

Model Contracts: a Survey of the Global Petroleum Industry

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The oil and gas business has pioneered the use of model contracts over the last fifty years. This article reviews the development of these model contracts throughout the global petroleum industry. It begins with the reasons for and benefits from implementing industry models. The article then discusses various approaches to how petroleum model contracts have been developed and the different types of models available. It provides a detailed analysis of model contracts published by different organisations and used in various jurisdictions around the world, including ones in the international industry. The article then concludes with an analysis of the factors necessary to successfully develop widely accepted industry model contracts.

‘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.’¹

The global petroleum industry is a huge, complex and multifaceted business.² Oil and gas companies engage in millions of transactions on a daily basis in every corner of the world. Each and every one of these transactions results in some form of a contract. Many of these contracts involve large sums of money, significant risk, huge liabilities and many difficult issues. Depending on their complexity, they take months and sometimes years to negotiate, draft and sign. Quite often, petroleum contracts set important international legal precedents.

For more than 100 years, the industry has developed a series of contracts for these transactions. Initially, companies negotiated and drafted their own set of contracts with each other. This took up significant time and resources. Sometimes, dominant players were successful in forcing other parties to use their contract. But more often, parties found that they engaged in a ‘battle of the contracts’ over using a particular contractual

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¹ *International Petroleum Transactions* (2nd edn, Ernest E Smith *et al* eds, Rocky Mountain Mineral Law Foundation, 2000), pp ii-iii.

² Daniel Yergin, *The Prize* (Simon & Schuster, 1991).

format. This approach failed to establish industry contract standards. Over the last several decades, the industry has taken an alternative approach and worked on a cooperative basis to develop and use various types of petroleum model contracts to gain the benefits of standardisation and efficiency.³

‘There have been many attempts over the years to produce standard proformas This has been an historical process. Firstly, companies sought to ensure their own internal pro-formas were standardised. Then they recognised they had to be regularly updated. This process, having been achieved in a particular region of operations, was then perhaps repeated on a worldwide basis within that company More recently the industry as a whole has tried to achieve something wider. If the process is to succeed, it will probably only do so at [an] industry level.’⁴

Defining model contracts

The concept of a model contract goes by many different names. It is sometimes called a ‘model form’, ‘model agreement’, ‘model form contract’, ‘contract template’ and a number of other terms that quite often describe the same thing. For purposes of simplicity, this article will use the term ‘model contract’ to describe these various formats. With a few exceptions, they tend to be models developed and endorsed by industry organisations on a cooperative basis to achieve wide industry acceptance and usage.

Model contracts vary throughout the petroleum business in their complexity and how they are used. Some are only a couple of pages long while others run to hundreds of pages with detailed guidance notes explaining the intricacies of the document. The short, simple model contracts tend to use a standardised format with parties engaging in minimal negotiation and drafting. Other model contracts are issued in paper format only with a ‘tick-the-box’ approach to handling alternatives. But many of the model contracts in the petroleum industry are made available in electronic format to provide parties with the flexibility to use the document as they see fit. They can accept it entirely in the issued format and simply choose the options and alternatives they want or they can use the model contract as a starting point and redraft the document as they deem appropriate. Naturally, the more a model contract is redrafted, the more complex and lengthy

³ The trend towards model contracts is not unique to the petroleum industry. Other examples can be found in the world of international arbitration, starting with the UNCITRAL Model Law which has been adopted by nearly 50 countries and the model arbitration clauses provided by various arbitral institutions, such as the ICC International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. Legal organisations have produced models such as the American Bar Association’s Model International Asset Purchase Agreement and Model Stock Purchase Agreement. The construction industry has developed a number of model contracts, as exemplified by the models of the International Federation of Consulting Engineers (FIDIC) and by some domestic civil engineering institutions. Various international agencies such as the IMO, World Bank, UNIDO, etc, have also supported standardisation of commercial terms to encourage international trade and improve economic systems.

⁴ Anthony Jennings, ‘FPSO Agreements’ in *Oil and Gas Infrastructure and Midstream Agreements* (Martyn R David ed, Langham Legal Publishers, 1999), p 198.

negotiations become, resulting in many of the efficiencies and benefits of the model contract being lost.

Many different parties throughout the global petroleum industry use model contracts. The majority of these contracts are used between companies, which is the focus of this article. But there are many governments around the world that have developed model contracts such as production sharing contracts or service agreements that are used to grant petroleum rights to investing companies. They may be used as a model for government contracts in a particular jurisdiction but they are not always widely accepted and used in other countries, even though some countries have cooperated with each other in sharing these types of precedents. These 'models' are sometimes encouraged and supported by multilateral institutions such as the World Bank. Its Petroleum Exploration Promotion Program tries to develop legal, contractual and fiscal frameworks in countries to attract foreign direct investment that will quicken the pace of petroleum operations. As part of this programme, the World Bank has encouraged the drafting of one or several variants of a 'model contract'. The philosophy behind its approach is best expressed this way: 'Despite some disagreement within the industry on the necessity of this element, a State is best served by having its own purpose-crafted contractual format from which to commence the negotiation of Petroleum Agreements.'⁵ In most jurisdictions, the clauses of such 'model contracts' are highly negotiable and not fixed.⁶ These government 'model contracts' are not the focus of this article because they tend to be developed unilaterally by an individual government rather than a multilateral organisation and are limited in their acceptance by investing parties. Therefore, they do not easily reap the benefits of models developed cooperatively.

There has been one attempt to develop a model host government contract on a cooperative basis by the Association of International Petroleum Negotiators (AIPN). But unfortunately, the project did not gain sufficient support from key oil companies and host governments and was never completed. Instead, the effort was redirected towards an extensive comparative survey of common clauses used by host governments throughout the world in their petroleum granting contracts.⁷ If the project had been completed as originally planned, its product would have fit into the definition of a model contract as used in this article.

Reasons for model contracts

There are many model contracts that have been developed throughout the global petroleum industry by different organisations. It has happened for a number of good reasons. Initially, individual companies wanted to use their own form of contract. They were comfortable with their own contracts because they knew what was in them and that important issues were addressed in an acceptable and often favourable manner to them.

⁵ William T Onorato and J Jay Park, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (2001) 39(1) *Alta L Rev* 95, 70-126.

⁶ Michael A G Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage* (Kluwer Law International, 2002), p 55.

⁷ *Host Government Contract Handbook* Vols 1 and 2 (Frank C Alexander Jr ed, Association of International Petroleum Negotiators, 1999 and 2004).

However, when they distributed their draft contracts to other parties in the transaction, they invariably received a significant number of comments that dramatically changed the nature of their initial drafts. Over time and from many companies, the same comments were given and the same issues addressed in similar ways. This process became extremely time consuming and inefficient. With some reluctance, companies began to realise that they had automatically built these inefficiencies into their contractual process by insisting on using their own contracts. Gradually, commercial and legal personnel in the industry recognised that there were a multitude of benefits in cooperating to develop model contracts that were consistently and regularly used by all.

Benefits of model contracts

If a model contract is successfully developed and used properly, there are a significant number of tangible benefits to the industry:

- A well drafted model contract allows the parties quickly and easily to agree on 80 per cent 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 per cent 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 per cent.
- Given that many experienced companies and many highly qualified personnel are involved in drafting model contracts, they tend to be better thought out and drafted than individual company contracts.
- With the acceptance of a particular model contract, it becomes widely used as the industry standard. The result is that transactions are drafted and handled more consistently and it is easier for parties to understand how they have addressed key issues in their contracts.
- With increased consistency and understanding, parties inherently reduce potential grounds for dispute and, therefore, their litigation risk. This is supported by a developing body of academic and judicial interpretation of the model contracts being used. All of this reduces the cost and risk of doing business.
- A successful model contract allows the entire industry to focus on the high-value parts of their transactions and maximise their efficiency in a commodity-based business where margins can make or break companies.
- Model contracts reduce transaction costs. No empirical studies have been conducted accurately to determine the time and cost savings, and ultimately the value, of model contracts. However 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 US\$2 million to US\$0.5 million. 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 the 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.

- Model contracts are either free or can be purchased for a minimal charge. Organisations that develop model contracts want them widely used and tend to make them readily available. Professional organisations, in particular, view their model contracts as an essential benefit to their members and are usually included in the cost of membership.

There are of course, some disadvantages to model contracts, which one needs to be aware of before using them:

- A model contract is what the name implies, a model. It is not set in stone and it does not necessarily work well in every instance. Parties using a model contract should therefore not always feel bound by it and should feel free to amend it as appropriate. In many cases a model contract is best used as the starting point in negotiations rather than the end product.
- Many model contracts deal with a multitude of very complex issues that can have a significant impact on a company's business. They are therefore best used in the hands of experienced, knowledgeable practitioners. Model contracts which are taken off the shelf and used by unskilled people can have disastrous results. It is somewhat like asking a person with a learner's driving permit to get behind the wheel of a Formula-1 car and expect them to win the race.
- Model contracts, especially early versions, sometimes contain mistakes, typos, perplexing clauses and inappropriate concepts. This is a reflection of the process used in developing industry models. It is difficult to always maintain a high standard of quality control when people are doing the work on a voluntary, part-time basis and consensus is the name of the game. The result is that quality control varies from model to model and from organisation to organisation.
- Industry models contain many compromises to satisfy the numerous parties involved in the process, which sometimes results in blurred concepts and vague language. At times, obstinate individuals or companies that are involved in the drafting process win their point simply because the drafting committee wants to move on and finish the project.
- Some model contracts are simply not good for you. There is an assumption that a model represents an industry standard and is fair and balanced. That is not always the case. Models developed by particular sectors of the industry represent that sector's point of view and nobody else's. Such models need to be used with caution, and quite often with significant revisions, to make them acceptable to parties who have not been involved in their development.
- Parties need to recognise the limits of model contracts. They are not designed to cover every situation. Parties that force a transaction into a model that they are familiar with but for which it was not designed can produce many negative and unintended consequences.

Overall, the advantages of model contracts far outweigh their disadvantages. However, in order to be effective, they need to be knowledgeably and skilfully used.

Approaches to developing model contracts

There are many different approaches to developing model contracts in any industry. The petroleum industry is no exception and the model contracts that are reviewed in this article have been developed in a variety of ways. There is no exclusive right way, but most of the better model contracts within the industry share many common characteristics in how they were developed. Here are some of the various approaches that have evolved over the last 50 years.

Dominant player

In the early developmental stages of some jurisdictions, there has been a dominant player who has successfully established its contract as the industry standard. As an example, in the 1960s and 1970s, the British National Oil Corporation (BNOC), which was the UK Government's oil company, was successful in getting other companies to use their particular form of joint operating agreement (JOA). This was achieved by the UK Government insisting that any company wanting to do business in the UK North Sea had to adapt this particular form of JOA.

‘The creation by the Labour government of the state-owned British National Oil Corporation and the policy of forcing participation in licences by BNOC had one positive outcome – the creation at the time of the Fifth Round of Licensing of a model-form Joint Operating Agreement. This document became a North Sea standard and remains in use in modified form today. It is interesting to speculate whether the industry would ever have agreed upon a model-form JOA had one not been forced upon it.’⁸

When BNOC ceased to be the national oil company of the United Kingdom, and for that matter ceased to exist,⁹ that particular model JOA continued to be used simply because UK companies were familiar with it and comfortable in continuing to use it.¹⁰ This is, however, a relatively rare case where a model contract was developed by a single entity (in this case, a government entity) and then accepted as the industry standard in that jurisdiction. Recently, the United Kingdom Offshore Operators Association (UKOOA) has taken responsibility for maintaining and updating this model JOA.

Industry organisations

Most successful model contracts in the global petroleum industry have been developed as a result of an industry organisation sponsoring and endorsing a model contract. In such

⁸ Martyn R David, *Upstream Oil and Gas Agreements* (Martyn R David ed, Sweet & Maxwell, 1996), p vii.

⁹ ‘Gone are the days of the shot-gun marriage to BNOC (and its successor the OPA).’ See Sandy Shaw, ‘Joint Operating Agreements’ in *Upstream Oil and Gas Agreements* (Martyn R David ed, Sweet & Maxwell 1996), p 13.

¹⁰ Taylor and Winsor, *Joint Operating Agreements* (FT Law & Tax, 1992).

cases, the industry organisation and its membership need to reflect a constituency that can successfully develop and use the model contract. Such industry organisations usually consist of commercial personnel and legal advisers that handle that particular transaction and its contracts on a regular basis. This article will provide a number of examples of such model contracts.

Multilateral cooperation

Sometimes in a particular segment of the petroleum industry there are many different players represented by different organisations and institutions. They often represent parties who work on different sides of the negotiating table when particular transactions are initiated and contracts negotiated and drafted. When that is the case, it is difficult for one organisation successfully to develop and implement a model contract by itself. On rare occasions, a unilateral initiative by a single industry organisation may gain acceptance. This happens when the industry is relatively fragmented and made up of a large number of small players on one side who have limited bargaining power and do not have the ability to speak with a single voice on a particular issue.

When the opportunity arises, there is a significant benefit when several organisations representing different facets of a business transaction agree to cooperate on a multilateral basis to develop a model contract. This requires a significant amount of goodwill and commitment from the organisations who participate in the joint development of a model contract. Sometimes the organisations are not able to agree on various issues and the necessary political capital is not available to overcome such obstacles. But if done properly, a successful multilateral approach to the development of model contracts results in a better and more widely accepted document.

Government participation

In some instances, the support and backing of a government ensures the wider acceptance of a model contract. Some examples are the development of a unit agreement in Canada with the participation of the Province of Alberta and the Cost Reduction Initiative in the New Era (CRINE) service agreements that the UK Department of Trade and Industry (DTI) actively participated in and supported. Both of these models are discussed below. These successful examples occurred when the government had a vested interest in the transaction and received clear benefits from the implementation of a model contract.

Types of model contract

There are many different types of model contracts that have been developed in the global petroleum industry. This article focuses on models developed in the upstream and midstream sectors of the business. It also analyses the service contracts that are used in these two sectors along with a miscellaneous group of contracts that are used throughout the industry. Interestingly, the author is not aware of any examples of model contracts that have been developed in the downstream business.

Upstream agreements

As the name indicates, ‘upstream’ operations occur at the beginning of the oil or gas pipeline. This is the exploration, development and production aspect of the petroleum business. Whenever two or more companies enter into a joint venture in the upstream end of the business, they require a contract to address the rights and obligations of the various parties, ie the operator and the non-operator(s).

‘Usually several companies participate in [an oil and gas] venture, even though only one has primary responsibility for the project. A contract (or contracts) sets out the terms of their joint participating and details, among other matters, how and when the various operational stages take place and how the project risks, expenses, and production are allocated. Such agreements are far from standardized, but they are frequently based upon participation, farmout, and joint operating agreements commonly used in the United States and Canada or upon the Model Form International Operating Agreement promulgated by the Association of International Petroleum Negotiators.’¹¹

Four common types of upstream contract are the study and bid agreement, the farmout agreement, the JOA and the unit agreement. All have a long history and are regularly used throughout the global petroleum industry.

Study and bid agreement

The oil and gas industry has historically used groups or consortia as vehicles to conduct exploration, development and production activities. By forming groups, companies are able to limit their financial exposure on high risk prospects and large, expensive projects. They usually start this process prior to acquiring a block or entering into a project.

‘Not uncommonly a company planning to apply for a concession agrees to bid on behalf of a group of companies or to assign interests in the licensed area to them if it receives the concession. A model form promulgated by the Association of International Petroleum Negotiators (AIPN) as a suggested guide for such agreements designates the party who will be in charge of negotiations with the host country, sets out the proportionate shares the participants will have, details the procedure whereby the participants determine the contents of their application for a license or production sharing contract, and provides that each party “undertakes that neither it nor any of its Affiliates shall submit any bid covering the lands ... either alone or with any third parties”.’¹²

¹¹ Bruce M Kramer and Gary B Conine, ‘Joint Development and Operations’ in *International Petroleum Transactions* (2nd edn, Ernest E Smith *et al* eds, Rocky Mountain Mineral Law Foundation 2000), p 549.

¹² Kramer and Conine, *supra* at 552.

