



The Netherlands
Transfer of Interests in a Licence

1. Introduction

Petroleum exploration and production licences¹ are core assets of upstream oil and gas companies. These licences are often held by a number of companies, co-venturers, who regularly trade their interests in such licences. The interests that are traded, typically, consist of two components: the actual Licence Interest and the rights, obligations and benefits associated with the Licence Interest.

The transfer of a Licence Interest and its associated rights, obligations and benefits is not as straight forward as it may appear, and is often carried out incorrectly or incompletely. This article, which is written under Dutch law, examines the way in which such transfer may be carried out correctly.

2. Licence and Licence Interest - Nature and Transferability

Licence

A licence may be regarded as the right given to a person to do something which would otherwise be unlawful. The transferability of a licence depends on the law pursuant to which it has been granted.

Dutch Mining Act

A petroleum licence granted pursuant to the Mining Act (a Licence) gives its holder the right to explore, develop and/or produce hydrocarbons in a particular part of the subsoil for a particular period of time. It is always held by a single entity, the Licensee², but the Licensee may comprise a single company or a number of companies; the right to explore, develop and/or produce granted under a Licence is an undivided right.

Dutch Civil Code

Under the Civil Code (the Code) a Licence, if held by more than a single company, can be considered to be a “community of property”³. The co-licence holders, as participants in a community of property, may, by mutual agreement, arrange matters for the benefit, use, operation and management of their community of property, i.e. the Licence and the goods acquired as part of the Licence’s normal operation and management. This mutual arrangement typically takes the form of a joint operating agreement (JOA).

Licence Interest

A Licence Interest is a combination of two separate legal instruments: an undivided legal interest in the Licence itself and a participating or percentage (beneficial) interest in the rights, obligations and benefits that flow from that Licence, usually as set-out in a JOA where there is an unincorporated joint venture.

Dutch Mining Act

The Mining Act allows for the transfer of a Licence, but only with the written consent of the licensor, namely the Minister of Economic Affairs (MEA). The Mining Act does not recognise the transfer of a

¹ The term ‘licence’ is used here broadly. Outside the Netherlands this may include production sharing agreements, concessions or leases.

² Cf Liability for Third Party Damage, WL Associates Upstream Legal Topics, June 2013

³ Cf Who is the Operator, WL Associates Upstream Legal Topics, Sept 2013, for a personal interpretation as the Dutch Mining Legislation does not explicitly deal with this issue.

participating interest in a Licence; a Licence can only be transferred from one Licensee to another Licensee, i.e. from one specific set of companies to another. Transferring a participating interest in a Licence therefore necessitates transferring the Licence itself, unless the group of companies comprising the Licensee does not change as a result of the transfer, e.g. under a JOA where the participating interests are changed but the parties remain the same.

Dutch Civil Code

Participants in a community of property each hold an equal share of such property, unless a different division is agreed among the participants. The co-licence holders typically set out the division of their share in the Licence, their participating interest, in the JOA. The Code allows participants in a community of goods freely to dispose of their percentage interest unless their legal relationship, e.g. the JOA, provides differently.

3. Transfer of a Licence Interest

The transfer of a Licence Interest consists of the transfer of the transferring co-holder's (Transferor) undivided legal interest in the Licence and its participating interest under the JOA⁴ to the new co-licenceholder (Transferee).

It should be noted that, under Dutch law, contractual rights and obligations may either be transferred as separate rights and obligations or a Transferee may replace entirely a Transferor as a party to the relevant agreement (*contractsoverneming*). Contrary to the transfer of a right, the transfer of an obligation as well as a *contractsoverneming* always requires the consent of the counterparty⁵.

Transfer of the undivided legal interest in a licence

As we saw above, rights granted under a Licence are undivided legal rights and the Mining Act regards the transfer of a participating interest in a Licence as a transfer of the Licence itself unless the Licensee does not change. Thus, the undivided legal interest in the Licence must be transferred from the Licensee (the Transferor and remaining co-holders) to the Transferee and the remaining co-holders (the aspiring Licensee). This is done by a deed executed by the Transferor, the remaining co-holders of the Licence and the Transferee.

