4. DISPUTES AND REMEDIES

4.1 Default Provisions

Articles

North R. A. "Comment on Penalties, Forfeitures and Dilution" [1989] *Australian Mining and Petroleum Law Association Yearbook* 21

North comments on and compares the articles on default and forfeiture by Mizen ([1985] *Australian Mining and Petroleum Law Association Yearbook* 91), the Hon. Mr Justice Clarke ([1989] *Australian Mining and Petroleum Law Association Yearbook* 1), and Young and Johnston ([1989] *Australian Mining and Petroleum Law Association Yearbook* 27) and notes the contrasting views of the authors in relation to the default clauses in the APEA Guidelines. He notes that quantum of loss is a thread running through both doctrines, such that the greater the value received by the defaulter, the less likely a clause will be struck down as a penalty - whether a loss of interest, dilution, transfer of interest etc., will be deemed a penalty will depend on the particular circumstances (*CRA Ltd v New Zealand Goldfields Investments Ltd* [1989] VR 873). North refers to Young and Johnston's remarks that for a sole-risk or non-consent operation to insist on a premium may be unconscionable because it knows that its co-venturer cannot afford to participate in or pay the premium necessary for reinstatement, and argues that such a conclusion works contrary to commercial reasons for entering into those clauses - a participant that has the financial capacity to carry out operations, should not be prevented from doing so, and a participant who declines to participate should not reap the benefit of any discovery made without recognising extra risk. North considers Young and Johnston's list of factors which may be taken into account in determining if equity will intervene to grant relief against forfeiture, and adds that for resource joint ventures, equity will take notice of the prospectively of the area concerned, and the relative negotiating strengths, financial and technical resources of the participants. In considering all the circumstances of an exploration case, North concludes that a court may view the position of a defaulting party as less unconscionable than other forms of joint venture.

Chambers R. "Joint Ventures: Breakdowns and Repairs Methods of Structuring a Joint Venture to Deal with a Co-Venturers Failure to Contribute to Expenditure" [1983] *Australian Mining and Petroleum Law Association Yearbook* 235

Assuming an unincorporated joint venture structure, Chambers explains the possibilities for voluntary withdrawal, abatement of interest, 'deemed withdrawal', or right to resume contributions available where a joint venture party is either unable or unwilling to contribute to an

exploration joint venture. Examples of appropriate clauses are provided. Chambers notes that where a party is unable to contribute, the validity of the remedies available may be subject to a court's consideration of the stage of the project's development, and the relevant positions of the parties, which will in turn affect the non-defaulting parties' choice of action.

The implications of a default situation will be different when the joint venture is operational, as supply of funds is paramount, and any shortfall may be immediately disruptive to the venture. Noting that the principle objective of remedy clauses is to discourage a co-venturer from defaulting and to provide incentive for non-defaulting co-venturers and lenders to assume the responsibilities of the defaulting venturer, Chambers provides example clauses and detailed discussion of the possible remedies, including (i) the right (or obligation) of co-venturers to make contributions in place of defaulter; (ii) loss of joint venture rights; and (iii) compulsory sale after a specified time.

In the second part of the paper, Chambers examines the conflict arising between lenders and non-defaulting venturers in a default situation. He canvasses the commercial and practical implications for both non-defaulting parties and lenders where the remedies of compulsory sale and loss of share of production are being considered, with sample clauses given in relation to each remedy. Other issues covered include (a) cross-defaults under joint venture and loans agreements; (b) the right to sell part only of the defaulter's interest; and (c) the relevance of foreign investment rules.