As mentioned, the AIPN developed its model study and bid group agreement for international operations. No similar model has been produced for domestic US, Canadian or European operations. Companies in those jurisdictions appear to be content with using either informal arrangements or simple company drafted pro forma agreements. In contrast, a typical international study and bid agreement usually contains the following extensive provisions:

- provide details on how the evaluation process will be conducted;
- determine a specified amount of money to expend on the evaluation;
- require the party conducting the evaluation to make periodic presentations to the other parties;
- provide a procedure for invoicing the parties and collecting the parties' participating share of the expenses in a specified currency;
- provide a disclaimer on any liability by the evaluating parties to any other party for the work performed;
- require the evaluating party to present its final evaluation at a specified time, usually 30 to 60 days prior to the bidding date;
- address what happens if the parties are unable to agree on a bid. Usually, the highest proposed bid or the most competitive terms proposed by any party will be the bid submitted;
- if one or more parties elect not to bid, provide that their participating interest share will be acquired by those parties electing to bid;
- require that if the parties who elect to bid revise the commercial terms of their bid, they must notify those parties who have elected not to bid and give these parties an opportunity to participate in the submission of the revised bid;
- designate one party as the operator for negotiating a host government contract and for the JOA;
- require that each party agree not to submit a competitive bid on its own or with any other party;
- require that all information is to be kept confidential, with the exception that disclosures can be made to affiliates, government entities, bona fide potential purchasers and consultants, if suitable protection is obtained;
- provide that the agreement terminates when no party elects to bid, only one party elects to bid, the bid is rejected by the host government or when the JOA supersedes and replaces the agreement.¹³

Farmout agreement

The term 'farmout' originated in the US oil industry. It borrowed the term from the agricultural business where sharecroppers could earn a share in the farmers' crops by

¹³ Andrew B Derman, *International Oil and Gas Joint Ventures: A Discussion with Associated Form Agreements* (Monograph Series No 16, Natural Resources, Energy and Environmental Law Section, American Bar Association, 1992), pp 15-59.

working on the farmers' land.¹⁴ The following explanation describes how a typical oil and gas farmout works in the United States:

[A farmout is an] agreement by one who owns drilling rights to assign all or a portion of those rights to another in return for drilling and testing on the property. The individual or entity that owns the lease, called the "farmor" ... is said to "farm out" its rights. The person or entity that receives the rights to drill [is] referred to as the "farmee" ... The primary distinction between an operating agreement and a farmout agreement is functional. A farmout agreement is a contract by which one party earns an interest in an oil and gas lease owned by another, while an operating agreement is entered into to define the rights and duties of parties who already own joint interests in a lease or a drilling unit and to combine those interests for joint operations. Another distinction is that the farmee "carries" the farmor for all or a portion of the drilling costs in a farmout, while the parties to an operating agreement generally share the costs of drilling. Typically, those who enter into a farmout agreement also will execute an operating agreement to govern their rights after they have performed the farmout contract.¹⁵

In the international oil and gas industry, the term 'farmout' is used on a similar basis. Essentially, one or more parties acquire an interest in a licence or concession in return for performing work that was to be done by the party or parties disposing of all or part of their interest.

A unique UK variation is the 'earn-in agreement'. An 'earn-in' differs from a normal 'farmin' in the timing of governmental approval, which is only given when the licence work obligations are done. This is a result of the UK DTI's 'moral repugnance' at trading in licences before work obligations have been completed. The reasoning of the government was that since licensees 'bid' for licences by offering work programmes rather than cash, they must have completed those programmes before being allowed to trade in the licences.¹⁶ Another variation that UK practitioners refer to is the 'turnkey farmout'. Under such an agreement, a lump sum (or 'turnkey') price is agreed on with a drilling contractor. The price is paid when the well reaches its target depth and is abandoned or if hydrocarbons are encountered, after casing has been set in the hole.¹⁷ In other jurisdictions, this would be simply considered a turnkey drilling contract (see description below).

Sometimes other arrangements to bring new parties into a joint venture, such as payment of cash, swapping of assets or just bringing a new party in on a ground floor basis, are considered akin to a farmout agreement. But they usually go by other names,

¹⁴ Martyn R David, 'Exploration, Appraisal and Development Farmout Agreements' in *Upstream Oil and Gas Agreements* (Martyn R David ed, Sweet & Maxwell, 1996), p 33.

¹⁵ John S Lowe, 'Analyzing Oil and Gas Farmout Agreements' (1987) 41 Sw LJ 759, 763-64.

¹⁶ David, *supra* n 14, at 35-36.

¹⁷ *Ibid*, at 39.

such as a participation, swap or transfer agreement. The traditional use of the term 'farmout' is normally applied to a 'drill to earn' arrangement.

Model farmout agreements have been developed and published in the United States by the American Association of Petroleum Landmen (AAPL), in Canada by the Canadian Association of Petroleum Landmen (CAPL) and for the international industry by the AIPN.

Operating agreement

Probably the most significant contract used in the upstream business is the JOA. It sets out the fundamental and overarching relationship among joint venture parties from the initial exploration to the ultimate production of hydrocarbons.

'The oil and gas operating agreement has evolved as an industry-wide document over several decades. The widespread need for it in United State onshore operations has resulted in the development of a relatively uniform agreement for domestic activities. However, as the complexity and size of the operation increases, as in the case of offshore and international exploration and production, modifications in standard terms of the onshore agreement become necessary. Domestic offshore and international joint operating agreements (JOAs) are not only more detailed and significantly different from onshore counterparts but exhibit important variations from transaction to transaction.'¹⁸

There are various model operating agreements that have been developed and used around the world. The AAPL developed the AAPL Form 610 Model Form Operating Agreement (AAPL 610) in 1956 for onshore operations in the United States and has revised it on several occasions, most recently in 1989. It has also developed other model operating agreements for specific use in the offshore shelf and deepwater Gulf of Mexico. The Rocky Mountain Mineral Law Foundation (RMMLF) has published a model operating agreement for the US Rocky Mountains and the American Petroleum Institute (API) issued a model operating agreement primarily for the Gulf of Mexico. The CAPL has developed two model operating agreements, one for the Western Canadian sedimentary basin and another for Canadian frontier areas. Other regions where unique model operating agreements have been developed are the UK North Sea and Australia. For other areas of the world, the AIPN has developed its International Model Form Operating Agreement.

Even though model operating agreements from various areas of the world deal with many similar issues, their approach in handling these issues can be quite different. For instance, there is a marked difference in various model JOAs on how the relationship between the operator and non-operator(s) is addressed.

¹⁸ Kramer and Conine, *supra* at 561.

‘Historically, the first model form operating agreements were drafted to address the drilling of onshore wells primarily in the United States, where individual autonomy is a prized tradition. These agreements were conceived to deal with relatively unsophisticated technology, low cost wells, high margin prices, and small lease areas held under a property ownership system that fosters unilateral initiative. Under the circumstances, it was not unreasonable for the parties to delegate broad authority to one of them to organize the drilling of an exploratory well and to develop the field.’¹⁹

‘In contrast to the broad discretion given to the operator in Canadian and US onshore JOAs, international JOAs provide for a management committee that exercises some degree of supervisory control over operations. Each participant has one representative on the committee with a vote weighted in accordance with the participant’s interest in the project. The powers of the operating committee may be specifically listed or stated in general terms.’²⁰

Domestic US and Canadian onshore JOAs contain a limited number of elections, whereas the AIPN international model operating agreement has many. This reflects a less diverse and complicated operating environment in onshore North American operations. But it is also indicative of the philosophy of organisations such as the AAPL and the CAPL in favour of standardising their model contracts as much as possible.

‘[Model JOAs have] evolved to reflect the particular industry standards, customs, laws and regulations in effect in the jurisdictions in which they are most commonly used. Conventional operations in Western Canada tend to involve a relatively homogeneous group of players. In contrast, international operations often involve a variety of participants from disparate political, legal and economic systems. The various participants may include state-owned oil companies whose agendas and expectations may be very different from the profit-driven goals of North American exploration and production companies. International projects tend to be larger in scale than most domestic operations, and are often located in places where there may be very little infrastructure and where the cultural, political, legal and economic environments are very different from those with which we are familiar in Canada. Moreover, the petroleum rights held by the participants will usually be derived from legal sources which are quite unlike conventional Canadian petroleum and natural gas leases. A workable international joint operating agreement must address these many distinctions.’²¹

¹⁹ Andrew B Derman and James Barnes, *Inst on Oil and Gas Agreements, Autonomy versus Alliance: An Examination of the Management and Control Provisions of Joint Operating Agreements* (Rocky Mt Min L Fdn, 1996), § 4.03 at 10.

²⁰ Kramer and Conine, *supra* at 564.

²¹ Michael D Josephson, ‘How Far Does the CAPL Travel? A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement’ (2003) 41(1) *Alta L Rev* 1, 3.

Given the above, one would assume that domestic model JOAs would always handle the same issues in a similar manner in contrast to how an international JOA deals with the situation. However, that is not always the case. As an example, both the CAPL model JOA²² and the AIPN model JOA²³ provide for the option of the removal of an operator without cause on the affirmative vote of a number of participants holding at least a certain percentage participating interest. In contrast, the AAPL 610 only permits the removal of an operator for good cause.

In effect, what is happening is a cross-fertilisation of ideas and concepts. For instance, there appears to be a movement in the Canadian industry towards what some commentators call 'norm-based standards' as opposed to a *pure* standardisation approach in which few changes to the model form are expected to be negotiated by the parties. Norm-based standard documents have been described as model forms which reflect the most common standards and approaches but which are intended to be modified in appropriate circumstances to address the special requirements of specific transactions.²⁴ This is a bit like the more flexible (and hence complicated) approach displayed in the AIPN model international JOA, which has many options and alternatives to choose from. The AIPN model JOA has had a significant influence on a number of issues in the pending CAPL model JOA revision. Likewise, concepts developed in the CAPL model have popped up in subsequent AIPN and AAPL models.

The more flexible approach in international models has not pleased all commentators. The AIPN model JOA was criticised in an *Oil and Gas Journal* article as having a 'smorgasbord of options' which failed to establish or legitimise any one standard for the international petroleum industry. Those critics stated that '[b]y not providing an approved solution, the [1995 AIPN model JOA] misses the opportunity to impose tested standards on parties new to the industry'.²⁵ These comments reflect an expectation for the narrow, standardised approach common in US domestic model JOAs rather than the more diverse and complex operating environment encountered in international JOAs. Most experienced international practitioners would maintain that those expectations are unrealistic and do not reflect the requirements of international operations.

The Australian Petroleum Production and Exploration Association (APPEA) produced a model JOA in 1984 for joint ventures in Australian territory. It included an accounting procedure and a schedule that addressed foreign equity and control as required under the Australian Foreign Takeovers Act of 1975. This model has never been revised and its content is now considered quite dated in the Australian industry. Instead, over the last 20 years, major Australian companies have developed their own pro formas sometimes incorporating and revising clauses from the 1984 APPEA form. Recently,

²² 1990 CAPL Operating Procedure § 202(b)(i).

²³ 2002 AIPN Model Form International Operating Agreement § 4.10, Optional Provision (E).

²⁴ Jim MacLean, 'CAPL Property Transfer Procedure Update', *The Negotiator*, Monthly News Magazine of the Canadian Association of Petroleum Landmen (June 2001).

²⁵ McArthur, Leitzinger and Ridlehoover, 'Special Report: Balance Needed In Operating as Industry's Center of Gravity Shifts to State Oil Firms' (2000) 43 *Oil & Gas Journal* 74 (23 October 2000).

they are being influenced by international model JOAs and are either adapting the AIPN model JOA in its entirety or incorporating some of its concepts into their own pro formas.

‘Each revision undertaken by the AIPN has brought stronger global acceptance of the Model Form Joint Operating Agreement. While there appears to be some [of] its use in Australia, it is suggested that Australian companies involved in international joint operations are increasingly using the AIPN document in negotiating joint ventures. In the domestic context, while companies have traditionally preferred [the] Australian-style joint operating agreements, the 2002 AIPN Model Form Joint Operating Agreement can still be a useful document or source for parties negotiating joint venture arrangements.’²⁶

The North Sea environment still stands apart from the mingling of JOA concepts seen in some other jurisdictions. Companies operating in the United Kingdom have never really taken to the AIPN model JOA²⁷ and have always rejected the North-American-style onshore JOAs.

‘It quickly became apparent, however, that the simple model-forms used for U.S. onshore drilling, which basically allowed the operator to do whatever he wanted, were wholly inappropriate to the big-money, high-risk environment of the North Sea, where inter-consortium wrangling was commonplace as operators in the early days consistently overran their budgets.’²⁸

Unit agreement

The need for unitisation arises when an oil or gas field has several or many different interest holders, each having different tracts in the same field. Governments, or their regulatory authorities, encourage and sometimes require unitisation to promote conservation and increase overall production of the field.

‘Achieving unitization is usually a lengthy and involved process If ... unitization is warranted, tract participation formulas must be calculated for the allocation of production from the unit and for the allocation of unit costs. In contrast to pooling, where production and costs are customarily allocated on a surface-acreage basis, unitwide allocations are usually based on a combination of factors, such as the acreage of each tract, the net acre feet of pay and the volume of oil in place beneath each tract, the differences in porosity within the field, current production, cumulative production, the projected primary recovery from each well, and other factors. Reaching an agreement on a fair

²⁶ Catia Malaquias Miles, ‘AIPN 2002 Model Form Joint Operating Agreement in Oil and Gas Joint Ventures’ (2003) 22 ARELJ 153, 160.

²⁷ ‘... the International Model Form Operating Agreement ... is not much used in the United Kingdom.’ See Shaw, *supra* n 9, at 14.

²⁸ David, *supra* n 8, at vii.

allocation formula is difficult, especially when some tracts may have no past or existing production.’²⁹

In order to make all of this happen, the parties must draft and sign unit agreements. In North America, the practice is to have two different agreements. First, there is the unit agreement which identifies and combines the various tracts and interests forming the unit. The second agreement is the unit operating agreement that governs the day-to-day operation of the unit. Elsewhere in the world, the practice is to combine these two documents into one.

‘The Unitisation Agreement is an agreement by the owners of a single oil field which extends into more than one licence area to develop that field as a single unit. Usually entitled a Unitisation and Unit Operating Agreement, the Unitisation Agreement normally includes all of the provisions of an ordinary JOA, together with additional ones, which are intended to establish the rights of the respective parties to production from the field. It is perfectly possible to have separate agreements for unitisation and operating purposes, and this is common in the United States, but in UKCS practice the two tend to be combined.’³⁰

The Petroleum Joint Venture Association (PJVA) has devised a model unit agreement and a model unit operating agreement for Canada. There are a number of model unit agreements that have been developed in the United States. The API has developed four models, which consist of a unit and unit operating agreement for either a standard (voluntary) unitisation or a statutory (compulsory) unitisation. The RMMLF has developed two model unit operating agreements. One is for divided interests and the other for undivided interests. Finally, the US federal government has provided for a statutorily required model unit agreement for onshore federal lands.³¹ Internationally, the AIPN has just completed a research paper on international unitisation³² and has begun developing an international unit agreement based on that research which should take approximately two years to complete.

Midstream agreements

‘Midstream’ is a relatively recent ‘term of art’ for the petroleum industry. It refers to the segment of the industry between the upstream (ie exploration and production) and the downstream (ie refining and marketing). It thus covers the gathering, processing,

²⁹ Owen L Anderson, ‘Mutiny: The Revolt Against Unsuccessful Unit Operations’ (1984) 30 Rocky Mtn Min L Inst 13-1, 13-3 to 13-8.

³⁰ Warwick English, ‘Unitization Agreements’ in *Upstream Oil and Gas Agreements* (Martyn R David ed, Sweet & Maxwell, 1996), p 97.

³¹ Model Onshore Unit Agreement for Unproven Area, 43 CFR, Section 3186.1.

³² This is the most comprehensive review of international unitisation published and can be found in Jacqueline L Weaver, A A White, David Asmus, Thomas Wälde and Elizabeth Bastida, *International Unitization of Oil and Gas Fields: The Legal Framework of International Law, National Laws and Private Contracts* (Association of International Petroleum Negotiators, 2004).

transport and sale of crude oil and natural gas (and gas related products). It has gained increasing significance as markets have been deregulated in North America and Europe and as gas and its derivatives have become a more commercially viable product in other international areas. This section covers agreements that have been developed for the burgeoning midstream business.

Crude oil lifting agreement

Crude oil lifting agreements are peculiar to international operations, in particular for the marine lifting of crude oil cargoes for export from a country. They have also been adapted for use in lifting crude oil by pipeline and by train and truck cargoes. The AIPN Model Form Lifting Agreement is the most noteworthy example of this kind of model contract, but it is primarily drafted for marine liftings into tankers. There are presently no models for the other kinds of liftings.

Crude oil sales agreement

As the name implies, these are agreements for the sale and purchase of crude oil. They are used in both domestic and international operations. The trend for these agreements has been to use the pro forma contracts of major sellers in the marketplace, rather than the industry establishing a model contract.

Crude oil transport agreement

These agreements address the transport of crude oil by pipeline or marine tanker. There are presently no model contracts widely used in this area. In the case of consortiums, they are unique, bespoke agreements. Otherwise, they tend to be company pro forma contracts.

