CHAPTER 8

JOINT VENTURE DISPUTES IN ENERGY SECTOR

8.1 Introduction

Joint venture disputes in the energy sector meet several requirements for drama: high stakes, powerful players, fierce competition, economic volatility, long-term contractual arrangements and political and economic instability. These are just a few of the most obvious factors that often converge in a single dispute. The same reasons for which joint ventures are seen as a highly effective medium for the sharing of risks, resources, know-how and technology also explain why joint venture arrangements can result in complex and protracted disputes. Within the energy sector, the oil industry has the longest history as both an investment destination and a theatre of contention. Smith has observed:

Historically, oil has been the subject of the most important international agreements and disputes. Many of the legal doctrines applicable to transnational private arrangements have been developed in response to the arrangements by which oil has been extracted and sold... Moreover, no other commodity, either historically or currently, can match the importance of petroleum to the world's political and economic order.

Few businesses are as capital intensive and adventurous as the oil business. Oil companies and, more recently, gas companies regularly invest vast sums of money in hydrocarbon exploration and exploitation activities in places with minimal infrastructure, underdeveloped legal systems and unstable political environments. While history has shown that 'farming the frontier' can be very profitable, it can also be fraught with risk and technical difficulty. Its addition, the petroleum industry is characterised by a diversity of participants with varying degrees of risk aversion, financial strength and expertise. These considerations increasingly motivate oil and gas companies to enter into various kinds of joint ventures as ways of sharing risk, pooling capital and maximising

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the technical expertise available for the project. The joint venture is therefore probably the most important contracting model for the modern international oil and gas industry.²

As is often the case in commercial law, the law follows the market. Although many legal systems now recognise the term 'joint venture', sometimes as a branch of the law of partnership, the origins of joint ventures lie in commercial practice and custom. Accordingly, while the term 'joint venture' may be defined in different ways its different places,³ among its commercial users it means any contractual arrangement in which two or more legally distinct parties cooperate with a common goal that goal being, at broadest, the realisation of profit.⁴

In the oil and gas industry, joint ventures take various contractual forms, each of which is subject to theoretically infinite permutations consistent with freedom of contract. Joint ventures require a legal instrument to establish the rights and obligations of the parties among themselves and a framework for the commercial and technical conduct of the relevant operations. This chapter focuses on four main 'upstream' joint venture agreements:⁵

- participation and bidding agreements;
- 'farm-out' agreements;
- joint operating agreements; and

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³ Practically speaking, in the oil and gas industry, a joint venture can be described as follows: "The mineral and petroleum joint venture is an association of persons (natural or corporate) to engage in a common undertaking to generate a product to be shared among the participants. Management of the undertaking is divided: specified activities are to be performed by a designated person (the operator or manager) as agent for the participants; the power to determine certain matters is vested in a committee (the operating or management committee) upon which participants are represented and entitled to vote in accordance with their interests in the venture; and other matters are decided at the outset by the participants as terms of the association. The relationship among participants is both contractual and proprietary: the terms of the association are fixed by agreement and property employed in the undertaking is held by the participants as tenants in common." tat Crommelin, "The Mining and Petroleum Joint Venture in Australia" 41 Energy Nat Resources and Environmental 65-66 (1986)

⁴ Indeed, the term 'joint venture' was developed as a business concept rather than a legal one. As such, scholars were for some time divided over the legal definition of a 'joint venture' and its legality in reference to other legal vehicles. Sec Falai Al-Emadi's discussion of the development of the concept in "Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements", (2010) 1 Geo 1 L 1.

⁵ Supra note 2 at 124.
• Unitisation agreements.

Each of these is the subject of a growing number of 'model forms' developed by professional associations and industry bodies.

Concentrating on the oil and gas industry within the energy sector, the purpose of this chapter is to identify the types of disputes and related procedural issues that most commonly arise in the upstream joint venture context. To that end, this chapter commences with a brief overview of these four main classes of upstream joint venture agreements, using the leading model contracts as working examples. The focus then shifts to dispute resolution and, more specifically, international arbitration. The point is made that while certain procedural issues are arguably endemic to upstream joint venture disputes, the adjudicatory risk that they present can be managed with proper contract drafting, diligent contract administration and specialist advice.6

8.2 Upstream Joint Venture Models

Today, most upstream joint ventures are based, either closely or loosely, on some form of model contract or precedent. Most sophisticated parties in the global petroleum industry use a relatively narrow range of model contracts in their relations with other companies. Although model contracts cannot claim to address every contingency and often contain certain compromises intended to satisfy the general preferences of the various parties involved, the perceived and actual advantages of model contracts are well known. These include:

• reduced transaction costs (eg, shorter negotiating time, reduced involvement of external counsel);
• increased certainty of rules and predictability of outcomes; and
• general improvement of counterparty relationships.7

6 Ibid.

7 Timothy Martin highlighted the tangible benefits of these contracts, arguing: "A well drafted model contract allows the parties quickly and easily to agree on 80 percent of the contract, which is commonly referred to as 'boilerplate', that is usually non-controversial and repetitive from one contract to another. The parties can then focus their attention on the 20 percent of the contract that adds value or where there are significant differences of opinion. Model contracts increase the speed of transactions. They often cut transaction times in half and sometimes as much as 90 percent." Further, he argues that although no empirical studies exist on the question, "much anecdotal evidence suggests that, at least for the international industry, contract negotiations for many large projects have been reduced from two years to six months with accompanying overhead costs for negotiating and signing contracts slashed from
The first model contracts in the oil and gas industry grew out of the drafting practices and demands of dominant players which could use their negotiating power to impose their preferred terms on counterparties. However, in more recent years industry associations, rather than dominant players, have driven the proliferation of model contracts covering a wide range of upstream and midstream activities. These organisations include the Association of International Petroleum Negotiators (AIPN), where model contracts are used as examples in this chapter.

Upstream - meaning the exploration, development and production phase of the petroleum business - the main AIPN agreements are:

- the Study and Bid Group Agreement 2006 (SBGA);
- the Farm-out Agreement 2004 (FOA);
- the Joint International Operating Agreement 2002 (JOA); and
- the Unitisation and Unit Operating Agreement 2006 (U0A).

