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# Understanding joint venture agreements in the Nigerian oil industry

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**Abstract**
Joint Ventures the world over is a contract-hatching partnership platform for heralding the growth and development of oil exploration. Of a fact, Joint Venture contracts have proven to be the most advantageous for the prompt and efficient operation in the Nigerian oil and gas industry as about 71.43 percent optimality of the Joint Ventures are accorded both government and oil companies with the participatory interest in the oil and gas exploration, development and production. This paper attempts to expose peculiar insights into the understanding of Joint Venture Agreements. It identified the reasons for entering into a joint venture agreement, analysed the kinds of Joint Venture Agreements enterable by Operators and highlighted the basic factors to consider before entering into a functional Joint Venture Agreement. This paper concludes that by agreeing that in the effort to distribute risk, maximise the use of investment capital and divide the heavy costs of construction and operation, most developing countries seeking capital often resort to joint venture arrangements as one of the most flexible arrangements available and that there is a blend of mandatory economic and political forces that bring this form of operation into ever increasing use. Whilst the considerable amount of sovereignty is restored to the government's fiscal powers, the significance of such an extension of sovereignty is that once accepted by the company, it further reduces the areas where conflict can be expected, irrespective of the unacceptably high rate of failure of the Joint venture. Similarly, successful joint ventures are considered as fostering the achievement of the major goals by each partner with clear goals within the stipulation and understanding of the objectives, interest and contributions of the joint venture partners.

**Keywords:** understanding, joint venture, agreements, oil and gas, host state

## Introduction

Joint Venture Agreements in the oil and gas industry typically refers to a contract between two or more oil and gas companies for the purpose of development and production of oil and gas properties, but most often times does not include joint exploration activities or marketing activities [1].

## Reasons for Entering into a Typical Joint Venture Agreement.

The objectives of each joint venture are basically the same. The terms and conditions vary somewhat from one agreement to another. Under this kind of arrangement, exploration plans are to be prepared and implemented, either directly by the foreign partner or through the agency of an operating company. Exploration should be to the maximum possible extent and in conformity with good oil field practice, and periodic progress reports should be submitted to the National Company. It is common place for the foreign partner to provide the capital at its own risk and is committed to spending agreed minimum amounts of money in a certain agreed number of years. If, unfortunately, after an agreed number of years, exploration does not result in a commercial discovery, the agreement automatically becomes ineffective. The multinational company, MOC will therefore not be reimbursed in any way. If, on the other hand, exploration does result in commercial discovery, the host country will have to reimburse the foreign partner for its share of the exploration expenses in accordance with a predetermined procedure [2].

The Agreements contain such obligations because of the potential conflict between the host country and the transnational oil company which arises from the motivation of exploring for oil. The purpose of these clauses is to make certain that the foreign oil company maximises input into exploration, not only to maximise the delay between the signing of the Agreement and the date of commercial discovery, but also to maximise the data produced for use by the host country.

Furthermore, the signature bonus paid by the multinational or international oil company when the Agreement is first signed has been common everywhere, notably in the Iranian Agreements. It has two main purposes: mainly, to increase the revenues and to speed up exploration activities. Which of the two is more important depends on whether the bonus is recoverable or not. In a situation where the bonus is non-recoverable, it provides no incentive to speed up exploration and can be regarded as a way of increasing revenue for the host country, but in the case where the bonus is recoverable from future earnings subsequently, most probably *ceteris paribus*, it clearly constitutes an incentive to the company to find commercial oil as soon as possible so that it can begin to recover its expense on the bonus [3].

In addition, the bonus also acts as an advance on revenue to the host country in the sense that the host country gets an interest free loan if a discovery is made, while if no commercial discovery is made the host country has at least gained some revenue in the form of the bonus. For instance, Iranian vintage agreements with Shell and the Tidewater Group, both of which failed to find commercial oil, paid to Iran $99 million, a sum equivalent to 55% of the consortium's payments to Iran in the same year. Most times, the signature bonus is intended to be a sign of the prospects for the area; nevertheless it has frequently proved an

inaccurate measure [4]. Minimum work obligations in terms of financial expenditure and or the number of rigs to be operated or the metres to be drilled are prevalent in all the agreements. Such a bonus provides the most direct encouragement to the foreign company to maximise input and minimise lag.

However, the only downside is a probable lack of flexibility if the obligations implicit are in technical rather than purely financial terms [5]. A commentator has remarked that if the foreign company can withdraw before the end of the contract period, then a minimum work obligation becomes meaningless. Some Agreements, nevertheless, cover this by forcing the foreign company to fulfil certain obligations before opting out and to pay compensation if these obligations are not met [6].

