

PRACTICE NOTE

ASSUMPTION DEEDS⁺

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1. INTRODUCTION

In order to complete the assignment of an interest in a mining or petroleum joint venture, it is ordinarily necessary for the assignee to become a party to the relevant joint venture or joint operating agreement (*JVOA*). The instrument by which the assignee does so is variously described as a deed of assumption, a deed of accession, a deed of covenant or an operating agreement novation deed (*Assumption Deed*)*. For something ostensibly so simple as joining a party to a contract, much lawyers' time and effort is expended in settling Assumption Deeds, even where a pro-forma is annexed to the JVOA. To some extent, this is because the assignee or the continuing participants often view the Assumption Deed as opening a window of opportunity to re-visit the terms of the JVOA.

Where the assignor has assigned all of its rights under the JVOA to the assignee, there ceases to be privity of contract between the assignor and the continuing participants under the JVOA. Unless the assignor is to be released from all obligations and liabilities under the JVOA, the Assumption Deed serves the critical function of re-establishing privity with the continuing participants and providing the nexus whereby they and the assignee can found a claim in contract for those obligations and liabilities under the JVOA for which the assignor is to remain responsible after it has assigned its joint venture interest to the assignee.

2. ALTERNATIVE STRUCTURES

How Assumption Deeds are structured depends primarily on the extent (if at all) to which the continuing participants are prepared to release the assignor. An Assumption Deed may adopt one of the 4 following alternatives:

2.1 No Release Deed

As regards the participating interest assigned to the assignee (*Assigned Interest*), the assignor continues to be responsible to the continuing participants for the due and punctual performance and discharge of all past, present and future obligations and liabilities (collectively *Liabilities*) under the JVOA, except to the extent that those Liabilities are performed or discharged by the assignee. As between the assignor and the assignee, there are likely to be mutual covenants whereby:

⁺ For a more detailed analysis of this topic, see S.E.N. Creese, Comment on Assignment Clauses in Mining and Petroleum Ventures [1986] *AMPLA Yearbook*, 149 at 155-160.

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- (i) the assignor agrees to indemnify and hold the assignee harmless from and against all Liabilities incurred prior to the effective date (as between the assignor and the assignee) of assignment of the Assigned Interest (*Assignment Date*), regardless of whether those Liabilities have "vested, matured or accrued" (to adopt the words used in AIPN's 2002 Model International Operating Agreement) prior to the Assignment Date; and
- (ii) the assignee assumes and agrees to indemnify and hold the assignor harmless from and against, all Liabilities incurred on or after the Assignment Date.

But as regards the continuing participants, the assignor continues to be primarily liable and, by so doing, effectively becomes the guarantor of the assignee's obligations under the JVOA.

2.2 Partial Release Deed

As regards the Assigned Interest, the assignor continues to be responsible to the continuing participants for Liabilities incurred prior to the Assignment Date. It is a matter for negotiation whether the assignor's responsibility:

- (i) will be limited to such of the Liabilities as were incurred prior to the Assignment Date and have vested, matured or accrued prior to that date. [Even in this instance, there may be a different treatment in relation to Liabilities which were incurred by the assignor in its capacity as Manager or Operator of the joint venture (as to which, see B.4 below)]; or
- (ii) will continue to apply to such of the Liabilities as were incurred prior to the Assignment Date, regardless of whether those liabilities vest, mature or accrue before, on or after the Assignment Date.

The continuing participants release the assignor from responsibility for Liabilities incurred after the Assignment Date. The assignee assumes responsibility for all Liabilities incurred after the Assignment Date as well as for, if the limitation referred to in A.3(b)(i) applies, such Liabilities as were incurred prior to the Assignment Date but do not vest, mature or accrue until on or after that date. In the latter case, the assignor is also released by the continuing participants from those Liabilities. The continuing participants accept the assignee's assumption of liability in lieu of the liability of the assignor and as consideration for the partial release of the assignor. As between the assignor and the assignee, again there are likely to be mutual covenants whereby:

- (iii) the assignor agrees to indemnify and hold the assignee harmless from and against all Liabilities incurred prior to the Assignment Date according to one of the following alternatives:
 - (A) regardless of whether those Liabilities vest, mature or accrue before, on or after the Assignment Date; or
 - (B) provided those Liabilities have vested, matured or accrued prior to the Assignment Date; and
- (iv) the assignee assumes, and agrees to indemnify and hold the assignor harmless from and against:
 - (C) all Liabilities incurred on or after the Assignment Date; and
 - (D) if the limitation in A.3(b)(i) applies, all Liabilities incurred prior to the Assignment Date, but which do not vest, mature or accrue until on or after that date.