These kinds of cost and time savings are repeated hundreds, if not thousands of times throughout the international energy industry on an annual basis. Aside from direct cost savings in drafting agreements, there are many broader benefits that model contracts provide to the industry including avoiding significant project delays, reallocating corporate resources to high-value business opportunities and building strong partner relationships through abbreviated negotiation sessions as opposed to lengthy and repetitive ones. See T Martin, "Model Contracts: A Survey of the Global Petroleum Industry", 22(3) IENRL (2004).

An often – cited example is the British National Oil Corporation, which during the 1960s and 1970s successfully established its joint operating agreement as the standard for North Sea Operations. Other leading industry bodies include the American Petroleum Institute, the Canadian Association of Petroleum 12ndinden, the United Kingdom Offshore Operators Association and the Australian Petroleum Production and Exploration Association.

The SBGA is of great interest when groups or consortia will be used to conduct exploration, development and production activities. The AIPN SBGA designates the party that will serve as operator for negotiating a contract with the host state and provides details on how the evaluation process will be conducted. In addition, the model agreement sets out the proportionate interests that the participants will have, the application procedure and what should take place in the event of a default of a party in paying in full any amount due. Finally, the AWN SBGA provides for exclusivity in that each party is required to refrain from submitting any bid or application covering any part of the study area either alone, with or through an affiliate or any third parties.

The FOA is an agreement by a party that owns drilling rights - the tumor - to assign all or a portion of those rights to another party the farmee - in return for drilling and testing on the property. Under the AIPN FOA, the farmor can explore alternative means of financing exploration activities. Whereas years ago the FOA was conducted orally, today the AIPN FOA includes provisions concerning the assignment of interest and the conditions precedent to assignment, such as governmental approval or an optional environmental assessment at the sole cost of the farmee.

The UOA provides a model unit agreement for companies that have interests in an oil or gas reserve which stretches into different tracts operated by different interest holders. The evolving trend is increasingly towards unitisation in situations where common petroleum reservoirs straddle the boundary.
Each of these joint venture agreements creates a complex scheme of rights and obligations, any one of which could be the subject of a dispute and consequent need for adjudication. This chapter does not examine the substantive provisions of these agreements, but instead focuses on their dispute resolution clauses, using them as a canvas on which to paint a picture of joint venture dispute resolution generally. In the finer strokes, the options available under the dispute resolution clauses of the AIPN suite of model contracts are used to illustrate certain recurring procedural themes.\(^{13}\)

For the uninitiated, the JOA is probably the most common form of joint venture agreement in the oil and gas industry. Indeed, on one view it is a "necessary extension" of a joint venture agreement.\(^{14}\) The AIPN is best known for its model JOA, at the core of which is an arrangement whereby a single party designated as the 'operator' is given responsibility for exploration and development under the supervision of an operating committee.\(^{15}\) The operator can be a co-venturer, an unaffiliated third party or a company established by the co-venturers to carry out specific operations. The JOA establishes a democracy at the operating committee level, where all co-venturers have an active say (usually in the form of voting rights proportionate to their participating interest) in the management of the joint venture. Under most JOAs, the participants collectively own the equipment, facilities and hydrocarbon production that flow from the permits held.\(^{16}\) Another common feature of JOAs is joint and several liability.

Over the years, JOA drafting practice has responded to certain commercial and regulatory trends. For example, in the 2002 revision of the previous 1995 version of the AIPN JOA, the

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\(^{13}\) Supra note 2 at 126.


\(^{15}\) The operating committee is comprised of representatives from all the parties to the JOA.

\(^{16}\) For example, the JOA between Tallow Ghana Limited, Sabre Oil and Gas Limited and Kosmos Energy Ghana HC established the respective rights and obligations of the parties with respect to operations in the Deepwater Taste contract area, offshore Ghana. Tallow, the operator, enjoyed a 55.5% share of participating interests, Sabre 4.5% and Kosmos 40%. A provision of the JOA nonetheless recognised the rights of the Ghana National Petroleum Corporation (GNPC) and the government of the Republic of Ghana, pursuant to which GNPC has a 10% participating interest in all petroleum operations under the contract and a right to acquire an additional 5% participating interest.
The revision committee adopted the incorporation of a health, safety and environment (HSE) provision in the model form. As this chapter observes, another drafting trend is the preference for arbitration as the method for the resolution of disputes.

In procedural terms, the main thing that the four AIPN model contracts have in common is that they provide for international arbitration as the method for resolving disputes, either alone or as a ‘long stop’ to other dispute resolution procedures such as senior executive negotiation, mediation or expert determination. For example, the arbitration clause of the AIPN FOA reads as follows:

Except as may be otherwise agreed in the JOA, any and all claims, demands, causes of action, disputes, controversies and other matters in question arising out of or relating to this Agreement, including any question regarding its breach, existence, validity or termination, which the Parties do not resolve amicably within a period of ______ days, shall be resolved by three arbitrators in accordance with the Arbitration Rules of the______________________ . Each Party shall appoint one arbitrator within thirty (30) days of the filing of the arbitration, and the two arbitrators so appointed shall select the presiding arbitrator within thirty (30) days after the latter of the two arbitrators have been appointed. If a Party fails to appoint its Party-appointed arbitrator or if the two

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17 See Article 4.12 of the AIPN JOA, which reads: “With the goal of achieving safe and reliable operations in compliance with applicable HSE laws, rules and regulations (including avoiding significant and unintended impact on the safety or health of people, on property or on Use environment), Operator shall in the conduct of Joint Operations: (1) establish and implement an HSE plan in a manner consistent with standards and procedures generally followed in the international petroleum industry under similar circumstances; (2) design and operate Joint Property consistent with Use HSE plan; and (3) conform with locally applicable HSE laws, rules and regulations and other HSE-related statutory requirements that may apply.” However, the model contract provides for varying degrees of control and oversight of the implementation and scope of HSE plats and procedures.