Normally, in a Joint Venture Agreement, the foreign company provides the financial resources and technical expertise. In addition to marketing its own share of the oil, the Transnational Company also undertakes to market part of the entire share of the national entity, if the latter so wishes. The Joint Venture generally lasts between 25 and 30 years, extendable for a further time of around half the original tenure. The effective date of the Joint Venture can either be the date of the beginning of commercial production, which tends to make the term of the agreement run separately for each field in which commercial oil has been found, or the date on which the agreement was signed or the Law of authorisation published in the official gazette, which normally makes the duration the same for all fields, regardless of the date of commencement: Egypt is a classical case. The Agreement might also make some provision for the amendment of the original contract to incorporate the improved terms that the National Oil Company might subsequently obtain under similar Agreements with other partners.

A relinquishment program regulates the Joint Venture so that after a predetermined period of time the Joint Venture will be left only with areas where commercially exploitable deposits have been discovered. While this is expected to speed up exploration, a too rapid rate of relinquishment may well defeat its own end since the company may not have sufficient time to carry out the work properly. How far this is likely to happen depends on the size of the area to be covered and the uncertainty attached to the area. One would have thought the relinquished area may have an enhanced value for the host country since it is an area in which the level of uncertainty has been reduced and the area can be re-let, except for the fact that all the evidence is very discouraging [7]. In addition, the sharing of profit is usually a fifty-fifty formula which was already in operation under the concession regime when these joint venture agreements were first introduced. Such agreements have also provided for payment of rent and royalty. A good example is the one stipulated under the renegotiated Getty Agreement of 1968 in Algeria, where Getty undertook to reinvest 75 percent of the profits of the sale of oil.

**Kinds of Joint Venture**

There are essentially two types of joint venture being operated in the Nigerian oil and gas industry, they are-contractual joint venture and equity joint venture.

**Contractual Joint Venture**

A kind of joint venture broadly espoused is described as a contractual joint venture or a joint structure. The contractual joint venture is particularly common in joint ventures whose purpose is mineral exploitation. The device, even though infrequently dealt with as a distinct form of business organisation in the civil law or common law countries of the world, is nevertheless virtually always available under the general principles of contract law. The contractual joint venture, which depends almost wholly upon the mutual agreement of the parties, is highly flexible. The joint venture does not assume a separate corporate identity, as the partnership is a not constituted into a joint stock company. Instead, an operating Company which is non-profit making in nature and registered under the Local Laws of the host country, is usually formulated to act as an agent for both the foreign and national oil companies [8]. Its capital is contributed on an equal basis. The Company is mainly responsible for production and oil produced is handed over to each of the partners in equal shares. The petroleum produced is not jointly owned; each party owns 50% of the undivided shares and consequently owns its share of production.

It is important to note here that although ownership of any petroleum discovered is joint and the operating company is jointly owned, the entire risk capital for exploration was to be furnished by the foreign partner. In the event that no commercial discovery was made, the loss was exclusively borne by the foreign partner. In the event of a commercial discovery being made, the jointly-owned operating company would be remunerated out of the revenue earned. During the exploration period, a joint venture acts as an agent only of the foreign partners while in the development and production, it acts as an agent to both parties.

Furthermore, a possible handicap of a non-profit-making company is that it may not have at its disposal any reserves and could face operational limits approved by the partners. In practice, however, the budget can be planned so as to leave enough margin of financial freedom to the management. Also, as an agent, it has powers to take any action obligatory in case of an emergency. Commentators are of the view that “The legal structure established by the 1965 agreement is not expected to hamper efficiency of management although it is not denied that in certain exceptional circumstances it could be an obstacle” [9]. The provisions regarding joint structure agreements have been gradually strengthened over the years.” [10] In addition, the joint structure agreement provides for a signature bonus. The financial provisions in the joint venture agreements, while proceeding on the basis of equal sharing of profits between partners as under an equity joint venture, in effect yielded a more favourable result to the government. The signature bonus paid by the foreign company when the agreement is first signed, even though not used in Egypt, has been widespread, particularly in Iranian agreements. The provisions and operation of the signature bonus has been discussed in Section 3.10 above [11].

Slight variations in Contractual Joint Venture agreements are common. For instance, the agreement between NIOC/PAN-AM stipulates that if a partner is unable to provide the necessary funds, such a partner could resort to raising a loan or securing the necessary funds by any other method, provided that such method must have been agreed upon by the two partners.

