ASSIGNMENT CLAUSES IN MINING AND PETROLEUM JOINT VENTURES

By W. F. Manning*

Almost invariably joint venture agreements relating to the exploration for and the production of minerals or oil and gas in Australia will contain provisions affecting the rights of joint venturers to assign or otherwise deal with their interests in the joint venture.

A typical assignment clause in such a joint venture agreement will restrict the right of a joint venturer to assign or deal with all or part of its participating interest in the joint venture unless it is to a related corporation or, in the case of assignments to third parties, unless the proposing assignor has first offered its interest to the other joint venturers on the same terms and conditions on which it proposes to assign such interest. Such a clause may also provide that no assignment or dealing shall be effected without the consent of the other joint venturers, such consent not to be unreasonably withheld.

There will normally be a provision that no assignment is to be effective until the assignee has first entered into a covenant with the other joint venturers to be bound by the terms and conditions of the joint venture insofar as they relate to the interest being assigned.

The right of a joint venturer to charge or encumber its participating interest will also usually be restricted by providing that no charge will be created unless under the terms of the charge the chargee agrees that in the event of exercising any of its remedies on default, for example, a power of sale or the right of foreclosure the chargee will be bound by some or all of the provisions of the joint venture agreement including any restrictions on assignments. The assignment clause will contain a prohibition on each joint venturer from seeking partition of the joint venture property or a judicial order for a sale of the property and subsequent division of the proceeds amongst the joint venturers.

In this paper it is proposed to consider the general principles of law and equity which relate to assignments of interests in mining and petroleum joint ventures, to consider the more common forms of restriction on the rights of a joint venturer to deal with its interest in a joint venture, to look at some common forms of transactions and problems which may arise in relation to them, and, finally, to consider some matters which should be addressed by the draftsman of an assignment clause in a joint venture agreement.

However, before dealing with these topics it may be useful to consider, briefly, the reasons for including assignment clauses and, in particular, rights of first refusal, in mining and petroleum joint venture agreements.

Firstly, in Australia, as in most countries, exploration for minerals and petroleum, development of discoveries and production therefrom

* B.A., LL.B. (Qld), Solicitor, Brisbane.

often involve high risks and large sums of money. Thus, mining companies have opted in the main for joint ventures whereby the risk and the costs are spread and shared by others. Even so, each joint venturer might incur significant liabilities and will wish to ensure that his fellow joint venturers have both the capacity and the desire to fund their portion of the costs of operations carried on by the joint venture. Consequently, many mining companies consider it to be important that they are able to have some control over future participants in the joint venture.

The 'corporate philosophy' of companies can vary enormously. A large multinational corporation with a significant financial base may be anxious to expend large amounts of money over a reasonably short period of time on an area it considers prospective whereas a small locally-based company with limited funds and limited access to further funds might wish to spend only modest amounts on the same area. The smaller company may find unpalatable the alternatives of having its interest diluted through not contributing its full share to programmes or of being 'frozen out' of parts of the joint venture area as a consequence of sole risk operations by other venturers, unless a high premium is paid.

A company entering into a joint venture will be anxious to ensure that its fellow joint venturers are able to work together harmoniously. Significant disputes or differences at the management committee level can prevent effective decision making and impair the general efficiency of the joint venture operations. As decisions are usually made on a majority vote of one level or another the company will not be keen to be put into a position where it may be constantly out-voted in respect of programmes and budgets and other significant matters.

Apart from the general corporate or business philosophy of companies, there may be different technical approaches as to the types of exploration, testing and studies which should be carried out by the joint venture.

A company may believe that because of certain personnel of another company it would find it difficult to work harmoniously with that other company. The mining industry in Australia has its share of characters and personality clashes are not unknown.

Joint venturers will wish to ensure that any new parties who may come into the joint venture after it has been formed will be compatible and they will often want the opportunity to prevent an incompatible party from being introduced by taking up the interest themselves.

Secondly, a joint venturer might seek restrictions on assignment because, having been an initial party to the joint venture and having invested a significant amount of money in a high risk area which turns out to be successful or at least to be highly prospective, it may feel entitled to an opportunity to increase its interest in that area if any of the other joint venturers desires to dispose of its interest. Thus a company may wish to have the opportunity to reap the rewards from the past risk-taking and expenditures, notwithstanding that it may have to pay a fair and reasonable price for the increase in its interest.

Thirdly, a joint venturer may wish to acquire additional interest in the joint venture so as to have a greater voice in decisions reached by the

management committee and thus more control over the management and operations of the joint venture even, perhaps, to bring about a change of operator. A company may prefer to see relatively few joint venturers rather than a large number holding small interests which could make the operation of the joint venture extremely cumbersome.

The above are only some of the reasons why a party to a joint venture may want to restrict the right of joint venturers to assign their interests by way of first refusal provisions. On the other hand most companies see no major drawbacks with such provisions. A joint venturer is free to make up its own mind whether it wishes to assign its interest and, if so, on what terms. It is only when that decision has been made that there arises an obligation to offer the interest to the other joint venturers. Of course, the need to reach agreement first with the third party on the terms and conditions and the time taken to offer it to the other joint venturers and to give them a reasonable opportunity of deciding whether to accept those terms and conditions may deter an interested third party and thus endanger a prospective sale. However, given the wide use of first refusal provisions in assignment clauses, most companies appear not to be easily frightened away by these delays. On the other hand, there are some that take the view that, especially in exploration situations, the difficulty of ascribing objective values combined with the potential that continuing work can substantially alter values dramatically make any restraint on sale so potentially limiting that none should be agreed to, except perhaps some limited right to withhold consent to a sale to doubtful third parties.

GENERAL PRINCIPLES OF LAW AND EQUITY RELATING TO ASSIGNMENTS OF INTERESTS IN JOINT VENTURES

Before considering the general principles of law and equity which relate to assignments of interest in joint ventures, it is necessary to examine the nature of a joint venture and the consequent nature of the interest of a participant in a joint venture.