Mizen A.F. "Default by Joint Venturers" [1985] *Australian Mining and Petroleum Law Association Yearbook* 91

Mizen provides an in-depth analysis of the major Australian High Court cases dealing with the equitable doctrines of relief against forfeiture and unenforceable penalties, and consider the implications and application of the principles to default clauses in the particular situation of exploration and production joint ventures. According to Mizen, the case of *O'Dea v Allstates Leasing System (WA) Pty Ltd* makes it clear that it is the substance of the contract which must be considered, to determine if the event triggering the 'penalty' is a breach of contract. When the substance of the many forms of default clauses are examined, Mizen concludes that dilution clauses and 'deemed withdrawal and forfeiture clauses' all involve elements of forfeiture in one form or another, and are likely to be considered breaches for the purpose of grounding a claim for unenforceable penalty (where non-contribution triggering sole risk and buy-back will not).

However, a court may grant relief against forfeiture even if the triggering clause is not considered penal. Following *Legione v Hateley* the interest forfeited must be in the nature of a proprietary or possessory interest - a joint venture participant's interest in a petroleum permit, mining tenement, or petroleum title may suffice for this purpose. However, the court must be of the view that the forfeiture would be unjust, unconscionable or inequitable. After a thorough examination of the court's reasoning in *Monarch Petroleum NL v Citco Australia Petroleum Ltd*, Mizen argues that the commercial imperatives associated with a mining joint venture, would make courts reluctant to interfere with the operation of joint venture default clauses.

Mizen also considers the importance of the conduct of the non-defaulting parties when faced with the default of another joint venture party, especially in deciding whether to send out a default notice, triggering automatic forfeiture of the defaulting party's interest. Mizen sets out the principles of the often neglected 'doctrine of election,' and warns that if parties are unsure about how to proceed, they should ensure their conduct in the meantime does not amount to an election one way or the other, as an election knowingly made cannot be withdrawn, even if it has not been acted upon by another to his prejudice.

Cases:
Legione v Hateley (1983) 152 CLR 406
Monarch Petroleum NL v Citco Australia Petroleum Ltd [1986] WAR 310
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359

The Hon. Mr Justice M.J.R Clarke. "Penalties, Forfeiture and Dilution" [1989] *Australian Mining and Petroleum Law Association Yearbook* 1

In this in-depth analysis of the doctrines of penalties and forfeiture, the author first summarises the factors considered by the court in determining if a clause constitutes a penalty, as described by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* ("*Dunlop*"). Justice Clarke argues that a similar rationale has been adopted by Australian courts in *AMEV-UDC Finance Limited v Austin* ("*AMEV"*)*,* such that the court will be reluctant to interfere with freedom to contract, and only where sum stipulated in the clause is out of all proportion (*AMEV*) or "extravagant and unconscionable" (*Dunlop*) in comparison to greatest amount of damages which might otherwise flow from the breach.

Clarke considers the question as to whether the doctrine applies to exercising a right of termination, when the right is not conditioned on the happening of a breach of contract. English courts have found clauses for payment of money on the happening of an event which event is not a breach of contract, is not a penalty clause (*Export Credits Guarantee Department v Universal Oil Products Co.*) and while this decision was been applied in *Offshore Oil LN v Southern Cross Exploration NL*, the High Court reasoning on this point in *AMEV leaves* the question unsettled in Australia. His Honour argues that the English position is difficult to sustain, as the right does not generate a secondary obligation arising from such breach - when an agreement is terminated pursuant to a contractual right (which may potentially be considered unconscionable) the real question is whether relief should be afforded from the forfeiture involved in termination.

In relation to relief from forfeiture, his Honour examines the cases, and concludes that following the case of *Stern v McArthur,* relief against forfeiture can be granted where a contract has been rescinded for breach of an essential term, but only where there are "exception circumstances", for which the plaintiff must show proof of unconscionable conduct. The right forfeited must be proprietary, in order to invoke court of equity.

