

## “USING A FARMOUT AGREEMENT (OR JOA) AS A ‘WHACKING GREAT’ POWER OF ATTORNEY: NOT SO EASY IN PRACTICE”

Last year, I was pretty heavily engaged in thinking about farmout agreements (**FOA**) and lots of very interesting issues presented themselves.

The FOA is a particular type of the asset sale and purchase agreement (**ASPA**). But instead of acquiring an oil and granting instrument (let us assume it is a licence (**Licence**)) through a simple purchase sum, the party farming-in (**Farmee**) (or buyer, if you will) acquires its equity (**Farm-In Interest**) in the Licence by funding its own share of the value of an oil and gas project (often say a well commitment) AND the share (or agreed part of the share) of the Farmor (or seller, if you will) (**Farm-In Programme**). The funding of the Farmor’s share is called a “**carry**”. FOAs can be either “**Equity-first**” in which case the Farmee takes title to its equity in the Licence before initiating Farm-In Programme funding or “**Equity-after**” (also called “**Earn-in**”) in which case the Farmee funds the Farm-in Programme and then receives the Licence equity.

One issue that has interested me for a long time is how a Farmor’s advisor can best protect his client’s interest, if the Farmee fails to perform a vital contractual obligation (like timely performing the Farm-in Programme). Assuming we are working with a so-called “Equity-first” FOA (under which the Farmee would receive the Farmout Interest before performing the Farm-In Programme), this failure to perform on the part of the Farmee would usually lead to a re-assignment (**Re-assignment**) of the Farm-In Interest to the Farmor. Is it possible to stipulate in the FOA that in the event of a Re-assignment, a Farmor will have the power granted to it by the Farmee to do all acts required to transfer the Licence equity back to Farmor? In other words, can the Farmee in the body of the FOA grant an upfront power of attorney (**POA**) to the Farmor to transfer Farmee’s future property (the Licence equity) to Farmor and possibly take other related acts in order to accomplish this goal?

The Association of International Energy Negotiators (**AIEN**) model form FOA (2019) (**AIEN FOA**) assumes that the FOA can serve as a Power of Attorney for the Farmor.

In this respect, AIEN FOA, Clause 11.5.8 is as follows:

Farmee irrevocably appoints Farmor, by way of security, for the performance of its [Re-assignment] obligations under this Article 11.5, its attorney to execute, deliver, or issue any necessary document, agreement, certificate, and instrument required to be executed by it under the provisions of this Article 11.5, in order to give effect to the rights afforded to Farmor under this Article 11.5.

In a different but related context, the Offshore Energies standard form Joint Operating Agreement (2021) provides the following at Clause 17.8 (Default):

### **Power of Attorney**

The Defaulting Participant appoints the Operator to be its attorney for the purposes of:

- a) taking and disposing on its behalf of its Percentage Interest share of any Petroleum and applying the proceeds as set out in clause 17.4;
- b) taking such actions as may be necessary or desirable to obtain any necessary consent of the Secretary to a [[forfeiture/transfer]] pursuant to clause 17.6.2; and
- c) executing and delivering on its behalf and in its name any and all documents necessary to effect any such [[forfeiture/transfer]] and acquisition;

and all costs and expenses pertaining to any such [[forfeiture/transfer]] and acquisition (including for the avoidance of doubt any stamp duty or stamp duty land tax incurred on the documents executed to effect such [[forfeiture/transfer]] and acquisition) shall be the responsibility of the Defaulting Participant.]]

By way of background, most JOAs provide that if a defaulting party (**Defaulting Participant**) fails to pay joint venture invoices or respond to Cash Calls, it will be declared to be in default by the Operator and that after a short time it will lose title to any production with its share going to the non-defaulting parties (**Non-Defaulting Participant**) (Clause 17.4). If default continues, the JOA participation of the Defaulting Party can be forfeited (Clause 17.6.2). Similar to the AIEN FOA therefore, the Offshore Energies JOA assumes that the position of the Operator (in place of the Farmor in the case of the AIEN FOA) can be bolstered by having a POA appointment in favour of itself. The Offshore Energies JOA notes that under English Law, a JOA having this kind of POA Clause must be in deed form. This is requirement is partly to obviate any possible objections to the POA based on lack of consideration.

Having reviewed the provisions of the AIEN FOA and the Offshore Energies JOA, both of them very important industry model contract forms, the one international and the other UK-based, I considered it worthwhile drafting in a "POA" clause in one of my FOAs of 2023. I wrote the FOA as a deed. It has always seemed odd to me to try to make a "whacking great" deal document serve a second function as a POA, but there is no doubt that this is workable in theory. I incorporated similar language to that used in the Offshore Energies JOA (although in an FOA context).

I am afraid I did not get very far. Counsel for the Farmee immediately objected on the basis that my POA language would not allow the Farmor (assuming a future Re-assignment) to actually transfer the Farmee's Farm-in Interest on the NSTA PEARs system. Furthermore, no third party would accept our power to act for the Farmee without a court judgement, unless the Farmee was willing to collaborate, in which case the POA would be largely redundant. Since this was not a major issue, I dropped the point, though the reaction interested me.

Similar points to those of Farmee's counsel were made by CMS Partner Norman Wisely in his very useful talk entitled "JOA Default and Exercising Forfeiture" in the Offshore Energies Legal Conference of 28 September 2023. I spoke to a very well-regarded colleague who is well versed in the Offshore Energies JOA at the same conference and her view is that the POA language in JOA Clause 17.8 cited above has never been tested and probably would run into PEARS problems apart from anything else.

In the international context, you may have the further issue that while it is usually quite easy to make the FOA subject to English Law and Courts it is another thing to try to confect a POA under English Law to give effect to transactions in a foreign jurisdiction.

My reaction to all this is that acting for a Farmor (or Operator for that matter), I would still prefer to have the POA language than not, because it always represents a threat of some sort, and it can be serious for a Farmee to misrepresent to a third party that it is not in contractual breach when it is. I would be very interested to hear from anyone involved with either a UK or international oil and gas practice as to whether they have ever seen such a POA clause being activated and what the results were?