18 Supra note 2 at 127.

19 See, for example, Article 18, Option (0) of the AIPN JOA 2002 and Article 20.2, Options (B) of the AIPN DOA 2006.

20 See, for example, Article 18, Option (C) of the AIPN JOA 2002 and Article 20.2, Option (C) of the AIPN DOA 2006.

21 For example, Article 18 of the AIPN JOA 2002 contains an “Optional Provision 18.3” “which provides for expert determination in the following terms: "For any decision referred to an expert under Articles [8.4, 12.2 or 12.3], the Parties hereby agree that such decision shall be conducted expeditiously by an expert selected unanimously by the parties to the Dispute. The expert is not an arbitrator of the Dispute and shall not be deemed to be acting in an arbitral capacity."
Party-appointed arbitrators cannot reach an agreement on the presiding arbitrator within the applicable time period, then the ________________ shall appoint the remainder of the three arbitrators not yet appointed. The place of arbitration shall be_____________________. The proceedings shall be in the ______________ language. The resulting arbitral award shall be final and binding, and judgment upon such award may be entered in any court having jurisdiction thereof. A dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect. Any monetary award issued by the arbitrator shall be payable in_____________________. It is expressly agreed that the arbitrator shall have no authority to award special, indirect, consequential, exemplary or punitive damages.

The broad, largely standard language of the AIPN FOA arbitration clause can be supplemented by the use of a number of optional clauses. These options cover issues such as waiver of the right to appeal on a point of law and the power of the arbitrator to grant equitable forms of relief (including specific performance and interim measures of protection). The other AIPN model contracts take a similar approach. Even more detailed optional clauses are contained in the AIPN JOA, covering:

- the form and content of the notice of dispute;
- negotiation and mediation (as optional preconditions to arbitration);
- the rules of the arbitration;

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22 AIPN FOA 2004, Article 11.2.
23 AIPN FOA 2004, Article 11.2, Option A.
24 AIPN FOA 2004, Article 11.2, Option B: "The Parties acknowledge that remedies at law may be inadequate to protect against breach of this Agreement. The arbitrators may therefore award both monetary and equitable relief, including injunctive relief and specific performance. A Party may apply to any competent judicial authority for interim or conservatory relief. The application for such measures or for the enforcement of such measures ordered by the arbitrator shall not be deemed an infringement or waiver of their agreement to arbitrate and shall not affect the powers of the arbitrator."
25 AIPN JOA 2002, Article 18.2, Option (A); and AIPN UOA, Article 20.2, Option (A). Establishing clear requirements for the form and content of a notice for dispute can be very helpful, as it can avoid the situation where one party issues a notice of dispute and the responding party denies that the notice of dispute is valid - for example, because it does not disclose the existence of a dispute or is deficient in some other formal sense.
26 AIPN JOA 2002, Article 18.2, Option (B); AIPN UOA 2006, Article 20.2, Option (B).
27 AIPN JOA 2002, Article 18.2, Option (C); AIPN UOA 2006, Article 20.2, Option (C).
28 AIPN JOA 2002, Article 18.2, Option (D)(1); AIPN SBGA 2006, Article 20.4.4; AWT FOA 2004, Article 11.2; and AIPN UOA 2006, Article 20.2, Option (D)(1).
• the number of arbitrators\textsuperscript{29} and the method for their appointment;\textsuperscript{30}
• consolidation;\textsuperscript{31}
• seat\textsuperscript{32}
• language;\textsuperscript{33}
• entry of judgment;\textsuperscript{34} and
• notice\textsuperscript{35}

Although these options are sometimes overlooked as fine-print or seen as matters too specific for the eleventh hour in which dispute resolution clauses are often negotiated, they cover important issues.

8.3 Typical Disputes

It should come as no surprise that disputes are common in upstream oil and gas joint ventures. Leaving aside the multitude of economic, physical (especially geological and environmental) and political inputs that may cause a dispute to arise in an international oil and gas project, one of the reasons why disputes are common in upstream joint ventures is that the joint venturers are often direct competitors.\textsuperscript{36} Joint venture disputes also frequently arise because one of the parties becomes dissatisfied with the original risk allocation model. When one participant is sold to or merges with a third party, the dynamic of the joint venture can be radically altered. The same thing can happen where one participant is a national oil company and there is a change of

\begin{thebibliography}{99}
\bibitem{29} AIPN JOA 2002, Article 18.2, Option (D)(2); AIPN FOA 2004, Article 11.2; AIPN SBGA 2006, Article 20.3, Alternative IA or 2B; and AIPN UOA 2006, Article 20.2 Option (D)(2).
\bibitem{30} AIPN JOA 2002, Article 18.2, Option (0)(3); AIPN FOA 2004, Article 11.2; AIPN SBGA 2006, Article 20.3, Alternative IA or 2B; and AIPN UOA 2006, Article 20.2, Option (D)(3).
\bibitem{31} AIPN JOA 2002, Article 18.2, Option (D)(4); and AIPN UOA 2006, Article 20.2, Option (D)(4).
\bibitem{32} AIPN JOA 2002, Article 18.2, Option (D)(5); AIPN FOA 2004, Article 11.2; AIPN SBGA 2006, Article 20.4.1; and AIPN UOA 2006, Article 20.2, Option (D)(5).
\bibitem{33} AIPN JOA 2002, Article 18.2, Option (D)(6); AIPN SBGA 2006, Article 20.4.2; AIPN FOA 2004, Article 11.2; and AIPN UOA 2006, Article 20.2, Option (D)(6).
\bibitem{34} AIPN JOA 2002, Article 18.2, Option (0)(7); AIPN SBGA 2006, Article 20.9; AIPN FOA 2004, Article 11.2; and AIPN UOA 2006, Article 20.2, Option (D)(7).
\bibitem{35} AIPN JOA 2002, Article 18.2, Option (0)(8); and AIPN UOA 2006, Article 20.2, Option (D)(8).
\bibitem{36} This is, in some ways, a distinguishing characteristic of the international oil and gas industry. As Timothy Martin and Jay Park QC observed, "it is difficult to imagine Coke and Pepsi negotiating a joint venture, but international oil companies do so frequently." \textit{See} T Martin, JJ Park, "Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger", 3(1) IWELB4 (2010) 3(1) .
\end{thebibliography}
government. Upon a review of published arbitral awards and anecdotal evidence, it is apparent that the most common disputes in upstream oil and gas joint ventures are as follows:

- **Deadlocks** — a deadlock will occur at the operating committee level in relation to an item of expenditure proposed by the operator, such as an authority for expenditure to carry out drilling or seismic works which are not obviously within the scope of the minimum works obligations attached to the permits held by the joint venture.\(^{37}\)
  
  In this situation, the arguments will usually focus on the voting rights of the parties (which may have changed due to acquisitions, assignments and farm-outs) and whether the authorised expenditure is justified (ie, the scope of the minimum works obligations and the commercial and technical merits of the proposed exploration activities).\(^{38}\)

- **Default and dilution** — one party will fail to answer a cash call issued by the operator, and the non-defaulting parties will move to dilute the defaulting party's participating interest in accordance with the default and forfeiture provisions of the agreement. In this situation, the arguments will usually focus on the validity of the unanswered cash call (and its preceding authority for expenditure), whether the expenditure that is the subject of the unanswered cash call is justified, whether the operator has complied with the accounting standards required by the JOA, whether proper notice of default was issued by the operator, whether the cure period has expired and other legal questions attached to the enforceability of the dilution provisions of the agreement\(^{39}\) (eg, 'penalty' arguments).