Gas sales agreement

Gas sales agreements have developed in tandem with the markets for gas. They were first drafted for long-term sales in the North American market between large producers, pipeline transporters and purchasers (usually utility companies). They tended to be unique, bespoke documents. When the marketplace was deregulated, more active selling and trading resulted in more parties participating in these transactions. This increased the need for model contracts. This was done in the United States in 1996 by the Gas Industry Standard Board.³³ The European market also saw increased activity as its markets deregulated, but there has not been any movement towards a European model contract.³⁴ In contrast, there has been a great deal of work towards developing an international model gas sales agreement for gas deposits that have met or will soon meet commercial thresholds in countries with large to medium-sized gas deposits. The AIPN has been

³³ Sheryl Fred, 'Former CMS Lawyer Discovers Life after Energy Trading' (2003) 13, 141 *Corporate Legal Times* 52 (August 2003).

³⁴ Deborah Mills, 'An Overview of Offshore UKCS Gas Transportation Agreements' in *Natural Gas Agreements* (Martyn R David ed, Sweet & Maxwell, 2002), p 11.

working on this model contract for several years and anticipates releasing it in late 2004 or early 2005.

Gas processing agreement

Quite often natural gas production has impurities, such as sulphur which is highly toxic and dangerous in gaseous form. Therefore, the gas needs to be processed at the field before transporting it to markets. The ownership of the facilities needed to process gas and the ownership of the gas going into the facilities are not always the same. In such situations, gas processing agreements are entered into. The only example of a model gas processing agreement developed in the industry is by the PJVA in Canada.

Gas balancing agreement

In a deregulated market with many different producers, sellers, traders and buyers of gas, the timing of production of gas by individual owners of gas fields can vary significantly from their actual interest holdings in the fields; hence the need for gas balancing agreements, which allow the parties to rectify or 'balance' the gas production after the fact.

‘Although balancing has often been regarded as a complex matter, the concept is simple. Balancing is the process of reconciling any imbalances that have arisen between the parties to a joint development, due to their use of a common stream of production to service differing contracts with differing quantity commitments.

The use of the term “balancing” should still be viewed with some caution, as it may not always be applied to the same concept, and confusion can very easily arise. For example, according to one U.S. glossary of oil and gas terms, a gas balancing agreement is a “Deferred Production Agreement”. This is an agreement providing a mechanism under which one joint seller is empowered to proceed with gas sales earlier than another seller which cannot do so while still awaiting the necessary authorisations from the regulatory authority. This is a different and somewhat narrower concept. Again, in the same volume, a “Gas Bank Agreement” is a method of reconciliation as between the joint sellers themselves, not with third parties, and so “bank” is here used in the sense of balancing. Notwithstanding these confusions, the term “balancing” is now normally applied to the concept, albeit still quite generalised, defined in the previous paragraph.’³⁵

Similar to the gas processing agreement, the PJVA in the Canadian industry has developed a model gas balancing agreement. There has also been a model gas balancing agreement developed in the United States by the RMMLF.

³⁵ Anthony Jennings, ‘Joint Venture Aspects of Gas Contracting’ in *Natural Gas Agreements* (Martyn R David ed, Sweet & Maxwell, 2002), p 129.

Gas transport agreement

The transporters of gas (usually pipeline companies) are quite often not the same parties as the producers or ultimate purchasers of gas. In such situations, gas transport agreements are used to set out the terms for access to the gas pipeline(s) and the fees charged. The PJVA in Canada has developed a model gas transport agreement and the AIPN plans to start developing a model international gas transport agreement after it completes its model gas sales agreement.

Common stream operating agreement

This is an agreement which is being used more frequently in a deregulated, highly active market.

‘A common stream agreement will be needed for all joint sales agreements, whether with one buyer or a series of buyers. The agreement will appoint one party, usually the operator, to coordinate the various matters that need to be handled as between all the sellers, on their behalf, and to ensure that the requirements of the buyer or buyers are most efficiently met, so the buyers will also be parties to the agreement. Most importantly, the operator will keep the gas stream in balance. The agreement is both an arrangement between all the sellers and an arrangement between the sellers and the buyers. Without a common stream agreement, each seller would have to satisfy the various procedural requirements under its contract on an individual basis. The operator will handle all nominations, together with information, measurement, verification, and testing requirements. It will be the sender and recipient of all notices that need to be served in compliance with the contract requirements. In administering the buyers’ nominations, the operator will ensure that they are apportioned pro rata among the sellers under each joint sale contract.’³⁶

There is a model common stream operating agreement in Canada published by the PJVA, which is restricted to a common stream operator and other gas producers. In this model, the operator delivers the common stream gas to a sales gas receipt point after which each producer is responsible for its own sales.

Service contracts

The term ‘service contract’ or ‘service agreement’ is used in two distinct and very different contexts within the petroleum industry. The definition of ‘service contract’ that is used in this survey of model contracts is the one used for providing an oilfield service such as seismic, drilling or construction. The parties to this type of contract would typically be a service company and an operating oil and gas company.

‘The typical service contract is simply an agreement in which a company agrees to perform certain service for a monetary payment For

³⁶ *Ibid*, at 127.

example, an oil company that has an oil and gas lease on a tract of land may contract with a seismic company to do geophysical exploration on the land. After analyzing the results of the seismic survey, the oil company may enter into an agreement with a drilling contractor who agrees to drill a well at a specified location to a specified depth. If the drilling is successful, still another company may be hired to operate the well.³⁷

The other type of ‘service agreement’ is the one between a host country and a foreign oil company in which the company ‘assumes the managerial and technical responsibility and the financial and operational risks of exploring, developing and processing natural resources on its own, over a prearranged period’.³⁸ This would fall under the category of a host government contract or granting instrument that is not being reviewed in this article for the reasons already stated.

What is unique about service contracts is that, unlike the upstream and midstream contracts reviewed above, the parties to these contracts always stay on one side of the transaction and never exchange positions. They thus tend to have little sympathy for the other side’s concerns or are unwilling to validate the other side’s position by accepting alternative clauses in a model contract that undermine their industry position. In JOA negotiations, for example, parties often switch between being an operator and a non-operator in different projects. That is never the case when it comes to service contracts. You are either an oil company acting in the capacity of an operator or you are a service company providing the equipment and people to do the work. These different perspectives result in a unique and challenging set of dynamics when a model service contract is being established in the industry.

Many of the petroleum service organizations have attempted to establish their own model service contracts on a unilateral basis which they have, with a few noted exceptions, unsuccessfully proffered to the oil companies. The typical reaction of oil companies is to insist on using their own pro forma contract.

‘Rightly or wrongly operators tend to regard themselves as being in the driving seat and will normally require their own standard pro forma conditions to be used. Many contractors do have their own standard terms but they are left in no doubt that the operator’s terms are to apply. If an operator were so desperate for the services of a particular contractor that it allowed the contractor’s terms to govern, it would have the unenviable task of having to negotiate significant variations or run the risk of losing the control its investment in the project demanded.’³⁹

³⁷ Ernest E Smith, ‘Service Contracts, Technology Transfers and Related Issues’ in *International Petroleum Transactions* (2nd edn, Ernest E Smith *et al* eds, Rocky Mountain Mineral Law Foundation, 2000), p 480.

³⁸ Mikdashi, ‘Policy Issues in Primary Industries’ (1974) 7 *Vanderbilt J of Transnational Law* 281, 305.

³⁹ Anthony Jennings, ‘FPSO Agreements’ in *Oil and Gas Infrastructure and Midstream Agreements* (Martyn R David ed, Langham Legal Publishers, 1999), p 200.

Recently, there have been a number of initiatives to bring operating and service companies together on a multilateral, cooperative basis using their respective industry organisations. This was done in the UK North Sea with CRINE, in Canada between the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP), and internationally between the AIPN and several international service organisations.

As one would expect, service contracts go into great detail describing how and when services and equipment are provided and compensation paid. 'International service contracts, especially those for off-shore drilling, are long complex documents. Many companies have developed form agreements that set out the basic terms of the parties' agreement. Detailed provisions relating to the specific work covered by the agreement are contained in specially drafted attachments.'⁴⁰ But the biggest issue in service contracts is the allocation of risk. This is addressed in great length in the liability and indemnity clauses. It is also the most contentious issue and takes up the greatest amount of time in contract negotiations. The more common types of service contract are as follows.

Seismic contract

The petroleum industry uses seismic or geophysical data to determine where to drill for oil or gas bearing structures. The data is acquired by generating vibrations into the earth and recording their type and velocity, thus indicating the characteristics of the section of the earth through which the vibrations pass.⁴¹ A seismic acquisition contract covers this particular service. The next step is the processing of this field data in sophisticated computer programs that generate data which geophysicists interpret for choosing well locations. A seismic processing contract provides that service. Finally, many seismic contractors acquire geophysical data on a speculative basis over prospective areas as opposed to a single oil company or consortium retaining a seismic company to acquire data on an exclusive basis. This speculative or 'spec' data is sold or licensed under a seismic licensing agreement.

The International Association of Geophysical Contractors (IAGC) has developed model seismic contracts for the acquisition, processing and licensing of geophysical data for both the United States and internationally. The Canadian Society of Exploration Geophysicists published a Master Seismic Data Licence Agreement for the Canadian industry in 2001. The AIPN developed an international model seismic acquisition contract with the IAGC that was published by the AIPN. The IAGC did not provide its final endorsement to this model. There are no equivalent model seismic contracts for the domestic UK industry.

Drilling contract

A drilling contract addresses the rights and obligations around the provision of a drilling rig and personnel by a drilling contractor to an operating company. It could be for either

⁴⁰ Smith, *supra* at 489.

⁴¹ *A Dictionary of Petroleum Terms* (3rd edn, Jodie Leecraft ed, The University of Texas, 1983), p 136.

onshore or offshore operations and covers a wide variety of rig structures. These contracts provide compensation to the drilling contractor in one of three ways: daywork (calculated by the amount of time), footage or meterage (calculated by the amount of depth drilled) or turnkey (a lump sum payment for meeting a set predetermined target). The most common form used is a daywork contract.

‘There are literally hundreds of contract forms addressing drilling activities in domestic and foreign areas involving land and offshore rigs. The most prevalent type of contract involves drilling on a daywork basis, although contracts for work on a footage or turnkey basis have been adopted with increasing frequency for domestic operations.’⁴²

The International Association of Drilling Contractors (IADC) is the primary industry organisation that has published model drilling contracts. Its onshore US models are frequently accepted by small operating companies with limited resources and expertise or in a highly modified form by more experienced operators. However, its offshore US and its international versions are less accepted (and quite often rejected) in the industry where experienced operators insist on using their own pro forma contracts. The API, which represents operating companies in the United States, at one time published a model drilling contract that is still used in the US Gulf of Mexico. The CAODC has developed a number of model drilling contracts for the Canadian onshore industry but has recently decided to jointly develop their models with the CAPP. A model offshore drilling contract has been jointly developed in the UK industry under the auspices of CRINE.

These limited numbers of model drilling contracts are used in many variations.

‘Drilling contracts, including offshore drilling contracts, come in many forms. The IADC has its forms as does the American Petroleum Institute (API). Many operators also have their own forms, which frequently include provisions specifically designed to avoid problems encountered in their particular experience. In addition, many hybrids exist, including modifications of IADC and API forms and earlier versions of those forms.’⁴³

The negotiation of drilling contracts is quite often done within a strong adversarial setting, as witnessed by the following statements; first as seen from the perspective of a drilling contractor and secondly from the perspective of an operator. Note how each side views the issue of risk.

‘Perhaps the most controversial provisions of a drilling contract are the clauses addressing allocation of risks and insurance requirement. The recent softness in the rig market has witnessed a gradual but significant shift in risks

⁴² Carey A Moomjian Jr, *Drilling Contracts: Pursuit of an Equitable and Balanced Relationship Between Operators and Contractors*, 1989 SPE/IADC Drilling Conference (No 18677), p 485.

⁴³ William W Pugh, ‘The IADC Offshore Drilling Contract’ in *Oil And Gas Development On The Outer Continental Shelf* (Rocky Mtn Min L Fdn, 1998), § 8-2.

from the Operator to the Contractor, perhaps in response to the converse situation which existed several years ago when rig demand and rates reached a crescendo.⁴⁴

‘The IADC Offshore Form is not a good contract for an operator to use. It takes significant time and care to try to make the revisions necessary to make the contract acceptable This is not a contract that should be signed without careful and extensive review. Otherwise, an operator could very easily find itself assuming risks that it would not knowingly have accepted.’⁴⁵

Well services contract

Many different, ancillary services are required to drill an oil or gas well, such as mud, drill bits, testing, wireline, transport, etc. At various times, there can be 50 or more well service contractors, along with the drilling contractor, at a typical well site.

The AIPN and the Petroleum Equipment Suppliers Association (PESA) have jointly developed and endorsed an international model well services contract. CRINE has published a number of model service contracts for the UK North Sea, including a model well services contract. There are no equivalent model well service contracts in the domestic US or Canadian industries.

Master services agreement

Oil companies sometimes enter into global, long-term arrangements with their service providers. The objective is to gain the benefit of a stable, long-term relationship for both the customer and the service provider. Usually under such an arrangement, the customer expects better service and lower prices while the service provider expects guaranteed sales and revenue. However, the reason may simply be to enter into one contract rather than many and thus cut down on the administrative work.

The AIPN and PESA have jointly developed and issued a model master service contract for the international industry. The American Corporate Counsel Association (ACCA) developed a model master service agreement for the US offshore industry with the participation of both service and operating companies. The Petroleum Services Association of Canada (PSAC) has published a short, brief master service agreement for its members in the Canadian industry. No model master service contract exists for the UK sector.

Design and construction contract

These contracts are for the design and construction of oil and gas facilities used in the production phase. Their size varies from small, off-the-shelf products to extremely large, complex projects.

⁴⁴ Moomjian, *supra* at 491.

⁴⁵ Pugh, *supra* at § 8-82.

CRINE has developed a number of such model contracts for the UK industry, including ones for construction, design and marine construction. Outside the United Kingdom, the petroleum industry has not collaborated on developing model facilities construction contracts. Some of the organisations that represent construction contractors have developed generic models for all kinds of major projects but, overall, they are not well received or used in the petroleum industry.

‘There are a number of standard contract forms published by professional organisations for use in engineering and construction projects, such as the ICE [British Institute of Civil Engineering] and FIDIC [International Federation of Consulting Engineers] Conditions. These though, while commonly used for onshore civil engineering works, are not considered suitable for use offshore. This is partly because they do not provide for matters that specifically need to be addressed in offshore contracts and partly no doubt because they are not so favourable to operators.’⁴⁶

Procurement contract

These contracts are used for purchasing equipment that is later transported to the site, rather than for on-site construction of facilities equipment. This is usually a small, simple document, such as a purchase order or it can be quite lengthy and detailed for more complex, made-to-order products.

Once again, CRINE in the United Kingdom is unique in developing a model purchase order and model contract for supplying major items and equipment, whereas the rest of the global petroleum industry appears to rely on pro forma documents generated by purchasers.

Miscellaneous

There are a number of other agreements that are used quite regularly throughout the petroleum industry and thus benefit from standardisation. The miscellaneous model contracts reviewed here are the confidentiality agreement, accounting procedure, agent agreement and transfer document.

Confidentiality agreement

At various stages of the business, companies need to exchange confidential information, either to get work done or to attract partners to their project. This information is considered quite valuable and must therefore be protected while at the same time balancing it with the need to share it with other parties.

‘Companies entering into service contracts, licenses, technical assistance contracts, joint ventures and other form of agreements that involve using or sharing intellectual property usually attempt to protect such property by

⁴⁶ Jennings, *supra* n 39, at 200.

including confidentiality provisions in their contracts. The specific language of the provisions will differ, of course, depending upon the type of agreement involved, the nature of the information disclosed, and the party that is preparing the agreement.⁴⁷

A typical confidentiality agreement is usually only a few pages long and addresses the following items:

- describe the information and data covered;
- prohibit the sale, trade, publishing, disclosure or reproduction of such data to any third party;
- permit the disclosure of confidential information to third parties that need to know or are required by law;
- provide warranties from the receiving party that it will keep the information confidential and that there will be no unauthorised disclosures;
- require all information and data given to be returned within a specified time;
- terminate the agreement when the receiving party legally acquires an interest in the property or after a specified number of years.⁴⁸

In the past, companies devoted hundreds of hours to negotiate and prepare such confidentiality agreements. And in any project, dozens of these agreements were used. The result was a need to develop a model confidentiality agreement. A special drafting committee of the RMMLF published a model form confidentiality and non-disclosure agreement in 1996 for use in the US industry.⁴⁹ The best known and most widely used model for international operations is the model confidentiality agreement released by the AIPN in 1992. There has recently been a model confidentiality agreement developed by the UKOOA for use in the UK North Sea.