In a paper delivered at the 1980 AMPLA Conference[1] J.D. Merralls Q.C. dealt with the nature of the interest of a participant in a joint venture and pointed out that the critical distinction to be maintained between a joint venture and a partnership was that a participant, unlike a partner, has a separate and identifiable interest in each asset used in the venture. The interest of a partner in partnership property is an equitable interest in the entirety of the net assets of the partnership after they have been realized and converted and the debts have been paid and liabilities discharged. Mr Merralls said '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' and, later, '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

1 (1977) 3 *A.M.P.L.J.* 1, 5, 6.

proportionate share in the assets that a carefully drawn agreement will identify as the participant's individual or undivided interest in the venture.'.

The nature of the interest in a joint venture has been considered more recently by Professor Michael Crommelin[2] where he pointed out that it was in fact 'twofold: proprietary and contractual. The proprietary interest is that of a tenant in common in the assets of the joint venture. The contractual interest comprises choses in action relating to management of the common undertaking.'

Professor Crommelin referred to a decision of the High Court[3] which noted that one of the indicia of a partnership as opposed to a joint venture is the ultimate equitable interest of a joint venturer in the whole of the assets of the joint venture. The High Court said

> The partner's share in the partnership is not a title to specific property but a right to his proportion of the surplus after the realisation of assets and the payment of debts and liabilities. However, it has always been accepted that a partner has an interest in every asset of the partnership and this interest has been universally described as a 'beneficial interest' notwithstanding its peculiar character ... the interest of the partner in an asset of the partnership is *sui generis*. It is, as we have said, recognised as a beneficial interest. As such it constitutes an equitable interest and is not a mere equity to set aside or rectify a transaction by means of a court order.

Professor Crommelin went on to state that

> It is too early in the development of the law in Australia concerning the mineral and petroleum joint venture to regard the interest of a participant as *sui generis*. Analysts of this interest must acknowledge its dual character and apply the relevant principles of the law of property and contract. That dual character has important practical consequences particularly with respect to assignment.

Previous commentators on this topic have therefore been in general agreement that an interest in a joint venture consists of a number of different rights but, basically divisible into two categories: firstly, an interest as a tenant in common in certain items of property being the joint venture property including exploration or mining tenements, freehold and leasehold land, improvements on the land, machinery, plant and equipment; secondly, choses in action being contractual rights under various agreements including the joint venture agreement and the operating agreement.

The contractual rights would include the right to take a share of the production in kind, the right to enforce the obligation of the other joint venturers to contribute their proportion of the costs and expenses of joint venture operations and the obligations of the operator to manage the operations in a proper and businesslike manner with the usual standards of care, to maintain the tenements and to take out and maintain policies of insurance.

It is therefore necessary to keep in mind the dual character of an interest in a joint venture when considering the relevant legal and equitable principles.

2 In a paper presented at the International Conference on Energy Law and Policy in Asia and the Western Pacific LAWASIA Energy Section, Singapore, November 5–9, 1984.

3 *Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd.* (1974) 131 CLR 321.

PROPRIETARY INTEREST AS TENANT IN COMMON

Prohibition Against Restraints on Alienation

Any attempt to restrict the right of a joint venturer to assign his interest in the property which is the subject of the joint venture may run contrary to the general principle of prohibition against restraints on alienation. The High Court[4] has declared void, as being a restraint on alienation, a provision in an agreement for the sale of land that the purchaser would not subsequently transfer the land except with the consent of the vendor and that if the purchaser proposed to transfer the land it would offer it to the vendor at the price which the purchaser had originally paid.

The doctrine of restraint on alienation of property and its application to assignment provisions, particularly those containing first refusal rights, has been previously considered by Allen and Cottee.[5] As pointed out by the authors, the High Court was divided on the case. Of the majority who held the covenant void Dixon C.J. and Menzies J. concentrated on the clause which prohibited any disposal of the land without the consent of the vendor. They did not consider the pre-emptive right as such but held that the power of the vendor to stop the disposal at its discretion was a restraint on alienation and therefore void. Fullagher J. the other member of the majority, held that the clause as a whole was merely intended to give the vendor a right of pre-emption but that, even so, the pre-emptive right was void because, in particular, the vendor could exercise the pre-emptive right at the original sale price which might be much less than the real value at the time the pre-emptive right was exercised.

The minority of Kitto and Windeyer JJ. held that although the document was unclear the intention was to give a pre-emptive right and that this was valid and enforceable and not void as being a restraint on alienation. The other two cases referred to in the same article[6] both involved pre-emptive provisions providing for purchases at the original price rather than a fair market price at the time the pre-emptive right was to be exercised and the courts in those cases, relying on the decision of the High Court, held the provisions to be void as being restraints on alienation.

The authors then proffer the opinion that not all restraints on alienation should be void under this doctrine. Options and pre-emptive rights are a necessary part of commercial life. Pre-emptive provisions which provide for a fair market price or which are to be exercised at a price offered by a third party should be held to be valid because they are inserted for a bona fide commercial purpose and not for the purpose of making the property inalienable. They say 'The pre-emptive right with which we are concerned is one whose primary purpose is to ensure stability of the joint

4 *Hall v. Busst* (1960) 104 CLR 206.

5 Allen P.J. & Cottee R.I. 'The Effect of the Rule Against Perpetuities on Pre-Emptive Rights in Joint Ventures' (1982) 4 *A.M.P:L.J.* 190.

6 *Saliba v. Saliba* [1976] Qd.R. 205 & *Blacktown Municipal Council v. Doneo* [1971] 1 NSWLR 157.

venturers and the normal provisions raise no question of the interest being offered at a price markedly below market value.'

Rule Against Perpetuities

This rule is also dealt with in the abovementioned article by Allen and Cottee. The question to be considered is whether this doctrine and the related statutory provisions which have been enacted in a number of Australian jurisdictions would have the effect of rendering void a first refusal right in an assignment clause.

The rule against perpetuities provides that any future interest in any property real or personal is void from the outset if it may possibly vest after the perpetuity period has expired, the perpetuity period consisting of any life or lives in being together with a further period of 21 years and any period of gestation.

The authors first consider the question of whether a right of first refusal is an interest in property. After reviewing the relevant authorities, they come to the view that a right of first refusal does not create an interest in the property over which it is given because it gives no present right, even a contingent one, to call for a conveyance of the legal estate. The grantor of the right is still free to decide for himself whether he wishes to sell or not. Whatever interest the grantee of the right might have is subject to the actions of the grantor. The right of first refusal is to be distinguished from an option where the grantee acquires a right to call for a conveyance of the property without any further intervention required by the grantor. The obtaining of the property is completely within the grantee's power and it is for this reason that an option creates an equitable interest in the property. Consequently, they conclude that the rule against perpetuities does not apply to rights of first refusal.

