MINING AND PETROLEUM JOINT VENTURES IN AUSTRALIA: SOME BASIC LEGAL CONCEPTS

J. D. Merralls, Q.C.*

THE CONCEPTION OF JOINT VENTURE

Joint venture arrangements for modern mining and petroleum enterprises in Australia have been devised not only to provide a convenient structure for bringing together capital and talent on a large scale but also to achieve a satisfactory position under the tax and trade laws of Australia, the United States and other countries. Thus the concept of joint venture is significant for what it is not as well as for what it is.

Combinations as joint venturers for these purposes in Australia are unincorporated, though companies are sometimes formed to perform subordinate functions within the venture.[1] The combination that this paper examines is an unincorporated association, usually comprised of corporations though sometimes with individuals as well. It is created by contract. Its membership is quite small. The formal agreement usually declares that the parties associate themselves in a joint venture for a stated purpose subject only to the provisions of the agreement[2] and it disclaims any other legal or equitable relationship between them.[3] There is no commonly accepted term to describe the parties to a joint venture. In this paper they are called participants.

The description joint venture or joint adventure is not new. It was applied to arrangements made between English traders for the exportation and sale or the purchase and importation of goods in the eighteenth and nineteenth centuries in which the distinguishing features were that separate stocks were contributed or separate funds subscribed for acquiring stocks that were later to be divided and that the parties were associated only for a particular transaction.[4] The description has been applied in this century in the United States to many business relationships of limited duration and purpose.[5] It is used in Scottish law to denote a species of partnership which, like a partnership in English law but unlike a general partnership or firm under Scottish law, is not a legal person distinct from its members.[6]

The essential concept of modern mining joint venture does not depend upon a priori conceptions derived from these models. The statement that the arrangement is to be regarded as a joint venture and not some other combination is intended as much as a refutation of the proposition that "no association of individuals to carry on business in common for profit, which is not either a corporation or a partnership, is known to the law"[7] as a compendium of the rights and duties thereby created. The abjuration of intention to form a partnership, trust or company perhaps is more significant. Even so the parties' own description of their relationship is not conclusive. If the legal incidents of a relationship do not concur with the description, the description will be ignored.[8] But if an agreement contains a genuine statement of the parties' intentions the description will be given its proper weight in relation to other provisions of the agreement. A false label will not alter the truth but the parties may resolve doubts that might exist about an ambiguous relationship.[9] Obligations may be owed by the parties to outsiders however which are the same as those of partners, though between the parties them-

selves the rights and duties are as stipulated by the agreement. The structure of mining or petroleum joint venture arrangements may not yet have become so rigid nor the terms of exploration or production agreements so stereotyped that they are essential to the conception of joint venture. But it has been found convenient to the parties themselves, to their financiers and to their suppliers and customers for a conventional form and common provisions to be adopted for joint venture agreements[10], and the time may have arrived when the bare fact that parties agree to form a joint venture has juridical significance.

The legal and equitable concepts of real and personal property, contract, partnership, trust and agency have a place in defining the structure of a joint venture and determining the rights, duties and obligations that arise from and are associated with it, but they do not provide a satisfactory solution for all the problems that are encountered. Instead of straining conventional concepts or applying unsuitable labels to new things it is preferable to recognize differences where they exist and to devise appropriate legal solutions. It took time for the law governing incorporated joint stock companies to break the shackles of partnership and trust. But as the inaptness of the rules of those compartments of the law to the condition of companies was perceived new conceptions were developed and rights and duties were described in language derived less obviously from other fields. Thus the duties of directors ceased to be expounded in terms of the law of trust and rules were devised by the courts and by statute that were adapted to their function. That process occurred at first through litigation. But the courts are unsuitable vehicles of change unless litigation is regular and it provides opportunities for coherent development. Many of the great changes in the law of property were achieved through judicial recognition of conveyancers' invention. The law of joint ventures is not being made in the courts or the statute books but in the voluminous documents which order the complex exploration, development and financing activities that modern mining and energy operations involve. The child of convenience is assuming a character of its own.

COMMON FEATURES OF MINING AND PETROLEUM JOINT VENTURE AGREEMENTS

Different arrangements will be required for ventures formed for the various activities of exploration, production and the operation of a facility, but the legal structure of each is basically the same. The agreement states the scope, purpose and duration of the joint venture, identifies the assets committed to it, describes and quantifies the interests of the participants and provides for the operation, management and control of the venture, the subscription, holding and expenditure of funds, the apportionment of liability, the consequences of default, the use and disposal of the fruits of the venture, the assignment of interests and withdrawal from the venture. These are matters for which provision must be made in any common enterprise. The distinguishing features of a standard joint venture arrangement are first that the participants hold their interests in the assets of the venture in common and their liability is several, second that an operator or manager is interposed between the participants and the operation, and third that the participants receive the fruits of the venture separately and in kind.

JOINT VENTURE AND PARTNERSHIP

The last provides the main ground for the common belief that this form of

joint venture is not a partnership. Since the English Partnership Act was enacted in 1890 partnership has been defined in Anglo-Australian law as the relation which subsists between persons carrying on a business in common with a view to profit.[11] The profit to which the statutory definition refers is a gain arising from the conduct of the business, the business being the activity from which a loss or a gain may arise.[12] There is an academical controversy whether it is essential to the statutory definition that the profits be divisible amongst the persons who carry on the business[13], but the question is not pertinent to determining the legal character of a joint venture. If what is done in common produces profits there is no doubt that they are divisible amongst the participants. The critical questions are whether the joint venture activity is a business carried on in common and whether the agreement to divide the fruits of the activity, be they prospects proved or product won or treated, gives it "a view to profit". It would be hard to maintain that a joint venture formed solely for the purpose of prospecting or exploration and which required separate arrangements to be made for the exploitation of discoveries was either a business or an activity with a view to profit. The object of the activity is to obtain a capital asset capable of being exploited. That is not the kind of systematic activity normally connoted by the word business.[14] Where the common activity is the working of a mine or a well however a further element is present. The product is not fixed capital but stock for consumption or sale. If a participant were to conduct the whole operation alone from extraction to sale, he would be conducting a business at all phases. There would be no need to make an artificial distinction between extraction, treatment and sale and in common parlance he would not be said to conduct three businesses. If he were to join with another for the purpose of selling the product, the separation of that activity from production would make them different businesses, at law, for accounting, and for taxation. Combination for production which is not followed by a distinct transaction of sale of the product by the parties in combination to themselves individually is essentially different. Though the parties acquire individual interests in the product upon the division of a mass owned in common, the individual's business of selling is not separate from the activity of production. He does not acquire his stock by purchase and the phase of the total activity that is conducted in common is not a separate gainful activity.[15] A combination to provide a facility, such as a treatment plant or a railway, for gain may be a partnership despite the parties' desire that it should not. The old cases that established that the ownership of income-producing property coupled with agreement about management did not constitute a partnership[16] are given statutory recognition by the rule that joint tenancy, tenancy in common, joint property, common property or part ownership does not *of itself* create a partnership as to anything so held or owned whether or not the owners or tenants share any profits made by the use thereof.[17] There is no partnership because there is no business. But if the co-owners' activities extend beyond the mere ownership of property and the requisite passive management to the conduct of a business it is hard for them to resist the character of partners.