These models take very different approaches in how they handle the concept of confidentiality. The RMMLF model is designed to emphasise the preservation of confidentiality and has teeth behind it to ensure its enforceability. The AIPN model emphasises the encouragement of transactions and takes a more laissez-faire approach to compliance.

Accounting procedure

Attached to every JOA or unit agreement is an accounting procedure that sets out how the operator handles the books and records for the joint venture. These have become quite standardised throughout the industry and significant benefits have flown from establishing model accounting procedures. The Council of Petroleum Accountants Society (COPAS) has issued several model accounting procedures for use with model JOAs in the US domestic industry.⁵⁰ In Canada, the Petroleum Accountants Society of

⁴⁷ Smith, *supra* at 542.

⁴⁸ Derman, *supra* n 13, 3-9.

⁴⁹ Smith, *supra* at 547.

⁵⁰ Robin Forte, 'COPAS: Tips for the Non-Operator in Interpreting, Negotiating and Drafting' 40 *Landman* 13 (Issue 6 of 1995). Andrew B Derman, *Exhibit 'C' to Operating Agreement-Accounting Procedure Joint*

Canada (PASC) has a model accounting procedure to attach to the CAPL model JOA and the PJVA model construction, ownership and operating (CO&O) agreement. The AIPN has established an international model accounting procedure that has been revised and updated several times in conjunction with its model JOA.

Agents/consultants agreement

This is a unique agreement required in the international industry. It is used to retain agents or consultants to assist in the development of business in foreign countries. Given the existence of corruption in many of the countries in which the petroleum industry operates⁵¹ and the requirement of anti-corruption laws such as the US Foreign Corrupt Practices Act (FCPA), and similar laws in more than 60 other countries,⁵² companies are very vigilant about whom they retain as agents. They are also careful about the kinds of contracts they enter into with such individuals – hence, the need for establishing such standards in a model contract.

Transfers and assignments

A number of organisations have developed standard documents to expedite the transfer or assignment of interests in oil and gas properties. The CAPL has developed a simple assignment procedure for assigning interests among existing and new parties and has also published a property transfer procedure for the sale and purchase of such assets. The UKOOA has sponsored a master deed that simplifies the transfer of licence assets between companies, so that such transfers can be made quickly and with certainty.

Development of model contracts by various organisations

Model contracts have been developed in the oil and gas industry over the past 50 years in a variety of jurisdictions. The first model contract emerged in the mid-1950s in the United States. The concept then spread to Canada in the early 1960s. The movement to international model contracts began in the late 1980s under the leadership of the AIPN. They took hold in Europe in the 1990s, primarily in the United Kingdom. Widespread global interest in model contracts has only occurred in the last decade.

The following section provides a detailed review of some well-known and established model contracts by the organisations that developed them. These

Operations, The Oil and Gas Joint Operating Agreement, Paper No 7 (Rocky Mt Min L Fdn, 1990). Cook, 'The Accounting Procedure of Joint Operating Agreements' (1971) 12 Sw Legal Fdn National Institute for Petroleum Landmen 193.

⁵¹ For a more complete history of corruption, see J Noonan Jr, *Bribes* (New York: Macmillan, 1984). A Timothy Martin, 'Corruption and Improper Payments: Global Trends and Applicable Laws' (1998) 36(2) *Alberta Law Review* 416. A Timothy Martin, 'The Development of International Bribery Law' (1999) 14(2) *Natural Resources & Environment* 95 (ABA). Michael Levi and Monty Raphael, 'Anti-Corruption – a signpost for transactional lawyers' [1999] *Business Law International* 80 (IBA).

⁵² Lucinda Low and Michael Burton, *The OECD, OAS and Council of Europe Antibribery Conventions: New International Standards and their Implications*, ABA Third Annual Symposium on the Implementation of the OECD Convention, Bruges, Belgium (September, 2000).

organisations are usually one of two types. First are trade organisations which represent a particular business group within the petroleum sector and have a membership base which is primarily corporate. The second type is professional organisations. Their members are typically individuals (such as negotiators, landmen, lawyers, geoscientists, engineers, accountants, etc) who have gathered together to deal with common professional issues. The dynamics and perspectives of each of these two kinds of organisation are quite different. The professional organisations try to balance the different demands of their diverse membership while the trade organisations strongly advocate the goals and interests of their particular trade group. The addresses and contact details of all the organisations surveyed in this article are provided in Appendix 1. Copies of their respective model contracts can be acquired directly from each of the organisations.

American Association of Petroleum Landmen

Landmen are a unique institution in the North American petroleum industry. They originated in the United States as oil company employees who dealt with the landowners of the mineral or surface rights from which oil and gas was produced.⁵³ Their responsibilities expanded over the years to include negotiating deals and trades with other oil and gas companies and individuals, drafting contracts (and administering their compliance), acquiring mineral and surface leases and ensuring compliance with governmental regulations. Their professional organisation in the United States is the American Association of Petroleum Landmen (AAPL) based in Fort Worth, Texas, USA. The AAPL was one of the first organisations to develop model contracts in the petroleum industry starting in the 1950s. Its model contracts break down into the following categories.

Operating agreement

Their primary model JOA is the Onshore Operating Agreement 610, which was first issued in 1956. The first version of this model form joint operating agreement was called the Kraftbuildt Form 610.⁵⁴ This model form was revised in 1977.⁵⁵ It was further updated and issued in 1982⁵⁶ and in 1989.⁵⁷ The AAPL has also developed model JOAs

⁵³ *Manual of Oil and Gas Terms* (12th edn, Williams and Meyers *et al* eds, Lexis Publishing, 2003), p 589.

⁵⁴ Schroedter and Mosburg, *An Introduction to the AAPL Model Form Operating Agreement*, The Oil and Gas Joint Operating Agreement, Paper No 1, 1-3 (Rocky Mt Min L Fdn, 1990).

⁵⁵ See Wigley, 'AAPL Form 610-1977 Model Form Operating Agreement' (1978) 24 Rocky Mt Min L Inst 693. Gary B Conine, 'Rights and Liabilities of Carried Interest and Nonconsent Parties in Oil and Gas Operations' (1986) 37 Sw Legal Fdn Oil & Gas Inst 3-1. Rathert, 'Use of the Model Form Operating Agreement for the Creation and Enforcement of a Security Interest' (1986) 62 ND L Rev 197. Young, 'Oil and Gas Operations: Who Does What, To Whom, For Whom And Who Pays, How and When' (1982) 27 Rocky Mt Min L Inst 1651.

⁵⁶ See Andrew Derman, *Joint Operating Agreement: Working Manual*, ABA Section of Natural Resources Law Monograph No 2 (1986). Himebaugh, 'An Overview of Oil and Gas Contract in the Williston Basin' (1983) 59 ND L Rev 7 at 45. Hardwick, *Inst on Oil and Gas Agreements, The 1982 Model Form Operating Agreement: Changes and Continuing Concerns* Paper 8 (Rocky Mt Min L Fdn, 1983). Wood, 'Oil and Gas: A.A.P.L. Form 610 Model Form Operating Agreement: Imposing Limitations on the Operator's Ability to Require Contribution from Nondefaulting Nonoperators' (1983) 36 Okla L Rev 730. Peters, 'The Operating

for the US offshore business, in particular the Offshore Shelf Operating Agreement 710 and the Deepwater Operating Agreement 810. The 710 Model was designed for shallow waters in the Gulf of Mexico and comes with two different exhibits: one for Louisiana and another for Texas, Mississippi, Alabama and Florida. It was last updated in 2002. The 810 Model is for the deepwater Gulf of Mexico and has two exhibits: one for Louisiana and another for Texas.

Other agreements

The AAPL has also published a model farmout agreement (Form 635) and a series of land service contracts: the Master Land Services Contract and the Contract for Land Related Services. These last two model contracts were designed to be used between oil companies and consulting landmen to provide ongoing land services.

Oil and gas lease

Individuals, rather than the states, hold a lot of the onshore oil and gas rights in the lower 48 states of the United States. To deal with the acquisition and retention of these rights by oil and gas companies, the AAPL developed a series of agreements for use in four of the most active southern states: Texas, Oklahoma, Louisiana and Kansas. They covered such activities as the acquisition, release and assignment of such leases. They also dealt with the requirements of meeting the obligations under the petroleum law in those jurisdictions by providing for the payment of royalties, shut-in of wells and the pooling of leases. These forms are examples of model contracts which have been developed unilaterally, since only one side of the transaction (the lessee in this case) actively participated in the development of the model. The AAPL has not updated these model contracts and presently classifies them as discontinued even though they are still available and being used. Their oil and gas lease forms consist of the following:

- Kansas Release of Oil and Gas Lease, Form 689;
- Kansas Oil and Gas Lease – Shut-In Royalty, Pooling Form 690;
- Kansas Oil and Gas Lease Paid-Up Form 691;
- Oklahoma Assignment of Oil and Gas Leases, Form 640;
- Oklahoma Oil and Gas Lease – Shut-In Royalty, Pooling, Form 670;
- Oklahoma Oil and Gas Lease, Form 670-1;
- Oklahoma Oil and Gas Lease, Paid-Up Form 671;
- Oklahoma Release of Oil and Gas Lease, Form 686;
- South Louisiana Oil, Gas and Mineral Lease, Form 820;
- South Louisiana Oil, Gas and Mineral Lease, Form 821;
- Texas Assignment of Oil and Gas Lease Overriding Royalty Interest, Form 651;
- Texas Assignment of Oil and Gas Leases, Form 652;

Agreement' in McKinney, *Oil and Gas Litigation* (Okla Bar Ass'n, Dep't of Continuing Legal Education, 1982).

⁵⁷ See The Oil and Gas Joint Operating Agreement (Rocky Mt Min L Fdn, 1990). Andrew Derman, *The New and Improved 1989 Joint Operating Agreement: A Working Manual*, ABA Natural Resources, Energy, and Environmental Law Section Monograph Series No 15 (1991).

- Texas Voluntary Pooling/Shut-In Gas Royalty Oil, Gas and Mineral Lease, Form 676;
- Texas Release of Oil and Gas Lease, Form 687;
- Texas Oil and Gas Lease Shut-In Clause, Pooling Clause, Form 675;
- Texas Oil, Gas and Mineral Lease, Form 658-85;
- Texas Oil, Gas and Mineral Lease Paid-Up Form 659-85.

Canadian Association of Petroleum Landmen

The CAPL is a professional organisation for people involved in all aspects of petroleum land management in Canada, which is very similar in its objectives and activities as the AAPL in the United States. Its offices are in Calgary, Alberta, Canada. The CAPL membership includes individuals responsible for the acquisition, administration and disposition of mineral and surface rights for petroleum exploration and production companies, as well as related service and financial companies in the Canadian energy industry. The CAPL has developed numerous model contracts over the past 35 years in the following categories.

Operating agreement

The CAPL's first model contract was its operating procedure for the Western Canadian Sedimentary Basin. It plans to issue the sixth version of its highly successful operating procedure in late 2004 or early 2005, with prior versions being issued in 1969, 1971, 1974, 1981 and 1990. The versions issued in 1969 and 1971 were initially rejected by many of the major oil companies operating in the Canadian industry and did not see much success. The third version issued in 1974 turned the tide and became more accepted in the industry as operating companies began to see the benefit of such a model contract. It has since evolved to become one of the most important standard documents in the Canadian petroleum industry⁵⁸ and it is now the most 'widely accepted standard form of joint operating agreement for conventional oil and gas joint operations in the Western Canadian Sedimentary Basin'.⁵⁹

'It has fundamentally changed the way in which our industry has documented the business relationship between joint owners of P&NG rights. Its success has also demonstrated the major business benefits of standardizing those aspects of our agreements for which our industry cannot afford to address basically the same business terms in a multitude of different ways.'⁶⁰

The CAPL had a number of objectives⁶¹ in revising its Western Canadian Operating Procedure:

⁵⁸ James A. MacLean, 'The 1990 CAPL Operating Procedure: An Overview of the Revisions' (1992) 30(1) *Alta L Rev* 133-177.

⁵⁹ Josephson, *supra* at 2-3.

⁶⁰ Introduction to pending revised CAPL Operating Procedure (draft model on file with CAPL).

⁶¹ James E O'Byrne, 'CAPL 1990 Operating Procedure – A Working Man's Guide' in *Oil & Gas Operating Agreements* (Edmonton: Legal Education Society of Alberta, 1991). Introduction to pending revised CAPL Operating Procedure, *supra*.

- Update the document based on evolving business needs, industry experience and changes in the legal and regulatory landscape while still maintaining the integrity and substance of prior versions.
- Create a document that continues to be used widely in the Canadian petroleum industry and is endorsed by a broad section of industry organisations and stakeholders.
- Balance the document between the needs of operators and non-operators, individual parties and collective parties, small companies and larger companies.
- Minimise the degree to which foreseeable, easily avoidable problems frustrate operations.
- Simplify the presentation, use a consistent drafting style and increase the clarity of the document without sacrificing its content and options.
- Make it user-friendly and assist all users in understanding the philosophy and principles of the document by providing extensive annotations to assist users of all experience levels.
- Use a ‘norm-based standard’ where users can modify the document to meet any of their special circumstances.
- Ensure that experts in areas such as insurance and dispute resolution provide input into the document.
- Structure the document effectively to use advances in information technology.

The CAPL also developed a Frontier Joint Operating Procedure in 1988 for the frontier regions of Canada, such as the Arctic, Beaufort Sea and the offshore East Coast. However, this model never did take hold in the Canadian frontier industry. It was published just when the Canadian frontiers became inactive. It took more than a decade before the industry began exploring again in that region and instead of using the CAPL form, it is now using agreements more closely based on the AIPN model JOA or the AAPL Deepwater Operating Agreement 810 since these models provide a lot of flexibility in defining the relationship between the operator and the non-operator(s), which is required in that kind of high-risk, high-cost operating environment.

Other joint venture contracts

The CAPL has developed a number of other joint venture models to assist the Canadian oil industry. It first developed a model farmout agreement and an accompanying farmout and overriding royalty procedures in 1993 but those models did not receive the anticipated level of industry support. Learning from its experience, the CAPL took a different approach in updating these models. It recruited and obtained the endorsement of five related industry associations and over 30 companies in the Canadian oil industry. It combined the two documents and issued the 1997 CAPL Farmout and Royalty Procedure after less than 15 months of committee work. This level of industry support on an accelerated schedule was largely due to the process that was followed during the project.⁶² It was an immediate success with wide acceptance in the Canadian industry resulting in faster transactions and substantial cost savings.

⁶² James A MacLean, A Case Study on the CAPL Farmout & Royalty Procedure Project (unpublished study on file with CAPL).

The CAPL also developed and published in 2000 a model oil and gas property sale agreement (property transfer procedure) for the sale and purchase of such assets in Western Canada. This model is designed to provide parties with a high degree of standardisation on the procedural components of transactions, while providing them with a high degree of flexibility in structuring major business terms. The latter is accomplished through a combination of a modest number of elections and a design that requires parties to address their key terms in a short customised head agreement.

The CAPL has published models for amending existing agreements (Amending Agreements – 1994) and a model for expediting the assignment of interests in oil and gas properties among existing and new parties in a joint venture (Assignment Procedures – 1993). All of these model contracts have extensive annotated notes to explain how the contract works.

Freehold mineral lease

Most of the oil and gas rights in Canada are owned by the provinces or the federal government (often called Crown rights under Canada's constitutional monarchy status) and are granted to oil companies using leases and licences. But there are quite a number of individual owners of petroleum rights in Western Canada holding the title on what are called freehold mineral rights. The CAPL has developed a number of model leases to acquire such rights in the western provinces of Canada:

- Alberta P&NG Lease and Grant (1998, 1991 and 1999);
- Saskatchewan P&NG Lease (1988 and 1991);
- Manitoba P&NG Lease (1988 and 1991);
- Alberta Natural Gas Lease (1988 and 1991).

Surface rights lease

Similar to the practice in the United States, Canadian oil companies retain landmen to acquire surface access to oil and gas well drilling sites and to obtain rights of way for the pipelines required to produce and transport crude oil and natural gas. The CAPL therefore developed and published a series of model surface rights leases for use in Western Canada:

- Alberta Surface Lease (1988 and 1995);
- British Columbia Surface Lease (1997);
- Saskatchewan Surface Lease (1998);
- Alberta Right of Way Agreement (1992);
- Pipeline Crossing Agreement (1998).

The model freehold mineral leases and the model surface rights leases were developed on a unilateral basis, ie there was no group representing the lessor as they were being drafted. These models have been accepted by lessors, for the most part. However, there were exceptions, such as the Canadian Pacific Railway (and its successors) which held

large tracts of freehold mineral rights and issued its own form of lease when granting petroleum rights.