Where clauses provide for diminution or dilution of a party's interest upon default, Clarke observes that Australian courts are more recently cognisant of the particular commercial risks and

uncertainty of exploration joint ventures (see Kennedy J. in *Monarch Petroleum NL v Citco Australia Petroleum Ltd*) and in these circumstances, it may be more difficult to establish the effect of the dilution or diminution of interest as a penalty. The plaintiff would need to show the high dilution rate was unconscionable, and examining the particular circumstances of the case, the court would also consider the damage and increased risk to other venturers, and reduced liability to the defaulter, flowing from the defaulters actions. The APEA default clause (under which the interest of a defaulter may be forfeited with defaulter remaining liable to pay the outstanding call plus interest which was in default) has "the earmarks of a penalty" as the defaulter is exposed to a secondary liability while other ventures enjoy a windfall.

Cases:
AMEV-UDC Finance Limited v Austin (1986) 162 CLR 170
Esanda Finance Corporation V Plessnig (1989) 84 ALR 99; 166 CLR 131
Stern v McArthur (1988) 81 ALR 463
Monarch Petroleum NL v Citco Australia Petroleum Ltd & Ors [1986] WAR 310
CRA Ltd v New Zealand Goldfields Investments Ltd [1989] VR 873
Offshore Oil LN v Southern Cross Exploration NL Unreported, NSW S/C, 19 March 1987
Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited [1915] AC 79
Export Credits Guarantee Department v Universal Oil Products Co. [1983] 1 WLR 399

Young N.J. and Johnston B.W. "Commentary on Penalties, Forfeitures and Dilution" [1989] *Australian Mining and Petroleum Law Association Yearbook* 27

Young and Johnston provide a detailed discussion on the doctrines of penalties and of relief from forfeiture. They set out point by point, the elements of both doctrines as they currently stand, and argue that relief from forfeiture may become more potent as an action in the future, due to the flexibility a court of equity has to consider the circumstances of each case, to shape the remedy, and to apply the principles of unconscionable conduct generally.

The second part of the paper focuses on the application of the doctrines to the particular situation of resources joint ventures. The authors note that Australian cases have considered the different reasons behind the use of default clauses in the high risk and uncertain circumstances of exploration joint ventures which impact on determining whether penalties will be considered "extravagant and unconscionable." Issues particular to an exploration joint venture, in applying for relief against forfeiture of an interest, include difficulty in establishing sufficient disparity between the value of the obligation to transfer the joint venture interest and the maximum conceivable loss the innocent venturer would suffer; difficulty in establishing a pre-estimate of loss; the potential for divestiture obligations to be seen to benefit the defaulter by way of decreased risk. Such issues highlight the need for default clauses to be carefully drafted, with the particular circumstances of the joint venture in mind.

Cases:
Stern v McArthur (1988) 81 ALR 463
CRA Ltd v New Zealand Goldfields Investments Ltd [1989] VR 873

Pliner R. and Coyle M. "The O'Dea-Allstates Case and the Implications for Exploration and Mining Joint Venturer Agreements" (1983) 2(3) *Australian Mining and Petroleum Law Association Bulletin* 37

Pliner and Coyle examine the principles enunciated by the High Court in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) case regarding the equitable doctrine of 'penalties' and consider the implications for the enforceability of breakdown provisions (dilution; forfeiture; withdrawal; sole risk and buy back) contained in exploration and mining joint ventures. The authors observe that exploration and mining joint ventures involve 'high risk and a number of imponderables' which make it difficult for courts to assess whether the value of the premiums and losses arising as a result of some form of non-contribution are a genuine pre-estimate of damages or constitute a 'penalty,' and argue that the peculiar uncertainties surrounding mining and exploration activities make the application of principles of unconscionable conduct inappropriate to mining joint ventures.