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\(^{37}\) In a case brought before the US District Court for the District of North Dakota, plaintiff Magnum Hunter Resources Corporation, filed an ex parte motion for a temporary restraining order arguing that the defendant, Eagle Operating Incorporated, should be enjoined and restrained from performing any primary or secondary recovery operations on oil and gas properties jointly owned by the parties, as two of the proposed wells included in the authority for expenditure were not identified in a mutually agreed-upon business plan. The court granted the motion, holding that the business plan's absence posed a significant risk to the performance of the oil and gas properties. See Magnum Hunter Resources Corporation v Eagle Operating Inc (NW Nd 2010).

\(^{38}\) Supra note 2 at 129.

\(^{39}\) In the final award on jurisdiction in ICC Case 11663 of 2003 (A Jan can den Berg (ed), (2007) 32 YCA 60), this was the exact scenario: Company C concluded a shared management agreement with companies A and B in the framework of crude oil production in Yemen. Article 8.7(a) of the shared management agreement provided that if a defaulting party remained in default for more than 60 days after receipt of a default notice, it would be obliged upon request of a non-defaulting party to forfeit and assign its participating interest to that party. A dispute arose between the parties when C allegedly breached its obligations under the shared management agreement by failing to deliver letters of credit and to make timely payments of cash calls.
• Loss of permits — the operator fails to perform its duties,\textsuperscript{40} the joint venture loses its good standing with the regulator and the permits revert back to the host state. In this situation, there may be administrative proceedings brought by the operator on behalf of the joint venture against the regulator (and possibly claims for expropriation under applicable investment treaties), and secondary damages claims by the joint venturers against the operator for negligent breach of its contractual duty to maintain the permits in good standing.\textsuperscript{41}

• Farm-out disputes — the farmee either fails to make good on its obligations under the FOA\textsuperscript{42} (in which case the farmor will typically dispute the farmee's entitlements), or the farmee completes its obligations and 'earns in' to the joint venture, but without its works having yielded any benefit to the joint venture. In this situation, any number of substantive issues can arise, including questions as to

Before the tribunal, C argued that the provision was "draconian", amounting to a penalty, and as such was not applicable under English law. However, the tribunal dismissed C's arguments and granted the claimants' request for specific performance, ordering C to assign its participating interests to A and B and resign as operator.

The question of operator negligence is illustrated by \textit{Joint Venture Yashlar v Government of Turkmenistan} (ICC Case 9151/FMS/KGA), interior award, June 8 1999. In this case, the claimants were Bridas and the joint venture controlled by Bridas. The respondent was the Turkmenian Ministry of Oil and Gas Industry and Mineral Resources. The respondent advanced several grounds for termination of the joint venture, one of which was the argument of an entitlement to repudiate the joint venture agreement on account of alleged breaches by Bridas with respect to operations in the field. The respondent claimed that there were numerous and persistent repudiatory breaches as well as violations of fiduciary duties towards the respondent committed by Bridas during the drilling of two exploratory wells. Expert testimony was of prime importance, but after careful consideration of the evidence, the tribunal disagreed with the respondent.

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\textsuperscript{41} Supra note 2 at 130.

\textsuperscript{42} In \textit{RAI Production Corporation v Grenada} (ICSID Case ARB/05/14) Award, March 13 2009), RSM, the claimant, entered into a written agreement with Grenada. The agreement recorded a contractual arrangement whereby RIM intended to apply for an exploration licence from Grenada for oil and gas over a designated area in the waters off the islands of Grenada. In the event of commercial discovery, RSM intended to apply for one or more development licences granted by Grenada. When RIM applied to Grenada for an exploration licence under the agreement, Grenada refused to grant the licence, terminating the agreement. Grenada advanced the counterclaim of unlawful misrepresentation as a ground for rescinding the agreement under Grenadian law. Grenada argued that RSM's intentions from the outset were materially different from those expressed to Grenada, which was led to believe that RSM was willing and able to carry out the exploration and development to be envisaged in the agreement, but that in reality RSM planned to lock up Grenada's territory until the agreement could be farmed out to other companies that would do all of the work, pay all of the costs and take all of the risks, thereby 'carrying' RSM's interest. RSM denied the existence of any misrepresentation, stating that FOAs are standard business practice in the international oil industry. However, Grenada contended that RIM never intended to assume any financial risk or to carry out any of its obligations under the agreement. The tribunal sided with IISM, asserting that there was no unlawful misrepresentation on their part relating to farm-outs which could justify rescission of the agreement.
the validity of the FOA (eg, assignment and joint venture approvals for the farm-out), factual inquiries as to whether the farmee completed the works allocated to it under the FOA, arguments concerning the operating committee composition and the voting rights of the farmee, and the rights of the farmee to any hydrocarbons discovered or extracted.43

43 Supra note 2 at 130.

- HSE breaches — the operator is prosecuted under the HSE regulations of the host state and seeks to rely on the indemnities given to it by the other parties under the joint venture agreement. The other parties deny liability to indemnify the operator, arguing that the violation that is the subject of the complaint was due to the gross negligence of the operator. In this situation, the legal arguments will usually focus on the interpretation and construction of the operator's indemnities and the fact-intense question of whether the operator was grossly negligent (which will be a matter of expert evidence on 'good oilfield practice').44

44 Ibid.

This is by no means an exhaustive list of the disputes that can arise in an upstream oil and gas joint venture. Many other issues can lead to disputes in this context, including representations as to prospectivity, the fiduciary duties of operators, tax liability, hardship and force majeure events, insolvency and winding up of a party. But for the purposes of this chapter, these five typical disputes will be used to illustrate the procedural problems that are commonly encountered at the arbitration stage.45

