of publicly available concession are used in this book to illustrate certain of the propositions made in respect of JOAs:

- from the United Kingdom, the model clauses that are applied to any seaward licence granted for petroleum production (and referred to in this book as the ‘MCs’);²
- from Tanzania, the 2013 model form production sharing contract (and referred to in this book as the ‘TPSC’).³

In this book the following example of the grant of a concession (in whatever form) is used:

A concession is granted to three companies:

- A Co
- B Co
- C Co

The concession is granted initially in respect of a defined physical area which is prescribed by areal coordinates (that is, according to surface-mapped latitudinal and longitudinal bearings), by reference to certain stratigraphic layers (that is, according to levels of depth below sea level), or by a combination of these descriptions.

The concession holders regulate their internal relationship through a JOA that recites the following components:

The three companies decide to hold the concession in the following proportions:

- | | |
|--------|-----|
| • A Co | 40% |
| • B Co | 40% |
| • C Co | 20% |

A Co agrees to act as the operator.

This example will be used in this book to illustrate how the JOA functions.

Several aspects of the concession, which are discussed further in this book, have a critical bearing on the terms of the JOA:

- definition of the concession holder – the concession could be awarded to a consortium of persons, who together will have joint and several liability to the state under the terms of that concession. Those persons will collectively be referred to as the concession holder, in the singular;
- concession area – the concession will define a certain physical area in respect of which the concession holder will enjoy certain rights and will be subject to certain obligations;

2 The model clauses are recited in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008 (SI 225/2008).

3 Available at [www.tpsc-tz.com/Model%20Production%20Sharing%20Agreement%20\(2013\).pdf](http://www.tpsc-tz.com/Model%20Production%20Sharing%20Agreement%20(2013).pdf).

- work obligations – most concessions oblige the concession holder to perform a defined series of activities (commonly known as the minimum work obligations) within the early part of the lifecycle of the concession.⁴ These obligations will relate to certain exploration and appraisal activities. Thereafter, any wider development and production activities will typically require state consent;
- concession phases – the concession that is awarded might be a single concession that is intended to govern all of the phases of exploration, appraisal, development, production and decommissioning (see 5.1), but it may be that, depending on the terms of the prevailing mineral law, separate concessions will be awarded for different phases of the overall petroleum project. Thus, there may be an exploration and appraisal permit that will apply for a defined period and require the performance of a defined series of exploration and appraisal activities, and only upon the expiry of that permit might a further concession be awarded for the development of any discovered petroleum deposit;
- the operator – the concession might identify one of the parties constituting the concession holder that will act as the operator for the purposes of the concession⁵ and this will usually be replicated through the appointment of an operator under the JOA (see Chapter 7);
- key terms – the concession will typically define what constitutes a commercial petroleum discovery and will provide for project development to be sanctioned through submission of a form of development plan;
- JOA approval – the concession could necessitate approval by the state of the terms of the JOA that the parties intend to utilise.⁶

1.2 The role of the JOA

The examination of the terms of a typical JOA in this book is prompted by the assumption that a concession has been awarded to and is held by a private sector participant in the form of a group of persons that have agreed to act together within some form of collaborative joint venture, rather than to a single person as the sole concession holder. Under the terms of the concession, that group of persons, as the concession holder, will be entitled (and will also be obliged) to explore for petroleum, and to produce any petroleum that is thereby discovered, in the defined concession area.

Where it is held by several persons, the concession typically provides that those persons will be jointly and severally liable to the state for the proper performance of the terms of the concession.⁷ This means that the state could, if it so wished, look to enforce the terms of the concession against any one (or more) of the parties that are together the concession holder. The JOA reallocates this position of joint and several liability between the parties through provision that the parties' liability among

4 MC 16; TPSC Art.5.
 5 MC 24.
 6 MC40; TPSC Art.3.
 7 MC 1(2).

themselves will be apportioned according to several predetermined shares. This several liability could be invisible to a third party that deals with the parties and will also not constrain the state in respect of the concession.

The concession is of obvious importance to the joint venture between the parties. This will be reflected in provisions in the JOA whereby the operator will undertake to keep the concession in force (see 7.3) and the JOA might also impose an obligation on all of the parties not to do anything that might jeopardise the concession. Any breach of this obligation that leads to loss of the concession would ostensibly expose the party in default to liability to the other parties for breach of contract, but any exclusion of liability for consequential losses that exists in the JOA (see 14.1) would make questionable the real value of such an obligation.

The concession sets out the vertical relationship between the state (as the grantor of the concession) and the parties (in their capacity as the concession holder), but does not address the terms of the horizontal relationship between those parties.

Therefore it could become necessary for the parties to define their relationship. There is no obligation on the parties to enter into a JOA, and they could hold the concession without a JOA in place. It is, however, advisable to impose a JOA upon their relationship, for reasons that will become apparent.

Where the parties have elected to work together through the vehicle of an unincorporated joint venture, the JOA will be the agreement that defines that relationship and provides for the sharing between the parties of the rights and the liabilities arising in connection with the concession. The JOA underpins the concession and is the accord that records the relationship between the members of the joint venture as the parties that together hold the concession.