Similar to other organisations that have made a significant commitment over many years to develop model contracts, the CAPL views itself ‘as the custodian of what is, in effect, a living industry document’ and accepts that it has an ongoing obligation to revise and update the document ‘in consultation with interested members of the oil and gas community’.⁶³ Even though these comments were in relation to the CAPL model JOA, they are true for all of the models that they have developed. The CAPL plans to update its model contracts on a regular basis in order to make them relevant in an evolving industry. In this way, its model contracts continue to add value and it ensures that its industry is more efficient.

Petroleum Joint Venture Association

The PJVA was incorporated in Calgary, Alberta, Canada in 1985 to provide a multidisciplinary forum for petroleum joint venture issues concerning the development and production of Canadian oil and gas properties. PJVA members negotiate production facility ownership, processing and transport agreements and monitor costs, production volumes, profitability and audits, through analysis of production reports, operating expense and capital budgets. According to the PJVA, a petroleum joint venture agreement deals with production facilities, rather than joint exploration or marketing activities. A primary objective of the PJVA is to develop and maintain model contracts for the Canadian petroleum production business.

Its first and one of its most important models is its model unit agreement. The first Canadian model unit agreement, commonly referred to as the ‘Mines Ministers’ Model’ as developed on behalf of the Petroleum and Natural Gas Committee of the Annual Conference of Provincial Mines Ministers in 1962. It was revised several times until its last official version in 1972. In 1986, the PJVA formed a task force to revise the 1972 Model. In 1992 after six years of consultation and drafting, the task force received approval of its new Model Unit Agreement from the PJVA Board of Directors and the Alberta Energy Ministry.⁶⁴

‘The fact that it took almost six years to reach a consensus on the terms of the 1992 Model speaks to the difficulty of the task of producing a model form unit agreement that is acceptable to a significant majority of the numerous different players that can be expected to use it.’⁶⁵

Similar to many other experienced organisations developing model contracts, the PJVA task force tried to strike a reasonable balance between:

- the divergent needs of the major interest groups involved in unit agreements and individual players within those groups;

⁶³ MacLean, *supra* n 58, at 176-177.

⁶⁴ David A Guichon Jr, ‘The 1992 PJVA Model Form Unit Agreement’ (1993) 31(1) *Alta L Rev* 26, 27.

⁶⁵ *Ibid*, at 36.

- the desire for simplicity, the need to minimise uncertainty and the potential for conflict through comprehensive treatment of complex issues;
- the desire to use the model in a relatively broad range of situations.⁶⁶

The comments of the PJVA task force on how it went about developing its model unit agreement reflect a common approach in producing a successful model contract within the petroleum industry. 'If we are to achieve our objectives, the document must be a product of a reasonable accommodation and compromise, as it simply cannot provide every prospective unit participant with everything that he, she or it may want.'⁶⁷

Neither the PJVA nor the Alberta Ministry considered the 1992 Model to be 'carved in stone' and they accepted that it would require modifications from time to time as circumstances dictated.⁶⁸ The Unit Operation Agreement was subsequently revised and approved in 1995 and the Unit Agreement in 1999. The PJVA followed the typical North American practice of separating the two agreements rather than combining them into one document as is seen in the UK North Sea and international operations.

The other major model developed by the PJVA is its Construction, Ownership and Operation (CO&O) Agreement issued in 1996. It has had a significant impact on Canadian production operations in Western Canada. Whereas many production facilities previously did not have a CO&O Agreement in place, the introduction of the PJVA's model CO&O Agreement resulted in most facilities quickly adopting it. This was because the PJVA's model significantly reduced the cycle time and cost of completing these agreements.

The PJVA has issued a number of other model contracts for use in the production side of the Canadian oil industry including its Common Stream Operating Agreement in 1996. The PJVA has also developed a series of model contracts for the gas side of the business:

- Gas Balancing (1991);
- Gas Processing (1995 and 1998);
- Gas Transport (1998).

In addition, it has provided the Canadian industry with a number of other models to increase the efficiency of production operations:

- Contract Well/Facilities Operating (1995);
- Well Effluent Processing (1999);
- Well Payout (1989);
- Standard Terms and Conditions Agreement (2003).

Association of International Petroleum Negotiators

The AIPN is a professional organisation founded in Houston, Texas, USA, in 1982. It has more than 1,500 members from over 75 countries representing international oil

⁶⁶ *Ibid*, at 37.

⁶⁷ *Ibid*, at 36 (excerpt from memorandum of the PJVA task force accompanying penultimate draft).

⁶⁸ *Ibid*, at 37.

companies (IOCs), national oil companies (NOCs), host government energy ministries, legal and consulting firms and energy analysts.

One of its primary services is the development of model international petroleum contracts in the upstream and midstream business. The AIPN's model contracts are recognised as the standard in international energy transactions and they have produced enormous cost savings for the international petroleum industry. The model that it is best known for is its International Model Form Joint Operating Agreement.

Operating agreement

In 1988, the AIPN formed a working group with the American Corporate Counsel Association (ACCA) to produce an international model JOA. Previously, parties spent many months, and in some cases years, negotiating and drafting each operating agreement. It was inefficient, time consuming and expensive, especially since these agreements required frequent international meetings to resolve. Over the course of two years, the drafting committee met 17 times and held four general industry sessions to discuss the draft. There were representatives from nearly all the large and medium-sized international companies in the upstream international oil and gas business.⁶⁹

As described by the Chair of the first drafting committee, the International Model JOA was drafted with two main themes. First, it did not force parties to accept predetermined concepts and consequences. It used options and alternatives to allow the parties to structure their transaction to fit a wide variety of situations to meet various corporate philosophies and the underlying host government contract. Secondly, the model JOA encouraged exploration and development without forcing a party to participate in expensive, risky ventures and at the same time allowed a party to make independent proposals after not being able to meet the necessary pass-mark vote for a group decision.⁷⁰

It met with great success on its issue in 1990 and provided immediate benefits. 'Thus far, the response by the industry has been nothing less than outstanding. Negotiation time has been cut by as much as 75 percent.'⁷¹ Similar to other organisations, the AIPN is committed to the ongoing revision and improvement of its model forms. Thus the 1990 version was subsequently revised and reissued in 1995 by the AIPN but without the assistance of the ACCA.⁷² This revision became even more widely accepted as the starting point for international JOA negotiations.

⁶⁹ Derman, *supra* n 13, at 89.

⁷⁰ *Ibid.*

⁷¹ P Sean Murphy, 'Model Form International Operating Agreement: A Practical Approach to Drafting Issues' (1996) 34(3) *Alta L Rev* 579, 601.

⁷² S Murphy and D Asmus, 'AIPN Model Form International Operating Agreement – A Practical Approach to Drafting Issues', *Short Course On International Oil & Gas Law, Contracts And Negotiations* (2002). Michael D Josephson, 'Fundamentals of International Operating Agreements' (2002) 53 *Inst On Oil & Gas L & Tax* n 1. David Asmus, 'The 1995 Model Form International Operating Agreement' (1996) 14 *JERL* 144.

In January 2001, the AIPN began the process of revising its 1995 model JOA. For the first time, the AIPN used 'extranet' communication via the internet. This facilitated the participation of more than 90 AIPN JOA revision committee members from virtually every continent around the world.⁷³ The committee released the 2002 Model Form International Operating Agreement in June of that year.⁷⁴

At the initial stages of the drafting process, the committee sent a list of questions to all AIPN members asking them how they used the existing JOA and what revisions would be most beneficial. The response to this survey revealed a strong global acceptance of the 1995 version, with some hesitation in using it in French-speaking Africa and in Australia. More recent evidence indicates that even this resistance is beginning to fade (see reference to the Australian JOA above). In situations where the 1995 AIPN model JOA was not fully used, its provisions were often borrowed and incorporated into JOAs drafted by the parties. The survey also confirmed that few disputes arose under the 1995 model JOA and that English law was widely chosen (with Texas and New York law being chosen less often than once thought).

In its efforts to make the 2002 model JOA a more global agreement, the AIPN JOA committee provided civil law guidance notes to use in connection with the drafting of JOAs in civil law jurisdictions. The committee modified the agreement in a number of areas to meet recent industry practices.⁷⁵

As part of its strategic plan for its model contracts, the AIPN plans to continue to update and revise the Model Form International Operating Agreement on a regular basis. A reasonable period of time to revisit it would be every five to seven years.⁷⁶

Closely associated with the AIPN model JOA is its model Secondment Agreement issued in 2002. Its purpose is to address an emerging trend of non-operators seconding their personnel into joint venture operations. It is provided as an optional agreement to the traditional international JOA since it is still not the operating philosophy of all companies in the international industry. In the next revision of the model Secondment Agreement, which will occur after the JOA has been updated, the AIPN plans to expand it to include not only the secondment of personnel, but also of equipment and services.⁷⁷

Accounting procedure

Similar to other model accounting procedures, the AIPN model was designed to attach to its model JOA. Unlike other model accounting procedures, it was not developed by an

⁷³ This is a tool that the AIPN is now using on its website for developing all its model contracts. It provides an ongoing, real-time forum that is accessible from anywhere in the globe.

⁷⁴ Philip Weems and Michael Bolton, 'Highlights of Key Revisions – 2002 AIPN Model Form International Operating Agreement' (2003) 6 Int'l Energy L & Tax'n Rev 169, 171.

⁷⁵ *Ibid*, at 172-173.

⁷⁶ *Report from Model Contract Review Committee* at 10 (unpublished report on file at AIPN, Tim Martin *et al* eds, November 2003).

⁷⁷ *Ibid*, at 10.

accounting organisation. Instead, AIPN members who were international petroleum accountants produced the first model accounting procedure in 1992, a few years after the 1990 AIPN model JOA was published. The AIPN considered working with COPAS, which is a US domestic-oriented organisation, but decided not to do so because of the significant differences between US domestic and international petroleum accounting practices – different currencies, expatriate benefits, technical and professional off-site service providers, etc. Broad international participation resulted in a balanced document representing the views of integrated and independent oil companies, large and small businesses and operator versus non-operator perspectives. The model was revised in 2000 to update it for the 1995 AIPN model JOA and emerging industry accounting issues. Members of the COPAS International Committee participated in the 2000 revision. Although COPAS did not formally endorse the revised model, it was presented to the COPAS membership at its North American Petroleum Accounting Conference as a joint effort of the two organisations. The accounting procedure was updated again in 2004 to better align with the 2002 AIPN model JOA, to address new industry issues and to provide more clarity to the model.

Confidentiality agreement

To avoid unnecessary negotiations and to expedite the ability of companies to show their properties to prospective partners while maintaining the confidentiality of their information, a model Confidentiality Agreement was developed by a committee of the AIPN in 1990.⁷⁸ It was revised in 1999 to ensure that it met current industry practice. Even though the model is relatively short and simple, it is without doubt the most frequently used document in the AIPN stable of model contracts since most companies look at a lot of projects before deciding to participate in one.

Most users of the AIPN model Confidentiality Agreement comment that the document works quite well overall, but needs occasional ‘tweaking’ in certain limited areas to keep it abreast of current industry practice. The AIPN plans to update it in a few years to meet these continuing needs of industry.⁷⁹

Participation and bidding agreement

The AIPN with the assistance of the ACCA began drafting a Model Form Participation and Bidding Agreement in early 1991. It was completed and approved by the AIPN Board in February, 1992. This model is unique since other models do not appear to have been developed in domestic petroleum jurisdictions. Comments from one of the drafters of this model contract illustrate some of the frustrations one can encounter in putting together any industry model:

‘The cover page was the focus of much debate during the course of the drafters’ deliberations. At times, it seemed like we would never get beyond the cover page After hours of deliberation, the drafters eventually

⁷⁸ Derman, *supra* n 13, at 3.

⁷⁹ Report from Model Contract Review Committee, *supra* at 10.

concluded that it was advisable to include a reference to the *Effective Date* on the cover page where it would be visible and easily found. Since some members of the drafting committee believed that the cover page might get separated from the *Agreement*, the *Effective Date* also appears on page 1, line 1 of the *Agreement*. Needless to say, the term *Effective Date* is a defined term. Sometimes I felt that we would never get past the concept of how to handle the *Effective Date*. Only lawyers could find such a diatribe fascinating.⁸⁰

The Model Participation and Bidding Agreement is the oldest AIPN model contract in existence, having been first released in 1992 and not revised since. The AIPN has recently begun revising this model with a planned release in 2005.⁸¹

Service contracts

In July 1999, the AIPN started a project to develop model seismic, well service, drilling and master service contracts. These model service contracts were developed to increase the efficiency and timeliness of drafting service contracts for international energy and service companies. In order to ensure widespread acceptance throughout the industry, a multilateral, transparent and inclusive approach was adopted by inviting representative trade organisations from the service industry to participate. Those organisations were the PESA representing well service companies, the IAGC representing seismic companies and the IADC representing drilling companies.⁸²

Over a three-year period, more than a dozen drafting and editing meetings were held at various locations in Canada, the United Kingdom and the United States. In addition, numerous subcommittee meetings were held on drafting specific articles and schedules. Drafting committee members and advisers included individuals from Argentina, Austria, Canada, France, Germany, Italy, Spain, the United Kingdom and the United States. During that period, the group produced approximately 20 draft versions of the various model contracts, schedules and notes for comment and feedback.

The model service contracts were drafted by the committee to ensure that:

- they were fair and balanced;
- they were consistent in layout and format;
- they used common provisions or terms used throughout;
- alternatives were provided for non-agreed issues and different applications;
- options were provided for extra requirements of parties.

There were a number of model service contract precedents available from other jurisdictions but the committee decided not to use them. Instead, the drafting process started with a blank sheet of paper to ensure that the drafting committee began its work from a fresh rather than a potentially biased perspective. The final products of this project were:

⁸⁰ Derman, *supra* n 13, at 15.

⁸¹ Report from Model Contract Review Committee, *supra* at 9.

⁸² 'Guidance Notes', *International Model Service Contracts* (AIPN, Tim Martin *et al* eds, 2002).

- International Model Seismic Acquisition Contract;
- International Model Well Services Contract;
- Master Service Arrangement (Agreement) (MSA);
- Guidance Notes.

The drafting committee prepared the MSA in response to the desire of both operating and service companies to enter into global relationships and to minimise the contracting process as much as possible. Unlike the Model Well Services and Seismic Acquisition Contracts, the MSA is little more than a template that parties may use in structuring their own global arrangements or agreement. The drafting committee recognised that a master service document must be tailored to fit the particular needs of the parties and therefore only provided a simple template that allows the parties to choose from a number of different approaches. The committee also produced extensive guidance notes to assist the ultimate user of the model service contracts.

A model contract for drilling was not produced. The IADC dropped out of the joint effort after six months because it decided not to endorse an approach that would produce a model contract which provided options that it did not find acceptable. It took the position that any model they would eventually endorse had to preserve the IADC's longstanding (since 1952) contract philosophy concerning risk allocation and that an option approach was not an acceptable substitute for a commitment to its risk allocation philosophy. The rest of the drafting committee was willing to include the IADC's risk allocation philosophy into the model drilling contract but was not prepared to make it the only philosophy included in the model; hence the disagreement on taking an optional approach in the drafting process. Given the importance that the committee placed on its multilateral, inclusive approach, it decided that there was no benefit at that time in developing an international model drilling contract on a unilateral basis.

This series of model contracts has been well received and is adding value to the international industry.⁸³ Given that it was released in mid-2002, it needs several more years of field testing before it will be looked at again. Depending on demand, the types of model service contracts are also likely to be expanded.⁸⁴

Consultant Agreement for Business Development

When the AIPN developed and released the Consultant Agreement for Business Development in 1999, its focus was on US legal requirements, in particular, the Foreign Corrupt Practices Act (FCPA). The world has changed significantly since then. There are several multilateral treaties in place and more than 60 countries that now have similar foreign anti-corruption laws as the United States. This is now an issue in which all IOCs share similar concerns. Within the next two years, the AIPN plans to dramatically

⁸³ Brian Schaible, 'AIPN and PESA Develop Model International Service Contracts', *The American Oil & Gas Reporter*, January 2004 at 180.

⁸⁴ Report from Model Contract Review Committee, *supra* at 10.

overhaul this model contract properly to reflect present international law in this area and the different cultural approaches to the issue. It is also an opportunity to work with several key organisations in this area on a multilateral basis.⁸⁵

Crude Oil Lifting Agreement

The Crude Oil Lifting Agreement was issued in early 2001 and the AIPN plans to revise it around 2006. It appears to have been successfully received and used widely in the industry. However, people are starting to expand its coverage to onshore, non-tanker situations that will require a fresh look at the model.⁸⁶

Gas Sales Agreement

In response to strong international demand, the AIPN initiated the drafting of a model gas sales agreement. It has broad industry participation from throughout the world and anticipates issuing the final approved model contract in late 2004 or early 2005.