However, in two Australian States, legislation has been passed amending the common law position.[7] The rule against perpetuities has been extended to a right of first refusal in respect of land and such a right is void after the expiration of 21 years from the date of its grant.

Although it is not clear whether a mining lease is a right in respect of land for the purposes of these provisions, they would obviously apply to any freehold or leasehold surface title involved in a mining project. A mere exploration permit would probably not be regarded as an interest in land. The authors of the article discuss a number of ways by which a draftsman might overcome the problems raised by these provisions and a further suggestion in this regard is made later in this paper.

Creation of Trusts

Equity has long recognized that one of the corollaries to a right of ownership in property is the right to create a trust in respect of that property. A person who has the capacity to alienate or dispose of property

7 Property Law Act 1974 (Qld) s. 218(2); Perpetuities and Accumulations Act of 1968 (Vic) s. 15.

can settle property on another or declare himself trustee for another and thereby create a trust.[8]

Charges and Mortgages

The absolute owner of property real or personal can at law create a charge or mortgage over that property to secure an obligation.[9]

Right of a co-owner of property to seek partition or judicial sale of jointly owned property.

At common law the agreement of all co-owners of jointly owned property was required for partition, that is, the physical division of property. By the early sixteenth century rights had been granted by legislation to joint owners to make application to the courts for partition and there was no power in the courts to refuse partition. By the Partition Acts of 1868 and 1876 the courts were empowered to order a sale in lieu of partition in certain circumstances and several Australian states have passed similar legislation.[10] A co-owner of property has a right to partition but the court may direct a sale of the property as an alternative if it thinks fit. If the party or parties requesting a sale are interested to the extent of a moiety or upwards in the property the court must direct a sale unless it sees good reason to the contrary. Where a request for a partition is made and neither party requests a sale the court is obliged to order partition and has no discretion to order a sale.[11]

In New South Wales and Queensland a co-owner of property either real or chattel may apply to the court for the appointment of trustees to hold the property on a statutory trust for sale or on a statutory trust for partition.[12] It has been argued that under these provisions the court has a discretion whether or not to appoint trustees for partition or sale. It has been suggested that a discretionary bar to an application for appointment of statutory trustees might be found to arise from some proprietary right or some contractual or fiduciary obligation with which an order for sale would be inconsistent.[13] In a Queensland decision in 1982[14] the Supreme Court held that a right to partition or sale is an incident of the property of a co-owner of land and it was therefore difficult to conceive of circumstances in which the discretion, if any, conferred by the word 'may' in section 38(1) of the Property Law Act should ever be exercised against the appointment of statutory trustees. However the Court did note that the position may be

8 *Lewin on Trusts* (16th ed. 1964) 'The creation of a settlement is but a particular form of modification of property; in general, therefore, any person who is competent to deal with a legal estate or equitable interest may vest it in a trustee for the purpose of executing the settlor's intention.'.

9 *Re Price ex parte Tinning* (1931) 26 TLR 158 *per* Nicholls C.J.

10 Vic.: Property Law Act 1958 Part IV; S.A., Law of Property Act 1936–1980 Part VIII; W.A., Property Law Act 1969–1979 Part XIV; Tas., Partition Act 1869.

11 *De Campo Holdings Pty Ltd v. Ciancillo* [1977] W.A.R. 56.

12 N.S.W. Conveyancing Act 1919 Part IV Div. 6; Qld., Property Law Act 1974 Part V Div. 2.

13 *Re McNamara* (1961) 78 W.N. (N.S.W.) 1068.

14 *Ex Parte Eimbart Pty. Ltd.* [1982] Q.R. 398.

different where there was a trust which imposes on a trustee active duties beyond those of merely holding land for the beneficiaries.

In a recent unreported Queensland case[15] which appears to be of direct relevance to the right of a joint venturer to seek partition or judicial sale of joint venture property, the Court was dealing with an application by a wife for the appointment of statutory trustees for sale of property jointly owned with her former husband, the marriage having been dissolved. The land in question was used in connection with a business carried on by the husband and wife in partnership. The husband opposed the application, *inter alia*, on the ground that the applicant had not given notice in writing of her intention to retire from the partnership and that the application, if successful, would end the partnership contrary to the provisions of the partnership agreement. Under the partnership agreement which had been entered into between the husband and wife it was provided that either partner may retire from the partnership upon giving to the other partner not less than three calendar months' notice in writing of intention to do so whereupon the other party had the option to purchase the share or interest of the retiring partner. The agreement went on to provide for winding up and distribution of assets in accordance with the Partnership Act if no other arrangement was made and the option of purchase was not exercised.

The Court stated that the discretionary character of the court's power was important when the issue between the parties was not simply one of dealing with the property held by or for them in co-ownership and then went on to say:

> In my opinion, the fact that the property was being used for partnership purposes, and that it may be partnership property, are circumstances which make it inappropriate to make an order for the appointment of statutory trustees for sale of the property. The parties have agreed to conduct a business in partnership on the property and they have agreed on the terms upon which one partner may retire from the partnership, and they have also agreed as to the distribution of the assets upon the termination of the partnership. An authorisation for sale of the property would or at least could be inconsistent with the rights of the parties under the partnership agreement. Accordingly I refuse to make the order sought by the summons.

The decision appears to be directly relevant to joint venture agreements which usually give parties certain rights where one of the joint venturers wishes to withdraw from the joint venture. Where there are relevant provisions in the joint venture agreement and an order for sale or partition would be inconsistent with those provisions the court may, on this authority, exercise its discretion not to grant the order. An order for the sale or partition of joint venture property would often have the effect of destroying the joint venture and would be completely inconsistent with the joint venturers' rights under the agreement. These matters would, it is submitted, be a powerful influence on a court to exercise its discretion not to make an order for partition or sale of joint venture property.