2.3 Total Release Deed

As regards the Assigned Interest, the assignee assumes, and agrees to hold the assignor harmless from and against, all of the assignor's past, present and future Liabilities and the continuing participants accept the assignee's assumption of liability in lieu of the liability of the assignor and as consideration for the complete release and discharge of the assignor. In other words, the Total Release Deed operates by way of novation. In this case, as between the assignor and the assignee, there may or may not be mutual covenants to the effect described in A.3(b).

2.4 Double Indemnity Deed

Where, as regards the Assigned Interest, the assignor remains responsible for Liabilities incurred prior to the Assignment Date, the continuing participants may also insist that the assignee assumes responsibility for those same Liabilities. The effect is to make the assignor and the assignee severally liable for the Liabilities, but with 2 particular advantages for the continuing participants. First, the assignee's cross-charge over the Assigned Interest will also secure the assignor's retained Liabilities and, secondly, the Manager or Operator will be able to cash-call the assignee under the JVOA to meet the assignor's Liabilities. As between the assignor and the assignee, it is highly probable that the assignee will insist on mutual covenants to the effect described in A.3(b).

3. SOME RANDOM COMMENTS

3.1 No Release Deeds

The most obvious situation where it is appropriate for an Assumption Deed to be in the form of a No Release Deed is where the assignee is a related body corporate of the assignor and there are no restrictions on intra-group assignments of joint venture interests. This is particularly apposite where there are no "change of control" provisions in the JVOA and the assignee may be minded to avoid pre-emptive rights or rights of first refusal by an assignment of some or all of its joint venture interest to a related body corporate and the subsequent sale of the shares in that company to a third party.

However, no Release Deeds are also usually favoured by the "majors". Particularly where there is to be competitive bidding in highly prospective areas, great care is taken as regards the composition of a bidding consortium. It is desirable that the members have similar financial capacity and that they bring to the consortium other synergies (such as operating experience, proprietary technology, technical skills or the potential to be a foundation customer of the project). Accordingly, there is much to be said for "keeping the consortium together", particularly where expensive, mandatory exploration programs are involved. A No Release Deed is a disincentive to assignment because the assignor carries on-going performance and credit risks in relation to the assignee.

If the assignor's joint venture interest is encumbered by a cross-charge, the continuing participants are unlikely to agree to release it.

3.2 Partial Release Deeds

The continuing participants will be more inclined to agree to a Partial Release Deed, and to the release of the assignor's cross-charge to the extent that it relates to the Assigned Interest, where the

Assigned Interest represents only part of the assignor's joint venture interest and the balance of that interest remains subject to the assignor's cross-charge. In this instance, care will need to be taken to ensure that the cross-charge secures not only the assignor's participating interest share of Liabilities as at the time an event of default occurs, but also any Liabilities for which the assignor continues to be responsible and which are referable to the Assigned Interest.

The position is further complicated where the assignor was the Manager or Operator of the joint venture. Although the circumstances in which the assignor can be personally liable for acts or omissions as Manager or Operator are typically limited to the rare cases of gross negligence or wilful misconduct on its part, there needs to be clarity as to whether those Liabilities are assumed by the assignee or retained by the assignor. Again, the situation is less problematic where the assignor retains a joint venture interest. However, where the assignor insists upon making a "clean break" from the joint venture and, at least as between the assignor and the assignee, requires that the assignee assume all liabilities incurred by the assignor under the JVOA, the assignee will be in an invidious position, especially where it does not succeed the assignor as Manager or Operator. It will have the burden of the Liabilities without the benefit of any protections afforded to the Manager or Operator by the JVOA.

In the case of Partial Release Deeds, there is the same issue as described in 3.2 concerning whether both the respective Liabilities of the assignor and the assignee are to be secured and, if so, by whose first-ranking cross-charge.

3.3 The Assignment

The Assignment Date and the effective date of the assignment of the Assigned Interest as between the assignee and the continuing participants are likely to be different, the latter being usually conditional on Ministerial approval of the transfer of the relevant tenement and the Assumption Deed, and the grant and registration of the assignee's cross-charge. This "mismatch" can be problematic for the assignee where it is responsible for observance and performance of the JVOA in respect of the Assigned Interest from the Assignment Date, but will not receive notices from the Manager or Operator, nor be entitled to attend and vote at management committee meetings, until the later date.

Where the assignment clause in the JVOA requires the continuing participants' non-exercise or waiver of pre-emptive rights or rights of first refusal, or where the continuing participants' consent to the assignment is required, the Assumption Deed may also record those items. It may also operate, as between the assignor and the assignee, as the instrument by which the Assigned Interest is actually assigned, particularly in the circumstance where the assignment clause of the JVOA prohibits any assignment (as distinct from an agreement to assign) prior to execution of an Assumption Deed.