THE INCIDENTS OF PARTNERSHIP

The implications of the status of partnership for taxation are beyond the scope of this paper.[18] For general legal purposes there is a distinction between the incidents of dealings between partners and outsiders and those between the partners themselves. Many of the former are imposed by law; most of the latter are

subject to special agreement. It is fundamental to the conception of partnership that in dealing with outsiders every partner has authority to act on behalf of the partnership and to bind the other partners. The extent of his authority is confined by the scope of the partnership business and the relationship of a particular dealing to it and by agreed limitations upon the partner's actual authority to act on behalf of the firm. Other partners are bound only by a partner's acts for carrying on in the usual way business of the kind carried on by the firm. Express limitations on a partner's authority relieve his partners from liability for his acts only if the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.[19] It is also fundamental to the conception of partnership that each partner is liable jointly with the other partners for all debts and obligations of the partnership incurred while he is a partner[20] and jointly and severally for loss or injury caused to an outsider or for a penalty incurred by the wrongful act or omission of any partner acting in the ordinary course of the partnership business or with the authority of the other partners.[21] The partners may agree amongst themselves to distribute the burden differently but their agreement does not bind outsiders who deal with the partnership even with knowledge of its existence. Individual partners cannot obtain limited liability by notice. A judgment creditor may levy execution against the separate property of one of the partners. The partner has only a right to be indemnified by his partners in the agreed proportions. The commitment of particular assets to a partnership does have legal consequences for creditors if the partnership becomes insolvent. The claims of partnership creditors must be satisfied out of the partnership assets before those of the partners' separate creditors and the claims of the separate creditors of a partner must be satisfied out of his separate estate before those of the partnership creditors.[22] Execution cannot be levied against the separate interest of a partner in partnership assets, but provision has been made by statute for obtaining an order charging a partner's separate interest in the partnership property and profits.[23] Before the Partnership Act 1890 a separate judgment creditor was entitled to levy execution against a debtor partner's interest in the partnership and for that purpose was entitled to an account between the debtor and his partners.[24] Under the procedure instituted by the 1890 Act a charging order has the effect of an equitable charge given by the debtor partner, but a further order must be obtained to give effect to the charge by the appointment of a receiver and, in special circumstances, the taking of accounts and inquiries between the chargee creditor and the other partners. The other partners are at liberty at any time to redeem an interest that has been charged or, if the court directs sale, to purchase it, or they may dissolve the partnership.[25]

The legal incidents of the relationship between partners by and large depend upon the terms of the contract of partnership. The agreement also has relevance in relation to dealings by outsiders with the firm because it determines whether assets that are used for the purposes of the partnership are partnership property, and hence assets primarily available for partnership debts, or the separate property of individual partners. In the absence of contrary agreement the interests of partners in partnership property and their rights and duties in relation to the partnership are determined by statutory rules:- (a) all partners are entitled to share equally in the capital and profits and are liable to contribute equally to the losses; (b) the partnership is liable to indemnify each partner for payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business or in anything

necessarily done for the preservation of the business or property of the partnership; (c) a partner making, for the purpose of the partnership, any payment or advance beyond the amount of capital he has agreed to subscribe is entitled to interest from the date of payment or advance; (d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him; (e) each partner may take part in the management of the partnership business but (f) none is entitled to remuneration for acting in the partnership business; (g) no person may be introduced as a partner without the consent of all the existing partners; (h) any differences arising as to ordinary matters connected with the partnership business may be decided by a majority but unanimity is required to change the nature of the partnership business. These are rules intended for simple partnerships. Express provision will be made for most of the matters in a partnership agreement. Other covenants are implied: where a partnership is not for a fixed term it is terminable by any partner at will; the partners are obliged to render accounts of the partnership business and full information to any partner; partners may not compete with the firm; and the court may decree that the partnership be wound up in specified circumstances.[26]

Other incidents of the relationship are imposed by law. Two are paramount: (i) a partner has no title to specific property owned by the partnership but has a chose in action against all the other partners which entitles him to require the partnership property to be applied for the purposes of the partnership business during its currency and in its termination to receive a proportion of the net surplus of the assets after liabilities are satisfied;[27] and (ii) a partner owes a fiduciary duty to the other partners in relation to the partnership business. These matters are recognised in the Partnership Act but they are derived from the application of ordinary legal and equitable principles to the relationship of partners. They are inherent in the relationship.

THE CONTRACTUAL BASIS OF JOINT VENTURE

The parties to a joint venture may agree to the matters about which partners can agree. Can they also agree to those matters about which partners cannot? Two things they can agree and usually do: that the assets committed to the venture are owned in common and that a participant in that capacity has no authority to bind the others. They can also agree about the assignability of rights. They cannot by agreement between themselves alter the rights of creditors that obtain in relation to their transactions nor the rights of their separate creditors in relation to property committed to the venture, but by ordering their property interests and their conduct in particular ways they can determine what most of those rights will be.

THE INTERESTS OF PARTICIPANTS

It is more accurate to refer to the interests of participants than to interests in the venture. A joint venture agreement invariably states the proportionate shares of the venturers. The terminology is not conventional but descriptions such as individual or proportionate shares are not uncommon. Some agreements relate those shares to the joint venture itself but this should perhaps be regarded as an elliptical reference to the assets of the joint venture if the critical distinction is to be maintained between a joint venture and a partnership that a participant, unlike a partner, has a separate and identifiable interest in each asset used in the venture. It is preferable to avoid the confusion of ideas.

The law of partnership distinguishes between partnership property and the property of individual partners used for the purposes of a partnership. The interest of a partner in partnership property is an equitable interest in the entirety of the net assets of the partnership regarded as a converted fund. For succession and other purposes for which the distinction between real and personal property is significant, the interest of a partner is personalty.[28] Property may be used for the purposes of a partnership which is owned by one or more of the partners or by all of them, jointly or in common, in the same proportions as their interests in the partnership or different proportions, without its becoming partnership property. Nice questions may arise whether particular assets are partnership property.[29] The share of a partner in the partnership is his proportionate interest in the partnership assets after they have been realised and converted and the debts have been paid and liabilities discharged.

A properly drawn joint venture agreement will identify the assets that are to be used in the venture and apportion shares in them. It is usually declared that those assets are owned by the participants as tenants in common in the proportion of their defined shares.[30] (In some joint ventures, particularly exploration ventures, assets committed to the venture remain the property of some parties to the exclusion of others. Special provision has to be made for those assets in the agreement. Moreover it is not necessary for all the assets that are committed to a joint venture to be owned by the participants in the same proportions.) The agreement binds the participants to commit the assets to the venture and usually provides for their management and control. The participants each may be said to have an "interest" in those mutual undertakings which are legal choses in action. It is that interest together with each participant's proportionate share in the assets that a carefully drawn agreement will identify as the participant's individual or undivided interest in the venture.[31] One of the purposes of the mutual undertakings is to commit the commonly owned assets to the venture in a similar way to which partnership property is committed to a partnership while preserving the participants' separate interests in them. Upon the distinction depends the identification of the property in respect of which a partner or a participant can confer an interest as security. In the case of a partner it is the chose in action constituting his rights in the partnership. If the partner is a company a mortgage or charge is fixed or specific not floating, though the mortgagee does not acquire any right to interfere in the operation of the partnership business.[32] A security conferred by a participant in a joint venture is over his interest in the assets committed to the venture. It may be either fixed or floating. Because the assets are committed by the agreement, questions arise on the one hand of whether a mortgagee can enforce his security against the mortgagor's separate property interest free of the agreement committing it to the venture and on the other of whether he can acquire the benefit of the mortgagor's rights as a participant. The mutual agreements of participants to commit assets to the venture and not to seek partition create personal obligations enforceable between the parties, but it is a moot point whether they confer legal or equitable interests in the assets apart from the proprietary interests arising from the agreement that assets used in the venture are to be owned in common. Security interests cannot be created in the choses in action alone.[33] They are merely ancillary to the participants' interests in the assets. But if a mortgage or charge over an interest in the assets does not carry the ancillary rights, it is necessary to confer rights in respect of them.

Participants do not agree only to commit assets to the venture. Funds have to be found for the common activities and participants agree to contribute them.[34] It is not uncommon for participants to be given cross-charges over each other's interests to secure the performance of the obligation to contribute funds. If the cross-charges have priority over mortgages or charges to third parties, a third party's own security will be subject to the charges of participants other than his own mortgagor and he will take the benefit of his mortgagor's cross-charges without novation.