It is of course normal to find provisions in a joint venture agreement either in the assignment clause or elsewhere whereby the parties agree not to seek partition or judicial sale of joint venture property. The question

15 *Re Bolous O.S.* No. 234 of 1985 16th May, 1985.

arises whether the parties can contract out of these statutory rights. In *Eimbart's case*[16] the court said

> It is also difficult to imagine that the existence of a mere contract or agreement to the contrary would ordinarily constitute a bar to the court's discretion to appoint a statutory trustee in the case of co-owners at law. No doubt in many such cases the contract or agreement in question would amount to a fetter upon alienation which would be void or unenforceable according to the principle adopted in Australia in *Hall v. Busst* that a contractual restraint upon alienation is contrary to public policy and which has been held to be applicable to contractual restraints upon alienation between co-owners: see *Saliba v. Saliba* (1976) Qd.R. 205.

It has been said that 'Wherever there is a question whether there can be a contracting out or waiver of statutory provisions, the problem must be solved on consideration of the scope and policy of the particular statute. Little help can in general be derived from other statutes'.[17] It is submitted that in respect of these provisions there is nothing in the legislation inconsistent with the right to contract out and that the right to make application to the court for partition or judicial sale is a private right which may be renounced by contract. In any event, an agreement by the parties to a joint venture not to seek partition or judicial sale is obviously a relevant consideration to be taken into account by the court in deciding whether to make an order.

Contractual Rights

At common law a contractual right could not be assigned so as to entitle the assignee to sue for its recovery in his own name. Equity has always recognized the right of a party to a contract to assign contractual rights except in certain cases such as contracts involving personal skill. The legislatures[18] have also confirmed the right of the holder of a chose in action to assign that right if the assignment is absolute, in writing and written notice has been given to the person who is liable in respect of such contractual right.

On the other hand the burden of a contract cannot be assigned except with the consent of the other party to the contract.[19] Therefore, as a general rule, the assignee of the benefit of a contract which involves mutual rights and obligations does not acquire the assignor's contractual obligations. There is an exception to this rule where an assignee will not be able to enjoy the benefits assigned to him without also assuming the assignor's obligations, for example, where the benefit and burden of the contracts are interdependent and cannot be separated.[20]

Some Common Forms of Contractual Restraints on Assignment

An assignment clause will usually contain a catch-all general provision which prohibits any transfer or creation of interests or other dealing with a joint venturer's interest except as specifically permitted by

16 Above n. 14.
17 *Admiralty Commissioner v. Valverda* [1938] A.C. 173, *per* Lord Wright.
18 *E.g.* Property Law Act 1974 (Qld) ss. 119, 200.
19 *Tolhurst v. Associated Portland Cement Manufacturers Limited* [1902] 2 K.B. 656.
20 *Tito v. Waddell (No. 2)* [1977] Ch. 106, 302, 303.

the later provisions of the assignment clause, which may contain one or more of the following.

Right of First Refusal

This form of restraint is also commonly referred to as a pre-emptive right or a preferential purchase right although for the purposes of this paper, pre-emptive rights have been regarded as a distinct form of restraint and have been dealt with separately.

Such a provision would follow a format to the effect that, if a joint venturer wishes or proposes to assign all or part of his interest in the joint venture, he must first offer it to the other joint venturers and give them an opportunity to acquire the interest on the same terms and conditions.

One of the clearer statements as to the nature of a right of first refusal and the comparison with an option to purchase was made by Street J. in *Mackay v. Wilson*[21] when he said:

> Speaking generally, the giving of an option to purchase land *prima facie* implies that the giver of the option is to be taken as making a continuing offer to sell the land, which may at any moment be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period. It has more than a mere contractual operation and confers upon the optionee an equitable interest in the land, the subject of the agreement: see, for example, *per* Williams J. in *Sharp v. The Union Trustee Co. of Australia Ltd.* (1944) 69 C.L.R. 539 at 558.
>
> But an agreement to give 'the first refusal' or a 'right of pre-emption' confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement.

A typical right of first refusal will provide that where a joint venturer makes or receives a bona fide offer from a third party for cash consideration (perhaps limited further to offers with immediate settlement on completion) or some other consideration which is readily convertible to cash or cash equivalent and which the offeree wishes to accept then he must give notice to the other joint venturers setting out the terms and conditions of the offer including details of the offeror. The other parties will then have a period of time, say 30 or 45 days, in which to indicate whether they wish to take the interest on the same terms and conditions. If none of the other joint venturers wishes to take the interest on those terms then the joint venturer giving the notice may proceed to assign the interest on the same terms and conditions or, at least, terms and conditions no more favourable to the assignee, within a certain period, for example, 90 or 180 days.

The clause will provide that if more than one of the other parties wishes to take an assignment of the interest offered they will, subject to agreement between them to the contrary, take in proportion to their existing participating interests in the joint venture.

21 (1947) 47 S.R. (N.S.W.) 315, 325.

This provision is usually drafted so as to avoid the possibility of the other parties picking up part only of the offered interest. The clause will normally provide expressly that if the whole of the interest on offer is not taken by the other parties then the proposed assignor may proceed with the assignment to the third party. This can be an important protection for a party who, for whatever reason, wishes to retire from a joint venture. Such a party would not want a situation where only some of its interest is disposed of to other joint venturers, leaving a balance which is insufficiently large to be attractive to other purchasers, and may in practice be quite unsaleable.

There may be excepted from the operation of the pre-emptive provisions a proposed transfer to an existing joint venturer but most parties to joint venture agreements would prefer to have an opportunity to pick up their proportional part of any interest on offer, so as to be able to maintain their percentage interest in the venture.

An alternative type of provision does not require as a necessary precondition that there be a bona fide offer to or from a third party. It may merely provide that where a joint venturer wishes to assign his interest he may give notice to the other parties of the terms and conditions upon which he is prepared to assign and if the other parties do not wish to take the interest on those terms the party is then free to transfer on the same terms and conditions or at least on terms no more favourable to the purchaser, to any third party.

The benefit of this alternative to a party wishing to dispose of his interest is that it does not first require a bona fide offer. This requirement could cause some difficulties where a prospective purchaser is not prepared to spend the time, effort and money involved in properly investigating and evaluating the interest which may be necessary for him to obtain an idea as to its value and negotiating terms and conditions acceptable to both parties, with the risk of being ultimately pre-empted.

One obvious disadvantage from the point of view of the other parties with this alternative is that they will not know the identity of the assignee before having to decide whether to accept the terms and conditions. It seems that this defect could be overcome if the other parties had the right reasonably to withhold their consent to the assignment once the assignee had been identified, but objections to the identity of a third party, though substantial, may be difficult objectively to sustain on any test of reasonableness.