Dispute Resolution Agreement

The AIPN has recently developed a model dispute resolution agreement which it published in 2004. International agreements are unique in that the choice of law for the contract and the dispute resolution mechanism and forum are significant negotiation points, as opposed to domestic contracts where parties normally defer to local law and courts. This important issue was addressed differently in each of the AIPN's model contracts as they were individually developed. In order to obtain consistency in the dispute resolution mechanisms provided in its model contracts, the AIPN decided to develop this model for insertion in all its future model contracts.

Different languages, cultures and laws

The AIPN is cognisant that all of its model contracts have been drafted in English by lawyers trained in the common law, yet their models are used in many countries where the first language is not English and the legal system is not based on the common law. Therefore it has made available a number of translations of its models, in particular its model JOA, in Russian, French and Spanish. It has also encouraged the participation of more lawyers trained in the civil law and the Sharia law in the drafting process to ensure that its model contracts incorporate important concepts from those legal systems. This is part of the globalisation process of model contracts in the international petroleum industry.

United Kingdom Offshore Operators Association

⁸⁵ *Ibid*, at 9.

⁸⁶ *Ibid*, at 10.

The UKOOA is the representative trade organisation for the UK offshore oil and gas industry. Its more than 30 members are companies licensed by the UK Government to explore for and produce oil and gas in UK waters.

The UKOOA's legal subcommittee formed a Streamlined Commercial Agreements sub-group that has developed a number of model contracts for use throughout the UK industry, including:

- Confidentiality Agreement (2000);
- Sale and Purchase Agreement (2002);
- Novation and Amendment of JOA (2000);
- Assignment of Interest;
- Deed of Novation of Trust Deed (2000);
- Stamp Duty Agreement (2000);
- Pipeline Crossing Agreement (2000).

They have also taken on the responsibility of maintaining the UK joint operating agreement for use in the UK North Sea bid rounds. Their latest version is dated 2002 and was used in the 20th bid round.

These documents have been subject to detailed review by a broad cross section of the UK industry and represent best current practice in that jurisdiction. The UKOOA legal subcommittee plans to make periodic reviews of these documents to ensure that they are updated as necessary.

American Petroleum Institute

The API was established in 1919 and is the primary trade association for the US oil and natural gas industry. It is based in Washington, DC, and has offices in 27 US state capitals. The API represents more than 400 members involved in all aspects of the industry. It is a major research institute, policy forum and developer of industry technical standards.

The API has developed more than 500 equipment and operating standards that are used around the world covering everything from drilling equipment to environmental protection. It distributes more than 150,000 publications annually and sponsors research that runs the gamut from economic analysis to toxicological testing to public opinion surveys. The API gathers and maintains statistics on subjects ranging from domestic US oil and gas production to environmental expenditures.

The API has also developed and published a number of model contracts for the US domestic petroleum industry. This activity is not one of its core businesses like some of the other organisations surveyed in this article.

Offshore operating agreement

The API developed this model offshore operating agreement for state and federal lands within the Outer Continental Shelf of the Gulf of Mexico in 1984 and a second edition was released in 1996. This model JOA was not considered suitable for deep water operations. The API now lists it as an historical publication which is out of print as a result of its policy of only maintaining standards and documents for a maximum five-year period unless reaffirmed by the appropriate API committee. It can only be ordered as a photocopy. The API did not develop a model JOA for the onshore industry since this niche has historically been held by the AAPL 610 form.

Unit agreements

The API has developed and continues to distribute four model unit agreements used in the US industry. They consist of two sets, one for voluntary unitisation and another for statutory (or compulsory) unitisation. Both sets consist of a unit agreement and a unit operating agreement. The API describes these models as providing a common standard of reference for parties involved in the formation of such units.

The first two models are the Model Form of Unit Agreement and the Model Form of Unit Operating Agreement. They are designed to assist in the voluntary unitisation of oil and condensate reservoirs that are substantially developed in order to conduct some form of cooperative operation(s) to increase ultimate recovery. In this kind of unitisation, the interest holders initiate and complete the process on their own. The first editions of these two models were published in 1957 with revised editions for both models published in 1961 and 1970.

In a statutory or compulsory unitisation, a state regulatory agency has the authority to impose unitisation on a pool of oil or gas against the objections of small minority interest holders. This can occur where a proposed unitisation plan has been approved by a significant majority of the owners of operating interests and royalty interests in the unit.⁸⁷ The two API models (Model Form of Unit Agreement for Statutory Unitisation and Model Form of Unit Operating Agreement for Statutory Unitisation) were developed for such statutory unitisation in those states where field-wide units may be established by a regulatory agency for the purpose of increasing ultimate recovery of hydrocarbons. There has only been one edition for these two models which were published in 1974.

Drilling and service contracts

The API developed a series of model drilling and well service contracts for the US industry, including:

- Single Well Drilling Contract, Model Form 4A1, 2nd Edition, May 1979;
- Master Drilling Contract, Model Form 4B1, 2nd Edition, May 1979;

⁸⁷ MANUAL OF OIL AND GAS TERMS, *supra* at 199.

- Drilling Contract, Model Form 4C1, 1st Edition, February 1983;
- Master Well Service Contract, Model Form 4S1, 1st Edition, 20 April 1985.

They reflect the contracting philosophy of major operating companies in the United States. These models are no longer published and available in the API catalogue as a result of not being updated or reaffirmed by the appropriate API committee within the last five years.

Rocky Mountain Mineral Law Foundation

The RMMLF was established in 1955 in Colorado, USA, as a non-profit educational organisation dedicated to the study of legal issues affecting US domestic and international mineral and water resources. The Foundation is a cooperative project of law schools, bar associations, industry associations and individuals. It has more than 2,000 members worldwide. Its goals are to foster and encourage a scholarly, yet practical study of domestic and international laws relating to oil and gas, mining, water, public lands, mineral financing and taxation, land use and environmental protection. It runs a variety of conferences in North and South America, publishes treatises, books, model forms and newsletters, and offers scholarship and grants programmes.

The RMMLF has developed a number of model contracts for the domestic US oil and gas and mining industries. Two of these models (Forms 2 and 7) are available electronically, while the remainder are only available in paper format.

Unit agreements

The RMMLF has published two model unit operating agreements for use in the western United States. One is for divided interests and the other for undivided interests. A divided unit operating agreement is one where the sharing of costs and benefits is dependent on participating areas which may be established and varied from time to time. The undivided type of unit operating agreement provides for the sharing of costs and benefits in accordance with a formula agreed on at the time the unit is formed, without regard to the location and size of any future participating areas which may be established from time to time.⁸⁸ In other words, the formula is permanently set.

The RMMLF's model undivided interest unit operating agreement (referred to as Form 1 in its catalogue) was developed to promote the expeditious processing of US federal lands into a unit. It provides that all costs are borne and all production, from whatever unit lands obtained, are shared by the working interest owners in predetermined percentages which remain fixed for the life of the unit. It was originally published in 1954, which makes it one of the first model contracts available for industry use. It has not been revised since.

The RMMLF's model divided interest unit operating agreement (referred to as its Form 2) provides for the ability to vary the participating interests in the unit over time. It

⁸⁸ *Manual of Oil and Gas Terms, supra* at 300.

was originally issued in 1980 and revised in 1985 and 1995 to incorporate ongoing changes in industry unit operating practices. One of the most important changes is the removal of the obligation of the non-consenting party to pay investment adjustment charges for a non-consent well based on its acreage outside the drilling block formed for the non-consent well.

Operating agreement

The RMMLF developed this model JOA for joint venture operations in the US Rocky Mountain area where there is no field-wide federal unit involved. It incorporates similar concepts found in other model JOAs where there is a sharing of financial risk and benefits by the parties. It was issued in 1968 and never revised. It is referred to as Form 3 in the RMMLF catalogue.

Gas balancing agreement

The RMMLF model gas balancing agreement (referred to as Form 6) was developed to facilitate the negotiation of operating agreements, since gas balancing issues are often sticking points in the negotiation process. Optional provisions address the more controversial issues in gas balancing. This model may be used on a stand-alone basis or as an appendix to the AAPL Model Form Operating Agreement 610. It was issued in 1990 by the RMMLF and has not been subsequently revised.

Confidentiality agreement

The RMMLF developed this model confidentiality and non-disclosure agreement for both the oil and gas industry and the mining industry. It is designed to work in a variety of circumstances for the disclosure and review of information and data, including data room situations, soliciting offers for property sales and prospect disclosures and determining the feasibility of joint participation activities. It places more emphasis on the enforceability of the confidentiality provisions with stronger remedies than the AIPN model confidentiality agreement. This model includes a brief discussion on areas of law to review prior to use and suggested readings. It provides comments on how to use it as well as additional provisions that should be considered when using the model (non-solicitation of employees, standstill provisions, limitation of term, area of mutual interest, arbitration). The RMMLF issued this model (referred to as Form 7) in 1996 and has not revised it.

Council of Petroleum Accountants Societies

COPAS was established in Texas, USA, in 1961 to provide a forum for discussing and solving accounting issues for US domestic oil and gas operations. It is a professional organisation for petroleum accountants in the United States. COPAS has grown to 23 local societies and over 2,700 members in the United States and Canada. The Petroleum

Accountants Society of Houston (PASH) is its largest local society and the Petroleum Accountants Society of Canada (PASC) is affiliated with it. COPAS has created model accounting procedures, guideline documents and educational materials for petroleum accounting in US oil and gas operations.

Model accounting procedures

COPAS presently makes available the following model accounting procedures for the US domestic industry:

- 1984 Onshore Model Form Accounting Procedure;
- 1986 Offshore Model Form Accounting Procedure;
- 1995 Alternative Model Form Accounting Procedure;
- 1998 Project Team Model Form Accounting Procedure;
- Gas Plant Accounting Procedure.

It also provides model form interpretations for its following historical and most recently issued accounting procedures:

- 1962, 1968, 1975 and 1984 Onshore Accounting Procedures;
- 1974 Arctic Accounting Procedure;
- 1976 and 1986 Offshore Accounting Procedures;
- 1995 Alternative Model Form Accounting Procedure;
- 1998 Project Team Accounting Procedure.

There have been model accounting procedures used in the United States prior to the existence of COPAS. In particular, the Petroleum Accountants Society of Oklahoma (PASO) issued a short model accounting procedure in 1949, which was used in other jurisdictions, including Canada.

Petroleum Accountants Society of Canada

The PASC was established in Calgary, Alberta, in 1961. It is one of the founding member societies of COPAS and continues to maintain an ongoing relationship with it to keep informed about petroleum accounting developments in the United State and internationally. Similar to COPAS, it is a professional organisation for petroleum accountants in Canada.

The PASC has several committees that are responsible for developing model accounting procedures, sponsoring educational seminars and providing guidelines on revenue, joint interest, marketing and financial research issues. PASC members are also actively involved in work conducted by joint task forces sponsored by other associations such as the PJVA, CAPL and the Canadian Association of Petroleum Land Administrators (CAPLA).

Model accounting procedures

The PASC has developed a number of model accounting procedures for the Canadian domestic petroleum industry, including:

- 1983 and 1988 Onshore Accounting Procedure – for use with the CAPL Operating Procedure covering Western Canada joint operations. It requires slight modifications for unit operating agreements.
- 1986 Frontier Exploration Accounting Procedure – for use with the CAPL Frontier Operating Procedure for exploratory joint operations in Canadian frontier and offshore areas.
- 1991 Frontier Development and Operations Accounting Procedure – for use with operating agreements covering development, operations and maintenance of joint projects in the Canadian offshore and Arctic areas.
- 1991 Facilities Accounting Procedure – for use with the PJVA CO&O Agreement for facilities such as gas plants, gathering systems, compressors, etc, in Western Canadian joint operations.
- 1996 Accounting Procedure – for use with the CAPL Operating Procedure, the PJVA Unit Operating Procedure and the PJVA CO&O Agreement in Western Canadian joint operations. It revises and combines the PASC 1988 Onshore Accounting Procedure and the PASC 1991 Facilities Accounting Procedure.

The PASC has also issued several bulletins which provide explanatory guides for interpreting and understanding the provisions of all of the above accounting procedures.

International Association of Drilling Contractors

Established in 1940, the IADC is a trade association that represents the worldwide oil and gas drilling industry. Its head office is located in Houston, Texas, USA, with subsidiary offices in Washington, DC, Europe and the Middle East. It promotes safety, preservation of the environment, advances in drilling technology and fosters education and communications within the upstream petroleum industry. Its membership primarily consists of drilling contractors, most of whom are based in the United States, some of which have international operations. One of its member services is the development of model drilling contracts for both US and international operations.

The IADC has an extensive suite of model drilling contracts for US domestic operations. For onshore (or land) drilling, it has models for each of the three different kinds of compensation scheme: daywork, footage and turnkey. Its model offshore drilling contracts (primarily for the Gulf of Mexico) are only for daywork or turnkey. The IADC also has a model master service contract for drilling contractors to use with its subcontractors, and some bid and equipment list forms. The IADC has also published two international model drilling contracts which are rarely accepted by operators and, if so, with significant modifications. Both are for daywork rates, one being for land operations and the other for offshore operations.

The IADC develops its model contracts with the participation of only its member companies. It does not include its clients, the operating companies, in those discussions. In its opinion, this approach avoids the drafting process turning into a negotiation session

with one side attempting to gain some advantage over the other and memorialising it in a model contract. The IADC's experience with an industry multilateral approach is that the drafters become intransigent resulting in the work grinding to an unsuccessful halt. Based on other models reviewed in this article, that has not always been the experience of other service organisations that have chosen to work on a multilateral basis with their clients' industry organisations.

Canadian Association of Oilwell Drilling Contractors

The CAODC was formed in June 1949 in Alberta, Canada, as a trade association to represent drilling contractors in the Canadian oilwell drilling industry. Its principal members are drilling and service rig contractors and its associate members are companies who provide services to the drilling contractors. The CAODC has developed standard operating procedures for its member companies and publishes standard forms for the Canadian onshore drilling industry similar to those that the IADC publishes for the US industry.

It has published two different types of onshore model drilling contracts: one based on compensation being calculated on the depth drilled (Standard Meterage Contract) and another based on the amount of time taken to drill the well (Standard Daywork Contract). It has also developed a number of form exhibits for bidding on contracts and providing the specifications of wells (Bid Sheet and Well Specifications Exhibit). The CAODC initially developed these model contracts on its own, issuing its last versions in 1994. As experienced in other jurisdictions, operating companies were reluctant to use these unilaterally developed models. In order to gain efficiencies for both sides and provide a model drilling contract that would actually be widely accepted and used in the Canadian industry, the CAODC worked with the CAPP, which represented oil operating companies, jointly to develop a model drilling contract which they both endorsed in 2001 (Master Daywork Contract and Exhibit with Specifications).

International Association of Geophysical Contractors

The IAGC is headquartered in Houston, Texas, USA, with offices in England and the Far East. It is a trade association representing companies that provide geophysical services (geophysical data acquisition, geophysical data processing and interpretation, and seismic data ownership and licensing) to the oil and gas industry. Among other services to its members, it provides geophysical model contracts in a set of manuals, one for domestic US operations and another for international operations. The IAGC has developed three kinds of model contract for the geophysical industry:

- Seismic (or Geophysical Data) Acquisition;
- Seismic (or Geophysical Data) Processing;
- Seismic (or Geophysical Data) Licensing.

The IAGC Geophysical Contract Manual for use in domestic US geophysical operations was originally published in 1977. That manual was restructured and revised in 1980, in 1988 and the latest version in 1998. An International Contract Manual, for use outside the

United States, was first published in 1980 and revised in 1985 and 1999. Both of these manuals contain the three different types of geophysical model contract for US and international operations along with explanatory notes.⁸⁹

Early versions of the IAGC manuals contained voluminous alternate and optional contract provisions. The IAGC has now moved to more of a minimalist and standardised approach in its latest contract manual. This approach tends to reflect the views and wishes of the geophysical contractors rather than their clients, the oil companies. The latest versions of its model contracts only include alternate and optional clauses for a few sensitive and important provisions of its model master agreement and some special clauses for marine contracts. It was felt that the inclusion of many of these alternate and optional clauses was somewhat confusing and made the manual less 'user-friendly'. The IAGC does acknowledge, however, that its model contracts are 'intended as a starting point, a guide' and that parties are free to modify them as needed. In practice, this is likely to occur since this standardised approach does not reflect the contracting philosophy of many of the IAGC members' clients.