Date for Commencement and defining the nature of activities is usually not uniform. After the commercial

discovery of oil, the operating Company normally assumes the role of agent for both the National and Foreign companies. However, there are other Agreements, where the operating companies are to be established only upon commercial discovery of oil and within 30 days thereof. This method or form of business cooperation has been preferred by the American oil companies because under the United States Tax Laws, American Companies investing abroad may obtain considerable fiscal advantages if they can prove to the tax authorities that they have direct ownership of their part of the production when such proofs are established. Such American companies are entitled to deduct certain intangible expenses from the taxable account in the year of occurrence. In addition, the Company is also allowed depletion allowance [12], which supposedly is a form of fiscal compensation for the depletion of deposits each year.

One can safely state that in a contractual joint venture arrangement, the National partner obtains exclusivity of title and ownership over installations and production and the foreign partner is limited to contractual rights for commercial compensation. One writer [13] is of the view that the joint venture system of association is totally different from the traditional concession system. When developments are made in the areas explored, "The host country participates directly in the management of the joint company through its own management, administration and technical personnel ensures that the country's interests are represented in all decisions affecting the winning of the oil revenue, whilst, at the same time the staff are acquiring training and experience."

Equity participation in the local subsidiaries of Transnational Corporations does not substantially mean participation in the downstream operations of marketing, processing, procurement etc. of the Transnational Corporation [14]. It would appear that the law applicable to a contractual joint venture is generally for the parties to decide. In deciding their view, in particular, it is necessary to require the incorporation of a provision to settle disputes and to surrender to a modus operandi for resolving them. The non-existence of any preceding agreement on the applicable law can lead to adverse consequences, for instance when A and B, domiciled in two different countries, coalesce to perform a contract in country C, the laws of which may not be particularly appropriate to governing the relations between the parties and may even be hard to establish. Most times the purchasing country maintains that its law is applicable to the supply contract. The fact is that the parties may have little choice but to agree to that arrangement, even though they may well wish their own internal relations to be managed as completely as possible by some other law with which they and their advisers are more familiar [15]. A case of two parties, one American and one English, choosing English law to govern their relations in a joint oil exploration venture in Libya is dealt with along these lines in the mentioned case. As far as can be inferred from the published material, this case is not a joint venture as defined here, since the entire management of the project appears to have resided in one party and the sharing arrangements are also at least somewhat special. Lord Brandon in the House of Lords' decision refers to it as a 'combined adventure'. The result would be that the joint venture arrangements would be governed, for instance, by Egyptian law but the supply law would be governed by the laws of the purchasing country. An additional choice is to acknowledge the local system of law, but to be in agreement to adjudicate in a third, unbiased country, e.g. Algeria.

In a situation where a corporate entity is formed, the agreement which constitutes the corporate body automatically settles the law applicable to that entity as a corporate body. The laws of some countries, e.g. France, do not recognise as valid agreements between shareholders about the conduct of a company. In choosing where to locate a corporate entity, these questions of applicable law must play a significant role, just as these and related questions, such as the language governing an agreement, have been received from the point of view of a US participant [16]. Where a corporate joint venture is being formed to carry out activities in a particular territory, the requirement for local credibility will frequently dictate that the joint venture is corporate under the laws of the country concerned [17]. Furthermore, it would appear that while most legal systems allow contracting parties latitude in arranging their affairs, joint venture contracts belong to the group covered by the phrase complex long-term contracts. This, in some legal systems, particularly on the Continent of Europe, may mean that they are subject to renegotiation and probable judicial or arbitral modification in the event of an essentially changed state of affairs [18]. Also, in international joint ventures, it must be remarked that arbitration clauses can often be found in the joint venture contract. This, coupled with the choice of a governing legal system which would be neither party's first choice but may perhaps be in the law of the country where the arbitration is meant to take place, is occasionally considered an appropriate compromise. There is no doubt that a court or arbitrators might, in certain state of affairs, regard such a choice of law as invalid; and even more critically, it may, if upheld, lead to quite unexpected results unless the parties have totally satisfied themselves about the consequences of the legal system of their choice on any interpretation of their contract. In particular, in some jurisdictions, arbitrators have the right to adjust a contract to what they see as apposite in the situation [19]. It has been recommended [20] that in international joint ventures relating to numerous parties there is a good case for multi-party arbitration. This would appear to have validity where all parties request a declaration of the same problem, and has the addition advantage of reduction in time and costs. However, it must be borne in mind that notwithstanding any provision for multi-party international joint venture arbitration, scores of disagreements may possibly not be of such a nature as to be amenable to arbitration in that type of forum.