One further problem with this alternative so far as the proposed assignor is concerned is that having advised the other parties of the proposed terms and conditions it is not possible for him to make any variation or amendment to those terms and conditions without first going back to the other parties and repeating the procedure with the amended terms and conditions. Of course it could be quite an advantage to a proposed assignor in negotiating with a proposed assignee to make the point that where terms and conditions have already been offered and rejected by the other joint venturers, the proposed assignor cannot offer more generous terms and conditions to the assignee without there being substantial delay and the risk of the other joint venturers accepting those terms.

Pre-Emptive Rights

The articles of association of a private company may contain a provision (often referred to as a 'pre-emptive right') to the effect that, if a shareholder desires to dispose of his shares, he is required to give notice to the directors who are thereby appointed as his agent for the sale of the shares to any other shareholder who may wish to purchase them, at a price agreed between the shareholder and the directors or, failing agreement, at the fair market value as determined by the company's auditors or some other independent person. Given the 'sudden death' nature of such a provision, it is hardly surprising that it appears rarely in mining joint venture agreements.

One variant of the right of first refusal which might be more accurately described as a pre-emptive right is a clause whereby the proposing assignor gives the other joint venturers written notice of its desire to sell its interest. Each of the other joint venturers has a certain time within which to make an offer to purchase the interest, specifying the terms. The proposing offeror can then accept any of the offers, with, presumably, the right given to participate proportionally, if two or more of the joint venturers wish to purchase the interest on the accepted terms. Alternatively, if the proposing assignor does not wish to accept any of the offers, it may sell to a third party on more advantageous terms, so far as the assignor is concerned, within a fixed period. This provision may be regarded as being fairer to a proposing assignor but many companies may be reluctant to participate in such a 'Dutch auction' without having any right to match the final terms offered to the assignor by a third party.

Consent

The assignment clause in the joint venture agreement will normally contain a clause requiring the consent of the other joint venturers to an assignment, either in addition to or in lieu of a first refusal provision. This will usually oblige a party to obtain the prior written consent of the other joint venturers before assigning an interest, such consent not to be unreasonably withheld (so as to lessen the possibility that the restriction will be void as a restraint on alienation). The clause may well go on to set out some examples of what are reasonable grounds for withholding consent, for example, where the interest of the assignor or assignee would as a result of the assignment be reduced to less than a prescribed percentage, *e.g.* five per cent or where the other party or parties are of the opinion that the proposed assignee is not a financially respectable and responsible person. Because of the difficulty of foreseeing all eventualities it is preferable not to make such examples exhaustive.

Even where there is a first refusal provision, there are sound arguments for adding a consent clause especially to ensure the financial capacity and will of the proposed assignee. There remains however the problem of being able to demonstrate objectively one's subjective concerns, which may be based on hearsay allegations of previous practice, or financial soundness, which a prospective transferee could be expected to deny vigorously, with or without threats of libel action.

Transfers to Related Corporations

It is not uncommon to find provisions in assignment clauses which permit a joint venturer to assign to a related corporation without having to go through the first refusal procedures or to obtain the consent of the other parties. The definition of 'related corporation' as set out in section 7 of the Companies Codes is often adopted and would appear to be sufficiently wide for most situations.

If there were nothing more than this, a joint venturer might easily by-pass the restrictions by assigning its interest to a related corporation and then disposing of the shares in that corporation. To prevent this abuse there is usually a provision that if, subsequently, the assignee ceases to be related to the assignor, the assignee will be obliged to transfer the interest back to the assignor. To assist with the enforcement of this obligation a precondition of an assignment to a related company will be that the proposed assignor have the proposed assignee enter into a covenant with all joint venturers that in such circumstances it will retransfer the interest. Care should be taken to specifically provide that, in respect of any transfer back to the assignor in the event of the two companies ceasing to be related, the first refusal provisions will not apply in favour of the other parties.

One other common provision that hinders the sale of shares in the interest holder to avoid restrictions on assignment, is that the transferor is to remain liable for the obligations of the related company.

Minimum Participating Interests

To avoid the problem of a large number of joint venturers holding relatively small participating interests, the assignment provisions may prohibit an assignment of part of a joint venturer's interest if, as a result of that transfer the assignor or the assignee would hold a participating interest less than a prescribed percentage. This could be 1, 2, 5, 10 per cent or other figure felt by the parties to be a minimum. There may be a question as to whether such a provision would be void as being a restraint on alienation but it could be argued that a joint venturer is still free to transfer the whole of his interest or even a part so long as it did not result in anyone holding less than the minimum interest. Therefore it is not a complete restraint but of only a limited effect and there may be good commercial arguments for such a restriction, for example, it would be very difficult to administer a joint venture with a large number of participants.

Transfers of Interests in Part Only of the Joint Venture Area

If a joint venturer is able to transfer his rights under a joint venture insofar as they relate to a part only of the joint venture area, this can create substantial problems in that there would then be, in effect, two joint ventures for the different areas with different parties holding different per centage interests. Consequently, assignment clauses will often provide that although a party can transfer part of his interest as to the whole area he cannot transfer the whole or part of his interest so far as it relates to a part only of the geographical area covered by the joint venture.

Foreign Investment

Under the Foreign Investment Guidelines a mining or petroleum project requires certain minimum Australian participation and control. If there is a transfer by a party which has the effect of reducing the Australian equity in the joint venture below such maximum limit this may endanger the whole project *e.g.* by a failure to obtain permits. The assignment provision may therefore prohibit a transfer which would have this result or could have this result although, of course, if there is a consent requirement the threat to the project would seem to be ground for withholding consent.

More difficult considerations arise when the joint venture is only at the exploration stage. Under the present foreign investment guidelines the Federal Government is only concerned as to the extent of foreign equity or control when the project proceeds to development and production. The assignment clause may attempt to address this problem by providing that there is no restriction on assignments to parties which are foreign or partly foreign owned during the exploration phase but if this results in the project exceeding the maximum foreign equity permitted at the development stage then when the development stage is reached both the assignor and the assignee will have the obligation to increase the Australian equity so that the project meets the guidelines.