Applying the principles governing penalty clauses to particular joint venture provisions, the authors find:

> (i) a court is not likely to regard a <u>dilution</u> clause as a 'penalty', as the non-contribution does not involve a breach of contract, but is a result of an election not to contribute, and because the diminution in the joint venture interest also results in a reduction to future expenditure. Further, dilution usually only occurs in the event a party fails to contribute to the venture expenditure - the effect of the dilution of interest is therefore commensurate with the extent of the default. Additionally, a court would find it difficult to assess whether the value of the dilution is 'extravagant and unconscionable' as judged *at the time of making the contract* - the 'greatest loss' that could follow a breach of contract will be unknown at the time of making the joint venture agreement;
>
> (ii) in the case of <u>forfeiture</u>, a court may consider the forfeiture to constitute a breach of contract where the non-contribution results in the forfeiture of an entire interest. However, forfeiture in the context of a mining joint venture also involves the cessation of further contributions, and only occurs after a series of dilutions, resulting in circumstances that may not be considered inequitable. The authors advise that percentage level at which a forfeiture of an interest occurs should be reasonable, and no more than 5%;
>
> (iii) whether a provision enabling a contributing party to <u>acquire</u> the interest of a non-contributing party, will depend on the seriousness of the breach resulting in the buy-out and the price paid on the exercise of the buy-out right;
>
> (iv) the premium payable to enable a non-participant to buy-back into a <u>sole risk</u> activity, is not likely to be considered a penalty, as there is no breach of contract involved.

> Neither is it a consequence of a failure to perform a covenant, as required under the principle of forfeiture.

Cases:
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359

Willoughby G.D.M. "Forfeiture of Interests in Joint Operating Agreements" (1985) 3 *Journal of Energy and Natural Resources Law* 256

Willoughby examines UK law regarding history of remedy of relief against forfeiture and its application to operating agreements. After detailed discussion of English case law, it is concluded that relief against forfeiture is only applicable where (a) the forfeited interest is proprietary or possessory and (b) the right of forfeiture is intended to secure the payment of money. It is argued that an operating agreement would not meet the requirements for the securing of payment of money, irrespective of the nature of the interest. Even if both (a) and (b) were satisfied, the English courts would regard the commercial context of the agreement as "highly relevant" and in this context the courts will not be likely to grant relief against forfeiture of interests in an operating agreement.

Cases:
Shiloh Spinners Ltd v Harding [1973] 1 All ER 90
Scandinavian Trading Tanker Co. AB v Flota Petrolera Ecuatoriana [1983] 2 All ER 763
Sport International Bussum BV v Inter-Footwear Ltd [1984] 2 All ER 321
BICC plc v Burndy Corp [1985] 1 All ER 417

Roberts M.G. "Panel Discussion on Default Provisions in Mining and Petroleum Joint Ventures" [1980] 2(2) *Australian Mining and Petroleum Law Journal* 360

Roberts identifies some of the practical issues arising from the formulation of default provisions, and advocates that the joint venture agreement should seek to minimise the risk of default through provisions relating to the scope of the joint venture, withdrawal mechanisms, requirements for unanimity and provisions for sole risk, non-consent and dilution. A short discussion follows, regarding who should bear the risk of default and the possible arrangement to achieve a balance of interest between commercial priorities of lenders and joint venture participants.

Reynolds R.M.B. "Joint Ventures: Breakdowns and Repairs Defaults and Securities" [1983] *Australian Mining and Petroleum Law Association Yearbook* 224

Reynolds provides a comprehensive practical and legal explanation of the operation of various charges in the event of default. In relation to securities held by other joint venturers participants, he examines 'present' and 'prospective' liability under cross-charges and the legislative meaning of 'notice' of registration. The issues and procedures to effect access to securities over proceeds of sales contracts is also considered. Reynolds goes on to examine the effect of default on

securities held by lenders, particularly in a project finance situation where security is over cash flow, and the factors to consider when appointing a receiver.

Returning to the joint venture agreement itself, Reynolds emphasises the need to address the position of outside lenders and the implications for joint venture financing at the outset. Reynolds discusses the issues that should be considered, namely:

- what restriction there should be on the ability of a joint venturer to create charges over the joint venture interest, and if so, what consent provisions are required;
- the extent to which an outside lender should be bound by the provisions of the agreement and to what degree will 'notice' of a cross-charge protect participants;
- provisions to be included which ensure failure by a receiver to pay contributions are deemed to be a default under the joint venture agreement;
- whether appointment of a receiver by a lender should be a default
- the extent to which a receiver will personally accept joint venture responsibilities, especially when ongoing business decisions need to be made;
- whether the operating committee should include only continuing joint venture parties (and exclude the receiver); and
- whether a receiver should be bound by alterations to the joint venture agreements.