THE ASSIGNMENT OF INTERESTS

A partner can assign the benefit of his membership of the firm but cannot foist an assignee upon the other partners as a member. "The assignment does not constitute the assignee a partner or pass to him the powers of management, administration and inspection of books and accounts which repose in the assignor as a partner. What is more, legal title to the assets of the partnership continues to vest in the partners to the exclusion of the assignee and he has no access to the assets. The extent of the assignee's equitable interest is ascertainable only on dissolution ... The assigning partner continues to stand in the relationship of a trustee to the assignee notwithstanding that the assignee may be entitled to receive payments from partnership profits direct from the partnership."[35] The separate interest of a participant in the assets of the venture is capable of being assigned absolutely or for the purposes of security; but because the burdens undertaken in a joint venture agreement are not severable from the benefits conferred by it, a participant's so-called individual interest in the venture is not an assignable species of property at law unless it is made assignable by agreement. In this respect it resembles a partner's interest and differs from a company share. To avoid the inconvenience of being confined to equitable assignment, specific provision for assignment has to be made in the joint venture agreement. The identity of the venturers is usually so important to each venturer that the common practice is to prohibit assignment without the consent of the other venturers except assignment for the creation of certain security interests.[36] The prohibition usually extends beyond assignment to charging. Though a charge is a passive security[37], its value is diminished if the property charged cannot be transferred when it is enforced. An agreement not to assign an interest in property is of limited effect. It can be enforced by injunction before breach, but an interest may be acquired in breach of it, even by an assignee with notice[38], unless the restraint is incidental to the conferring of an interest in the property or the acquisition of a particular interest depends upon registration or consent required by superior law. Even in those cases it may be possible to separate beneficial enjoyment from legal title.[39] Hence it is desirable to impose restraints comprehensively and also to confer an interest upon other participants, such as a right of preemption, that will survive the breach of an agreement not to assign.[40]

MANAGEMENT AND CONTROL

The normal practice is for the power to control a joint venture to be vested in a committee representing the participants, usually designated the operating or management committee, and for operations to be conducted by an operator or manager. It is usual for one of the participants to be appointed as operator by the

agreement or for it to provide for such an appointment, but it is not incompatible with a joint venture arrangement for the operator to be a stranger. The operator's general authority is usually derived from the joint venture agreement. Particular authority is not infrequently conferred by a separate management agreement.

OPERATING COMMITTEE

The composition of the operating committee, its procedures and powers are specified by the joint venture agreement or joint operating agreement. It is not essential for all participants to be directly represented, but the agreement should provide for the representation by other parties of parties who are not directly represented. Voting procedures and requirements are also specified by the agreement. Voting rights usually match percentage interests. Special provision is sometimes made for the casting of votes on behalf of participants who are not directly represented. It is important that matters for decision requiring unanimity or other than a simple majority of votes should be clearly described. It may also be desirable to provide for the breaking of deadlock.[41]

The operating committee has a superficial resemblance to the board of directors of a company, but there is no analogy with the duty that directors are said to owe to the company as a whole.[42] Voting representatives are not under a general duty to subordinate the interests of their participants to an assumed interest of the venture or to those of the other parties. In this respect the operating committee is more like a company in general meeting where voting rights may be exercised in the individual interests of shareholders.[43] It does not follow that voting power can be exercised without restraint to harm another participant. If an agreement were to require the share of a participant who was unable to meet certain financial commitments to be reduced, it would be an abuse of power for the representatives by a majority to fix contributions in excess of the needs of the venture with the intention of reducing the shares of parties who were unable to meet the required amounts. The power, though contractual, would be treated in the same way as other powers which the law requires to be exercised for the purposes for which they were created and not for an extraneous purpose. Hence a power to determine a budget for capital or operating expenditure would be exercised mala fide if the substantial purpose were to diminish the interest of a party. The task of unravelling purposes is no less difficult in the case of a joint venture than in that of a company where it has been said that the decision often will turn "on a value judgment formed in respect of the conduct of the majority — a judgment formed not by any strict process of reasoning or bare principle of law but upon the view taken of the conduct".[44] The really difficult question concerns the major premise. To what extent if any do divergent interests and needs of participants have to be compromised in decisions about the conduct of the venture? To say that they must seek to reconcile differences by agreement does not provide a legal solution if reconciliation fails. The answer lies in part in the consideration that the parties have elected not to associate in a partnership where the interests of each must be merged for the benefit of all. But the law of partnership provides an escape from the perils of association by dissolution while not every joint venture agreement will do so. The statutory right of partners to obtain the dissolution of the partnership by the court[45] is not available to the participants in a joint venture. Some of the statutory grounds incorporate principles upon which courts of equity acted to decree the dissolution of a partnership before the enactment of the Partnership Act,[46] but in doing so the

courts were moved by the disturbance of the relationship of confidence which partnership required. It is unlikely that a court of equitable jurisdiction would apply by analogy to a joint venture the statutory ground for dissolving a partnership or winding up a company that circumstances had arisen that rendered it just and equitable to do so. That ground is a creation of statute and not a codified statement of general law principles.[47] It covers matters that govern the discharge of ordinary contracts by frustration or breach but also confers a discretion which is not confined by that analogy. Having chosen a contractual association of which the legal incidents depend upon the separation of individual interests, the participants in a joint venture cannot complain if they are bound to their association unless the agreement is discharged by frustration or breach. Thus contractual procedures such as those providing for the loss or diminution of interests or rights to production and election whether to proceed upon "sole-risk" basis or to take part in a "non-consent" operation are vital.[48]

OPERATOR

The operator is appointed to conduct the activities of the venture. If he is himself a participant he acts in a separate capacity as operator. The problem of dual capacity is sometimes avoided by appointing a subsidiary of a participant as operator. The operator's duties are usually defined, and his powers conferred, by the joint venture agreement, but the agreement is often supplemented by a separate management agreement and accounting manual. Provision is usually made for the resignation of an operator and for his removal.

The operator's legal status is determined by the nature of his functions and the incidents of his relationship with the participants and the third parties with whom he deals. Analysis in terms of ordinary legal conceptions is inadequate. The agreement sometimes declares that the operator is not the agent of the participants. False description aside, what does this mean? That he does not hold funds on their behalf? That he does not enter into contracts that bind them? That he does not hold real or personal property or mining rights for them? That his employees who are engaged in the activities of the venture are not their employees? That they are not responsible for tortious acts or breaches of the law committed by him in the operation? If he is not an agent for a particular purpose, is he a trustee? If he is an agent, is he the agent of the participants together and if so what does this mean for dealings between the operator and strangers and between the operator and the participants? Or is his position so anomalous that he should not be placed in conventional legal categories for all that he does but should be recognized as belonging to a special legal category only now emerging?

1. Operating Fund

There is no universal practice for fixing the amounts that are to be contributed as capital and operating expenses or for making the participants liable to pay them. In development ventures it is not uncommon for the agreement to stipulate amounts that are to be contributed within certain periods for capital works. In exploration ventures and production ventures after the initial development, the obligations imposed by the agreement are likely to be less precise. However that may be, the agreement usually provides for the preparation, submission and approval of budgets for capital works and operating expenditure and binds the participants to contribute funds in specified proportions. The means of imposing

obligations, the provisions for collection and spending, and the sanctions for breach vary between agreements. If the agreement provides adequately for a participant's failing to contribute his share of an agreed or budgetted amount there is no need for enforceable obligations. It is sufficient for the agreement to state the consequences of a participant's failure to contribute a particular amount.[49] But if an obligation is created it should be enforceable. It is usually desired that funds should be paid to the operator. The agreement can create an obligation, by covenant with the operator, by each participant to pay to the operator the amount of each duly determined contribution. It can create similar obligations (to pay the operator) by mutual covenants between the participants. To avoid problems in enforcement if more than one participant should be in default, those obligations should be owed to the other participants severally.[50] Alternatively the agreement can create separate obligations to pay the same amount to the operator which will be enforceable by the operator and any other participant individually but cumulatively.[51]

The agreement may require the operator to keep the contributed amounts as an identifiable fund or as separate funds for each participant, or it may allow or require him to mix them with his own moneys. A separate fund will be held upon trust. Mixed funds will not be impressed with a trust unless moneys are mixed in breach of duty.[52] A participant's right to moneys wrongly mixed with the operator's own funds will depend upon the application of equitable rules.[53] A creditor of an operator who holds a separate fund will be entitled to be subrogated to the operator's right to be indemnified from the fund for a debt duly incurred for the purposes of the venture.[54]

2. Third Party Contracts

The agreement may require the operator to enter into any contracts with third parties as a principal and not as the agent of the participants.