Whilst it makes sense that the transferor be permitted the maximum flexibility in how he 'Australianizes' his interest *e.g.* by transfer of all or part to Australian or partly Australian companies or by issue of shares to Australian residents, there should be a 'fall-back' provision in the event the party liable does not Australianize within say, three months, of the time when this becomes necessary.

One way to handle this situation would be to provide that the transferor must then offer the necessary part of his interest to the other parties, commencing firstly with such of the other parties as has the highest Australian ownership and so on in descending order of Australian ownership so as to minimize the size of the interest which needs to be disposed of. Upon receiving any acceptances, the price would be agreed between the parties or fixed by independent valuation. The usual rights of first refusal would not apply to such offers. If none of the parties offered an interest accepts, the transferor must endeavour to assign to a third party so as to bring the Australian equity up to the level prior to the original transfer but is not obliged to do so for less than a reasonable price fixed, if necessary, by an independent valuation.

Charge

The assignment clause will normally also deal with the rights of a joint venturer to charge his interest in the joint venture. Where the joint venture provides for cross charges between the joint venturers to secure the obligations as between themselves then the agreement should specify that any charge created by the joint venturers in respect of other lenders will be subordinate to those cross charges.

In addition and even where there are no cross charges, the agreement will normally provide that a charge given by a joint venturer

must bind the chargee, in the exercise of any of his rights consequent upon a default by the chargor, to the provisions of the joint venture agreement as if he were a joint venturer. For example, in exercising a power of sale pursuant to the charge the chargee must comply with the provisions of the assignment clause such as the granting of first refusal rights to the other joint venturers. The clause may require that the charge prohibit the holder of the charge from foreclosing and taking the interest in the joint venture.

Prohibition on Partition or Judicial Sale

Often in assignment provisions there will be an express prohibition on the joint venturers from attempting to seek an order of the court for partition or sale of any of the joint venture property. The general principles governing this subject have been set out earlier. In those jurisdictions such as Queensland and New South Wales where the legislation has to some extent varied the common law position the court appears to have a discretion whether to order partition or sale of jointly owned property. In the case of a mining or petroleum joint venture there are pressing and cogent reasons for not granting such orders given that the parties have entered into an agreement which contains express provisions for withdrawal and that such an order would in most cases destroy the joint venture.

Common Dealings and Problems

It is now proposed to consider a number of situations which may well arise in practice and which should be kept in mind when drafting or interpreting assignment clauses.

Outright Sale for Cash

Where there is a proposed sale by a joint venturer of his interest in the joint venture for a cash consideration the time involved in agreeing terms and conditions with the prospective assignee, offering the same terms and conditions to the other joint venturers and giving them time in which to consider and accept the offer, as provided for in the usual first refusal provision, could endanger the whole transaction. A prospective purchaser may not be prepared to expend a significant amount of time and money in investigating and evaluating the particular joint venture which would include assessments of geological information, feasibility studies, *etc.* and then negotiating and agreeing to satisfactory terms, only to see the other joint venturer step in and take the fruits of that effort and expense. For this reason, a first refusal provision in an assignment clause may deter 'lukewarm' prospective purchasers. On the other hand, because of their frequent use in joint venture agreements, a purchaser interested in acquiring an interest in a joint venture would not normally be surprised by such a provision and would accept it, albeit grudgingly.

In practice, a joint venturer wishing to assign might attempt to shortcut the whole process by making an early approach to the other joint venturers indicating the terms on which he is proposing to assign and the

identity of the assignee and requesting the other joint venturers to waive their first refusal rights rather than require a formal notice. If the other parties agree to waive their rights then the time for consummation of the deal can be significantly shortened.

Another problem that might arise on the usual first refusal provision is that the clause is usually drafted so as to require all the terms and conditions to be notified to the other joint venturers. In the event of the other joint venturers not accepting the offer the proposing assignor may only assign on precisely the same terms and conditions. The assignor and assignee will therefore have to agree in advance on all the terms and conditions, that is, in effect, on the form of the agreement for sale for submission to the other joint venturers. Any variation or omission between the terms offered and those finally consummated could involve a breach of the agreement with, perhaps, an injunction from one of the other joint venturers to prevent the sale. There may be some scope for avoiding this problem by providing that the terms and conditions have to be only substantially the same as those offered. This may not avoid an argument as to whether the terms are or are not substantially different and there could still be a risk of some action by the other joint venturers to prevent the sale from proceeding. Obviously, a provision that refers to terms and conditions no more advantageous to a purchaser allows some more latitude.

If you are acting for a prospective purchaser of an interest in a joint venture you will want to be satisfied that where there are first refusal rights in the joint venture agreement either those rights have been properly waived by the parties entitled to them or the procedures have been followed.

The deed of assignment and assumption to be entered into between the assignee and the remaining joint venturers should contain a confirmation and acknowledgement by the other joint venturers either that they have waived their rights or that the first refusal procedures have been complied with and they have no continuing rights under the assignment provisions. The agreement for sale should contain a warranty that there are no existing first refusal rights exercisable by the other joint venturers unless, of course, there is an express condition precedent to the assignment that the other joint venturers have waived their rights or having been offered the interest have not accepted them within the given period.

For a first refusal provision to be effective the other joint venturers must be satisfied that the terms and conditions on which the interest was eventually assigned were the same terms and conditions which had been offered to them. To establish this, there should be a provision in the joint venture agreement that before any assignment is effective the assignor will produce copies of any agreement or assignment for inspection by the other joint venturers. If this is not included, the assignor and assignee may merely provide a deed of assumption without producing any of the documentation setting out the terms of the assignment. The assignor and assignee might be reluctant to disclose all the terms but unless this is done the rights of the other joint venturers under first refusal provisions cannot be properly protected.

There have been cases where terms have been notified to parties who have waived first refusal rights but it has subsequently come to light that the farm-out agreement or deed of transfer between the assignor and the assignee contained different terms including even a reduced consideration. An obligation to produce the documents should go some way to avoiding this.

Area or Acreage Swaps and other transactions involving non-cash consideration

It is not unusual for mining companies to enter into arrangements with other mining companies whereby they exchange interests so as to spread the risks and obtain interests in areas which adjoin their own where, from information obtained from their own area, they believe that the prospects might be good for future discoveries.