Seismic (Geophysical Data) Acquisition Agreement

Most geophysical contracting in the United States is carried out through 'master' geophysical agreements which remain in effect indefinitely and under which specific jobs or projects are undertaken through the use of supplemental agreements. The international practice outside the United States is to use service contracts on a 'one-project' basis. The use of 'master' geophysical contracts outside the United States is the exception rather than the norm. Therefore, the IAGC has developed a Model Master Agreement for US operations and a single project Model Agreement for international operations.

The IAGC International Model Service Agreement is based largely on the type utilised in Europe and which is prevalent in other areas of the world. The IAGC used the draft contract for Onshore Geophysical Operations which was prepared, but not finalised, during 1995 and early 1996, by the Contract Standardisation Committee of the Europe, Africa and Middle East (EAME) Chapter of the IAGC.

The structure of this model contract follows a traditional European format with a short form service contract together with attached General Conditions of Contract, Special Conditions of Contract and various schedules and appendices. This style of drafting is used in the CRINE documents from the United Kingdom, which are reviewed later in this article. There is also a Model Agreement of Guarantee, which is a parent company guarantee of the performance by a subsidiary contractor.

The US Model Master Seismic Acquisition Agreement is primarily drafted as a land acquisition contract. However, the IAGC included additional liability, indemnity and

⁸⁹ *USA Geophysical Contract Manual* (International Association of Geophysical Contractors, 4th edn, 1998). *International Geophysical Contract Manual* (International Association of Geophysical Contractors, 3rd edn, 1999).

other clauses for marine operations (including deep water, transition zone, marsh, swamp and other shallow water environments) which users could add on as required.

Seismic (Geophysical Data) Processing Agreement

The IAGC developed a Model Data Transmittal and Processing Agreement for data processing operations based on the assumption that most geophysical data processing is handled either in an acquisition contract or by simple work order or data transmittal form. The IAGC could not find many instances where contractors and clients entered into long-term contracts for pure data processing operations. In fact, many operators in the industry use a simple purchase order to handle their data processing.

Seismic (Geophysical Data) Licensing Agreement

Geophysical data licensing occurs when geophysical data has been acquired on a speculative (or 'spec') basis by a geophysical contractor and licensed to an oil and gas company. The IAGC has developed two types of geophysical data use or seismic licensing agreements: one for a single, one-off licence of data and the other which is designed to cover the licensing of data for an indefinite number of times over a period of time. The single transaction licence is essentially a shortened version of the multiple transaction licence.

They supersede similar documents published by the IAGC in January 1990 under the title 'Guidelines for the Licensing of Proprietary Geophysical Data' and by the IAGC's EAME Chapter in September 1993 as 'Guidelines for Non-Exclusive Seismic Data Licences'. The latest version released by the IAGC in June 2004 is its Model Master Geophysical Data License Agreement for use in US federal waters.

The most important aspect and quite often most contentious area of geophysical data licensing contracts is the rights of the licensee to show the data to third parties. These models go into great detail on which third parties may or may not view, receive, retain or process regarding the data, including:

- consultants;
- data processors;
- storage contractors;
- venture participants (prospective lenders, joint venturers, etc);
- prospective purchasers of licensee or its assets;
- government agencies (if by law or court order);
- related entities (to licensee) existing as of the date of the licence;
- exploration group members;
- merger and acquisition parties.

These models also address the ability of the licensee to reprocess, reformat or interpret the data (the results of which will be owned by the licensee) but subject to the same restrictions of confidentiality, use, disclosure and transfer as the original data. There is some disagreement in the industry on this subject, ie how far do the rights of the data

owner extend to and over the 'derivative product' (results of reprocessing and interpretation). These models do not reflect the full range of opinions.

Petroleum Equipment Suppliers Association

The PESA comprises equipment manufacturers, wellsite service companies and supply companies serving the drilling and production segments of the petroleum industry. It is a trade organisation whose membership is open to companies that are US based manufacturing, wellsite service or supply companies with at least 50 per cent of their sales to the drilling, production, refining or pipeline segments of the petroleum industry. Founded in 1933 as the American Petroleum Equipment Suppliers Association, it adopted the present name in 1938. The PESA is based in Houston, Texas, USA, and has nearly 200 active member companies who provide petroleum services both in the United States and internationally.

The PESA joined with the AIPN in 1999 to develop several model international service agreements. Along with the AIPN, it endorsed the following international model contracts which are available on its website:

- Model Well Services Contract;
- Master Service Agreement (MSA);
- Guidance Notes for Model Service Contracts.

A detailed explanation of the above model contracts is provided in the section above concerning the AIPN model service contracts. The PESA has not developed any model service contracts for the domestic US petroleum industry.

Petroleum Services Association of Canada

The PSAC was incorporated in 1981 in Alberta, Canada, by 143 founding member companies. It is a trade organisation that presently represents approximately 250 oilfield service, supply and manufacturing companies which cover all facets of the Canadian petroleum service sector, except drilling and service rig contractors and geophysical contractors who have their own trade associations. In 1996, the PSAC and CAPP signed a strategic alliance between Canadian petroleum producing companies and their suppliers.

The PSAC developed a model MSA for its members in 1990 and updated it in 1998. It is available as a standardised contract in a pad of 25 forms. It is not widely accepted and used by major operating companies in Canada. The PSAC also developed a Guide to Master Service Agreements to help its member oilfield service companies negotiate service contracts with operators. It covers terms and conditions, agreement and interpretation, compensation, liability and indemnity and termination of work.

At the present time, the PSAC has not jointly developed any model service agreements with operating companies similar to the collaboration between the CAPP and the CAODC, which jointly produced a model drilling contract in 2001.

Cost Reduction Initiative for the New Era – CRINE

The CRINE model service contracts were developed to improve the efficiency of the UK petroleum industry and to ensure that the North Sea continued to be an attractive place to invest. A number of UK companies through their industry organisations took several initiatives to improve the efficiency of the North Sea industry. The UK Department of Energy, which subsequently merged into the Department of Trade and Industry (DTI), actively participated in these developments. One of the primary goals was technical and commercial standardisation including the development of model service contracts. The anticipated result of these initiatives was the lowering of capital and operating costs by 30 per cent in the face of low oil prices. CRINE was thus born in 1992. It evolved into the CRINE Network and finally into the Leading Oil and Gas Industry Competitiveness (LOGIC).

‘[T]he drive is on for rationalisation. The most serious attempt in the UK has been the work of the CRINE Standard Contracts Committee. If the CRINE standard proformas are widely adopted this may lead to further progress. But some operators will wish to vary the CRINE standard terms, involving as they do an element of compromise between operators and contractors. The cost of the resources needed to analyse the terms in order to establish variations, or the commercial cost of accepting the terms unvaried, has to be set against the potential saving in negotiation time.’⁹⁰

Like other jurisdictions in the world, service contracts in the UK North Sea were tendered and negotiated in a similar manner by all companies except that each company used its own form of contract. Given the diversity of contracts, it was a highly inefficient process with a very significant negative impact on costs and resources. CRINE believed that this process achieved very little.

‘Risk is not managed or allocated where it can most appropriately be borne, rather it is pushed from one party to another depending on prevailing market conditions. Additional insurance costs can result and contract costs may be increased due to uncertainties and/or contingencies being added. Ultimately, however, the contracts that are signed by different operators and contractors often end up being remarkably alike.’⁹¹

They therefore concluded that there was a compelling case for standardised contracts. ‘Standardisation in this context deals only with the general terms and conditions, the “boiler plate”, where little value, but significant cost, attaches to a repetitive adversarial approach.’⁹² This eliminated much of the effort spent reviewing and qualifying the many different sets of general conditions used in the industry. The intent was to increase the time available to focus on developing specific terms directly beneficial to the work to be done.

⁹⁰ Jennings, *supra* n 3, at 199.

⁹¹ *Guidance Notes*, CRINE Contracts (2nd edn, 2001), p 1.

⁹² *Ibid*, at 1.

The CRINE model contracts are laid out using a European format. They provide a General Conditions of Contract that establishes a commonly known and understood foundation for the operating company and the contractor. Attached to the model General Conditions is a model Form of Agreement which includes a schedule of other sections to the contract. These documents allow the operating company to shape the total contract to match the Scope of Work. Within the model Form of Agreement are Special Conditions of Contract. This enables the company, in negotiation with the contractor, to adapt the General Conditions as necessary to suit its specific requirements and purpose. Initially, CRINE only provided its models in print form. However since December 2002, it has made its models available electronically on the LOGIC website. The CRINE committee also decided to develop guidance notes for its model contracts, which provide practical support and explanation of the documents. This ensures users will get the best value from using the model contracts.

The CRINE Standard Contracts Committee developed the following service contracts for use in the UK North Sea⁹³:

- (1) *Design (1997 and 2003)*. This contract addresses the scopes of work for design contracts (excluding well design).
- (2) *Construction (1997 and 2003)*. This contract addresses the following scopes of work:
 - major fabrication;
 - topsides installation and hook up;
 - significant topsides modifications;
 - construction services contracts for topsides works.This CRINE model can also be used as the basis, with appropriate amendments, for other contracting arrangements (eg EPIC/EPFI).
- (3) *Marine Construction (1998)*. This contract addresses the following scopes of work:
 - pipe-laying;
 - offshore installation;
 - sub-sea construction;
 - inspection repair and maintenance using diving support and other support vessels.This CRINE model can also be used as the basis, with appropriate amendments, for other contracting arrangements (eg EPIC/EPFI). A second edition is being developed.
- (4) *Mobile Drilling Rigs (1997)*. This contract addresses the provision of offshore drilling units on a daywork basis in the UK North Sea. This CRINE model would require amendments to cover the provision of drilling services on an integrated services or other basis. A second edition of this model is presently under development.
- (5) *Well Services (1997 and 2001)*. This contract addresses the scopes of work for service contracts associated with well engineering work.

⁹³ See generally *Guidance Notes* for description of models, CRINE Contracts (1997 and 2001).

- (6) *Onshore and Offshore Services (1997 and 2003)*. This contract addresses the scopes of work for a range of offshore services other than well services. Originally published as separate models for onshore and offshore service in 1997, they were combined in the 2003 version.
- (7) *Purchase Order Terms and Conditions (Short Form) (1997)*. This contract addresses the purchase of the following types of project material:
- high volume transactions;
 - low value;
 - low technical risk.

It is intended that the Purchase Order Terms and Conditions (Short Form) are incorporated into the Purchase Order by reference. A scope of supply should be attached in order to form a contract. Any specific amendments to the Purchase Order Terms and Conditions (Short Form) should be detailed in the Purchase Order. A new version of this model is being considered.

- (8) *Supply of Major Items for Plant and Equipment (1998)*. This contract addresses the purchase of complex capital plant and equipment such as gas turbines, compressors and pumps. For less complex equipment, it may be more appropriate to consider an intermediary stage contract between the CRINE Purchase Order Terms and Conditions (Short Form) and this model. For the intermediary stage, it is suggested that the Short Form be augmented with appropriate provisions from this contract to meet the project specific needs. It is the intention of the CRINE Standard Contracts Committee in the future to review the need for such an intermediary stage contract and, if there is a requirement, the Committee will undertake to develop a new standard.
- (9) *Small/medium Enterprises (SME) Services (2001)*. In response to the concerns of smaller companies servicing the UK petroleum industry that had limited assets to handle the large risks in standard service contracts, CRINE developed new models to be flexible enough for a wide range of low/medium risk contracts onshore or offshore. They include provision for work involving supply of materials by both the contractor and the operator and some design work where this is required. The SME General Conditions are based largely on the Onshore Services and Offshore Services models.

These SME General Conditions were designed to be used in preference to the similar CRINE Onshore/Offshore Service model in situations where there is a need to:

- recognise that the risks to an SME should be proportionate to the value of work and to the limited assets of the SME. Accordingly, limitations of liability can be set at levels as appropriate covering periods both before and after the date of completion of the work;
- incorporate a wide range of applications and can be utilised for relatively complex but low risk packages encompassing where required design/engineering and material supply by the operator/main contractor or SME as well as various types of services;
- make provision for the inclusion of liquidated damages as an option where appropriate to further limit the SME's liability and to quantify the risk for delay, etc.

The CRINE committee has also developed an Industry Mutual Hold Harmless (IMHH) that is administered by LOGIC and is found at its website. The purpose of the IMHH is for contractors and subcontractors who are not contracted to each other and are, therefore, third parties with respect to one another, to indemnify and hold one another harmless for death of or injury to their own people, loss of or damage to their own property and their own indirect/consequential losses (ie each looks after his own people and assets regardless of cause and where ever such death, injury, loss or damage occurs, and to do so anywhere on the UK Continental Shelf). The IMHH does not take precedence over any relevant contract between the parties where this exists, but it provides a 'safety net' where no such contract exists. It is, therefore, in the form of a deed. More than 200 contractors and subcontractors are participating in this indemnity scheme.

The CRINE contracts are the first time that the UK industry has fully developed and maintained a set of model contracts. 'The issue of the standardisation of agreements in the oil industry is one which is often raised and in the UKCS context, other than in respect of standard documents produced through the CRINE initiative and certain charter party forms there is a dearth of standards.'⁹⁴ That situation is gradually changing. The development and use of model contracts in the UK petroleum sector is becoming more widespread as illustrated by the recent issuance of the UKOOA models.

Best practices in developing model contracts

Most of the model contracts reviewed in this article are widely used in the industry sector for which they were developed. However, some of the models had to be revised and relaunched several times before they became accepted as the industry standard. Based on the experience of successful model contracts, the following best practices have been developed in the industry.⁹⁵

Industry demand

The ultimate goal of developing any model contract is to meet a clearly defined need and to create a document that will be widely accepted and used in the industry. To define that demand, the first step is to ask the industry what it wants. That can be accomplished in a number of ways: conducting written surveys of an organisation's members, dialogue with key players in the industry, discussions within model contract drafting committees and requesting the input of an organisation's board of directors. Through this kind of ongoing analysis, a consensus emerges on what new models should be undertaken, what existing models should be revised and in what priority.

⁹⁴ Robert J A Ruddiman, 'Ancillary Pipeline Agreements' in *Oil and Gas Infrastructure and Midstream Agreements* (Martyn R David ed, Langham Legal Publishers, 1999), p 149.

⁹⁵ The author gratefully acknowledges the comments and insight of Jim MacLean of the CAPL, Andy Derman, Philip Weems and Terry Todd of the AIPN, Doug Morris of the API, Jay Park and Murray Feddema of the PJVA, Ken Fischer of the IADC, David Odling of the UKOOA, Dave Phillips and Mark Holland of the RMMLF and the many other staff and members of the organisations that developed the model contracts reviewed in this article.

Typically, the kinds of agreements that are good candidates for developing into a model are ones that are already widely recognised and used in the industry. They usually have a long history and an extensive set of established precedents. They have a good base to work from and an opportunity to reach consensus on many of the issues found in them. They are transactions which are entered into frequently and the greater the volume, the greater the benefits obtained. Agreements that are unique, bespoke documents or which are in the early days of conceptual development do not lend themselves well to becoming a model contract. They may eventually become so, but that takes time and many transactions to accomplish.

Industry support

A model contract without support is a model contract that will not be used. Therefore, gaining wide industry support for a model from the very beginning of the project is absolutely essential for its success. There are a number of methods for ensuring industry support. The first is to work through an organisation that represents the ultimate users of the document. One company acting on its own cannot persuade the industry that its document is the solution to their problems, no matter how good it is. In fact, the opposite reaction is more likely, ie rejection. Ideally, the sponsoring organisation should have a proven track record in developing model contracts. Surprisingly, such organisations are not that common. It takes a great deal of experience, resources and credibility to properly develop and market a model contract. The backing and support of such an organisation increases the level of industry exposure for the project and the level of buy-in by individual companies.

Once initial industry support has been acquired, it is necessary to maintain it throughout the development of the model and after its release. The sponsoring organisation must always show good visible support. It should provide information sessions and workshops on an ongoing basis, give updates in its organisation's newsletters, provide seminars on the document in the initial months after its endorsement and include the model in its continuing education programme. It is also important for the organisation to work closely with key stakeholders of the model on an ongoing basis.

There are a number of key stakeholders whose support is critical to the model contract's success. Large companies who drive a significant portion of the transactions in the sector for which the model is intended need to be convinced of the benefits of a model and should be strongly encouraged to participate in its development. In situations where agreements require government approval or where governments actually participate in the transaction, government support and participation are also needed.

All significant sides of the business transaction should be involved in the drafting of the model. For instance, if it is a model sales contract, both sellers and buyers should be on the drafting committee. If it is a service contract, operators and service providers need to participate. The various parties (and their representative organisations) in the chain of transactions that occur within a particular agreement should be included. So, for instance, for a title transfer document, the dealmakers, lawyers, accountants,

administrators, etc, should be involved in the drafting process. This ensures the model will be ultimately accepted up and down the transaction chain, which increases its usefulness.

