

The 2023 AIEN Model Form JOA Placing ESG issues at the heart of oil and gas operations

Energy Analysis: Darren Spalding, Adam Blythe and Adam Quigley of Bracewell LLP consider the key updates to the Association of International Energy Negotiators' (AIEN) 2023 version of its model form joint operating agreement (JOA) which places ESG issues at the heart of oil and gas operations. On 16 February 2023, the Association of International Energy Negotiators (AIEN), formerly the Association of International Petroleum Negotiators or AIPN, published an updated version of its model form joint operating agreement (JOA). The AIEN JOA has for many years been adopted as the standard agreement used across the oil and gas industry for unincorporated joint ventures, notwithstanding that there are alternative regional model forms that are popular in some jurisdictions.

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Those familiar with the earlier 2012 version of the AIEN JOA (which itself was an update from 2002 and 1995 versions) will be reassured that the updates in this 2023 version do not change the fundamental principles of the 2012 version—with the intention to address two of the significant challenges currently faced by the sector. The primary focus is on environmental, social and corporate governance (ESG) matters that have become increasingly prominent issues for the oil and gas industry. The revised JOA offers some useful additions and optionality to address these topics. The other main area of revision is the introduction of an economic sanctions regime (not previously covered by the 2012 version), a topic of considerable recent concern in the aftermath of the Ukraine invasion.

This note is intended to offer a speed-read summary of the key updates to the 2023 version of the JOA.

Decommissioning

Many of the amendments to the 2023 JOA relate to decommissioning and provide additional optionality. One matter to consider in this regard is that, in many jurisdictions (including those in emerging markets), the decommissioning regime set out in newer production sharing contracts, concessions or licences are now regularly more detailed than those of the past, so any JOA provisions dealing with this issue must obviously dovetail with those regulatory or contractual requirements. The new JOA provisions include:

- decommissioning arrangements in respect of wells that are already producing at the effective date of the JOA (referred to as legacy wells)
- alternatives in relation to decommissioning liability where fewer than all of the JOA parties elect to take over joint facilities or wells
- updates to the 'Decommissioning Procedures' (which is itself an optional schedule to the JOA), including escrow arrangements for the decommissioning provision amounts

Greenhouse gas emissions

The 2023 version of the JOA introduces new optional provisions regarding greenhouse gas emissions, in recognition of the increasing focus of oil and gas producers on climate change mitigation. The new optional provisions include a duty on the operator to act in a manner that limits or mitigates greenhouse emissions from operations and to report on a periodic basis in respect of greenhouse gas emissions.

Human rights

Recognition of human rights principles is new to the 2023 JOA. There are now obligations linked to the UN Declaration of Human Rights, the ILO Declaration of Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights. The operator is required to manage operations in a manner that respects human rights and comply with laws relating to human rights, and all JOA parties are required to exercise their rights in a manner that is compliant with human rights.

Sanctions

The concept of economic sanctions has now been expressly addressed in the JOA. The absence of provisions dealing with this issue in earlier versions of the JOA meant that some companies had developed their own 'model' provisions to deal with this issue, particularly where a counterparty is a national oil company, so it is beneficial that this has been 'standardised' in this latest version. The concept flows through a number of JOA provisions, including:

- an obligation on the operator to implement policies and procedures designed to comply with economic sanctions in the conduct of joint operations
- the ability to remove an operator that is in breach of economic sanctions
- prohibitions on transfers to sanctioned entities (and deemed default if the transfer occurs by way of a change of control)
- permitting withdrawal if there is a belief that another party is subject to sanctions, in which case transfer can be made solely to the non-sanctioned entities

Anti-bribery and corruption

The 2023 JOA bolsters the anti-bribery and corruption provisions that were included in the 2012 version. In particular, the operator has enhanced obligations relating to compliance and engagement of third-party contractors and allows for removal of the operator if the operator is in breach of anti-bribery and corruption requirements.

Other changes

The 2023 JOA also includes a number of other less 'intrusive' amendments:

- reference rate—Following the UK Financial Conduct Authority's announcement of the cessation of the publication of LIBOR, the JOA now provides for SOFR as a replacement 'Reference Rate' for the purposes of calculating interest. The JOA provides optionality for either 'Average SOFR' (calculated on a backwards-looking basis) or 'Term SOFR' (calculated on a forward-looking basis, similar to LIBOR)
- withering interest—This default remedy is now optional, rather than one of the standard selection of remedies. Despite its complexity, there are advantages to retaining this option, particularly for English law governed JOAs

- force majeure—State-controlled entities are now no longer entitled to rely on force majeure relief as a consequence of change in law or other governmental action in certain circumstances

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