If the operator expressly enters into contracts upon that footing, the participants will not acquire rights or liabilities against a third party whatever may be the true legal character of the relationship between the participants and the operator. The doctrine of undisclosed principal will not apply. That doctrine provides for a contract between a third party and an agent for a principal whose existence is not disclosed to be enforced by the principal and the third party against one another when the legal relationship of principal and agent is revealed, but otherwise only by the agent and the third party against each other. The third party's rights to look to principal or agent may be lost by election and the agent's rights are lost upon the intervention of the principal.[55] Why the doctrine should not apply where an agent expressly contracts as principal is not clear. Perhaps it is because it would be inconsistent with the terms of the contract itself for someone other than the agreed principal to be the true principal.[56] The fact that between operator and third party the operator contracts as principal does not affect the acquisition of property by the participants. The participants acquire property pursuant to their agreement with the operator at the instant it passes from the third party. Problems may occur in relation to damages for breaches of contract by the third party if the operator cannot sue as trustee on behalf of the participants[57] and the participants cannot sue because of the absence of privity of contract with the third party.

If the operator does not expressly enter into contracts upon the footing that he is the principal in the transaction with the third party, extrinsic evidence may be admissible to establish that the participants were undisclosed principals. It is not

clear that the participants would be bound if the operator were required by the agreement only to enter into contracts expressly as principal. The concept of implied authority by its very nature is not adaptable to a situation in which agency is not disclosed.[58] If however the operator is not required to contract as principal but does enter into a transaction as agent without revealing his capacity, under Anglo-Australian law the participants can adopt his act and sue the third party[59] and they are liable to be sued by him.

Where participants are liable upon an operator's contract, agreed limitations of liability between them will probably not bind a third party, whether or not he has notice of the limitations, unless the contract with him expressly apportions and limits the liability of individual participants. The principle that a member of an unincorporated non-profit club is not liable for debts incurred by the committee or management of the club beyond the subscription he is required to pay under the rules of the club is an anomalous exception to the rule that co-principals are individually liable for debts incurred by their agent, subject to rights of indemnity and contribution between one another.[60]

3. Property held for Venture

The joint venture agreement usually makes all assets acquired for the purposes of a venture the property of the participants to be held in common in the proportions of their individual shares. Items that are held by the manager are owned beneficially by the venturers but their rights are subject to any right to a lien or indemnity conferred by agreement and to any right of indemnity in equity. The treatment for taxation of the participants' separate interests in such items of property is beyond the scope of this paper, but it illustrates the anomalies that arise from the operator's position.

4. Employment

The operator is usually required to employ the persons who are engaged upon the activities of the joint venture. Even if in conducting the operation the operator is in law the agent of the other participants, the function of agency will not necessarily extend to the engagement of employees. The essence of agency in a legal conception is the inter-position of a third person — the agent — between two others who enter into legal relations. It is not inconsistent with the relationship of principal and agent between the other participants and the manager for transactions with third parties for the agent's employees not to be employees of the other participants for any purposes. Between the operator and the other participants the arrangement may be that the participants are merely to have the benefit of the services of the operator's employees.[61]

5. Indemnity against Liability

The joint venture agreement usually deals with the distribution of liability between the operator and the participants for damages, penalties and other liabilities that may arise from activities in furtherance of the venture.[62] Primary liability depends upon the general law. Penal statutes identify the persons who are exposed to sanctions, but liability may depend upon legal relationships extrinsic to the punished act. Civil liability depends upon the nature of the act and the relationship of parties. Acts performed at express direction of another and acts which of their nature involve a substantial risk of damage may found liability in persons other than the actor.[63]

6. Duty of Good Faith

The operator owes a duty of good faith to the other participants which does not depend upon the precise legal character of their relationship. It arises from their association from the character of the activities undertaken by the operator for the other participants.

Apart from duties imposed explicitly by the joint venture agreement, an operator can be said to owe fiduciary duties of three main kinds: not to make personal profit from the use of property committed to the venture, not to take personal advantage of information received or opportunities presented in the course of the venture's activities, and not to engage in conduct in which he may have a personal interest in conflict with those of the other participants.

The first two duties are perhaps particular examples of the third. As a broad proposition the third poses problems in a joint venture relationship because the concept of joint venture is predicated upon the existence of separate businesses conducted by the participants. There is no merging of separate interests in a joint enterprise as in a partnership. The personal interests of the participants may conflict and often will and it is unlikely that the participants will be required to order their conduct outside the venture or exercise their powers within it to promote a common interest at the expense of their own.[64] Mr. McCafferty mentions in his paper the inadequacy of the device that is sometimes adopted of participants accepting fiduciary duties by express agreement. The problem remains of giving content to the words. Are the limits of being "just and faithful" to each other found in the notion of joint venture or do the words impose a higher duty than would normally obtain?

Special considerations apply to the operator. His position may enable him to prefer one participant at the expense of another or himself at the expense of his co-adventurers. It is no answer that he must not allow his own interest to conflict with those of the others. The arrangement puts him in a position where it may. The problem is one of reconciling conflicting interests. It is perhaps doubtful whether an operator is required to subordinate his own interests to those of the other participants provided that he does not prefer himself to them. A case can be made that the strict rules of equity governing the conduct of fiduciaries where interest and duty may conflict[65] have to be modified when they are applied to the relationship between an operator and the other participants in a conventional joint venture arrangement. The operator must of course act fairly between the other participants and not prefer one against another. These observations are directed to things occurring in the actual conduct of an operation where it is not possible to obtain directions from the management committee. In other matters a participant operator is the paradigm of a fiduciary agent.[66] The description in the agreement of the scope of the joint venture will therefore be of crucial importance in determining the constraints on his freedom of action.[67]

DEFAULT PROCEDURES AND ELECTION

A distinction should be made between a breach of an undertaking or obligation under the joint venture agreement and a failure to exercise a right. It is convenient to call the first default by breach and the second default by

non-performance. If the agreement did not set out the rights of the other participants upon default by breach they would be entitled to terminate the agreement and to sue for damages or to seek specific performance. These rights are clumsy and unsuitable for many kinds of joint ventures. Termination will be unsatisfactory if it affects liabilities to lenders or disturbs the continuity of the venture activity. Specific performance will often be useless. Accordingly contractual procedures have been devised with the object of preserving the venture by adjusting the participants' rights. These procedures take many forms but six are common. They are directed mainly though not solely to default in the contribution of funds and they are capable of applying to default by breach and default by non-performance. The six common procedures are

(a) loss of interest ("forfeiture");
(b) abatement of interest ("withering or dilution");
(c) loss or suspension of rights to take product;
(d) payment by non-defaulting participants under the security of cross-charges;
(e) expropriation by purchase by other participants;
(f) liability to pay interest or a premium.[68]

The first three are variations on a theme, but simple forfeiture differs from abatement of interest in that it involves the divestiture of interests in property and dilution involves the adjustment of rights in assets to reflect changes in the proportion of contributions. Dilution may however involve an element of forfeiture, as Mr. Coyle's paper at the Fourth Annual Conference demonstrated. Loss or suspension of production rights may be either a form of forfeiture or of abatement of interest. The forfeited or abated interest is of specific property rather than of all the assets committed to the venture. A distinction is sometimes made between the deprivation of a right to take production and the conferring of only a conditional right depending upon the performance of all obligations under the agreement. An analogy is sought to be made with determinable and conditional interests in the law of real property. The analogy is not sound unless the defaulting participant acquires under the joint venture agreement only a contingent right to future product conditional upon his not being in default when it comes into existence. If a participant has an undivided interest in common with the other participants in all the property of the venture, he has that interest in the common stock of product at the instant it is won. His right to sever and take a proportionate part is a right to obtain the enjoyment of his property and not a right to obtain an interest in the severed part. In relation to product won and stock-piled or held at the time default occurs, deprivation of the right to take works a forfeiture. In relation to future product, it operates, if the loss of rights is permanent, as an abatement of the participant's interest in the chose in action against the other participants constituted by the agreement to share future property in specified proportions. It is not clear whether this is an equitable assignment or merely a variation of contractual rights between the participants. If the loss of rights is not permanent but the defaulting participant is not to be entitled to recover lost production rights by making good his default, it operates as a forfeiture. The loss of production rights in the draft clause set out in note 69 is either by forfeiture or compulsory sale.