45 Id, at 131.

46 Ibid.

8.4 Causes of Procedural Problems

As has been observed, joint ventures are a common form of commercial undertaking in the oil and gas industry, typically involving at least one sophisticated actor, extensive pre-contractual negotiations, protracted commercial and operational planning phases, and specialist advisers. This backdrop raises the question of why procedural problems are so often encountered when joint venture disputes are taken to arbitration.46

46 Ibid.
8.4.1 Number of Parties

The first reason is numbers. Although joint ventures are often born as agreements between two parties, such as two international oil companies or an international oil company and a national oil company, they often expand by way of farm-outs and acquisitions to become multi-party, multi-contract undertakings. Additionally, a new local entity may be forced into the joint venture by virtue of the mandatory requirements of the investment code of the state in which the permits are located.\textsuperscript{47}

When a dispute erupts in a multi-party joint venture context, the following procedural questions will commonly arise:

- Which parties have the right to appoint arbitrators?
- Can the parent companies of the joint venturers be joined?
- If separate arbitrations must be commenced, can they be consolidated?

If the joint venture has expanded from a bipartite form into a multi-party undertaking, the dispute resolution clause in the original agreement might well be silent on these points. In such a situation, it will largely be a question of what the arbitration rules chosen by the parties dictate, and what the law of the seat permits the arbitrators to do.\textsuperscript{48}

8.4.2 Party Characteristics

The issue of party characteristics is closely related to the issue of numbers. The fact is that some actors have particular strengths and peculiar weaknesses. To use the casts call example, junior explorers are often cash poor, but skill rich. As such, once they have farmed-in, they are more likely than their senior partners (eg, international or national oil companies) to become distressed if project costs suddenly increase. Indeed, cost increases that might go virtually unnoticed by an international oil company may be enough to sink a junior explorer. If a farmee becomes insolvent, one procedural consequence may be that the other parties to the joint venture may be unable to commence arbitration to enforce dilution of the insolvent farmee's participating

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
interest. The same problem can arise with local entities, where the appointment of a liquidator may affect the standing of these parties to arbitrate and be arbitrated against.\(^{49}\)

Complications can also arise when local entities are introduced to the joint venture and their conduct is regulated by mandatory laws which may not be consistent with the terms of the joint venture agreement. The reconciliation of the laws governing these actors with the law governing the joint venture generally is no simple exercise, and can (if not properly conducted by the arbitrators) jeopardise the enforceability of an award made in relation to them. Similar issues can also arise where the joint venture is established through the incorporation of a local joint venture company.\(^{50}\)

At the other end of the scale, international oil companies tend to avail of complex corporate structures by using local subsidiaries, holding companies and even other joint ventures as vehicles for counterparty interactions. Performance of the contract is often shared among the 'outer' members of the corporate group, with the 'centre' supplying command, capital and expertise. Similarly, when disputes arise in joint ventures that involve national oil companies, they are often complicated by politico-strategic factors. For example, when a national oil company is involved, the existence of a dispute may implicate the host state. If a claim is made against a national oil company, the claimants may wish to join the host state on the basis of international law principles of attribution and state responsibility, or even bring the claim directly against the host state under an investment treaty.\(^{51}\) The published awards — of which there have been dozens in the last decade — show that these types of claim raise complex questions of jurisdiction and admissibility. Alternatively, the claim for attribution may be made at the enforcement stage, when the successful

\(^{49}\) Id., at 132.

\(^{50}\) Ibid.

\(^{51}\) The procedural options open to the claimant investor will vary depending on the investment treaty in question. When drafting the arbitration clause, if the host government is a party to the agreement in question and the Washington Convention, it must be determined whether the Rules of Procedure for Arbitration of the International Centre for Settlement of Investment Disputes (ICSID) would be appropriate and, if so, whether an alternative arbitral institution should also be selected for disputes for which ICSID may lack jurisdiction. In choosing an institution, account should be taken of various issues, including the historic forum preferences of the state respondent (eg, eastern European states display a preference for the Stockholm Chamber of Commerce), the possibility of intervention by third parties (either as proper parties or by way of amicus briefs) and whether any aspects of the claim might make it susceptible to set aside proceedings at the seat (or annulment in the ICSID system).
joint venturers engage in 'hot oil litigation' in an attempt to attach the assets of the national oil company (or the host state) in other countries.\textsuperscript{52}

\textbf{8.4.3 Subject Matter}

The second reason why arbitration of oil and gas joint venture disputes is often afflicted by procedural problems is subject matter. Oil and gas projects are high-risk ventures involving large-scale capital commitments over long periods. When disputes arise, the parties often want more than money. For this reason, when arbitrations occur in this context, claimants regularly seek orders of specific performance and declaratory relief, rather than damages, as a means of 'getting what they bargained for'. To return to the dilution example, the non-defaulting parties might seek a declaration that the defaulting party is in default, and that they are entitled to dilute its participating interest in accordance with the dilution provisions of the JOA. It may also be necessary for the non-defaulting parties to seek an order of specific performance that compels the defaulting party to transfer its registered interests in the relevant permits to the non-defaulting parties.\textsuperscript{53}

The occurrence of a default can raise difficult legal issues, as a participant's failure to answer a cash call may place the operation in jeopardy and require the other participants to make up the difference on short notice. Devices used to deal with default include:

- forfeiture;
- 'withering clauses';
- abatement or dilution of the defaulting party's interests;
- liens; and
- loss or suspension of rights to production, rights of purchase and claims for debt (including charges over the defaulting party's participating interest and other assets).\textsuperscript{54}

\textsuperscript{52} Supra note 2 at 132.
\textsuperscript{53} Ibid.
Not all legal systems recognise the enforceability of these types of arrangement or the powers of arbitrators to grant the types of relief necessary to carry them into effect. Unless the parties have chosen appropriate bodies of substantive and procedural law to govern their contract and any arbitral proceedings that may occur under it, their prayers for relief may be denied.\textsuperscript{55}

Similarly, it will often be of the utmost importance that the parties continue to perform their obligations while the arbitration takes place. In the deadlock example, if the parties cannot agree on the expenditure proposed, the progress of the project may be obstructed and the good standing of the permits may ultimately be jeopardised (eg, by failure to maintain the minimum works timetable agreed with the regulator). In this situation, interim measures of protection may be required, for example to compel continuing performance of minimum works obligations pending final determination of the dispute as to voting rights. In the dilution example, the defaulting party may need interim measures of protection to prevent the non-defaulting parties from diluting its participating interest. However, like specific performance and declaratory relief, the availability of arbitrator-ordered interim measures of protection will depend on the arbitration agreement and the lex arbitri.\textsuperscript{56}

Subject matter can also raise questions of arbitrability. For example, where the liability of the joint venture under the public laws of the host state is at issue (eg, in the HSE example), it may

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\textsuperscript{55} Ibid.