There is a growing recognition that the progression from a traditional concession regime to a joint venture does not significantly affect the location of control of the decision making process, so long as a Transnational Corporation continues to manage the undertaking. In short, the mere acquisition of a majority equity interest does not disentangle the extractive industries of developing countries from the global network of Western Transnational Corporations or the occurrence of the old international economic order. Unless transfer of ownership is matched by a meaningful transfer of essential managerial powers and the acquisition and mobilisation of technical expertise for the purposes of effective management, a growing country will be mostly illusory in controlling this area [21].

**Equity Joint Venture**

Equity Joint Venture (Under the Italian approach) is usually characterised by closer partnership ties. The joint venture is a separate entity in the form of a joint stock company created under the local laws of the host country to conduct, as a corporate body, all phases of the operations, as well as the marketing of oil. These types of joint venture encompass arrangements where direct and significant participation in the investment is made by the two parties to the company. Know-how, technical assistance or personnel are made available under the contract between the operating company and the foreign partner. The operating company is run as an independent corporation, with profits distributed to the parties to the joint venture in the form of dividends. The parties exercise control of capital stock. Policy and other major decisions are made by the organs of the operating company. Autonomously, in theory, of the holding companies, in the equity type of joint venture, the ratio of participation varies between a foreign minority, a foreign majority and a 50-50 arrangement. In no case is the mutual control by the parties affected. When the local partner has a minority of interest, it may still enjoy a right of veto. When the foreign partner is in the minority, the local party's need for technical assistance and know-how may result in giving the foreign partner being given a degree of control superior to its voting power.

Further, it can be remarked that the earliest joint ventures were those established by ENI and certain Egyptian concerns and by Agip Meraria, an ENI subsidiary, NIOC of Iran, both in 1957 [22]. In this case, each partner owned 50 percent of the equity. The company was in charge of the functions of exploration and sale of any crude oil or other hydrocarbon that was produced. It has been argued that "The symbolism of the joint venture lies not simply in its jointness and in the existence of an entity called a State Oil Company, but also in the fact that the territory is not licensed solely to a foreign oil company." [23] Agip could retain only those areas in which commercial quantities of oil were discovered. A commercial quantity embodied in the ENI-Agip agreement was as follows:

*'The yield capacity of a petroleum field in commercial quantities in which a commercial quantity will, under prevailing conditions, be estimated when the amount of oil extraction reasonably foreseeable is such that when the cost price of delivery seaboard, calculated on the basis of production costs plus transport and handling charges and an additional 12.5% of the posted price payable as a minimum for tax and duties to the Iranian government is deducted for the posted prices of a similar kind of petroleum, it would leave a reasonable margin of profit'.*

It is important to note that this Agreement, however, did not incorporate a mechanism which would enable one party to proceed to development at sole risk, in the event that there was difference between the parties on the assessment of the commercial prospects of a discovery. Such a problem however arose under the Agip – NIOC agreement. To correct such anomalies, a formal mechanism was incorporated in the Agip – NIOC agreement to deal with the deadlock. This mechanism was not satisfactory, even though it provided a formal procedure for resolving a deadlock; it was more akin to an adjudicatory procedure than one for arriving at a consensus in the interests of the joint venture.

Furthermore, with time, a more resourceful mechanism was developed and incorporated in later joint venture agreements to deal with situations where the parties did not agree on the commercial prospects of a discovery. A clause was inserted which enabled either party to undertake discovery at its sole risk". For this reason, the risk clause was incorporated in the Pan American – UAR Agreement of 1963, under which the operations were entrusted to the joint operating company, the Fayoum-Petroleum Company (Fapco).

The sole risk clause was invoked in the Abu Qir gas discovery in Egypt by Phillip in 1969, which the corporation did not consider lucrative but which, to suit domestic criteria, the government has decided to develop at its sole risk. To some extent the sole risk clause may make the definition of a commercial discovery redundant [24]. The sole risk clause allows either partner to develop a field at its own risk subject to certain conditions and provisions. This clause allows either side to opt out of the development of the find [25]. Nevertheless, the sole risk clause usually only becomes operative once the venture has been created, i.e. a commercial discovery has been formally declared which still leaves open the problem of defining the first discovery as commercial or otherwise. What the sole risk provision actually does is to make the precision of the definition less important, given that once the venture exists, neither party is obliged to commit itself to the development of the field as the result of a declaration of commercial discovery.