Transfer of the rights and obligations under the JOA

The transfer of participating interest in a Licence takes place by means of a deed executed by the Transferor and the Transferee. As a Licence is a community of property, upon execution of this deed, the Transferee, by operation of law, is bound by the provisions of the JOA. The Transferee becomes, also by operation of law, jointly and severally liable for the outstanding obligations of the Transferor under the JOA. By law, the Transferee has to notify the other co-licenceholders, promptly, of the transfer of the Licence Interest. Any damage resulting from failure to notify the other co-licenceholders will be for the account of the Transferee.

Although not strictly necessary in respect of binding the Transferee to the provisions of the JOA, it is good practice to replace the Transferor by the Transferee as party to the JOA by means of a deed of *contractsoverneming*, signed by the Transferor and the Transferee and also by the other co-holders of the Licence. Such a deed would ensure the JOA is up to date and can be used to confirm the effective date of the transfer of the rights and obligations of the Transferor under the JOA towards the other co-licenceholders (and the operator).

4. Transfer of Associated Interests

Associated to a Licence Interest are several rights and obligations that most likely require to be transferred in conjunction with the transfer of a Licence Interest. These associated interests may be divided into two different groups (i) the rights and obligations arising from agreements concluded

⁴ and/or any other agreement arranging for the benefit, use, operation and management of the Licence

⁵ it is perhaps helpful to think of transferring money debts – it makes no substantive difference whom a debtor pays, but it makes a huge difference who is to pay the debt

between the Licensee⁶ and a third party (Licensee-Third Party Agreement) and (ii) the rights and obligations arising from agreements concluded between the Transferor and a third party.

Rights and Obligations pursuant to Licensee – Third Party Agreements

Licensee-Third Party Agreements may be concluded by the Licensee itself or by the operator on behalf of or for the benefit of the Licensee. Examples of agreements typically concluded by the Licensee are co-operative agreements like joint well agreements and unitization agreements, whereas examples of agreements typically concluded by the operator are service contracts like drilling contracts, seismic contracts and platform building contracts.

Depending on the wording and specific provisions of an agreement and the way in which the operator represented the Licensee⁷, the transfer of a Licence Interest may necessitate a *contractsoverneming* of a Licensee-Third Party Agreement. Prior consent of the relevant third party to the transfer of the Licence Interest is then required.

Rights and Obligations pursuant to individual co-holders – Third Party Agreements

Individual co-holders of a Licence may conclude several agreements with respect to (the benefits derived from) their Licence Interests, for example, Natural Gas Sales Contracts, Transportation Agreements, Processing Agreements or Overriding Royalty Agreements.

The transfer of a Licence Interest will most likely necessitate either a transfer of the rights or obligations pursuant to, or a *contractsoverneming* of, the agreements concluded between the Transferor and third parties. Except where it concerns the transfer of a right, third party consent would be required for the transfer of the Licence Interest.

4. Conclusion – How to transfer an interest in a Licence

The transfer of a Licence Interest, and all rights and obligations associated therewith under agreements concluded by or on behalf of the Transferor, involves more than a succinct deed of transfer executed by the Transferor and the Transferee and is likely to contain hardly more than a general reference to the Transferor's rights and obligations in respect of the Licence.

As a minimum, the deed of transfer of the Licence Interest should include a list of all operative agreements to which the Transferor is a party and (the rights and obligations of) that should be transferred to the Transferee. The consents of the counterparties to these agreements should be acquired prior to the transfer of the Licence Interest. In addition, the Licence itself may have to be transferred by deed executed by the old and new Licensees, i.e. the Transferor, Transferee and the remaining co-holders of the Licence.

If done incorrectly, transfers of Licence Interests may still be considered effective practically (as is commonly the case in the Netherlands), but the status quo will only hold as long as none of the parties, including the Transferee's successors, objects or questions the true legal position.

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⁶ or the operator of the Licence on behalf of or for the benefit of the Licensee

⁷ Cf Who is the Operator, WL Associates Upstream Legal Topics, Sept 2013