The payment of outstanding contributions by non-defaulting participants under the security of a cross-charge is an orthodox security arrangement. Questions such as whether there should be an obligation or merely a right to pay, whether the

charge should be over future product as well as the assets committed to the venture, and whether the charge should have priority over security interests granted to outside lenders are beyond the scope of this paper.

The exercise by non-defaulting participants of a right to purchase a defaulting participant's interest may be a form of forfeiture if the consideration is inadequate in the circumstances. Even if the consideration is adequate it may be correct to treat the right to acquire the interest as an equitable mortgage and thus as subject to a redemption. Such a right would be inconsistent with the concept of a charge not by way of mortgage.[70] The right to acquire the interest would be a fetter on the defaulting participant's right to redeem.

Three important questions arise about these default procedures. Does any of them involve the creation of a charge by a participant which s. 100 of the Companies Act 1961 requires to be registered? Will the exercise of any right or power they confer be vulnerable under s. 293 or s. 227 of the Companies Act? Will any procedure involve the imposition of a penalty or a forfeiture against which equity will relieve a defaulting participant?

Section 100 requires an instrument by which a charge created by a company is created or evidenced to be lodged for registration within thirty days after its creation. For non-compliance the charge is void against a liquidator or any creditor of the company so far as any security on the company's property or undertaking is conferred. As between the parties the charge is fully enforceable even if not registered. Cross-charges between participants have to be registered, but it is not clear whether any of the other procedures mentioned above involve the creation of charges within s. 100. The description of the categories of registrable charges differs slightly between the Companies Acts of the Australian States, but all States require floating charges on the undertaking or property of a company to be registered and also charges and assignments which if given by an individual would be governed by the bills of sale legislation or its equivalent. The critical questions with forfeiture, dilution, loss of production rights and compulsory sale provisions are whether they charge any property with an obligation arising under the venture agreement and, so far as avoidance is concerned, whether the charge is by way of security.[71]

Here again there are difficulties in applying conventional legal and equitable conceptions to the special arrangements that have been devised for joint ventures. A security may be said to exist where a creditor is afforded rights over property of a debtor to satisfy an obligation to the creditor by the debtor or some other person.[72] The obligation may be actual or contingent. The rights must be given to secure the performance of the obligation not to extinguish it. Where rights are conferred absolutely to discharge an obligation, as for example where book debts are assigned to extinguish a debt owed by the assignor to the assignee, the transaction is not by way of security unless the parties intend that there should be a right of redemption.[73] If the parties do not have that intention but equity supplies a right of redemption, the assignment nevertheless may be by way of security even though the assignor does not exercise the right. If an assignor under an assignment such as may occur through forfeiture or the abatement of accrued interests under a joint venture agreement has an equitable right to obtain relief, the loss of rights though absolute in form may be by way of security. It may then be significant whether the joint venture agreement imposes mutual obligations to pay the agreed contributions. If it does not and the default is merely by non-performance, the passing of property will not be by way of security. In a case in which the apparently absolute passing of property constitutes a

charge, further questions arise of whether the company from which the property passes "creates" the charge and if so when. Since the charge will have arisen by virtue of the joint venture agreement, the extended definition of charge in s. 10 of the Companies Act, which includes an agreement to give a charge or mortgage whether upon demand or otherwise, will probably apply to it.

If the interest in property passing on default cannot be redeemed, by virtue either of the agreement or an equitable right, the rights conferred by provisions for forfeiture or abatement of interests will not cause the agreement to be registrable unless those provisions themselves create a charge. Where forfeiture may occur through the election of a participant not to contribute, property will not pass as security for or in discharge of a debt. Where forfeiture or abatement may occur upon default by breach, the character of the changes in interests in property that will ensue is significant. If the abatement of the defaulting participant's interest in assets held at the time of breach merely represents an adjustment in interests resulting from the reduction in the proportion of the total amount of contributions to the venture contributed by the defaulter, the non-defaulting participants will have acquired a larger interest in some items of property but the defaulting participant may have acquired an interest in others without further payment. The confusion of contributions that are to be reflected in the value of assets and those that are not may complicate the matter and problems may arise from treating the participants' interests as though they have the legal character of interests in a partnership.

Because the actual operation of forfeiture and abatement provisions cannot be foreseen it may be prudent to regard them potentially as charges and to take action accordingly.[74]

Similar problems may arise in connexion with s. 293(1)[75] and s. 227(1)[76] of the Companies Act. It is beyond the scope of this paper to consider the possible effect upon forfeiture and abatement of interest provisions of s. 122 of the Bankruptcy Act 1966, which s. 293(1) attracts. It is sufficient to say that if the abatement of a defaulting participant's interest is merely to adjust interests to take account of a change in the ratio of contributions it will probably not be within the field of operation of either s. 293(1) or s. 227(1). Forfeitures will be vulnerable under both sections.

The power of equity to relieve against forfeiture must be considered because of the dire nature of some of the consequences of breach. The distinction between default by breach and default by non-performance is important since equity is less likely to give a second chance to a participant which elects to forfeit its interest or to allow it to abate than to one against whom other participants have exercised a right.[77] In either case a court of equity might take a less indulgent view of forfeiture after default under an exploration venture than under other forms of venture in which substantial assets are held. Default before completion under a production venture lies somewhere between them. The court would consider "the conduct of the applicant for relief, in particular whether his default was wilful, . . . the gravity of the breaches, and . . . the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach".[78]

The courts' approach to the question whether a provision of a contract that a sum of money be paid upon the occurrence of a stipulated event is a penalty and therefore not recoverable is not settled. The High Court of Australia has referred to a conflict of judicial opinion on the question whether a provision, which is so

expressed that it may operate in the same manner in cases in which there is a breach of contract and in other cases where there is not any breach, can be affected by the law relating to penalties. The court considered the preponderance of judicial opinion to be "in favour of the view that it is only when a provision operates so that the event upon which an obligation is placed upon a party to pay a sum of money to another party to a contract is the breach by the former party of a term of the contract, that the question arises whether an obligation arising upon that event is a penal provision. Thus if a sum has become payable because a party has exercised an option given by the agreement, the exercise of which is conditional upon a payment, the view has been taken that the question of a penalty does not arise . . . It has been held that each case must be considered, not only in relation to the particular terms of the agreement under which an obligation is created, but also having regard to all the surrounding circumstances, including the subject matter of the agreement. . . . [It] may be important to consider whether the subject matter is likely to depreciate in value quickly or slowly."[79] Those remarks were directed to provisions which were alleged to be void as imposing money penalties. But there is no reason to believe that a similar distinction would not be observed in connexion with the forfeiture of property.[80] It is therefore advisable for a joint venture agreement to concede to a defaulting participant a right to elect and even a second opportunity to perform what is required of it.

The imposition of interest at abnormal rates on outstanding contributions and the requirement of large premiums for reinstatement must be capable of being justified by the circumstances. Prima facie both are penal.