If it is not possible to have all the parties at the drafting table because one party is recalcitrant; at a minimum, the party(ies) with the most significant bargaining power in the transaction need to be there. Failure to do so undermines the success of a model contract and means that a lot of time is wasted in developing it. As an example, the development of some model service contracts by trade organisations without the participation of their clients (who ultimately have the final bargaining power) resulted in their models not being used.

When several industry organisations are involved in developing a model contract, it is best that one of the organisations is appointed custodian. That clarity ensures commitment and ownership. Otherwise, the ability to continually revise and update the document may be lost. Nevertheless, the other organisations need to actively participate in the process to ensure the success of the model.

Having said all of the above, it is important to remember that unanimity is not the objective in this kind of exercise. Rather, it is reaching a broad consensus and gaining wide support in the industry. That means drafting committees must do better than just a simple majority decision on the key issues. But not everyone needs to agree on everything.

Resources

Assuming that industry demand has been confirmed and its support successfully acquired, the next issue is determining and obtaining the necessary resources to draft the model contract. This is primarily human resources, ie, enough experienced and knowledgeable people to get the job done in a reasonable period of time. It is addressed when the drafting committee is formed.

There are two key decisions with regards to forming the committee that will draft a model contract. One is its size and the other is the kind of people that populate the committee. There are different approaches to handling the size of a committee. One is to keep the committee small, while obtaining representation from major stakeholders. The other approach is to open up the committee to anyone who wants to join. A small committee has the benefit of making the project more manageable and quicker to complete. A large committee is more cumbersome, it tends to attract less experienced people who are there for the learning experience and it takes much longer to get the job done. However, it has a better chance of getting buy-in and wider support in the industry because it is perceived as a more transparent and credible process. Interestingly, no matter what the size of the committee, there are usually only a handful of people who actually do the bulk of the work.

Whatever the size of the committee, it is essential that a core group of drafters are knowledgeable about the type of contract being drafted and are experienced in how a model contract is developed. That is especially the case for the chairs of the committee. They need to understand how the process works, their past experience brings credibility to the project and their knowledge of the particular contract enables them to quickly identify and resolve the key issues in the model contract.

There should also be strong and credible representation from the different sides of the transaction. This will not only ensure that the correct issues are addressed in the model contract, but it will also result in a more balanced document that will make it acceptable throughout the industry. Besides the lawyers, commercial and operational people need to be involved in the drafting process. This is not just a legal process being documented. The model contract must reflect commercial reality and must properly work in the field on an operational basis. The full participation of commercial people in the development of the model also ensures their buy-in to the document and a more successful result. Ideally, core committee members should have both a legal background and functional expertise in the area.

Given that the ultimate goal of the project is a well drafted contract, it is important to have at least one member with well developed legal drafting skills. If the committee decides to split the drafting responsibilities, then several committee members will need good drafting skills.

Finally, core committee members must have the necessary time and commitment to get the work done and complete the project on schedule. Model contract work is usually done on a voluntary, *pro bono* basis and takes significant time to complete. That usually means after hours, and volunteers only have so much time. As a result, companies must be willing to second their people to drafting committees for extensive periods of time and be prepared to support them until the project is completed.

Project management

Chairing the development of a model contract is a major undertaking and requires good project management skills. This means getting alignment and commitment on the process before starting to draft anything. The following items therefore need to be discussed and confirmed at the beginning of the project and properly managed throughout its life:

- committee goals;
- timetable;
- responsibilities;
- drafting philosophy;
- mechanisms to resolve different opinions;
- communication plan;
- deliverables.

The committee chairs need to first determine the project scope, timetable and objectives with the committee. They should lay out a road map for the committee to follow and

establish such things as frequency of meetings, whether conceptual issues will be discussed before drafting (or vice versa), how the drafting responsibilities will be handled, roles within the committee, whether a precedent document will be used and to what extent, whether guidance notes or annotations will be part of the final work product, etc. It is important to identify issues and problems at the beginning rather than at the end of the project. Otherwise, late breaking problems can potentially overtake the project and undermine the completion of the final model contract.

One important consideration in managing such a project is to realise that it is a group of volunteers. People are not being paid to participate and they have other priorities in life, in particular, their real jobs. Thus directives or ultimatums do not work. Rather, appealing to professional pride and personal commitment are key drivers to getting such industry committees to work properly.

Another important issue to manage is the comments the committee receives on the various drafts of the model contract. Comments must be encouraged. They should be considered on their merits, with appropriate feedback provided to the commenting parties, preferably with an explanation if they were not incorporated. The commenting process allows any interested party to participate in the creation of the document and provides the committee with a tremendous opportunity to identify potential champions for the document inside individual companies. This is particularly important in the initial drafts of the document, as active early participation in the commenting process allows optimisation of the product, and engages stakeholders and parties that will use the final document on its release.

Besides ongoing committee meetings, a very valuable tool in the development of any model contract is providing industry workshops on a regular basis. This type of event allows anyone interested in the model to find out what it is about, to provide their input into the document and to get their buy-in. It should be a hands-on drafting session rather than just a lecture format. In order to make it effective, the size of the workshop needs to be limited to about 60-75 industry participants working together. Facilitators in small break-out groups ensure that the full range of issues associated with the document are discussed. This information can then be compiled and presented in summary format to the whole group. The drafting committee then has the benefit of feedback from a good cross-section of industry personnel while the document is still taking shape. This kind of session also acts as a recruitment tool for the committee and it builds a foundation of interest and support for the model contract.

The logistics of managing such a project on an international scale are more challenging than in a single domestic jurisdiction. Most domestic petroleum industries are centred in one city and it is relatively straightforward to arrange committee meetings. Successful international model contracts attract participants from throughout the world from many time zones. It is therefore not so simple to call monthly committee meetings and expect everyone to show up. Other project management tools must therefore be developed. As an example, the AIPN has effectively used the internet to encourage and support wide participation. It first used e-mail extensively and it has now developed an

interactive website that allows ongoing drafts and comments to be automatically distributed to committee members. It has also made its Model Contract Workshop an annual event where all of its ongoing models are actively reviewed and discussed.

It is important to constantly communicate the progress of the draft model contract to key stakeholders, board directors, the association members and to the industry at large. Without telling key people how the project is progressing, interest and support for its implementation can be lost.

Drafting philosophy

The committee needs to discuss and confirm its drafting philosophy at the beginning of the project rather than let it evolve on an ad hoc basis. A fundamental initial decision of the committee is whether to start discussing concepts and then draft or take the reverse approach, and begin with a working draft and discuss concepts on an exception basis. Tied into that decision is whether the committee should start with an existing industry precedent that can be used as a foundation to minimise work or start with a clean sheet of paper. It is usually quicker to start with an existing precedent, but if it is badly drafted or contains many controversial sections, it will make the process longer rather than shorter. Also, as was shown in the AIPN service contract project, it may make more sense politically to start with a clean sheet of paper. That approach eliminates criticism that the process was biased from the start against one group or another. But it does take more time and resources to accomplish.

It is beneficial to have a common hand doing the drafting, so that the document has a consistent style. This can be done in several ways. Either one person can do all of the drafting or one person can edit the drafting of the various subcommittees so that a single consistent drafting style exists throughout the entire model contract. Each approach has its pros and cons. The former can place a major burden on one person, can result in some of the committee members feeling distanced from the project and can create vulnerability for the project because it becomes dependent on one individual. The latter approach can be difficult to coordinate and takes more time to complete. However it is done, it is critical to avoid a document that looks like a cut and paste job. The final product should be a model contract that is laid out well, drafted consistently and shows clarity in dealing with issues.

The committee should also use annotations or guidance notes to educate users about the document. Many of the model contracts presently in the industry do not come with guidance notes. This is unfortunate since they are invaluable tools. They do take extra time to prepare but are well worth the effort for the benefits they bring in effectively using the model.

The philosophy of the committee around the issue of standardisation will be determined by how the model contract will ultimately be used. If the committee and its organisation are striving for standardisation, then they will provide single solutions for each issue. If the organisation wants more flexibility to accommodate different industry

perspectives or their documents are used as a starting point rather than the final product, then the committee will need to provide a variety of alternatives and options in the document. If the committee is taking the latter approach, it needs to be realistic on how many alternatives and options it will provide in the model. They need to stick to the mainstream approaches that most parties can use. Model contracts are not the place for unique, infrequently used options.

If the committee's goal is to have widespread acceptance in the industry, then it needs to ensure that a balanced perspective is brought to the document. There are a number of tools that can be used: bring all sides of the transaction to the drafting table, have a neutral person as the chief draftsman or editor (especially if there is an adversarial tone to the process), or provide sufficient alternatives and options to accommodate the main points of view.

Finally, every drafting committee should strive for clarity. The ultimate user of a model contract does not appreciate obfuscation, which will cause them problems rather than provide solutions. Therefore, committees need to deal with difficult issues in a clear and unambiguous manner rather than drafting vague language. If there is no single solution available, then drafting committees need to provide clear alternatives.

Deliverables

There are a number of ways to publish model contracts. The traditional way is to publish a paper copy. But technology now allows documents to be distributed electronically, either on disks or over the internet by downloading from an organisation's website. The electronic version provides a great deal of flexibility in how the model is used. The method of publication also delivers a message about the organisation's philosophy on how it wants its models used. Model contracts distributed by paper reflect a desire to achieve as much standardisation as possible, whereas an electronic publication indicates that the organisation does not set strict standardisation as the primary goal. Rather, it wants to provide flexible solutions to its members and customers.

The committee also needs to decide whether it will produce only a model contract or will also provide an explanation of how to use the document. This can be done in several ways. One is to provide annotations on the opposite pages of the document that run parallel with the clauses of the model. Another approach is to provide a separate set of guidance notes. And finally, some committees publish articles about the model in industry or professional journals.

All of the above needs to be determined at the outset of the project to ensure that the project can be delivered on time and as planned. Deciding to prepare guidance notes or annotations after the model contract is completed is likely to result in a failure to fully capture how the model was developed and key issues decided. Rather, they should be drafted in parallel with the model itself.

Marketing

Marketing is a critical element of a successful model contract. If the industry does not know about the document, it will not use it. Therefore, it is important to market the document to all stakeholders over the life of the project. This should begin with the industry surveys on which models should be undertaken, to committee recruiting, to communicating the progress of the drafts, to endorsing the model and to ongoing education. This can be done at industry meetings, in association newsletters and in industry journals.

Another key marketing decision is whether to charge for the model contract. Many organisations distribute their models for free, in particular, to their members. They see this as a primary membership benefit and they want to encourage wide use of the document. Other organisations want to recoup their investment or see it as part of their organisation's revenue stream and view a free document as one that the industry will not take seriously. However, the adage that the 'best things in life are free' quite often makes for a good marketing strategy.

Education

An organisation needs to have an education strategy in place by the time the model contract is completed to ensure the document is used properly. Having educational sessions soon after the issuance of the document builds broad industry support. This can also be done as part of the organisation's continuing education programme. Also, one cannot overlook that model contract development sessions, such as workshops, are a great educational tool.

Future versions

Organisations should review their model contracts periodically to ensure that they still meet industry's needs. Flaws or unexpected problems with the document will only become apparent as people begin to use it widely. Usually a minimum period of three to five years is needed to test the document properly. Without reviewing and updating on a regular basis, these models become less useful because they may not reflect current business practice or meet changing legal and regulatory requirements. As an organisation's stable of model contracts expands, it needs to have a clear plan on how it will revise its existing models along with meeting the demand for developing new ones.

Conclusion

Model contracts have been developed and used in a wide variety of ways in different jurisdictions. They are extremely flexible tools that allow users to draft effective petroleum contracts quickly and efficiently. They have spread throughout the global petroleum industry because of the significant benefits and immense value they provide to the entire business cycle. As a result, model contracts in the international industry will undoubtedly expand in their development and application in the future.

Appendix 1

Industry Organisations that Publish Model Contracts

American Association of Petroleum Landmen (AAPL)

4100 Fossil Creek Blvd
Fort Worth, Texas 76137
USA

Tel +1 (817) 847 7700
Fax +1 (817) 847 7704
E-mail aapl@landman.org
Website www.landman.org

American Petroleum Institute (API)

1220 L Street, NW
Washington, DC 20005-4070
USA

Tel +1 (202) 682 8000
Fax +1 (202) 682 8115
Website www.api.org

Association of International Petroleum Negotiators (AIPN)

11767 Katy Freeway, Suite 200
Houston, Texas 77079
USA

Tel +1 (281) 558 7715
Fax +1 (281) 558 7073
E-mail aipn@aipn.org
Website www.aipn.org

Canadian Association of Oilwell Drilling Contractors (CAODC)

800, 540 – 5 Avenue SW
Calgary, Alberta T2P 0M2
Canada

Tel +1 (403) 264 4311
Fax +1 (403) 263 3796
E-mail info@caodc.ca
Website www.caodc.ca

Canadian Association of Petroleum Landmen (CAPL)

350, 500 – 5 Avenue SW
Calgary, Alberta T2P 3L5
Canada

Tel +1 (403) 237 6635
Fax +1 (403) 262 1620
E-mail dgrieve@landman.ca
Website www.landman.ca

Canadian Society of Exploration Geophysicists (CSEG)

905, 510 – 5th Street SW

Calgary, Alberta T2P 3S2

Canada

Tel +1 (403) 262 0015

Fax +1 (403) 262 7383

E-mail cseg.office@shaw.ca

Website www.cseg.ca

Council of Petroleum Accountants Societies (COPAS)

PO Box 1190

Denison, Texas 75021-1190

USA

Tel +1 (903) 463 5463

Fax +1 (903) 463 5473

E-mail jgear@copas.org

Website www.copas.org

International Association of Drilling Contractors (IADC)

10370 Richmond Ave, Suite 760

PO Box 4287

Houston, Texas 77210-4287

USA

Tel +1 (713) 292 1945

Fax +1 (713) 292 1946

E-mail info@iadc.org

Website www.iadc.org

International Association of Geophysical Contractors (IAGC)

2550 N Loop W, Suite 104

Houston, Texas 77092

USA

Tel +1 (713) 957 8080

Fax +1 (713) 957 0008

E-mail iagc@iagc.org

Website www.iagc.org

International Federation of Consulting Engineers (FIDIC)

World Trade Center II

Geneva Airport

Box 311

29 route de Pré-Bois

Cointrin

CH-1215 Geneva 15

Switzerland

Tel +41 (22) 799 4900

Fax +41 (22) 799 4901

E-mail fidic@fidic.org

Website www.fidic.org

LOGIC

Exploration House
Exploration Drive
Offshore Technology Park
Aberdeen AB23 8GX
Scotland, United Kingdom
Tel +44 (1224) 853420
Fax +44 (1224) 853429
E-mail logic@logic-oil.com
Website www.logic-oil.com

Petroleum Accountants Society of Canada (PASC)

400, 1040 – 7 Avenue SW T2P 3G9
PO Box 4520, Station C T2T 5N3
Calgary, Alberta
Canada
Tel +1 (403) 262 4744
Fax +1 (403) 244 2340
E-mail pasc1@petroleumaccountants.com
info@petroleumaccountants.com
Website www.petroleumaccountants.com

Petroleum Equipment Suppliers Association (PESA)

9225 Katy Freeway, Suite 310
Houston, Texas 77024
USA
Tel +1 (713) 932 0168
Fax +1 (713) 932 0497
E-mail sstephens@pesa.org
Website www.pesa.org

Petroleum Joint Venture Association (PJVA)

400, 1040 – 7 Avenue SW
PO Box 6173, Station D
Calgary, Alberta T2P 2C8
Canada
Tel +1 (403) 244 4487
Fax +1 (403) 244 2340
E-mail pjva@pjva.ca
Website www.pjva.ca

Petroleum Services Association of Canada (PSAC)

1150, 800 – 6th Avenue SW
Calgary, Alberta T2P 3G3
Canada
Tel +1 (403) 264 4195
Fax +1 (403) 263 7174
E-mail info@psac.ca
Website www.psac.ca

Rocky Mountain Mineral Law Foundation (RMMLF)

9191 Sheridan Blvd, Suite 203

Westminster, Colorado 80031

USA

Tel +1 (303) 321 8100

Fax +1 (303) 321 7657

E-mail info@rmmlf.org

Website www.rmmlf.org

United Kingdom Offshore Operators Association (UKOOA)

London

2nd Floor

232-242 Vauxhall Bridge Road

London, SW1V 1AU

England, UK

Tel +44 (0)20 7802 2400

Fax +44 (0)20 7802 2401

Aberdeen

9 Albyn Terrace

Aberdeen, AB10 1YP

Scotland, UK

Tel +44 (1224) 626 652

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E-mail info@ukooa.co.uk

Website www.oilandgas.org.uk