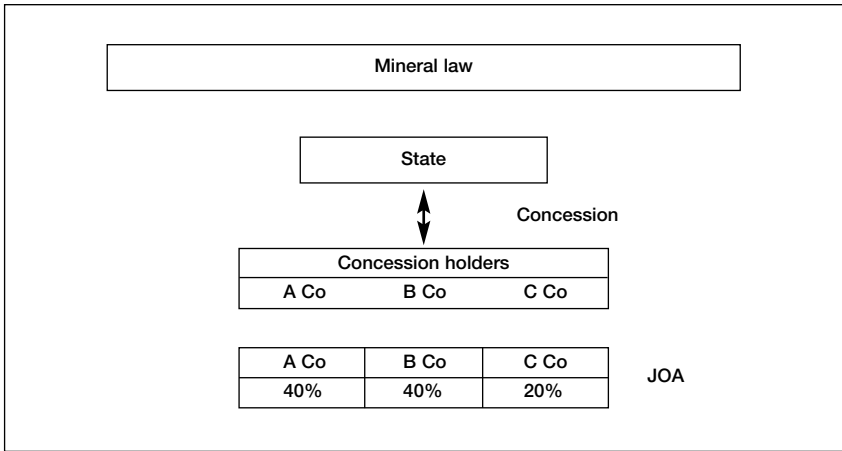
The JOA is effectively the constitution for the unincorporated joint venture that exists between the parties for the exploration for and the production of petroleum and for the management of the concession, and it provides for how the operations that are required to be performed under the terms of the concession will actually be performed as between the parties. The JOA establishes a consistent and predictable business foundation between the parties, and promotes best practices for the execution of the joint operations. Essentially, the JOA performs the same role between the parties as a partnership agreement performs between partners (although the JOA could go to some lengths to make it clear that it is not intended to be a partnership; see Appendix D).

The relationship between the mineral law, the concession and the JOA (other than in respect of North American leasehold interests, which are considered separately below) can be illustrated as on the following page.

The JOA might provide that in the event of a conflict between the terms of the concession and the terms of the JOA, the terms of the JOA (or of the concession, depending on what is negotiated) will prevail, but because of the very different nature of the relationships created by the concession and the JOA the prospects for such a conflict should be minimal, and care should be taken to address the potential conflicts.

The JOA typically relates to a single concession and applies in respect of petroleum operations in the area that is identified within that concession.

There may be a situation where, as a consequence of, for example, a successful



effort by the parties under a joint study and bid agreement (see Appendix C), more than one concession has been awarded to those parties by the state. It is possible that the parties might choose to enter into a single JOA in respect of several concessions, with a single operator (see Chapter 7) appointed in respect of all of those concessions, but this approach will not be ideal. For example, it may be that over the lifetime of the concessions, one party might transfer its interests in one of the concessions to another person but remain in the other concessions, or a party might transfer its interests in all of the concessions to different persons – such that in either case there might be different groups of persons that are recited as the parties in respect of the respective concessions, but that are all variously party to the same single JOA.

The position would be further complicated if the party that was appointed as the operator in respect of all concessions later ceased to be the operator in respect of some, but not all, of the concessions, and so the one JOA would need to be interpreted to apply to more than one operator.

In the circumstances, therefore, the preferable solution is to have a separate JOA entered into in respect of each concession, despite the initial commonality of the parties. If the parties wish to operate multiple concession interests as a whole, the implementation of a programme of unitisation might be the preferable solution, although a general pooling of concession interests might also be possible (see Appendix F). The parties might also consider a more general cooperation agreement (such as a form of area of mutual interest agreement; see 3.4) in respect of their multiple concession and JOA interests.

Whether there might be some advantage in linking the default remedy across more than one JOA and concession is considered separately (see 17.6).

Where separate concessions are granted for the separate activities of exploration and production (see above), a separate JOA might also be entered into, specific to those particular concessions and their defined activities.

The principal use of the JOA is in the context of exploration for and production of petroleum, both onshore and offshore, where technical complexity and/or economic exposure necessitates the creation of a joint venture. On occasion, the typical upstream

JOA has also lent itself readily to adaptation for abandoned mine methane/coal bed methane (CBM) project developments, and in 2014 the AIPN issued a model form JOA for use in unconventional petroleum projects (see Appendix J).

There is no reason why the JOA might not also be used as the constitutional basis for any other mining or wider energy sector project where an unincorporated joint venture approach is required, subject to the changes being made to the text of the agreement that are necessary to reflect the nature of the particular project. This possibility will be reflected in part in the scope of the JOA (see Chapter 5).

A somewhat elliptical question that is sometimes asked relates to the nomenclature of the JOA, and specifically to the extent to which (despite the title of the document) the JOA truly entails joint operations between the parties.

On one hand the JOA does not truly connote joint operations because there is only one appointed operator, rather than all of the parties having operational responsibility, and because the concept of exclusive operations (see 6.1) runs counter to the idea of joint operations.

On the other hand, however, there are several joint aspects of the relationship between the parties that the JOA creates, such as voting control (see 8.4) and default cover (see 16.2), which makes for an agreement in which the parties are jointly interested.

Perhaps the best way to characterise the JOA therefore is as an agreement for jointly coordinated operations, but not for the appointment of a joint operator.

The AIPN 2012 model form JOA revision (see Appendix A) sought to emphasise the joint nature of the relationship that is created between the parties to the JOA through a change in the title of the agreement from “Model Form International Operating Agreement” to “Model International Joint Operating Agreement”.

1.3 Hybrid concession/JOA structures

The concession could recite a hybrid concession/JOA structure, which would seek to legislate for the horizontal relationship between the parties (but to which the grantor of the concession would be party, and which the grantor would be able to observe directly). This could dispense with the need for a separate JOA, since many of the typical provisions of a JOA will be recited within the terms of the concession,⁸ but there could also be a separate voting compact that is entered into between the parties other than the grantor in order to address matters that those parties might prefer to retain for their personal consideration:

State	A Co	B Co	C Co	Hybrid Concession/JOA
	40%	40%	20%	

⁸ Notably: participating interests and commitments to fund joint operations; operator appointment and behaviour; meetings, voting, budgets and authorisations; default; exclusive operations; and an accounting procedure.