CONCLUSION

Modern joint venture arrangements are the creatures of contract. Though conventional concepts and contractual provisions are emerging they are not yet so widely accepted that the law governing joint venture arrangements can be expounded in terms peculiar to their special needs. An examination of the legal concepts upon which arrangements are at present based discloses too many areas of doubt for satisfaction. The area is a fruitful one for creative draftsmanship.

*LL.B. (Melbourne)

FOOTNOTES

1. These companies should be distinguished from so-called consortium companies which are another primary form of combination. Some of the consortium companies in Australia were formed before "farming" became a familiar practice.
2. A typical clause in a Production Joint Venture agreement is: "The Joint Venturers hereby associate themselves in a joint venture for the purpose of the progressive exercise and development of the Rights for the mining, overland transportation, processing, and loading for shipment of product but only subject to and upon the terms set forth in this Agreement", the terms "Rights" and "product" being specially defined.
3. E.g., "Nothing contained in this Agreement shall be construed to constitute a Joint Venturer a party, agent or representative of any other Joint Venture or to create any trust or mining or commercial or other partnership or any company or corporate entity for any purpose whatsoever (except the agency of the Manager as agent and representative of the Joint Venturers). The obligations of the Joint Venturers under this Agreement shall be several and not joint or joint and several."
4. Examples are cited in Halsbury's *Laws of England* (3rd ed.), vol. 28, p. 486.
5. There is a vast body of case law and commentaries about the conception of joint venture in the United States, yet it is elusive. A Circuit Court of Appeals said in 1923: "Its vogue arises from a desire to find words descriptive of joint enterprise yet not amounting to a partnership": Joring v. Harriss 292 Fed. 974, at p. 978 (which concerned the joint sale of a

quantity of cotton separately owned). American usage is explained in Corpus Juris Secundum, vol. 48, tit. Joint Ventures; *Am. Jur.*, vol. 46, tit. Joint Ventures; Williston, *Treatise on the Law of Contracts*, 3rd ed. (1958), pp. 585-591; Mechem, "The Law of Joint Ventures", *Minnesota Law Review*, vol. 15 (1931), 644; Nichols, "Joint Ventures", *Virginia Law Review, vol. 36 (1950), 425; Miller, "The Joint Venture: Problem Child of Partnership", California Law Review*, vol. 38 (1950), 860; Taubman, "What Constitutes a Joint Venture?" *Cornell Law Quarterly*, vol. 41 (1956), 640; Jaegar, "Joint Ventures: Membership, Types and Termination", *American Univ. Law Review*, vol. 9 (1960), 111; and Zaphiriou, "Methods of Cooperation Between Independent Enterprises (Joint Ventures)", *American Jo. of Comparative Law*, vol. 26 (1978), 245. Joint venture has sometimes been used as a device to avoid the rule of United States company law that a company cannot enter into a partnership unless the management and control of the partnership business is vested in the company's directors. See Mechem, loc. cit., pp. 651-653; Nichols, loc. cit., pp. 444-445; cf. Miller, loc. cit., pp. 865-866; Zaphiriou, loc. cit., pp. 246-247. There is no rule of English law that prevents a company from entering into partnership with another company or an individual. See, e.g., Hugh Stevenson & Son v. Akt. für Cartonnagen-Industrie, [1918] A.C. 239.

6. Section 4(2) of the Partnership Act 1890 (Scotland) states that "In Scotland a firm is a legal person distinct from the partners of whom it is composed".
7. Folks v. Woolf, [1933] V.L.R. 403, at p. 408. Cf. Smith v. Anderson (1887), 15 Ch.D. 247, at p. 277.
8. Adam v. Newbigging (1888), 13 App. Cas. 308; Weiner v. Harris, [1910] 1 K.B. 285; Wiltshire v. Kuenzli (1945), 63 W.N.(N.S.W.) 47; Beckingham v. Port Jackson & Manly Steamship Co., [1957] S.R.(N.S.W.) 403.
9. Cf. Australian Mutual Provident Society v. Allan (1978), 52 A.L.J.R. 407, at p. 409 (P.C.), where the question was whether an agreement correctly described a relationship as one of principal and agent and not master and servant.
10. The recognition of standard forms is greater in the United Kingdom where it has become the practice for the government to make the grant of a production licence for a North Sea oil operation conditional upon the licensee's entering into a joint operating agreement with the British National Oil Corporation in a form satisfactory to the Department of Energy. See Hill, "Joint Operating Agreements", Paper No. 14, Topic E, proceedings of the Petroleum Law Seminar organized by the Committee on Energy and National Resources of the Section on Business Law, International Bar Association (Cambridge, England, 1978), pp. 14.2-14.3. A distinction is sometimes drawn between the relationship constituted by a joint operating agreement and that constituted by a joint venture agreement. See, e.g., Smith, "Joint Ventures", Law and Business in Australia (1979), 182, at p. 187. If there is a fundamental distinction and not merely a functional difference it is not observed in this paper.
11. The Partnership Act 1890 was adopted more or less intact by all the Australian colonies within a few years of its enactment. The Acts have adopted different section numbers for comparable provisions. The English section numbers are used in this paper. A comparative table of sections is found in Higgins and Fletcher, Law of Partnership in Australia and New Zealand, 4th ed. (1981), pp. xxxvii-xli.
12. In re Spanish Prospecting Co. Ltd., [1911] 1 Ch. 92.
13. Cf. Pollock's *Law of Partnership*, 15th ed. (1952), pp. 9-11; Lindley on Partnership, 14th ed. (1979), p. 13. It was said in a leading case decided before the Act that there could not be a partnership without there being a commercial business to be carried on with a view to profit *and for division of profits* (Pooley v. Driver (1876), 5 Ch.D. 458, at p. 472).
14. Williams v. Robinson (1891), 12 L.R.(N.S.W.) (Eq.) 34, at p. 36.
15. Rule 2 of the rules for determining the existence of partnership in the Partnership Act states that the sharing of gross returns does not of itself create a partnership whether or not the persons sharing such returns have a joint or common right or interest in any property from which or from the use of which the returns are derived. The sharing of gross returns is not the profits sharing of because outgoings are not set against the distributed things before distribution. In the American case of Johnson v. Lion Oil Co. (1950), 216 Ark. 736; 227 S.W. 2d 162, however it was held that the agreement of parties to a joint petroleum venture to share product constituted an agreement to share profits for the purposes of Arkansas law.
16. See French v. Styring (1857), 2 C.B.(N.S.) 357, where examples are cited.

17. Rule 1 in the Partnership Act.
18. The Income Tax Assessment Act 1936 (Cth) defines "partnership" to mean an association of persons carrying on business as partners — thus incorporating the conceptions of the law of partnership directly — *or in receipt of income jointly.*
19. Partnership Act 1890, s.5.
20. Hence in jurisdictions in which the rule in Kendall v. Hamilton (1879), 4 App.Cas. 504 has not been abrogated, the obtaining of judgment against one partner discharges the others.
21. Partnership Act 1890, ss.9, 10.
22. This is the common law rule established by Ex parte Cook (1728), 2 P. Wms. 500. It now has legislative form in the Bankruptcy Acts (e.g. Bankruptcy Act 1966 (Cth), s. 110) but it will apply in the administration of the assets of a partnership between companies.
23. Partnership Act 1890, s.23.
24. See Lindley on Partnership, 5th ed. (1888), pp. 356 et seq.; Helmore v. Smith [No. 1] (1887), 35 Ch.D. 436, at pp. 447-448; Blackburn v. Wagner (1889), 15 V.L.R. 583; Brown, Janson & Co. v. Hutchinson & Co., [1895] 1 Q.B. 737; [1895] 2 Q.B. 126.
25. Partnership Act 1890, s.33.
26. Partnership Act 1890, ss.19, 24, 26, 28, 31, 35.
27. Halsbury's *Laws of England* (4th ed.), vol. 6, pp. 4-6; Federal Commissioner of Taxation v. Everett (1980), 54 A.L.J.R. 196, at pp. 197-198; United Builders Pty. Ltd. v. Mutual Acceptance Ltd. (1980), 54 A.L.J.R. 575.