\textsuperscript{56} Most arbitration rules now expressly address the issue of interim measures of protection. For example, see Article 26 of the United Nations Commission on International Trade Law (UNCITRAL) Rules; Article 28 of the 2012 International Chamber of Commerce (ICC) Rules; Article 34(a) of the American Arbitration Association (AAA) Commercial Rules; Article 25(0 of the London Court of International Arbitration (LCIA) Rules; and Article 183 of the Swiss Private International Law Act.
be impossible to resolve questions of secondary (ie, joint venture-level) liability without impinging on the exclusive jurisdiction of the courts of the host state. Similarly, dilution disputes can also raise questions of arbitrability insofar as they may ultimately go to the 'public status question' of which party holds a registered interest in a given exploration permit.  

Another common source of arbitrability arguments is corruption. The principal assets of an oil and gas joint venture are the exploration and production permits that it holds. Obtaining and maintaining these permits requires a direct and constant interface with representatives of the host state. Over the lengthy duration of an oil and gas project, these host state representatives may invite or require the investors to make payments in cash or kind to 'keep the ink flowing'. If a dispute arises, these dealings may undermine the enforceability of the joint venture agreement. While under the laws of many leading seats an allegation of corruption will not void the arbitration agreement, such an allegation makes good stock for non-arbitrability (and related admissibility) arguments. The application of 'long-arm' statutes such as the US Foreign Corrupt Practices Act can also play a part in this context.

International relations may also trigger arbitrability and admissibility arguments. The recent experiences of certain oil and gas companies in Libya and Syria illustrate how UN and EU trade sanctions — the effects of which may be framed in terms of hardship or force majeure — can implicate the authorities and prerogatives of international arbitrators. Given that, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) system, non-arbitrability is a ground for refusing to enforce the award, great care needs to be taken to ensure that these issues do not ‘infect’ the award. The best way to manage the risk of non-arbitrability is to select an advanced, 'arbitration-friendly' seat for the tribunal. However, due to the multiplicity of laws that can govern arbitrability, even with the selection of an advanced seat, the risk of non-arbitrability findings in enforcement courts may remain.

57 Supra note 2 at 134.
58 15 USC Sec 78dd-1, et seq.
Ultimately, the appointment of experienced arbitrators is the best insurance that the parties can take out.

8.5 Procedural Problem Solving

The best way to solve procedural problems is to anticipate them. The long-term nature of an oil and gas joint venture is such that the eventual occurrence of a dispute should, as a matter of prudence, be assumed. The officers and staff tasked with the day-to-day management and operations of the joint venture must be trained so that they develop a 'dispute resolution-oriented culture'. It must be understood that the occurrence of dispute is not a failure per se — what constitutes a failure is the inability to anticipate a possible dispute and be ready to deal with it efficiently when it arises.  

Arbitration is a highly specialised discipline, and anticipating when and how arbitration will occur requires specific expert input. The need for the assistance of experienced arbitration practitioners is heightened by the fact that the law and practice of international arbitration is in a phase of rapid, user-driven development. Oil and gas companies are among the biggest users of arbitration, and so many of the areas in which the jurisprudence is developing fastest are directly relevant to oil and gas joint venture dispute resolution. These areas include:

- the ways in which the jurisdiction of the arbitral tribunal can be extended to non-signatories; and
- the powers of arbitrators to grant interim measures of protection and non-monetary relief, such as orders of specific performance and declarations.

With the selection of the right governing law and arbitration rules and the proper drafting of the arbitration clause, it is possible to obtain the benefit of these developments and avoid many of the procedural problems that are experienced when oil and gas joint venture disputes go to arbitration.

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60 In this regard, oil and gas companies would do well to observe the contract management practices of large construction companies, where compliance with correspondence and record-keeping protocols when lead to significant time and cost savings in document production and witness preparation required for arbitration.

61 Supra note 2 at 135.
8.5.1 Multiple Parties and Joinder of Non-Signatories

In relation to multi-party arbitration, the choice of seat is crucial. If the joint venture will (or may) involve more than two parties, care should be taken to select an appropriate seat for the tribunal. Even within the group of leading seats, some are better developed than others when it comes to multi-party arbitration. Understanding the tolerances of each seat is a fine point. For example, it is often said that French law has recognised the so-called 'group of companies’ doctrine' as a basis for exercising jurisdiction over non-signatories.62 There is some exaggeration in this, in particular because there is no such equivalent doctrine in French company law. What is known as 'group of companies doctrine' in international arbitration could be more precisely defined as a presumption of consent to arbitration; in other words, where companies share a number of common factors including corporate branding, ultimate shareholders and senior management and where a non-signatory company within that group had some form of involvement in the circumstances of a given dispute, this non-signatory company can be presumed to have accepted to be bound by the arbitration clause entered into by one or several of the other group companies. This doctrine has its origins in International Chamber of Commerce (ICC) jurisprudence and has been accepted by a number of arbitral tribunals63 and national courts64 in recent years. In other jurisdictions, such as England,65 the courts have displayed a preference for contractual and equitable theories (eg, agency and estoppel) as bases for 'joining' non-signatories.66 The ability to invoke equitable estoppel as a basis for exercising jurisdiction over non-signatories is also recognised in ICC

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63 See, for example, ICC Case 5721; ICC Case 6519; ICC Case 8910; and ICC Case 11405.

64 See Supreme Court of Singapore, Aloe Vera of America Inc v Asianic Food Pte Ltd (20071 YCA 489; Swiss Tribunal federal, ASA (1996) Bulletin 14; and in Australia see Attain Kinder LLC v 114C Mining Inc 120111 VSC 1.

65 See, for example, Corniest Farms, Inc v C&M Farming Ltd (2004) 1 Lloyd's Rep 603, where the English court rejected the existence of the 'Group of Companies Doctrine' in English law.