Manning B. "Default/Insolvency—Enforcement Advice to the Non-Defaulters" [1991] *Australian Mining and Petroleum Law Association Yearbook* 78

Based on a hypothetical petroleum joint venture case, Manning considers the options available where an operator/participant has defaulted, from the perspective of non-defaulting parties. Practical implications are considered in relation to: removing the defaulter as operator; remedies for default in payment under the joint venture agreement (the situation regarding cross- charges, voting rights, and options to purchase defaulter's interest); pre-emptive rights; and the procedural and legal issues surrounding recovery of misapplied funds.

Roberts N.B. "Default Clauses in Joint Venture Agreements in the Context of Sections 368, 451 and 200 of the *Companies Code*"[1987] *Australian Mining and Petroleum Law Association Yearbook* 318

Roberts examines the enforceability of default clauses under the [then] Companies Code, giving detailed arguments for and against the applicability of the various bankruptcy and insolvency provisions on the interests of non-defaulters under joint venture default clauses. Beginning with section 451 (that incorporates section 120 and 122 of the *Bankruptcy Act 1966* (Cth)) the Court would have regard to the substance of the provision, and where the effect is to transfer property which would otherwise be available to creditors, the clause may be considered void as a preference. Section 122 will not apply if the non-defaulting venturers held an equitable interest prior to the six months before the winding up of the defaulting venturer. In this respect the court may find, following *Hewitt's* case, that each joint venturer has an equitable lien on the interest of each of the other venturers in the common property, and if this is so, it will arise at the time the joint venture agreement was entered into. In this case, non-defaulting joint venturers will be

treated as secured creditors. Roberts argues that the default provisions in the agreement should be characterised as agreement providing for the transfer of property upon the happening of a contingency (default), and may therefore be considered a preference, unless the default occurred prior to the six month period, in which case an equitable interest in that property would have already passed. Roberts argues that section 122 of *Bankruptcy Act 1966* (Cth) does not apply to a disposition of property pursuant to an agreement for valuable consideration where the parties are commercial entities dealing with each other at arms length.

Regarding section 368 of the *Companies Code* Roberts argues that the section will only apply if the property was at some time during the winding up, beneficially owned by the company. It may be possible to argue that the section should not apply to above property forfeited pursuant to section 368, but a court may decline its discretion if it could be shown that the value of the forfeited property significantly exceeds the unpaid calls. As to section 200, while cross-charges and express liens will ordinarily be registrable, forfeiture provisions should be characterised as conditional contracts to assign rather than security arrangements and are likely not to be registrable. If forfeiture provisions are considered a security arrangement, they will only be registrable if some part of the property is comprised in section 200. Where there are cross charges, the doctrine that equity will not allow any clogging of the chargee's equity of redemption will not prevent the forfeiture of interests under default provisions.

Cases:
Hewitt v Court (1983) 149 CLR 639
Maughan v Elders Finance & Investment Co. Ltd. (1986) 5 ACLC 20

Legislation:
Bankruptcy Act 1966 (Cth) sections 120 and 122
Companies Code sections 200, 368 and 451

Poulton T. "Panel Discussion on Default Provisions in Mining and Petroleum Joint Ventures"(1980) 2(2) *Australian Mining and Petroleum Law Journal* 350

Poulton looks at the legal and equitable problems associated with provisions relating to default in contribution. He considers Canadian and English case law in relation to relief against penalties, and relief against forfeiture, however the applicability of the authorities discussed to Australian context is somewhat dated. Contains a short discussion highlighting the differences between states on the registrability of charges.