28. Forbes v. Steven (1870), L.R. 10 Eq. 178, at pp. 188-190; Attorney-General v. Hubbuck (1883), 10 Q.B.D. 488, at pp. 499-500; (1884), 2 Q.B.D. 275, at pp. 278-279, 285-286, 289-290; also Partnership Act 1890, s.22.
29. See, e.g., Harvey v. Harvey (1970), 120 C.L.R. 529.
30. Typical clauses in a production agreement are:

    "The property and assets to be made available for the purposes of the Joint Venture are and shall be owned by the Joint Venturers as tenants in common in the proportions of their respective Individual Shares and shall consist of: (a) the Rights; (b) the Project; and (c) or other property (other than produced pursuant to this Agreement) hereafter developed, constructed or acquired by the Joint Venturers under or by virtue of this Agreement", the terms "Rights" and "Project" being specially defined to mean specific items of property.

    "The respective Individual Shares of the Joint Venturers shall be in the following individual percentages:

    A Co. Ltd. %
    B Co. Ltd. %
    C Co. Ltd. %
    D Co. Ltd. %

    or in such other percentages as may from time to time result from any sale, assignment, transfer or disposal of or the acquisition of the whole or any part of a Joint Venturer's Individual Interest pursuant to or as permitted by this Agreement."
31. A typical definition in a production agreement is:

    " 'Individual Interest' in relation to a Joint Venturer means — (i) the interest as tenant in common of that Joint Venturer in the property and assets specified in [the first clause set out in note 27]; and (ii) that Joint Venturer's rights (subject to the obligations attaching thereto) under the Project Agreements."

    " 'Project Agreements' means — (i) the State Agreement; (ii) the Joint Venture Agreement; (iii) the Management Agreement; (iv) any Cross Charge", the term "State Agreement" being defined to mean the formal agreement with a State government regulating the project, and the term "Management Agreement" to mean the collateral agreement between the joint venturers and the manager appointed to operate the project. The terminology varies. What is here called an Individual Interest is sometimes called a Participating or Percentage Interest. It is important to distinguish this interest from the description of the joint venturer's share of the assets, upon which usually depends the calculation of his liability to contribute funds and the proportion of the product he is entitled to take.
32. United Builders Pty. Ltd. v. Mutual Acceptance Ltd. (1980), 54 A.L.J.R. 575.

33. Mainline Investments Pty. Ltd. v. Davlon Pty. Ltd. (1969), 89 W.N. (Pt 1) (N.S.W.) 359, at p. 368.
34. The following comments apply more particularly to development and facility joint ventures and perhaps less to ventures for exploration. In exploration ventures it is more common to find the contribution of some participants to be in cash and of others in kind in the form of prospecting rights.
35. Federal Commissioner of Taxation v. Everett (1980), 54 A.L.J.R., at pp. 197-198; Partnership Act 1890, s.31.
36. A typical clause prohibiting assignment is:

"(a) Except as permitted in this Article, no Joint Venturer shall without the prior consent of each of the other Joint Venturers, sell, assign, transfer, mortgage, pledge, charge, encumber, lease, sublease or otherwise dispose of or create or suffer to exist a lien, charge or encumbrance over or trust in respect of the whole or any part of its Individual Interest, whether by act or deed or by merger or consolidation or reconstruction or by operation of law.

(b) No Joint Venturer shall or shall attempt or purport to sell, assign, transfer, mortgage, pledge, charge, encumber, lease, sublease or otherwise dispose of or create a lien over or trust in respect of the whole or any part of any other Joint Venturer's Individual Interest.

(c) Notwithstanding the foregoing, a Joint Venturer shall be permitted to create a Cross Charge contemplated by Article — and the Joint Venturers and the Manager may enter into any deed contemplated thereby and the same may be exercised and enforced in accordance therewith.

The prohibition contained in this Article shall not apply to any lien or encumbrance on the respective Individual Interests of all the Joint Venturers arising in the ordinary course of business in the operation of the Project by operation of law or statute and with respect to which the indebtedness, if any, secured by such lien is not overdue or is being contested or litigated in good faith."

There will then follow a "permitted charging clause" allowing a participant to grant a floating charge over its interest to secure borrowings to meet its commitments to the Joint Venture. The provisions of such a clause are usually complex. They are more appropriately dealt with in papers concerning the legal aspects of venture financing. See Ladbury, "Limited Recourse Finance", *Australian Mining & Petroleum Law Journal*, vol. 2, no. 1 (1979), 68; Ladbury, "Lenders' Requirements in Joint Venture Financing", paper delivered at Energy Law Seminar organized by the Committee on Energy and National Resources of the Section on Business Law, International Bar Association (Banff, Canada, 1981).

37. In re Bond Worth Ltd., [1980] Ch. 228, at p. 250; Swiss Bank Corporation v. Lloyds Bank Ltd., [1981] 3 W.L.R. 457, at pp. 466-467.
38. A caveat has to be placed against this proposition in view of the revival of propositions from the controversial case of De Mattos v. Gibson (1858), 4 De G. & J. 276, at p. 282; 45 E.R. 108, at p. 110 by the judge at first instance in Swiss Bank Corporation v. Lloyds Bank Ltd., [1979] 1 Ch. 569, at pp. 573-575.
39. See, e.g., Safeguard Industrial Investments Ltd. v. National Westminster Bank Ltd., [1981] 1. W.L.R. 286.
40. The judgment of Gibbs, J. in Laybutt v. Amoco Australia Pty. Ltd. (1974), 132 C.L.R. 57, at pp. 70-76, reviews the law relating to contractual options to purchase.
41. Mr. McCafferty's paper examines these matters.
42. This elusive concept is explained in Mills v. Mills (1938), 60 C.L.R. 150; Ngurli Ltd. v. McCann (1954), 90 C.L.R. 425; and Howarth Smith Ltd. v. Ampol Ltd., [1974] A.C. 821, esp. at p. 834.
43. Burland v. Earle [1902] A.C. 83; Goodfellow v. Nelson Line [1912] 2 Ch. 324; Peters American Delicacy Co. Ltd. v. Heath (1939), 61 C.L.R. 457, esp. at p. 504.
44. Crumpton v. Morrine Hall Pty. Ltd. [1965] N.S.W.R. 240, at p. 244. See also Hindle v. John Cotton Ltd. (1919), 56 S.L.R. 625, at pp. 630-631; Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L. (1968), 121 C.L.R. 483; Howard Smith Ltd. v. Ampol [1974] A.C., at pp. 835, 837-383.
45. Partnership Act 1890, s. 35.
46. See, e.g., Leary v. Shout (1864), 33 Beav. 582; 55 E.R. 494; Atwood v. Maude (1868), L.R. 3 Ch.App. 369; Knight v. Bell, (1887) 13 V.L.R. 878.