66 International Paper Company v Schwabedisen Maschinen Sr Anlagen GbH, 206 F3d 411 (Fourth Circuit, 2000). In French law, estoppel is known as "le principe de Pinterdiction de se cotredire au detriment d'autrui". As opposed to English law, in French law the notion of estoppel is intimately linked to that of good faith. On this nuance, see J’l’insolle, "Distinction entre le principe de restoppel et le principe de bonne foi dans le droit du commerce, international", (1998) MI 905. See also E Kleiman, "Stop! Definition necessaire de Pestoppel, entre fisveur n’Parbitrage et droit sraeces au Inv", (CV 2010, 303.)
jurisprudence.\textsuperscript{67} When the choice of seat is made for a dispute resolution clause in a multi-parry contract, care must be taken to avoid jurisdictions where the courts are hostile to these principles, or where narrow notions of privity prevail in the arbitral context.

The choice of seat does not overcome all of the problems that can be associated with the exercise of jurisdiction over non-signatories. This is because once the arbitral tribunal finds that it does have jurisdiction over a non-signatory, that non-signatory will be entitled to the full set of procedural rights enjoyed by the other parties, including the right to appoint an arbitrator. As the Dittco case\textsuperscript{68} illustrates, denying a party the right to participate in the formation of the tribunal will be a ground for setting aside or refusing to enforce the award. In practice, two main approaches can be taken to mitigate the 'Dutco risk':

- Where the parties have a preference for a three-member tribunal, the parties should use arbitration rules (e.g., the 2012 ICC Rules\textsuperscript{69}) which provide that in circumstances where there are three or more parties and the parties cannot 'form sides' for the purposes of appointment, all three arbitrators will be appointed by an agreed appointing authority; or
- The parties can simply agree to a sole arbitrator who, in the event that there are three or more parties and no agreement can be reached, will be appointed by an agreed appointing authority.\textsuperscript{70}

Taking either approach will minimise the Dutco risk and go a long way to ensuring that if a non-signatory is brought into the proceedings, that party is not denied its fundamental procedural

\textsuperscript{67} MW Buhler and Ill Webster, Handbook of ICC Arbitration (2005), 100. For example, estoppel by 'direct benefit' was accepted as a basis for exercising jurisdiction over non-signatories in ICC Case 2375 of 1975 and ICC Case 5730 of 1998.

\textsuperscript{68} Cass, Civ I, Siemens AG v Dian, Construction Company, January 7 1992. The rate began as an ICC arbitration commenced by Dutco against BKNi1 and Siemens. The three parties were members of a consortium formed to construct a cement plant in Oman. When a dispute arose, it became evident that the contract did not indicate how the arbitrators were to be appointed, and yet the two respondents were unrelated corporations with differing interests and failed to agree on the appointment of an arbitrator. The two respondents in Dutco were indeed independent and had potentially conflicting interests in the arbitration. As Eric Schwartz notes, the claimant had separate and distinct causes of action against each of them. See EA Schwarz, "Multiparty Arbitration and the ICC in the Wake of Dutco", (1993) 110 Int Arb 5. See also R Ugarte, T Bevilaqua, "Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions", (2010) 27(1)7 Int Arb 9.

\textsuperscript{69} Article 12(8) of the 2012 ICC Rules.

\textsuperscript{70} See Article 12(8) of the 2012 ICC Rules; Article 7(2) of the UNCITRAL Rules; and Article 8.1 of the 1998 LCIA Rules.
rights. Experience suggests that the optimal combination of law and rules is, for this purpose, French procedural law and the 2012 ICC Rules. An alternative combination would be English procedural law and the London Court of International Arbitration (LCIA) Rules.71

If the joint venture comprises multiple contracts from the outset, such as an SBGA and a JOA,72 the parties must ensure that the dispute resolution provisions of each contract are identical, and that either the law of the seat or the chosen arbitration rules (or ideally both) allow for consolidation of related disputes. Again, some seats are ahead of others in this regard. For example, Australia has enacted a 'Model Law Plus' consolidation provision in its international arbitration statute,73 making it a suitable seat for multi-contract arbitration. If the chosen arbitration rules do not allow for consolidation and the law of the preferred seat is also silent, the tribunal can be empowered to consolidate by express stipulation in the dispute resolution clause. Returning to the AIPN model contracts, this can be achieved by selection of Article 18.2, Option (D)(4) of the AIPN JOA 2002.74

8.5.2 Sovereign Immunities

Regarding party characteristics, as has previously been observed, the involvement of national oil companies can raise problems of sovereign immunity. Given the commercial nature of joint venture agreements in the oil and gas sector, the 2002 AIPN model JOA added a waiver of sovereign immunity clause to Article 18.4. The purpose of this waiver is to prevent a government-owned party from claiming sovereign immunity in relation to dispute resolution proceedings or, more broadly, any action brought to enforce any decision or settlement, award or judgment against it. To use the example of a joint venture in which a national oil company will participate, the

71 See D Mildon, "Unique Issues in Oil and Gas Disputes", (2006) 3(5) TOM 1. In response to the Dutco decision, the ICC, AAA and LCIA have recently adopted Rules that allow the institutions to appoint all arbitrators when there are more than two parties to an arbitration and either all claimants or all respondents are unable to agree on the joint appointment of an arbitrator for their side. See ICC Rules Article 12(8); AAA International Rules Article 6(5); and LC1A Rules Article 8.1.

72 In 2002 the AIPN JOA revision committee rightfully decided to address the possibility of multi-party arbitration. In the event of a lack of agreement, the model JOA currently provides that the arbitral institution must appoint either the arbitrators not already appointed or all three arbitrators. The second alternative thus addresses the Mato dilemma.