The difficulty of applying first refusal provisions in these situations is that the other joint venturers may not be able to offer the same consideration, that is, an interest in a particular exploration area or joint venture. The usual method of dealing with this situation is to require that any assignment be only for cash value. This means that the parties to the proposed swap must put a cash consideration on each of their interests. This could leave scope for abuses, in that, to prevent the other joint venturers exercising first refusal rights, the parties to the swap could agree to put the same large cash value on their interests which bears no relationship to a reasonable market figure. By using exactly the same figure no cash will have to change hands between the parties and so far as they are concerned there is no adverse effect in putting a large cash figure on the interests (except for possible stamp duty implications or difficulties in obtaining ministerial approval if there is a policy of the government to avoid trafficking in exploration titles).

This potential abuse could partly be avoided by providing that the cash consideration must be a bona fide fair market price. A more elaborate clause might provide that the other joint venturers, if they do not agree that it is a bona fide fair market value, can have the valuation of the interest referred to some independent expert or arbitrator for determination. Such a clause would have inherent dangers for a prospective assignor who, each time he makes an agreement, faces the possibility that the joint venturers will have the price arbitrated and it might be found to be lower than the price he has negotiated with an assignee. Obviously, the provision should only apply where there is a non-cash consideration. One drawback would be the time involved in having the value determined, and the uncertainty as to what methods were to be used. Valuations of *in situ* reserves can be very much a 'hit or miss' affair depending on who does the valuation and the reasons for the valuation.

Farm-Outs

Instead of assigning an interest for cash or other monetary consideration the holder of an interest in a joint venture might offer an interest in consideration for the assignee agreeing to perform or, at least,

pay for operations on the land such as seismic programmes and drilling of wells with the interest being transferred 'up front' or after the farm-in obligations have been satisfied. Some farm-outs involve expending a minimum amount of money in which case that could be matched, although it would be payable over a time rather than in one lump sum. In others the obligation is to perform certain work irrespective of the cost. If the assignment clause requires a lump sum cash consideration to be specified in the notice to other joint venturers, it may seriously restrict the right of a party to enter into the second type of farm-out arrangement. If your client is likely to want to enter into such arrangements you should ensure that the first refusal clause is sufficiently flexible.

There are so many different types of farm-in arrangement that it is difficult to generalize, but there are a number of problems that are common to all. Firstly, where a farminee does not receive a transfer of an interest until the work programme has been carried out or the minimum amount of money expended, should that farminee be able to take the benefit of first refusal provisions? If he is not then a party to the joint venture agreement he cannot insist on being offered an interest that is being disposed of by a joint venturer. Many first refusal provisions are drawn so that if more than one joint venturer wishes to pick up the interest on offer it is to be divided between them, in proportion to their participating interests. Even if the farminee is a party to the joint venture agreement, if he has not yet earned a participating interest he may have no right to take any of the interest on offer.

The interest may be transferred up-front and the farminee may become a party to the joint venture agreement with a participating interest even though he has not earned his interest. In this case he will covenant with the assignor to transfer back the assigned interest if he does not meet his obligations as to work or payment for work. The question is then whether he should be able to participate in the exercise of first refusal rights whilst not having actually completed his farm-in obligations. This is really a matter for the assignor. The farm-out agreement could stipulate that if the farminee defaults and has to transfer his interest back he is also obliged upon request from the assignor to assign any other interest that he has acquired under the first refusal provisions, perhaps for the same consideration that the farminee paid for that additional interest.

On the subject of up-front assignments and transfers back where farm-in obligations have not been met, it is important that the farminor obtains an agreement from the other joint venturers that in the event of the farminee transferring the interest back because of default, they will not exercise any rights which might otherwise apply to the re-transfer. If not, the other joint venturers who may not have exercised first refusal rights on the original farm-out would have a second bite of the cherry at the time the interest is re-transferred to the farminor. Even worse, it could be argued that the transfer back is for no consideration in which case the other joint venturers could just pick it up for nothing. However even if the transfer is to be regarded as being for value the farminor risks not getting his whole interest back.

Another general question that arises with farm-out arrangements is whether a farminee should be restricted from assigning his interest whilst

earning. Where the interest is purely contractual in the sense that the farminee does not take an assignment of any interest until he has completed his obligations there would be no problem with providing in the farm-out agreement that he cannot assign any of his rights under that agreement without the consent of the farminor. Where, however, the farminee takes an interest up front subject to reassignment on default and therefore has an immediate interest in the property of the joint venture a provision that he not assign that interest without the consent of the farmoutor might be void as being a restraint on alienation unless the consent cannot be unreasonably withheld. In some farm-out agreements where the interest is transferred up front there are specific provisions that, until the farminee has completed his obligations, the interest assigned to him is held in trust for the farminor. In that case a restriction on assignment would not be void as a restraint on alienation as the beneficial interest is not held by the farminee.

Package Deals

A joint venturer may propose to assign in the one transaction interests in a number of joint ventures. For example, an overseas company may decide to dispose of all of its mining interests in Australia. It may hold interests in a dozen different joint ventures and finds a buyer for its whole Australian interest. If there are first refusal provisions in any of the applicable joint venture agreements then it may be necessary to apportion a lump sum consideration amongst the various joint venture interests.

As with acreage swaps, this could give scope to avoidance of first refusal rights by 'loading' certain properties with a greater proportion of the total consideration than might otherwise be the case. Again, as with acreage swaps, the answer might perhaps lie in making it clear that the first refusal rights are applicable to a transfer of an interest in conjunction with other interests and that the proposed assignor is required to apportion such part of the consideration as represents a bona fide fair market value for his interest in that particular joint venture (notwithstanding any apportionment in the sale agreement) with a right given to the other venturers to require an independent valuation where they dispute the assignor's apportionment.