Ladbury R.A. "Mining Joint Ventures" (1984) 12 *Australian Business Law Review* 312

In the latter part of Ladbury's paper, he discusses the development of the use of unit trusts as a vehicle for joint ventures, explaining the underlying attraction of the unit trust and the legal position of a party contracting with the trustee of a unit trust. Ladbury then considers the issues arising where the venture is project financed, considering in detail the operation of joint venture clauses on the enforceability of security interests; the operation of confidentiality covenants in

relation to lenders, and the consequences of default of a venturer on project financing. The possible intervention of equity in joint venture default provisions is examined and the implications for the effectiveness of such default provisions (including forfeiture, dilution, rights of non-defaulter to purchase, cross-charges, operator's lien, loss of rights to take production) are considered.

Waite J.H. "Australian Resources Joint Ventures: Some Legal Pointers for Investors", Paper presented at *LAWASIA (Energy Section), International Symposium on Energy Law*, Jakarta, 7 November 1985

The third part of Waite's paper discusses the typical provisions in Australian resources joint venture agreements that deal with the situation in which participants are in default in making their financial contribution to the project. He notes that forfeiture of interest, withering or dilution and loss or suspension of rights to take product are more common in exploration ventures, and, being inimical to the interests of lenders on the security to projects assets, are inappropriate where there are project borrowings. Waite deals with the practical operation of cross-charge mechanisms, forfeiture, withering/dilution, loss of production rights, the charging of interest, and the rule against perpetuities on pre-emptive rights.

Books

Fazio W. "Defaulting Joint Venturers" in *The Rights and Duties of Joint Venturers in Tough Times*, Papers delivered at a 2-day Master Class, Business Law Education Centre, Melbourne, November 1990, Part 8

Fazio provides an introduction and overview of the principles and problems related to various default mechanisms, including dilution, penalty, relief against forfeiture, buy-out, loss of voting rights, and concludes that a properly drafted buy-out provision will usually provide an adequate and commercially appropriate remedy where the default has lead to a breakdown in the joint venture relationship. Drafters must bear in mind that a court will treat each case individually and scrutinise the circumstances for unconscionable conduct. The author also gives a short but practical introduction to the obligations of the defaulting venturer, and to the impact of insolvency.

Duncan W.D. (Prof.) and Clarke G. "Default, Deadlock and Resolution" in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney 1994, Chapter 9

The first part of this chapter gives an overview of the use of default provisions explaining the common default mechanisms used in exploration joint ventures (specifically buy out, dilution or forfeiture of interest) and the problems to be aware of when drafting such clauses. The authors then analyse the two principal forms of relief against the application of these clauses, namely relief against forfeiture and penalty. They argue that in relation to relief against forfeiture, a more expansive approach is to be preferred, in which the defaulting party may claim equity's jurisdiction in "exceptional circumstances" through evidence of unconscionable conduct on the part of those who will benefit materially from the forfeiture. It is noted however, that the court has

recognised the particular commercial context in which exploration joint ventures operate, and in these circumstances of high risk and minimal initial returns, it may be difficult to demonstrate any substantial degree of unconscionability. Noting that relief against forfeiture has traditionally applied to the forfeiture of a possessory of proprietary interest, the authors suggest that further development of equitable principles in this area may see an expansion of "interest" to include other categories of loss in future and attract jurisdiction where other unconscionability tests are satisfied.

Duncan and Clarke warn against the drafting of penalty clauses. Although in the context of exploration joint ventures, it may be difficult to establish the requisite disproportional between the sum or dilution stipulated in the clause and greatest loss conceivable at the time of the contract, in order to strike out the clause as a penalty, the need to consider each case individually gives rise to uncertainty, and in the event the clause is struck out, the only remedy left for non-defaulting co-venturers is damages for breach of contract.