47. Reference should be made to the first chapter of Mr. Callaway's monograph Winding Up on the Just and Equitable Ground (1978).
48. Some common devices are examined in Mr. Coyle's and Mr. Roberts' papers delivered at the Fourth Annual Conference of the Association, *Australian Mining and Petroleum Law Journal*, vol. 2, no. 2 (1980), p. 334.
49. See Williams, Joint Obligations (1949), pars. 13, 91 and the Law of Property Act 1925 (Eng.), s.82 and the Australian Acts that adopt it.
50. Williams, op. cit., par. 5.
51. Henry v. Hammond, [1913] 2 K.B. 515; In re Bond Worth Ltd., [1980] Ch. 8, at pp. 260-261.
52. In re Hallett's Estate (1880), 13 Ch.D. 696.
53. Octavo Investments Pty. Ltd. v. Knight (1979), 54 A.L.J.R. 87.
54. Halsbury's *Laws of England* (4th ed.), vol. 1, pp. 493-494. Keighley, Maxted & Co. v. Durant, [1901] A.C. 240; Pople v. Evans, [1969] 2 Ch. 255, at p. 261. Hill, "Some Problems of the Undisclosed Principal", [1967] *Jo. of Business Law*, 122.
55. Finzel, Berry & Co. v. Eastcheap Dry Fruit Co., [1962] 1 Lloyd's Rep. 370, at p. 375. But see Fred. Drughorn Ltd. v. Rederiaktiebolaget Transatlantic, [1919] A.C. 203.
56. Pople v. Evans, n. 53.
57. Cf. Watteau v. Fenwick, [1893] 1 Q.B. 346 where a limitation upon the authority of an agent to buy goods on credit was held not to preclude action by a seller for the price of goods supplied to the agent for an undisclosed principal.
58. Danish Mercantile Co. Ltd. v. Beaumont, [1951] Ch. 680.
59. The exception is explained in Wise v. Perpetual Trustee Co. Ltd., [1903] A.C. 139, at p. 149.
60. Halsbury's *Laws of England* (4th ed.), vol. 16, pp. 383-387.
61. Common provisions of joint venture agreements for indemnity are examined in Mr. McCafferty's paper. See also Hill, loc. cit. n. 10, 14.9-10, for a description of similar provisions in North Sea joint operating agreements.
62. The cases were reviewed by Stephen J. and Mason J. in Stoneman v. Lyons (1975), 133 C.L.R. 550.
63. It is not clear that the American authorities mentioned in Mr. McCafferty's paper which appear to require a joint venturer fiduciary conduct towards his fellows indistinguishable from that owed by partners to each other do not rest upon the close assimilation of the concept of joint venture to partnership in American law. See the examination of the leading case of Meinhard v. Salmon (1928), 249 N.Y. 458 in Mechem, loc. cit., n. 3, pp. 666-667. In the light of Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd. (1974), 131 C.L.R. 321, it is unlikely that the financing arrangement in Meinhard v. Salmon would not be held to constitute a partnership in Australia.
64. Some joint venture agreements state that nothing in the agreement shall restrict the freedom of any participant except with respect to the joint venture conduct as it sees fit any business or activity, whether in the State in which the joint venture activity is conducted or elsewhere, without being liable to account to the other participants.
65. The principles are stated in their strictest form Aberdeen Railway Co. v. Blaikie Bros. (1854), 1 Macq. 461, at p. 471, Bray v. Ford, [1896] A.C. 44, at p. 51, Regal (Hastings) Ltd. v. Gulliver, [1942] 1 All E.R. 378; [1967] 2 A.C. 134, and Phipps v. Boardman, [1967] 2 A.C. 46.
66. The duties of a fiduciary agent are examined in Mr. McCafferty's and Mr. Handley's papers to which reference should be made. See also MacWilliam, "Fiduciary Relationships in Oil and Gas Ventures", *Alberta Law Review*, vol. 8 (1970), 233.
67. This was the consideration upon which the important American case of British American Oil Producing Co. v. Midway Oil Co. (1938), 82 P. (2d) 1049 turned.
68. The procedures are described in Messrs. Ladbury, Fox and Nettle's paper "Current Legal Problems in Project Financing" and in Mr. Coyle's and Mr. Roberts' papers presented at the discussion session "Deadlock Breaking Mechanisms in Mining and Petroleum Joint Ventures" at the Fourth Annual Conference; see n. 47.
69. A typical loss of rights clause in a production agreement is:

> "(a) If at any time any Joint Venturer shall be in default in making any contribution in accordance with the provisions of this Agreement (any such Joint

Venturer being hereinafter called "the Defaulting Party") and such default shall continue for not less than 14 days any other Joint Venturer may give notice to the Defaulting Party specifying the default and if such default shall continue for not less than 7 days after the giving of the notice then after the expiration of the said 7 days and until all sums due and payable by the Defaulting Party and all interest thereon as hereinafter provided have been paid by the Defaulting Party, the Defaulting Party shall not own or be entitled to take any Production pursuant to this Agreement and the Joint Venturers not in default shall be entitled to sell all or any part of such Production and the proceeds of such sale after deducting all expenses in respect of effecting the same shall be applied in paying all sums and interest as aforesaid and all amounts payable by the Defaulting Party pursuant to sub-clause (c) and the balance (if any) shall be paid to the Defaulting Party.

(b) Any Production which may be sold pursuant to sub-clause (a) by the Joint Venturers not in default may be sold by them separately in such proportions as they may agree and in default of agreement if they or either of them shall have exercised their or its right to make payments on behalf of the Defaulting Party pursuant to sub-clause (c) in the respective proportions in which they shall have made such payments and if neither of such Joint Venturers shall have exercised such right in proportion to their respective Participating Interests. In effecting any sale pursuant to sub-clause (a) such Joint Venturers shall endeavour to obtain the best price reasonably obtainable. For the purposes of effecting such sale such Joint Venturers may enter into a contract for such period of time as shall be reasonable in the circumstances. To the extent that any Production to which a Defaulting Party would but for sub-clause (a) have been entitled is the subject of a contract entered into in accordance with this sub-clause (b) the period of which extends beyond the time during which the Defaulting Party pursuant to sub-clause (a) does not own and is not entitled to take Production that time shall be extended accordingly.

(c) So long as a Defaulting Party is in default in making any Contribution as aforesaid the other Joint Venturers shall have the right to make such Contribution on behalf of the Defaulting Party and if more than one exercises such right in such proportions as they may agree and in default of agreement in proportion to their respective Participating Interests. The amount of the Contribution so made together with interest thereon at the rate per annum of 10% plus the Bank Rate calculated from the date of making of the Contribution to the date the Joint Venturers making the same have recovered the amount thereof and compounded Quarterly shall be a debt due and payable by the Defaulting Party to those Joint Venturers and shall be recoverable in any court of competent jurisdiction.

(d) Nothing in this clause shall prejudice any other rights against the Defaulting Party which the other Joint Venturers may have."

70. The differences between a charge by way of mortgage and a charge simpliciter are explained in Fisher & Lightwood's *Law of Mortgage*, 9th ed. (1977), pp. 4-5 and Gough, *Company Charges* (1978), pp. 17-18, 216-217.
71. The answer may not be the same in every State if the security is not a floating charge because the description of the "bills of sale" charge differs quite greatly between the Acts. Mr. Poulton remarked upon the differences in his paper at the Fourth Annual Conference (see *Australian Mining and Petroleum Law Journal*, vol. 2, no. 2 (1980), p. 357).
72. Sykes, *Law of Securities*, 2nd ed. (1973), p. 11.
73. Sandford v. D.V. Building and Constructions Pty. Ltd., [1963] V.R. 137, at p. 141; Re Row Dal Constructions Pty. Ltd., [1966] V.R. 249, at p. 259.
74. Special problems may occur under "negative pledges" given to a participant's financier. The soundest solution may be to except some of the standard joint venture agreement provisions from the concept of charge in the borrowing instrument.
75. The uniform Companies Act of the Australian States s. 293(1) provides:

> "Any conveyance, transfer, charge, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner."

76. Section 227(1) provides:

"Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void."

77. See Associated Distributors Ltd. v. Hall, [1938] 2 K.B. 83 and the Canadian case of Oil City Petroleums (Leduc) Ltd. v. American Leduc Petroleums Ltd. (1951), 3 D.L.R. 835 cited by Mr. Poulton, loc. cit., n. 69.
78. Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691, at pp. 723-724.
79. I.A.C. (Leasing) Ltd. v. Humphrey (1972), 126 C.L.R. 131, at pp. 141-142.
80. The chapter "Penalties and Forfeiture" (ch. 18) in Meagher, Gummow & Lehane, *Equity — Doctrines and Remedies* (1975) contains a valuable account of the development of the equitable doctrine of relief against forfeiture and penalties and a statement of the present law.

I am grateful to several members of the Association who have allowed me to read unpublished papers concerning legal aspects of joint ventures and to draw upon their work, and especially to Mr. R. A. Ladbury who has permitted me to reproduce the forms of clauses appended to his paper "Lenders' Requirements in Joint Venture Financing", delivered at the Banff Centre, Canada, last May.