In addition, the "sole risk" clause has been praised as one of the commendable instances of elasticity made possible by the joint venture structure. The sole risk clause was introduced to provide a remedy for partnership problems where using arbitration clauses of the agreement was regarded by both sides as tantamount to a divorce [26]. In a situation where the sole risk operation has been wholly financed by the opposing party in case of a failure then the loss is borne by the opposing party only. But, on the other hand, if the sole risk operation is a success then after a certain time the opposing party has the right to join in the operation But a penalty rate must be paid to do that. In addition, the mechanism enshrined in the Pan American-UAR Agreement of 1963 provides a different form of flexibility for dealing with a situation when a project is endorsed by both sides but one party is either unable or unwilling to join in its financing.

In terms of the production phase, an obligation was imposed on the joint company to use all its possible efforts in order to raise to a maximum the sales level of production and for that purpose to develop the production of such fields so that production was achieved within the limits compatible with the most modern technical procedures in the oil industry. One conspicuous problem presented by the joint venture is the relationship between production and "offtake" by the respective parties. As long as both parties raise oil proportionally to their equity interest, there is no difficulty in the agreement. However, as a writer has observed, a "problem arises when there is a persistent under-lifter. The obvious solution would be for the over-lifter to provide the necessary additional capital, but this would create the problem of altering the equity share of the two sides.

Therefore, the over lifter must be able to buy crude from the persistent under lifter at a specific price. Intended for both parties to invest in the necessary capacity in such a way as to leave the equity interest unchanged, the under-lifter must receive a price for the crude oil which will provide a return on capital equal to or greater than a return from any alternative form of investment. The joint venture therefore

had to provide a mechanism to deal with a situation where one party is likely to persistently demand less crude in proportion to its equity than the other [27]. This is the period between early 1960 and late 1970 which was a period of falling oil prices and the crude oil market was generally slack. It was during this period that the host country's national oil companies sold crude oil and had difficulty in disposing of their offtake not to transform the crude oil processors. The Iranian situation, where NIOC was anticipated as the under-lifter is a classic example. Secondly, the price demanded by the under-lifter as compensation should not be so high as to have an effect on the level of demand of the offtake.

This situation is more discombobulated by the fact that, in a joint venture state of affairs, the foreign company and the host country require the crude for different purposes. The transnational oil company has entered the venture to secure the supply of owned crude [28]. Most transnational oil companies entering joint ventures till date have been crude deficit companies in the sense that their refinery capacities exceed their supplies of owned crude oil. This in essence means that the foreign company needs the crude as a refinery contribution. The host country's national company, on the other hand, will demand the crude as a revenue earner in a direct sense. The fundamental distinction is that the foreign company as an integrated operation is not unswervingly interested in maximising revenue at the production level of the operation, particularly with regards to one source of crude from perhaps many accessible to the company. The host country nonetheless, is interested in maximising revenue at this stage as a seller of crude [29]. This problem is dealt with by different mechanisms embodied in the provisions relating to marketing under the Agip-NIOC agreement. It is noted that one distinguishing feature between Joint Ventures, JVs and Production Sharing Contracts, PSCs is that whilst oil and gas operation funds are usually contributed by the JV Partners in proportion to their participating interests, it is not so under Production Sharing Contracts, the FOCs normally bear all the risks and costs of petroleum exploration and production, irrespective of the government's participation on commercial discovery [30].

## Concluding Remarks

It must be stated that Joint ventures, being business entities created by two or more parties in the industry to accomplish a specific task or business objective, whilst the partners retain and maintain their separate and individual identities must be viewed as an artificial initiative and business creation where there is shared ownership; shared governance and administration; shared profit returns and shared risk [31]. In drafting a valid Joint venture Agreement however, the following clauses like the object and scope of the Joint venture, the equity participation of the local and international investors; the Agreement to a future issuance of capital; the management committee, decommissioning action plan and funding; financial arrangements; composition of the board; management agreements, profit and loss distribution formula, sharing of risk, transferability of shares and liability, restrictive covenants on the company and workers, force majeure, voting procedure, appointment of CEO/MD, anti-compete clause, confidentiality, non-disclosure, indemnity clause, assignment, dispute resolution clause, control and decision-making clause, applicable law and tax considerations and liability[32]. Equally, since many of the provisions applicable to the typical joint venture agreement applies to the company and the shareholders as they normally pool resources together on a united front for a common commercial objective, it is imperative to find a typical joint venture being susceptible to the extant codes of corporate governance.

Moreover, since one of the primary objectives of a typical joint venture is the successful acquisition of foreign technology leading to rapid technological assimilation and adaptation which is a valid and requisite *sine qua non* for industrial development, economic progress, and technological self-reliance, gaining valuable insights into its successful operation remains very important to the relevant stakeholders in the industry.

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