Manning W.F. "Some Practical Aspects of Resources Joint Ventures" in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney 1994, Chapter 10

Manning gives a clear and concise overview of the context of Australian mining and petroleum joint ventures and explains how Australian legal and tax circumstances affect choice of structure, and how the Australian physical environment and the conditions of holding tenements, will impact on deadlock breaking procedures. Noting that arbitration or good faith provisions are not likely to be effective in resolving a deadlock, he discusses options open to joint venturers where there is failure to reach agreement.

In the later part of his paper dealing with defaults, Manning discusses specific issues that arise due to the nature of resource joint ventures and the property with which they deal. Most breaches of obligation under the joint venture agreement are left to be dealt with by the usual remedies for breach of contractual obligations (injunction, specific performance or termination and an action for damages.) However, where a joint venturer fails to contribute its share of costs, those remedies are ineffective, and in the particular circumstances of resource joint ventures, where tenements must be protected and an ongoing supply of funds is crucial to the survival of the joint venture, particular remedies are provided for, to deal with failure to meet calls, namely: (i) forfeiture of joint venture interest; (ii) compulsory dilution of joint venture interest; (iii) loss of rights to product or proceeds of sale; and (iv) compulsory sale of joint venture interest to the other participants. After explaining the practical issues involved in each of these remedies, Manning concludes that in drafting default provisions for a resources joint venture, different remedies should be provided for, at different stages during the joint venture, and clauses should be tailored to the actual and anticipated circumstances of the particular joint venture.

Cases:
Monarch Petroleum NL v Citco Australia Petroleum Ltd [1986] WAR 310, Supreme Court of Western Australia, 29 March 1985

Cases:
AMEV-UDC Finance Limited v Austin (1986) 162 CLR 170
Esanda Finance Corporation v Plessnig (1989) 84 ALR 99; 166 CLR 131
Stern v McArthur (1988) 81 ALR 463
Monarch Petroleum NL v Citco Australia Petroleum Ltd & Ors [1986] WAR 310
CRA Ltd v New Zealand Goldfields Investments Ltd [1989] VR 873
Legione v Hateley (1983) 152 CLR 406
Offshore Oil LN v Southern Cross Exploration NL Unrep, NSW S/C, 19 March 1987
Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359
Australian Energy Ltd. v Lennard Oil NL [1986] 2 Qd R 216
Export Credits Guarantee Department v Universal Oil Products Co. [1983] 1 WLR 399
Legione v Hateley (1983) 152 CLR 406

4.2 Deadlock Breaking Mechanisms

Articles

Binks C.C.A. "Joint Ventures: Breakdowns and Repairs Receivers Liquidators and Partition"[1983] *Australian Mining and Petroleum Law Association Yearbook* 258

Binks sets out the particular circumstances of joint and several financing, cross-charges and the legislative and practical ability to partition interests in the event of default. The lender's option to recover will be affected by the consequences of any default clauses (loss or suspension of rights, forfeiture, abatement, liability to operators, and compulsory purchase) which may have been activated, and of any pre-emptive rights in the other joint venturers. Binks discusses in detail the commercial and legal aspects of the appointment of a receiver or a liquidator in these circumstances, and the effects on the business of the joint venture. The effect on the role of the receiver and liquidator of the joint venture agreement is outlined and whether any default clauses may be considered voidable preferences under bankruptcy provisions.

Binks concludes that due to the security taken by lenders over both assets and income in the particular circumstances of a joint venture agreement, the most effective action for a project lender (through a receiver) is to continue to support a joint venture. There is a risk that 'outside' creditors may become impatient and appoint a liquidator, who may subsequently place pressure on participants while waiting for a better price for the defaulter's interest to be found. A receiver should therefore resist pressure to appoint a liquidator as such action may prejudice both the continuation of the joint venture and the interests of the creditors as a whole.

MacDonald K.D. "Joint Ventures - Breakdowns and Repairs Rights Upon Default" [1983] *Australian Mining and Petroleum Law Association Yearbook* 209

After first considering the potential existence of joint venture remedies which may in substance amount to registrable charges, MacDonald provides an extensive and thorough discussion of