Dealings with less than the full 'Interest'

Problems can arise where joint venturers purport to assign some of their joint venture rights but not others, for example, the right to take a share of production. This can be avoided by providing in the assignment clause that a joint venturer can assign part of his percentage interest in all the venture rights and assets but cannot assign all or part of one or more constituent elements of his joint venture interest. Although not quite on the same point, there is a recent decision of the Full Court of the Supreme Court of Western Australia[22] which raised the question whether a particular transaction involved the assignment of part of a joint venturer's

22 *Mt Isa Mines Limited v. Seltrust Mining Corporation Pty. Limited and Paragon Nickel Pty. Limited*, unreported, F.C. S. C. W.A. 27-9-1985.

interest. In that case a first refusal provision was effectively avoided by having back to back sale contracts under which the purchaser agreed to buy all the vendor's share of production from the joint venture in return for paying the vendor's share of joint venture expenditures. At no time did the vendor part with his joint venture interest and the court held that such an arrangement was not caught by the provisions of the assignment clause. The joint venture agreement specifically excluded a joint venturer's share of production from the definition of the venturer's interest. The Court came to its decision notwithstanding that the parties to this transaction had made it quite clear in the documents that it was their intention that they were to be placed in the same financial position as if the purchaser of the share of production had taken an assignment of the vendor's interest in the joint venture.

Sales of Shares of Joint Venturers

For one reason or another many assignment clauses in joint venture agreements appear not to deal with this question. The assignment of shares in a company which holds a joint venture interest can be one way of avoiding first refusal rights. However, as mentioned above, the usual assignment clause will deal with the situation where a joint venturer assigns to a related company and then afterwards disposes of the shares in that company. In that situation the related company has to assign the interest back to the original holder. Such a clause does not deal with the situation where the joint venture interest is put into a subsidiary from the outset (perhaps specifically with a view to avoiding first refusal rights). However, a company proposing this course faces the problem that the other initial parties to the joint venture may not be satisfied with accepting covenants from a $2.00 company which has no other assets and may in that situation require a parent company guarantee. Disposal of the shares may still leave the parent company liable under the guarantee unless the other parties agree to release it which they may be most reluctant to do if they consider that there has been an attempt to avoid the restrictions on assignments.

Where the party to the joint venture agreement owns other significant assets this may inhibit a transfer of the shares for the purpose of avoiding first refusal rights. Some joint venture agreements do attempt to deal with this problem and provide that where there is a change in control of a joint venturer, for example, a change in the holding of at least 50 per cent of the shares (although it may be appropriate in some instances to specify some lower threshhold such as 20 per cent as under the Takeovers Code) then that venturer is deemed to have offered its interest to the other joint venturers at a price either to be agreed between the joint venturers or failing agreement then as determined by some form of independent valuation. Clearly, such a provision cannot easily apply to publicly listed companies which are exposed to share market forces. Any change in control of the company in that situation could result in the loss of a most valuable asset, albeit at a fair market price and most public companies would not usually accept such a provision.

On the other hand, such a provision might be a very useful defence against takeovers. A 'corporate raider' may not be anxious to take control of a company if there is a risk that a significant asset might be lost or at least put in jeopardy, and for which cash would not, in his eyes, be adequate compensation.

Some Considerations in the Drafting of Assignment Clauses

The draftsman when faced with the task of drafting an assignment clause in a joint venture agreement needs above all to take clear and full instructions from his client. To do this, he must canvass the various provisions which are available, including the provisions dealt with earlier in this paper, and he must explain in detail the advantages and disadvantages of the various types of provisions. The consequences of the operation of different types of provisions in different situations must be explained.

One of the most important factors will be the commercial philosophy of your client. Does your client wish to pick up further interests in the joint venture if and when they become available or is your client perhaps looking to the possibility of diluting his interest and laying off his risk by taking up smaller interests in a larger number of areas? Does your client intend to look for farminees who will carry him for his commitments over the immediate future? Your client may have particular reasons for wishing to increase its interest in the joint venture at every available opportunity. In short there is no alternative to a detailed explanation of the options available and to then taking careful instructions.

If acting for a client who would like to have 'tight' assignment clauses you should consider the following matters:

- Provision for no assignments or other dealings without rights of first refusal plus the consent of the other parties such consent not to be unreasonably withheld.
- Assignments only to be pursuant to bona fide cash offers for full payment on completion.
- The notice to the other joint venturers should set out *all* the terms and conditions and the assignment should only be allowed to a third party if it contains *exactly* the same terms and conditions offered to the joint venturers.
- The clause should prohibit a joint venturer from assigning all or part of any constituent element of his interest or all or part of his interest in a part only of the geographical area of the joint venture.
- The assignment clause should provide that no assignment will be permitted which would result in the assignor or the assignee holding less than a prescribed minimum interest.
- The pre-emptive provision should clearly apply to package deals where interests other than the interests in the joint venture are being assigned in the same transaction.
- Where there is a 'package deal' or non-cash consideration the assignor must nominate a bona fide fair market value in relation to the interest with a right in the other joint venturers to have this independently determined if they disagree.

- There must be a reasonable time for consideration of the offer, for example, 60 days and if none of the joint venturers wishes to pick up the interest a relatively short period for the proposing assignor to dispose to a third party, for example, 90 days, after which the interest has again to be offered to the other joint venturers. The economic situation and other factors might change over a relatively short period so as to make the offer which was previously unattractive much more attractive and a proposing assignor should not have an unlimited time in which to dispose on the terms previously offered.
- The restrictions on assignment should be drafted widely enough so as to catch not just 'sales' but also other types of transfers and assignments both voluntary and involuntary, for example, sales by mortgagees, liquidators, receivers in bankruptcy as well as declarations of trust and creation of lesser interests such as overriding royalty interests and net profit interests.
- The offer made to the other joint venturers should be specified to be irrevocable during the period that the other joint venturers have to consider the offer so that an assignor cannot change his mind in the meantime and withdraw the offer. Once he gives notice to the other parties he must allow the full time to run.
- Finally, with Queensland and Victorian joint ventures, note that rights of first refusal may be inoperative after 21 years. One suggestion is the inclusion of a clause which obliges the parties to consult before the expiry date with a view to reaching agreement on suitable replacement provisions.

On the other hand, if you are acting for a particular client who is looking to have liberal rights of assignment you might consider a provision whereby instead of having to have an offer from a prospective purchaser with terms and conditions agreed with that purchaser, a venturer may give notice to the other venturers of the terms and conditions on which it is prepared to transfer and if they are not interested in taking up the interest on those terms then it can dispose to a third party on those terms and conditions or, preferably, on terms and conditions no more advantageous to an assignee. You would want to give the other joint venturers as short a time as possible to decide whether to pick up the interest and a reasonably long period in which to assign to a third party if the pre-emptive rights are not exercised.