73 See International Arbitration Act 1974 (Cth), Section 24.

74 See also Article 20.2, Option (D)(4) of the AIPN UOA 2006,
commercial parties would be well advised to seek an express waiver of sovereign immunity from both jurisdiction and execution.\textsuperscript{75}

\subsection*{8.5.3 Fast-track Arbitration}

For certain parties, time is of the essence. This is especially true of operators and junior farmees. A common complaint of oil and gas companies is that, in disputes that are essentially only about the payment of joint venture costs, arbitration takes too long. If it takes two years to get an award, the cash flow of the joint venture (and the parties to it) may be damaged, potentially beyond repair. One way of solving this problem is by agreeing to use a special procedure for disputes in relation to authority for expenditure and cash calls, such as 'baseball' arbitration.\textsuperscript{76}

In a baseball arbitration (also referred to as 'pendulum' arbitration), the proceedings are tightly programmed and the parties must put forward their best offer. The arbitrator's mandate is then usually limited to accepting the offer of one party or the other, a model which is seen as ensuring that both parties make the most reasonable offer possible. An example of this baseball model can be found in the AAA Rules.\textsuperscript{77} Naturally, this form of arbitration is inappropriate for complex disputes. Accordingly, if the parties wish to include a baseball option, the arbitration agreement must be carefully drafted to ensure that the circumstances in which baseball arbitration can be used are clearly defined. Specialist assistance is essential in this regard.\textsuperscript{78}

Another way to resolve this issue is to effectively combine a 'classic' institutional arbitration clause (eg, an ICC or LCIA model clause) with a bespoke fast-track procedure. Some institutional rules are better suited than others to this kind of tailoring. For example, the ICC allows the parties to shorten the various time limits set out in the rules.\textsuperscript{79} However, for this to be effective, one needs to set reasonable and realistic time limits, define milestones for each step in the proceedings (including the issuance of the award), and allow for some flexibility where this is necessary to ensure compliance with principles of due process.\textsuperscript{80}

\textsuperscript{75} \textit{Supra} note 2 at 137.
\textsuperscript{76} \textit{Ibid.}
\textsuperscript{77} See the Rules for Expedited Procedures of the American Arbitration Association.
\textsuperscript{78} \textit{Supra} note 2 at 138.
\textsuperscript{79} See Article 32(1) of the 2010 ICC Rules and Article 38(1) of the 2012 ICC Rules.
\textsuperscript{80} The ICC Rules are well developed in this respect. They provide that the court, on its own initiative, may
8.5.4 Subject-Matter Issues

While subject matter-driven problems are more difficult to account for, they can, to some extent, still be managed in advance through the selection of an appropriate seat and the inclusion of specific empowering language in the arbitration clause. To use the common example of remedies, because certain types of joint venture dispute may require the availability of specific performance and declaratory relief in order to be resolved, it is essential that these remedies be available to arbitrators under the procedural law that governs the arbitration. It is not enough that the arbitration agreement states that the arbitrators can grant these types of relief, as the procedural law of the arbitration may contain mandatory prohibitions that invalidate these aspects of the compromis.81

In many countries, the arbitration law recognises a presumption (sometimes referred to as 'seat theory' or 'approche territorialiste) that by selecting a certain seat for the tribunal, the parties intended that the law of that jurisdiction would be the procedural law of the arbitration.82 While there is a view that specific performance and declaratory relief are general principles of law83 or even part of the emerging procedural lex mercatoria, the safer view is that the availability of these remedies is a jurisdiction-specific question. Accordingly, parties to upstream joint venture agreements should check whether these remedies can be granted by arbitrators before the choice of seat is finally made. England is an example of a jurisdiction where the arbitration law expressly empowers arbitrators to grant specific performance and declaratory relief.84 French law also extend any time limit which has been modified by the parties if it decides that it is necessary to do so in order for the arbitral tribunal and the court to fulfil their responsibilities in accordance with the rules. See Article 32(2) of the 2010 ICC Rules and Article 38(2) of the 2012 ICC Rules.

81 Supra note 2 at 138.
82 'Seat theory' is not accepted everywhere. For example, French international arbitration law refuses to consider that the mere fact that the seat of arbitration proceedings is in France subjects the arbitration to the French legal order. This approach is known as ‘delocalisation’ and can be distinguished from the approche territorialiste that prevails in certain other jurisdictions. For this proposition, see P Mayer, "L'obligation de concentrer la mature s'impose-t-elle d.s l'arbitrage international", 120111 Cahiers de !Arbitrage, p 418 ; E Gaillard and J Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration,635 (first edition, 1999), ; and D Hascher, (2005) Repertoire de droit international, pars 113.
83 See, for example, ME Schneider, "Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice", (2011) in ME Schneider and J Knoll (eds), ASA Performance as a Remedy 6, where the author comments: "More thorough examinations of the subject have shown that specific performance is so widely available in legal systems that it can be considered a general principle of law.” See English Arbitration Act 1996, Section 48(3) of which allows for declaratory relief, and Section 48(5)(b) of which permits arbitrators to grant specific performance.
recognises the power of arbitrators to grant specific performance\textsuperscript{85} and to order a pecuniary sanction - generally a lump sum payable for each day of delay (known as an `astreinte') - in addition to a principal order, in the event that the debtor does not comply with the principal order within the timeframe set by the judge.\textsuperscript{86} The selection of these seats is therefore advisable for parties entering into FOAs and JOAs in which the obligation to contribute to joint venture expenses is backed up by default and dilution rules.

8.6 Conclusion

This chapter has described the main reasons why upstream oil and gas joint ventures are prone to disputes and why the arbitration of such joint venture disputes can lead to certain procedural problems. Proper drafting of the arbitration clause, including express reference to the remedies that are essential to preserve the intended risk allocation and essence of the bargain, can help parties to avoid many of the procedural problems that are too often experienced when joint venture disputes arise.

The fastest route to safety is through the use of the options offered in many model joint venture contracts, such as those of the AIPN suite. But for some matters, bespoke drafting is required. Examples include fast-track procedures and waivers of sovereign immunity. For these elements, a balance must be struck between simplicity and efficacy, the key being to avoid creating problems in the process of anticipating them. After all, the experiences of many parties illustrate that it is certainly possible to be 'too clever' when drafting an arbitration clause.

The dispute resolution 'wish list' of any international oil and gas joint venture participant should be an advanced, arbitration-friendly seat (where the courts do not unnecessarily interfere), modern institutional rules and a tribunal with powers that are clearly defined and which allow for the bargain struck to be enforced. Laying due attention to these elements of the arbitration clause


\textsuperscript{86} See, New Article 1468 of the Code of Civil Procedure, which provides that the arbitral tribunal has the power to order any interim measure and to subject its performance to penalties.
will ensure that, to the fullest extent possible, joint venture participants enjoy all of the unassailable advantages of arbitration, including neutrality, speed and enforceability under the New York Convention.